

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Carmen T. Mullen, Circuit Court Judge

GARY R. THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000442

APPENDIX

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INDEX

INDEX	i
TRANSCRIPT OF TRIAL HELD JANUARY 13-15, 2014.....	1
APPLICATION FOR PCR.....	382
STATE’S RETURN AND MOTION FOR A MORE DEFINITE STATEMENT	389
SUPPLEMENTAL APPLICATION FOR PCR.....	395
TRANSCRIPT OF PCR HEARING HELD APRIL 17, 2018	398
ORDER OF DISMISSAL.....	452
MOTION TO ALTER OR AMEND THE JUDGEMENT	483
STATE’S RETURN TO MOTION TO AMEND THE JUDGMENT	486
ORDER DENYING THE MOTION IN PART AND GRANTING IN PART.....	494
INDICTMENTS	508
SENTENCE SHEETS	512

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF GENERAL SESSIONS

2010-GS-23-08831

2013-GS-23-00700

STATE OF SOUTH CAROLINA,)

vs.)

TRANSCRIPT OF RECORD

GARY REECE THOMPSON,)
 DEFENDANT.)

ORIGINAL

January 13, 14, 15, 2014
 Greenville, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE; and a jury.

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

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 Assistant Solicitor

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 Attorney for the Defendant

HOLLIE M. JENKINS
 Circuit Court Reporter

I N D E X

(SW) - Denotes State's Witness
 (DW) - Denotes Defense Witness
 (IC) - Denotes In Camera

Page No.

Pre-Trial Motions.....	5
Jury Qualification.....	48
Jury Selection.....	56
Excusal of Juror.....	72

(SW) <u>TRICIA AUSTIN (IC):</u>	
Direct Examination by Ms. Sustakovitch.....	76

TUESDAY, JANUARY 14, 2014

Pre-Trial Matters.....	80
Introductory Remarks by the Court.....	103
Opening Statement by Ms. Sustakovitch.....	114
Opening Statement by Mr. Chambers.....	119

(SW) <u>Victim [REDACTED]:</u>	
Direct Examination by Ms. Sustakovitch.....	127
Cross-Examination by Mr. Chambers.....	141

Matters of Law.....	149

(SW) <u>Victim [REDACTED] (IC):</u>	
Cross-Examination by Mr. Chambers.....	156

Matters of Law.....	157

(SW) <u>Victim [REDACTED]:</u>	
Continued Cross-Examination by Mr. Chambers.....	162
Redirect Examination by Ms. Sustakovitch.....	164

(SW) <u>TY MILLER:</u>	
Direct Examination by Ms. Sustakovitch.....	168
Cross-Examination by Mr. Chambers.....	181

(SW) <u>WILEY GARRETT:</u>	
Direct Examination by Ms. Sustakovitch.....	184
Cross-Examination by Mr. Chambers.....	196

INDEX (CONTINUED)

<u>(SW) NANCY HENDERSON, M.D.:</u>	
Direct Examination by Ms. Sustakovitch.....	205
Cross-Examination by Mr. Chambers.....	218
Redirect Examination by Ms. Sustakovitch.....	229
 <u>(SW) JESSICA TAYLOR:</u>	
Direct Examination by Ms. Sustakovitch.....	230
Cross-Examination by Mr. Chambers.....	248
Redirect Examination by Ms. Sustakovitch.....	269
 Questioning of the Defendant.....	 273

WEDNESDAY, JANUARY 15, 2014

<u>(SW) TRICIA AUSTIN:</u>	
Direct Examination by Ms. Sustakovitch.....	279
Cross-Examination by Mr. Chambers.....	289
Redirect Examination by Ms. Sustakovitch.....	310
 Motions.....	 313
State Rests.....	319
Defense Rests.....	319
Closing Argument by Ms. Sustakovitch.....	319
Closing Argument by Mr. Chambers.....	336
Charge on the Law by the Court.....	360
Verdict of the Jury.....	375
Motions.....	376
Sentencing by the Court.....	380
Certificate of the Court Reporter.....	381

INDEX (CONTINUED)E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
(State's Exhibits)			
S-1	Photograph.....	37.....	180
S-2	Photograph.....	37.....	180
S-3	Photograph.....	37.....	180
S-4	Waiver of Rights-Gary Thompson.....	45	
S-5	Waiver of Rights-Jessica Thompson.....	45	
S-6	DVD.....	45.....	180
S-7	Stipulation.....	46.....	166
S-8	Statement of Jessica Thompson.....	80	
S-9	Statement of Jessica Thompson.....	80	
S-10	Photograph.....	80.....	173
S-11	Photograph.....	80.....	173
S-12	Photograph.....	80.....	173
S-13	Photograph.....	80.....	173
S-14	Photograph.....	80.....	173
S-15	Photograph.....	80.....	173
S-16	Property and Evidence Sheet.....	80	
S-17	Intake Form.....	204	
S-18	DVD of Redacted Interview on 6/15/10..	276.....	283
S-19	DVD of Redacted Interview on 6/22/10..	276.....	283
(Court's Exhibits)			
C-1	Transcript from Interview on 6/10/10...	45.....	45
C-2	Transcript from Interview on 6/22/10...	45.....	45
C-3	Transcript from Interview on 8/23/10...	45.....	45
C-4	DVD of Interview on 6/15/10.....	45.....	45
C-5	DVD of Interview on 6/22/10.....	45.....	45
C-6	DVD of Interview on 8/23/10.....	45.....	45
C-7	State's Request to Charge.....	319.....	319
C-8	Note from the Jury.....	373.....	373
C-9	Notice of Intent to Seek Life Without Parole.....	379.....	379

All Exhibits were retained by the Clerk of Court for
Greenville County.

P R O C E E D I N G S

THE COURT: This the State v. Gary Reece Thompson.
Mr. Thompson is present with his counsel, Mr. Chambers.

And, yes, ma'am.

PRE-TRIAL MOTIONS

MS. SUSTAKOVITCH: Thank you, Your Honor.

May it please the Court.

The State has, I believe, a total of six motions pre-trial. I did want to advise the Court that the motion related to the forensic interview in this case, listening to the tapes which, generally, the Judge does, it's going to take around two hours. And I just wanted to let Your Honor know that in case you wanted to advise the jury of anything. That's going to be my last motion. But I did want to let Your Honor know as far as time what it would take to get through that.

THE COURT: All right. Thank you.

MS. SUSTAKOVITCH: Yes, sir, Your Honor.

The first motion of the State -- did Your Honor receive my motions --

THE COURT: Yes.

MS. SUSTAKOVITCH: Okay. The first motion is the State is seeking, in this case, for introduction of this Defendant's prior under the charge of 16-3-655(A)(1). He has a charge for criminal sexual conduct with a minor.

1 The motion is made pursuant to 16-3-655(A)(2).

2 And in that -- under that section of the statute for
3 criminal sexual conduct first degree, the State has to
4 prove, number one, that there was a child under the age of
5 16 that this Defendant committed a sexual battery on, and
6 that this Defendant has a conviction such as CSC first
7 with a minor, or he's on the sex offender registry.

8 The case law on this point that the State relies on
9 is related to the burglary first statute. And in the
10 cases that I passed up in my memorandum to the Court, the
11 State v. Benton would be a primary authority on that, Your
12 Honor, under 526 S.E.2d 228.

13 In that case, the Court held that the State was
14 entitled to allow the prior convictions of a person when
15 an element of the crime was two prior burglaries to
16 elevate a crime to burglary first. And I'm not sure how
17 much argument Your Honor wants from the State on this
18 since I have filed the memo. And I don't want to take too
19 much of the Court's time. But the State is, essentially,
20 relying on the cases in the memo.

21 The State intends to call a witness that will --
22 Beverly Petit is present in the courtroom. She monitors
23 the sex offender registry. She would testify that -- the
24 State's intention is to put up a redacted sentencing
25 sheet, which would take out the particulars of the crime.

1 It would take out the fact that he pled guilty to that
2 crime. And then, essentially, we would enter that in as a
3 business record and have her testify that he's on the
4 registry.

5 Thank you, Your Honor.

6 THE COURT: Okay. Thank you.

7 Yes, sir.

8 MR. CHAMBERS: Your Honor, my response is to make a
9 motion of my own. And that is to quash the indictment
10 that she refers to in wanting to bring forward the prior
11 conviction of my client. The indictment that she
12 references is 2013-GS-23-0700. She got that indictment
13 following the -- we attempted this trial once before and
14 there were problems with the indictments. And so she had
15 to go back and seek amended indictments. This was not one
16 of the things -- she did not, originally, indict the case
17 under Section 2 of the applicable statute. She did that
18 only after the last hearing.

19 The reason that's important is the initial indictment
20 goes to Code Section 16-3-655, Section A(1). It says, A
21 person is guilty of criminal sexual conduct with a minor
22 in the first degree if the actor engages in sexual battery
23 with a victim who is less than 11 years of age. That is
24 the allegation in this case.

25 There is absolutely no issue as to the age of the

1 child when these actions were alleged to have occurred.
2 The child was only nine years old when she made the
3 allegations. And she was shortly thereafter removed from
4 the home.

5 Our position would be that the subsequent indictment
6 that they got, which is -- I've just cited the indictment
7 number to the Court, where they, also, want to proceed
8 under a separate indictment for the second part of Section
9 A under the statute is simply a way to try and bring in
10 the prior conviction.

11 So, I mean, I could address that as well. But I
12 don't even think we should get to whether or not it's
13 admissible under that particular part of the statute.
14 Because our position is that indictment should be quashed.
15 There's no reason for a separate indictment when there is
16 no issue as far as the age in this case.

17 We believe that they should have to elect which of
18 those indictments they're going to go forward on. And, in
19 fact, the election should be, essentially, made by the
20 Court in this case that they go forward on the one that
21 comes under Section A(1). Because, again, there is no
22 issue as far as the age.

23 The issue in this case is whether my client did
24 anything wrong at all. And they want the prior conviction
25 in because they know how prejudicial that is.

1 MS. SUSTAKOVITCH: Your Honor, if I may respond.

2 Point of clarification as far as when these charges
3 were brought. This case, initially, was assigned to a
4 different prosecutor. And Mr. Chambers is, actually, the
5 third attorney on this case for this Defendant. The
6 direct presentment was, actually, not brought in November
7 after this case did not go in November. This direct
8 presentment was brought almost a year ago in the February
9 Grand Jury of 2013. It was brought by me once the case
10 was assigned to me.

11 Now, what I would say, Your Honor, is that I will
12 agree to elect in this case. Essentially, what you have
13 are three indictments that were, initially, charged. He's
14 got four on the trial docket for CSC first. In the first
15 three if -- before Your Honor, it states, essentially, a
16 child under the age of 11 and a sexual battery.

17 And the officer charged based on different locations.
18 I will tell you if I had had this case from the beginning,
19 I don't, generally, charge that way. When you have
20 chronic abuse over a period of time, I, generally, charge
21 for the entire time frame, cover the entire time frame.
22 The State did a direct presentment for Section A(2) of the
23 statute.

24 So what we have there is if we go to criminal sexual
25 conduct with a minor, the statute there, essentially,

1 reads under Section A(1) that there's two ways to be
2 guilty of CSC first, you have a minor under 11 and you
3 have a sexual battery, or you have a minor under 16, a
4 sexual battery, and somebody with a prior.

5 So in this -- the State -- I'm glad Defense counsel
6 brought this up, because the State was going to wait for
7 Your Honor's ruling to bring this up. But I do believe in
8 the interest of keeping this case clean and in the
9 interest of assuming -- if the State does secure a
10 conviction, on an appellate level, the State does not want
11 there to be an argument about whether CSC first needed to
12 be broken out on one indictment or two. I know different
13 prosecutors across the State are doing it the way that I
14 have.

15 But in the interest of making this clean and simple,
16 the State will simply go forward on the one indictment,
17 the direct presentment, which has been properly served on
18 this Defendant. He's known about it for over -- almost a
19 year. It is no surprise.

20 It is the legislature of South Carolina that enacted
21 that statute. It's a repeat offender statute that they,
22 specifically, told prosecutors if you have a defendant who
23 has a prior and you have a child under 16 with a sexual
24 battery, it is not for this Defendant to tell the State
25 what he wants to go forward at trial with. The State of

1 South Carolina can go forward. Your Honor, respectfully,
2 our argument would be if the legislature has enacted a
3 statute, then we can either go forward under A(1) or A(2).
4 It is for the State to decide which one, if we're going
5 under a duly-enacted statute.

6 And I would -- when I filed my motions -- or left
7 them with Your Honor on Friday, I did want to reference
8 the State v. Cheatham. It is 349 S.C. 101. And, in that
9 case, the argument was, essentially, what the Defendant is
10 arguing here, which is you have this prior conviction,
11 it's so prejudicial. The State, in that case, they had
12 different aggravators. It was a burglary at nighttime,
13 you know. The guy had two prior burglaries.

14 So, in that case, the Defendant is like, wait a
15 minute. If the State can prove burglary at nighttime,
16 they don't even have to go over here to the burglary --
17 the two priors.

18 And the Court held in State v. Cheatham that while
19 they understand -- and I'll go to the verbiage from that
20 case. But it, basically, said that had the South Carolina
21 General Assembly wished to use the prior convictions as
22 merely a sentence enhancer, rather than an element of the
23 crime, they could have done so. Certainly, a cogent
24 argument may be made that the statute contravenes a
25 well-established rule that evidence that the accused

1 committed other crimes is not admissible in the
2 prosecution of a crime. However, it is not this Court's
3 province to question the wisdom of legislative -- of the
4 legislative enactment.

5 So what the Cheatham court said was, I get what
6 you're saying Defense counsel, but it's not up to you to
7 decide whether the State is going to go forward on
8 nighttime or priors. It's the State's decision. They
9 have to prove every element beyond a reasonable doubt.
10 And I would rely heavily on Cheatham for the fact that the
11 State will elect to go forward on the direct presentment.
12 And the State intends to prove that this child was under
13 16, that there was a sexual battery, and that he has been
14 convicted of a crime that puts him on the registry.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. CHAMBERS: Your Honor, obviously, this case
18 cannot be analogized through a burglary case. I mean, the
19 prejudice in allowing in a prior conviction of the sort
20 that my client has, basically, makes going forward on
21 the -- to trial a useless act on my part. They're the
22 ones who sought separate indictments. We didn't do that.

23 And so the Court -- we're asking the Court to make
24 the election. If there was any issue as far as the age
25 goes, it would be a different situation. But the child

1 was nine when these allegations were made.

2 We would -- and if the Court rules against this and
3 says, well, we're not going to enforce an election on them
4 if they want to go forward on the direct presentment, then
5 we would say that we should be allowed to stipulate to the
6 fact that he has the prior. That doesn't have -- then
7 doesn't have to come into evidence in front of the jury.
8 And we don't have to worry about the prejudice that's
9 involved.

10 If you want to analogize it much the way she does
11 with a burglary case and analogize that to a DUI second or
12 third case, when those cases are tried -- and there's a
13 long line of cases that indicate this is the proper way to
14 proceed. It is routinely stipulated by the parties that
15 there is that prior DUI. It's a necessary element of the
16 offense. But, yet, the jury doesn't hear about it.
17 Mistakes aren't nearly as high in a DUI case as they are
18 in a case like this.

19 There -- you know, given -- as you can tell, the
20 Solicitor is using a burglary case to argue her point.
21 This is an issue that's never really been before the Court
22 as far as I can tell. I couldn't find any cases that were
23 on point. So that's our position on it, Your Honor.

24 And we would still move to quash the indictment --
25 and I gave you that indictment number a few minutes ago --

1 and have the Court go forward on the other indictment.
2 But if the Court allows them to elect which one they want
3 to go forward on, then we would argue further that we
4 should be allowed a stipulation, and the evidence of the
5 prior offense does not come in in front of the jury.

6 Thank you, Your Honor.

7 THE COURT: If y'all will help me out, I need to
8 clarify. I understand the January 2013 indictment is
9 alleging the statutory language about the prior offense.
10 But was the amendment done after November to --

11 MS. SUSTAKOVITCH: That -- Your Honor, that was an
12 amendment to the timeline. There was a scribblers error.
13 We were before Judge Verdin in November and there was an
14 error in that. And the State sent all the indictments
15 back to the Grand Jury to correct that scribblers error.

16 If I may just briefly respond as far as --

17 THE COURT: Sure.

18 MS. SUSTAKOVITCH: -- the stipulation part.

19 Your Honor, the Supreme Court of the State of South
20 Carolina has flatly ruled that that -- the argument
21 Defense counsel makes is not a valid argument. While it
22 may be valid to make the argument, the Supreme Court has
23 ruled against that argument.

24 In the Benton case, which has previously been cited,
25 in that case, the Defense tried to do exactly what Defense

1 counsel is doing here and say, yes, we'll stipulate, fine,
2 and it doesn't need to be in front of the jury. But the
3 Court in that case said the State does not have to accept
4 a stipulation.

5 And what I would offer to the Court is that the State
6 is not trying to make this anymore inflammatory than it
7 has to be. We simply want to be able to prove an element
8 that the legislature says we have to prove.

9 Now, if -- I've written up -- as far as stipulations
10 go, I've written up a stipulation related to this element.
11 But the State has no problem if Your Honor wants to read
12 that into evidence. And if that's allowed in, we won't
13 put Beverly Petit on the stand.

14 But as far as any kind of stipulation where it's not
15 in front of the jury and an element that we have to meet,
16 the State would offer the Benton case to say that that
17 argument has been before the Supreme Court and rejected.
18 The State does not have to stipulate.

19 THE COURT: So you think that Rule 404 just doesn't
20 apply when this statute is relied upon?

21 MS. SUSTAKOVITCH: I'm sorry, Your Honor. Rule 403
22 or --

23 THE COURT: 403, right.

24 MS. SUSTAKOVITCH: Yes, sir.

25 I believe there's always an analysis for that, Judge.

1 I would rely back on the cases involving burglary first
2 where, as I stated, in the Cheatham case that there always
3 should be a 403 analysis. But then you, also, have to
4 look at the legislative intent behind a particular act.

5 And, in Cheatham, as I expressed earlier, you have a
6 guy on trial for burglary. It can't be more prejudicial
7 than to say he has two prior burglaries when that's what
8 he's on trial for. And the Court, in that case, said it
9 was not their job to look at the legislative intent and
10 contravene that. Because the legislature has determined
11 certain crimes are bigger than others. This is not a DUI
12 first. This is a CSC first.

13 And so, in a burglary case, if you have two priors,
14 you're going to be subject to that being something that
15 the -- a crime for which you can be held accountable and
16 found guilty. With criminal sexual conduct, if you have a
17 prior conviction, then if the State can meet the elements
18 as outlined in the statute with a child under 16, and a
19 sexual battery, and you have that prior, the legislature,
20 clearly, spelled out their intent when they enacted that
21 statute. And they spelled out for -- in the clear
22 language of the statute, they said it's either here or
23 here, nothing about electing, meaning nothing -- meaning
24 that the State could not go forward on either that it
25 chose to go forward on.

1 MR. CHAMBERS: Your Honor, assuming that they are
2 going to be allowed to go forward on the direct
3 presentment, it puzzles me as to how they could concede
4 that there's going to be any prejudice to the State if we
5 are stipulating as a matter of law that they have
6 satisfied that particular element that they have to prove.
7 It wouldn't -- it seems to me that it would be unnecessary
8 and would not do anything to undo the legislative intent
9 to not put that in front of the jury.

10 The jury is still going to have to make a
11 determination about whether they satisfied the other
12 elements of the offense. But they don't have to concern
13 themselves with that because we're willing to stipulate to
14 it. And we do believe as I didn't cite it, specifically,
15 but it's something that I alluded to the fact that you
16 still have to do, we believe, a 403 balancing in this
17 case.

18 And the common sense -- and the reason that she's so
19 adamant, frankly, about wanting to get into that is she
20 wants them to hear about the prior conviction. Because it
21 makes it a virtual certainty that they are going to
22 convict him when they hear about it.

23 THE COURT: You're talking about stipulating that he
24 has a prior conviction, that it would satisfy that element
25 of the crime?

1 MR. CHAMBERS: Yes, sir, because he does. I mean,
2 it's clear that he does.

3 MS. SUSTAKOVITCH: Judge, I would just say that the
4 State does not have to stipulate a way -- to an element
5 that we have to prove per the indictment. The legislature
6 spelled out what we have to prove. And as much as they
7 would like us to stipulate so that that's not heard in
8 front of the jury, the State has to prove every element.

9 THE COURT: I'm curious about this Old Chief v. U.S.
10 case and how y'all see that as supporting or detracting
11 from your position.

12 MR. CHAMBERS: I'm not familiar with it, Your Honor.
13 I didn't see it.

14 MS. SUSTAKOVITCH: Your Honor, I apologize. I did
15 not bring it in with me. I was relying primarily on
16 Benton and Cheatham. And I apologize for that.

17 THE COURT: So tell me how -- because Old Chief says
18 the term unfair prejudice within Rule 403 as to a criminal
19 defendant speaks to the capacity of some concededly
20 relevant evidence to lure the fact finder into declaring
21 guilt on a ground different from the proof specific to the
22 offense charged.

23 Now, how would that be unfair prejudice when this is
24 proof specific to the offense charged?

25 MR. CHAMBERS: Well, as I said, Your Honor, I didn't

1 read that case, so I'm not familiar with it.

2 THE COURT: Well, and I'm not trying --

3 MR. CHAMBERS: I understand.

4 THE COURT: -- to ambush you on it.

5 MR. CHAMBERS: And I don't feel ambushed. It's,
6 frankly, a hard question to answer. It is just -- you
7 know, it's just that -- this is the kind of offense that,
8 frankly, nobody, obviously, likes. And it is probably the
9 area where you have to be the most careful about the
10 client -- the Defendant being prejudiced.

11 And while that may be evidence specific to the
12 particular element to be proved, it is, again, so
13 prejudicial that I just don't believe that he could ever
14 get a fair trial once that comes in.

15 MS. SUSTAKOVITCH: Judge, I would offer up -- I
16 have -- and I'll hand it to Defense counsel -- a
17 stipulation that we drafted, if this would in any way take
18 the spotlight off of it in any --

19 THE COURT: Okay.

20 MS. SUSTAKOVITCH: -- fashion or form.

21 Instead of putting Beverly Petit on the stand where
22 she's going to be up there in front of the jury and
23 talking about the sex registry, and she's known this
24 Defendant since 2000. To get it in and out quicker, the
25 State has no problem with this stipulation, which,

1 essentially, says he's been convicted of CSC with a minor.
2 And it is a listed offense pursuant to 23-3-430(C). I
3 only offer that if that in any way makes it less
4 noticeable.

5 The fact of the matter is the State would strongly
6 object to -- we simply can't be made to stipulate a way of
7 fact that we've got to -- that we have to prove -- an
8 element that we have to prove. It's in the statute. And
9 we have to meet each element beyond a reasonable doubt.

10 I don't know how a conviction would even stand if we
11 were not meeting -- if Your Honor did not read that
12 statute to the jury and they did not come back, whatever
13 their ruling is, guilty or not guilty, beyond a reasonable
14 doubt.

15 MR. CHAMBERS: Your Honor, obviously, that's less
16 objectionable than having somebody take the stand and
17 testify.

18 But, you know, I just -- I want to go back to the
19 statute itself. And the way the legislature -- she's
20 argued a lot about legislative intent. If you look at the
21 way that that statute is laid out, it says, okay, it's
22 going to be criminal sexual conduct first degree if you
23 have, as we do in this case, a victim who's under the age
24 of 11 or -- and then they set forward, we'll make the age
25 a little older in a case where somebody has a history of

1 doing this sort of thing.

2 So, clearly, just based on the plain language of the
3 offense, what the legislature was looking at is while we
4 may not consider it as egregious if it's somebody under
5 the age of 16, but over the age of 11 has -- had this
6 offense perpetrated against them, if that -- if it's
7 somebody that has done this in the past, then, yeah, we're
8 going to make it a more aggravated offense. We're going
9 to elevate it to a CSC first. That seems to be where the
10 legislature is going with this case.

11 So when she argues that they have to prove this
12 element, they don't. They don't have to prove it at all.
13 She's either competent enough in her case to believe that
14 it happened and that this child is under the age of 11, or
15 she's not.

16 I mean, to go under the second provision of that
17 statute is simply trying to get this prior conviction in
18 because she knows it will ensure that my client is
19 convicted. And, I mean, that's a fact. That's the only
20 reason that she wants to do it in this particular case.

21 MS. SUSTAKOVITCH: Your Honor, if I could --

22 MR. CHAMBERS: She doesn't have to. She's talking
23 about worrying about whether or not she has a verdict that
24 is going to withstand an appeal, then go forward on the
25 way it was, initially, charged. She either has proof or

1 she doesn't.

2 MS. SUSTAKOVITCH: If I may briefly respond as far as
3 legislative intent. What I would argue, Judge, is if the
4 legislature of the State of South Carolina did not intend
5 for the repeat offender statute to apply when you have a
6 child under 11 and there's a sexual battery, they would
7 have, clearly, on (A)(2) written the language to say if
8 you have a child over 11, but under the age of 16, and you
9 have a sexual battery. They could have, clearly, done
10 that, but they chose not to. The legislative intent there
11 is spelled out that the State has two ways with which to
12 convict someone of criminal sexual conduct.

13 Had this case been mine from the get-go, looking back
14 at it, I would submit, Your Honor, the way I would indict
15 this in the future would most likely -- instead of being
16 on four indictments, it would be that there was a sexual
17 battery on a child under 11, or a sexual battery on a
18 child under 16, and he has a prior. But the reason the
19 State would like to go forward on just the one charge is
20 in the interest of keeping the record clean and not
21 creating an issue for appeal as far as whether it needs to
22 be on two different statutes.

23 But I go back to the primary fundamental issue which
24 is the State -- if it's acting under a statute that was
25 enacted by the legislature, the State gets to determine

1 what charges it brings against a criminal defendant, if
2 those elements are met.

3 THE COURT: All right. Well, I appreciate y'all's
4 fine arguments.

5 The question of whether it's unfairly prejudicial
6 under Rule 403 to allow the jury to hear about a prior
7 offense is much different than it was in Old Chief.
8 Because Old Chief involved the prosecution under Section
9 922 of the Federal Code of Laws Title 18 about whether a
10 defendant on trial for being a felon in possession of a
11 firearm could stipulate to being a felon and, thus, bar
12 the State from producing evidence about the underlying
13 facts of the conviction, which happened in that case to be
14 an assault and battery against someone.

15 The U.S. Supreme Court reversed the Ninth Circuit's
16 ruling that the State did not have to so stipulate. And
17 it talks a lot about the context of what unfair prejudice
18 means. It quoted the advisory committee of the federal
19 Rule 403 that stated that it meant an undue tendency to
20 suggest a decision on an improper basis commonly, though
21 not necessarily, an emotional one.

22 Obviously, the arguments that Mr. Chambers makes
23 about the emotional impact of this type of evidence and
24 the prosecution for a similar offense of a prior
25 conviction would be highly significant, and it might call

1 into question the serious issues about whether it is
2 propensity evidence to such an extent that it would be
3 unfairly prejudicial. My view of the statute, however, is
4 that that analysis is invariably going to be looking at
5 the probative value of the prior conviction.

6 Here, the probative value is essential. Because the
7 legislature didn't just say any prior felony conviction,
8 it said in Section 16-3-655 (A)(2) that it had to be a
9 certain type of offense, which is the offense that the
10 State is conceding it will be willing to stipulate to,
11 unlike the prosecutor in the Old Chief case. And, unlike
12 that case, the specific type of offense did have probative
13 value for a 403 analysis.

14 So while all of us know about the laws of hostility
15 towards propensity evidence and character evidence, here,
16 the legislature is fully aware of that hostility and well
17 chose, specifically, to allow and, in fact, require
18 evidence of the prior conviction in the form of specific
19 types of offenses that would make it a predicate for a
20 conviction under the statute. I don't know how any court
21 could require the State to elect under these circumstances
22 here, or to find that Rule 403 barred the jury from
23 hearing about a stipulation such as has been proposed by
24 the Solicitor.

25 What I will do, of course, is instruct the jury, if

1 the Defendant wishes me to, on the limited purpose for
2 which the prior crime can be considered consistent with
3 Rule 105. So that's my ruling on that issue.

4 All right. What's the next issue?

5 MS. SUSTAKOVITCH: Thank you, Your Honor.

6 The next matter before the Court is the motion of the
7 State to bring in Lyle evidence in this case. The State
8 has filed the motion pursuant to Rule 404(B). And
9 procedurally background info wise, this Defendant was
10 charged in 1993 with first degree criminal sexual conduct
11 on a minor against a child with the initials "TL." Her
12 name is **Minor Victim** [REDACTED]. She is present in the courthouse
13 today. He went to trial back in 1994. And that case was
14 a guilty conviction. The victim testified at trial.

15 The case was reversed, Your Honor, in 2000 -- or,
16 actually, it was 1998, rather. It was reversed, not based
17 on anything to do with that victim or her testimony. It
18 was related to a mental health evaluation. And I won't
19 get into the specifics of that. But it -- the reversal
20 had nothing to do with **Minor Victim** [REDACTED] and her testimony.
21 It had to do with his mental health evaluation and how
22 that was handled before the Court during that case.

23 In 2000, this Defendant pled guilty to criminal
24 sexual conduct with a minor first degree. And that is the
25 conviction that he is on the sex offender registry for.

1 As stated in the State's motion, pursuant to 404(B),
2 the acts of this Defendant, the common scheme, the common
3 plan, the similarities between this Defendant's actions in
4 1993 and, sadly, this Defendant's actions now are
5 startling. When you go back, the child -- and, briefly,
6 I'll go through Page 3 of my motion.

7 Both girls were assaulted around relatively the same
8 age. With the victim at trial, the abuse began between
9 seven -- six and seven and continued until nine, which was
10 the time of her disclosure. And in the case of the
11 potential Lyle victim, the abuse began around five and
12 lasted until she was around six.

13 Both girls were around the same age. They both lived
14 in the residence with this Defendant. In the case before
15 the Court, this Defendant was the stepfather to the trial
16 victim. In the case of **Minor Victim** [REDACTED], he was living in
17 the home and was the boyfriend of the child's mother's.
18 It was chronic abuse over several years. It was vaginal
19 penetration by this Defendant, oral sex by this Defendant.

20 I will note, I've advised Defense counsel in the
21 incident report with **Minor Victim** [REDACTED], she did allege back
22 in 1993 that the Defendant performed oral sex on her and
23 that white stuff came out of his penis. And she described
24 what it tasted like. And it's very similar to what the
25 victim at trial describes. Both of them said it was

1 yucky, it was nasty.

2 I did advise Defense counsel that **Minor Victim** [REDACTED] is
3 not -- as far as the oral sex being performed on her, now
4 20 years later, she is not able to independently recall
5 that. And I advised Defense counsel on Friday that that
6 is one difference from the incident report. Often times,
7 victims of abuse -- I asked her, is there some reason you
8 can't? She is, I, personally, think, trying to block that
9 aspect out. But, for whatever it is, the similarities
10 would be vaginal intercourse and oral sex that they both
11 had to perform on the Defendant on his penis.

12 The incidents occurred when the Defendant was alone
13 in the home. He was either -- other people in the home
14 were in the other room, or they were asleep. Both victims
15 were told by the Defendant to keep the abuse secret. Both
16 of their experiences were similar in that this Defendant
17 was in a position of authority as the stepfather, and as
18 the man of the house in the Lyle victim's case.

19 And, finally, Your Honor, both victims did not
20 disclose abuse until they were out of the abusive
21 situation, which is very common in these cases. In the
22 case for trial, **Victim** [REDACTED] did not disclose until she had been
23 EPC'd by DSS and was no longer living with her mother, a
24 co-defendant in this case.

25 So **Minor Victim** [REDACTED], as I stated, is present. And she

1 could testify before the Court, if Your Honor wanted to
2 hear her testimony. But the State would be moving
3 pursuant to 404(B) for admission of her testimony.

4 THE COURT: Thank you.

5 Mr. Chambers.

6 MR. CHAMBERS: Your Honor, it's been well established
7 and set forth in a number of cases, but I'll cite State v.
8 Wallace, 364 -- I'm sorry, 611 S.E.2d 332. It's a Court
9 of Appeals decision. The common scheme or plan in brazen
10 commission of two or more crimes are matters so related
11 that proof of the commission of one tends to prove the
12 commission of the other. And as the line of cases says,
13 it's not enough that they're similar. They have to be so
14 closely related to one another that one tends to prove
15 that the other -- or tends to prove the other, basically.

16 She gave a list of several similarities. But they
17 are not -- in fact, they're so remote in time that in and
18 of itself would not make them part of a common scheme or
19 plan. Remoteness is one of the things that the Court can
20 consider. There were differences in these children's
21 ages. There were -- there was as many differences as
22 there are similarities. But, again, similarities is not
23 the test here.

24 What we're talking about -- and I think the best way
25 to analyze is the case of a serial killer who has a

1 certain MO that he follows in every single case, you know,
2 wears a mask, you know, always strangles the victim, that
3 sort of thing. This is just the case of two similar
4 things, two similar cases. And it does not fit within
5 404(B).

6 And, again, even if the Court were to say, well, this
7 could be a common scheme or plan, you still have to do
8 that 403 balancing test. And there's no way that the
9 probative value of bringing this prior victim in from
10 1993 is going to outweigh the prejudicial effect of having
11 her testify from the stand.

12 MS. SUSTAKOVITCH: Your Honor, just for the Court's
13 clarification. All I was going to add, the Defendant was
14 24 at the time of the Lyle victim's assault. And he was
15 around 41 at the time of the assault on Victim [REDACTED]. He
16 was incarcerated until 2000. And he was out about five
17 years before he met the victim in this present case's
18 mother. And then he married the victim's mother in 2006.

19 THE COURT: How does the common scheme or plan
20 evidence become probative at all unless the Defendant,
21 specifically, denies some part of the State's proof as to
22 what the plan consisted of?

23 MS. SUSTAKOVITCH: Judge, I understand the Court's
24 question. I would just argue that the Courts have
25 established Lyle in all of these cases. The Defendant --

1 it's not dependent on the Defendant testifying or ever
2 taking the stand. It's dependent on whether there is a
3 sufficient common scheme and plan, and the similarities
4 are enough between the prior act and the act that is
5 before the Court for trial. That is the determination.

6 So whether the Defendant ever testifies, you know, I
7 would just say that that's not what Lyle is dependent on.
8 It's, basically, Your Honor, just deciding do you think
9 that these similarities are enough? Is it too remote in
10 time? That's a question for Your Honor. Are the
11 similarities enough that -- I believe they are, Your
12 Honor, as I relayed to the Court.

13 This Defendant, based on this conduct with both of
14 these young victims, has an issue with young girls and his
15 common scheme and plan is to get sexual gratification from
16 them. That would be my response.

17 Thank you.

18 THE COURT: So this hostility to propensity evidence
19 that we all agree is fundamental to the rules of evidence
20 is not something that we should take into account if the
21 evidence itself is showing propensity?

22 MS. SUSTAKOVITCH: Judge, I would -- I understand the
23 position the Court is in. I, frankly, have never tried a
24 case under 655(A)(2) and, also, have Lyle. When I
25 considered it, I considered the appropriateness of asking

1 for both. And I gave a lot of thought to that. And I,
2 certainly, will understand if Your Honor does not allow it
3 in.

4 The reason the State is bringing it before the Court
5 is because had the State elected not to go forward under
6 (A)(2) and was going forward under (A)(1), it's -- Lyle
7 testimony is Lyle testimony. It either meets the standard
8 or it doesn't. And it's not dependent on whether the
9 State is going forward under (A)(1) or (A)(2). It's two
10 different analyses. And I do understand what Your Honor
11 is saying.

12 Thank you.

13 THE COURT: Okay. Mr. Chambers.

14 MR. CHAMBERS: Well, Your Honor, I just would
15 reiterate that she's arguing on its face that you should
16 allow that evidence in because they're similar. And the
17 case law and the plain language of the rules,
18 specifically, says that's not enough. I mean, we're
19 talking about common scheme or plan, proof of one tends to
20 prove the other. And that's what we're talking about.

21 I mean, if we use the logic that she's putting
22 forward, then in any case where somebody was convicted of
23 killing somebody before, then you should be able to bring
24 in the victim -- or somebody who is the victim -- the
25 family of the victim in that murder case to say, yeah, he

1 did this before and it's very similar. You could do that
2 with any crime. But it's not enough that it's similar.
3 And that's really all that they're putting forward in this
4 case is that they're two similar crimes.

5 THE COURT: Well, the South Carolina Supreme Court in
6 the Wallace case did set forth that similarity test about
7 whether evidence of prior sexual abuse crimes could be
8 used in evidence in the State's case in chief under Rule
9 404(B), as long as it was similar to the crime that was
10 charged. And it gave a list of factors the courts are to
11 look at about whether it's -- the current crime under the
12 indictment is sufficiently similar to meet the common
13 scheme or plan exception.

14 I still think that the Court stated that Rule 403
15 still had to be contended with. And given that this is a
16 prosecution under 655(A)(2) where the jury is already
17 going to know about the prior offense, it seems like the
18 considerations we went over earlier about the State's
19 agreement to stipulate would be undercut by allowing in
20 the specifics of the prior crime. And Justice Pleicones
21 dissent makes the point, although it was a minority point,
22 that the holding created an exception to the rule -- rules
23 exclusion of propensity evidence. And, obviously, I have
24 to abide by the ruling of the Supreme Court.

25 I think, under the circumstance here, Rule 403 would

1 require me to find that there's unfair prejudice in
2 allowing the State to go forward with specific evidence
3 from the victim in the prior offense for which the State
4 has already stipulated Mr. Thompson was convicted of as an
5 element of the crime. And I find that the probative value
6 of it, given the fact that it's already going to be
7 stipulated to in terms of the prior conviction, does not
8 substantially outweigh the danger of unfair prejudice that
9 Old Chief talks about of luring a jury into making a
10 decision on irrelevant and emotional grounds.

11 So -- now, this is in limine. I don't know what the
12 proof is going to be at trial or what defenses are going
13 to be offered. But if for some reason evidence would
14 require reconsideration of this ruling in light of some
15 specific part of the conduct of the Defendant in this case
16 that might bring the probative value of the specific
17 conduct of the Defendant in the past case up to the level
18 of substantially outweighing that danger of unfair
19 prejudice, I would, certainly, reconsider my ruling.

20 All right. What's the next issue?

21 MS. SUSTAKOVITCH: Thank you, Your Honor.

22 Next would be the notice of LWOP in this case. It's
23 just -- I wanted -- the State attempted to serve
24 Mr. Thompson last February while he was at the law
25 enforcement center. He did refuse to take copies of the

1 Notice of Intent to Seek Life Without Parole and, also,
2 the direct presentment for CSC first.

3 Our investigator is prepared to testify, should that
4 be necessary, that he attempted to serve and this
5 Defendant refused acceptance. We, also, served those
6 documents on Defense counsel. I just wanted to resolve
7 that pre-trial, so that we don't have any issues pop up
8 later.

9 Thank you, Your Honor.

10 MR. CHAMBERS: Your Honor, we would, certainly, agree
11 that he was properly served. My client indicated to me
12 that he never refused service. He simply wanted them to
13 give them to me. I was made aware of both of those items.
14 And I discussed both of them with my client.

15 THE COURT: All right. Mr. Thompson, let me just ask
16 you to raise your hand, sir.

17 WHEREUPON,

18 GARY REECE THOMPSON,
19 after first having been duly sworn, testified as follows:

20 THE COURT: Sir, do you -- did you receive a copy of
21 the notice of the State's intent to seek a sentence of
22 life without parole, if you were to be convicted in this
23 case?

24 DEFENDANT THOMPSON: Yes, sir.

25 The investigator brought me like a whole bunch of

1 past stuff and the new stuff. He didn't know why the past
2 stuff was there. And I told him just to give it to my
3 lawyer --

4 THE COURT: Okay.

5 DEFENDANT THOMPSON: -- that I didn't -- you know, I
6 didn't look at it.

7 THE COURT: But, nevertheless, you've seen it.
8 You're aware of it --

9 DEFENDANT THOMPSON: Yes, sir.

10 I looked over it with him there.

11 THE COURT: And how far did you go in school, sir?

12 DEFENDANT THOMPSON: I got my GED when I was in
13 prison.

14 THE COURT: But you, certainly, can read and write?

15 DEFENDANT THOMPSON: Yes, sir.

16 THE COURT: All right. And you did read it and
17 understood what it said?

18 DEFENDANT THOMPSON: Yes, sir.

19 THE COURT: Thank you, sir.

20 MS. SUSTAKOVITCH: Your Honor, just to clarify. It
21 was service of the direct presentment and LWOP that was
22 attempted.

23 The next matter is the State has filed a motion in
24 limine for compliance with rape shield. That's a standard
25 motion I file in these cases, Judge. I would make the

1 Court aware that, in this case, the victim -- there is a
2 prior allegation she made against someone else that the
3 State is, of course, not going to object to that testimony
4 coming in because it's the facts of the case.

5 The testimony will be that her mother told her to say
6 that her biological father's uncle had done things to her.
7 That is what sparked the investigation into this
8 Defendant. We realize that's out there. And we just --
9 anything other than the allegation about Mark McMahan the
10 State would object to and would ask, at this point, if
11 there is anything else other than that testimony that it
12 be proffered at this time.

13 MR. CHAMBERS: Your Honor, I don't plan on getting
14 into the -- you know, the sexual history or anything. I
15 don't believe we're going to get into anything that would
16 violate a rape shield. So I don't believe that's going to
17 be an issue.

18 THE COURT: All right. It doesn't appear it's going
19 to be an issue.

20 What's the next issue?

21 MS. SUSTAKOVITCH: Next, Your Honor, there are --
22 there is a pornographic video that was -- actually, two
23 pornographic videos were seized when this Defendant and
24 his co-defendant wife, the victim's mother, were both
25 arrested. A search warrant was executed and they located

1 these two disks in the home. One of them is a very
2 graphic video of oral sex where women are performing oral
3 sex on various men. And it's tight shots. And it's very,
4 very graphic. The State is not attempting to bring that
5 into evidence.

6 There's another video called "Young Tight Asses"
7 where I would offer to the Court the three photographs the
8 State intends to introduce and have them marked for
9 purposes of this hearing.

10 (WHEREUPON, State's Exhibit Nos. 1, 2, and 3 were
11 marked for identification only.)

12 MS. SUSTAKOVITCH: The child when she was interviewed
13 during her forensic interview, she was asked, as they
14 usually are asked, was she exposed to any pornographic
15 materials during any sexual acts with her or with the
16 Defendant. She relayed to the interviewer that, yes, this
17 Defendant had brought her into the room in front of the
18 computer and masturbated while watching different
19 pornographic videos. She described, specifically, women
20 in short skirts bent over doing various things, sometimes
21 no bra's on. She saw, she said, a couple of these videos.

22 And the State is moving to -- will be offering the
23 actual video. We don't intend to publish it to the jury
24 in the courtroom. We selected three shots, which we
25 believe are consistent with the victim's detail of what

1 she saw, which was women -- and I apologize.

2 I left out possibly the most important part. She,
3 specifically, said women in stockings, which all three of
4 these videos have women in stockings in various sexual
5 acts. The State believes that they're relevant. They
6 corroborate what the victim says she was forced to see.
7 The State, also, has a dissemination charge that is part
8 of this case. And these photographs are corroborative
9 evidence that she, in fact, was shown pornographic
10 materials.

11 The relevance is very high because the State has to
12 prove beyond a reasonable doubt that she was shown
13 pornographic videos. Whether, in fact, this child was
14 shown these exact pictures, I don't know. I don't know
15 how many pornographic videos may have been in that home at
16 any particular time.

17 The mother, and co-defendant, of the child is going
18 to testify -- or is expected to testify that this
19 Defendant did attempt to destroy some CDs in the
20 microwave. And that he had stated that police didn't get
21 all of his videos when they did the search warrant.

22 So, anyway, the point of those three photographs,
23 they're still shots that would be published to the jury.
24 And the State -- the probative value is, essentially, it
25 corroborates what the child says she was subjected to

1 watch. It's not just any porn.

2 And what I would offer to the Court is we're not
3 attempting to show the very disturbing oral sex video just
4 for the fact that it's very inflammatory. And the child
5 does not, specifically, say that she was made to watch
6 oral sex. But she does say that she was made to watch
7 videos that had women in stockings without panties and
8 bent over. And, for those reasons, the State is going to
9 move to admit those pictures.

10 THE COURT: All right. Thank you.

11 Yes, sir, Mr. Chambers.

12 MR. CHAMBERS: Your Honor, I mean, at this stage of
13 the trial, I don't really know whether I would have any
14 objection to that or not. I don't know that this is
15 proper for a motion in limine.

16 At the point that the Solicitor decides she wants to
17 offer that into evidence, I'll make a decision at that
18 point about whether I want to object or not. That would
19 be my position. It's just I don't -- you know, I haven't
20 heard her lay the groundwork or any of the other
21 things that go into being able to introduce a piece of
22 evidence.

23 So my position would be this is not really something
24 that needs to be decided prior to trial.

25 MS. SUSTAKOVITCH: Judge, I just -- from past

1 experience, usually, pictures of this nature, there is an
2 argument that they're inflammatory and they shouldn't be
3 admitted. And if that it is part of the argument that we
4 need to have, I wanted to have it pre-trial.

5 The State does intend to lay the proper foundation
6 for admission of these -- of the tape and the still shots
7 from the tape. Assuming the State does that, we just -- I
8 wanted to take care of any arguments as far as the
9 inflammatory nature, if Defense counsel is arguing that,
10 and such at this time.

11 THE COURT: So one of the charges that the State is
12 going forward on is the dissemination charge?

13 MS. SUSTAKOVITCH: Yes, sir.

14 THE COURT: Okay. Well, I would find that, at this
15 stage of the trial, the threshold ruling would be that it
16 would be relevant. And it's probative value is
17 potentially outweighed by any danger of unfair prejudice
18 given the fact that it's directly relevant and likely to
19 prove essential elements of one of the crimes for which
20 he's on trial for.

21 Okay. What's the next issue?

22 MS. SUSTAKOVITCH: The final motion, Your Honor, is
23 pursuant to 17-23-175. It's for admission of the out of
24 state -- excuse me, out-of-court statement of the child
25 victim in this case pursuant to that statute.

1 At this time, the State would call the forensic
2 interviewer in this case, and then play the interviews for
3 the Court to make a finding.

4 THE COURT: Now, is this the part that has the two
5 hour --

6 MS. SUSTAKOVITCH: Yes, sir.

7 I didn't know if Your Honor wanted to take a break.

8 MR. CHAMBERS: Your Honor, I did one of these last
9 week and -- or not last week, but last month. And Judge
10 Welmaker just watched the video back in his chambers. I
11 don't have any objection if the Court wants to do that. I
12 don't think we need to do it out here in open court.

13 MS. SUSTAKOVITCH: There's no objection from the
14 State.

15 MR. CHAMBERS: And as far as the -- I mean, I'm
16 familiar with the process that -- of the forensic
17 interviewer. And my only objection to it coming in, based
18 on what I know about the statute, would be if the child
19 wasn't going to testify. Because that's one of the things
20 they have to do. If the child is going to be here and
21 testify -- I know that the forensic interviewer is
22 qualified. She could, certainly, do that later.

23 I would simply say for the sake of expediency to let
24 you watch the video in chambers. And then you can make a
25 determination of whether you're going to let them go

1 forward. But that's -- that would be our position as far
2 as the forensic interview goes.

3 MS. SUSTAKOVITCH: Judge, I have -- this is a -- the
4 interview was done in Spartanburg County through their
5 child advocacy center. And they take a dual interview
6 approach, which this interview is three meetings long.
7 It's from the 15th of June, 2010, the 22nd of June, and
8 then August. So it's three actual videos.

9 I did ask my secretary to transcribe them just for
10 the Court's -- to assist the Court. It's not a transcript
11 that I would say is word for word or verbatim. And we're,
12 certainly, not trying to put it in at this trial. I
13 thought it would potentially assist Your Honor as you
14 listen to them.

15 We do have Lieutenant Mike Peterson in the courtroom.
16 And there are some portions that need to be redacted.
17 I've gone through the -- I would offer these.

18 Judge, here's the transcripts of the interviews.

19 THE COURT: Thank you.

20 MS. SUSTAKOVITCH: Yes, sir.

21 Based on Your Honor's previous ruling that the Lyle
22 victim's testimony is not admitted, there are several
23 portions that the State has already redacted out in
24 anticipation that Your Honor may rule that way.

25 I would draw the Court's attention to the first

1 transcript, Page 20 of that transcript, it states, Did he
2 ever talk to you about -- this is about a third down the
3 page -- what he was doing or anything like that? And then
4 the interviewer said, Did you ever see Gary do this to
5 other kids?

6 And [Victim], the victim, says, He done it when he was
7 married. He had a daughter. He did it to her.

8 The State is redacting out all of that from, Did you
9 see Gary do it to other kids. And then they talk about
10 Gary told her he raped her.

11 And straight down the page, the child says, I can't
12 remember.

13 And the interviewer says, But he told you he used to
14 rape her?

15 It continues on to Page 21. We've redacted out the
16 first and second sentence. And then it ends with Tricia
17 saying, Well, was he doing that to anybody else?

18 [Victim] says, No.

19 So that was the stuff Gary used to do, the sex stuff
20 that he used to do? We've taken out that chunk related to
21 the prior victim, Judge, in the first interview.

22 In the second interview, there is another reference,
23 Judge, on -- this is the interview dated June 22nd, 2010.
24 On Page 11, the interviewer says, Any of your sisters say
25 anything happened to them?

1 **Victim** says, No. He only wants me and his other kid.
2 We've taken out "and his other kid."

3 And those would be the redactions that have already
4 been made. Certainly -- and I apologize. I don't know if
5 I just stated on Page 7 of this interview, it says, What
6 did Gary call this?

7 **Victim** says, Sex.

8 The interviewer says, Did you ever see him do it to
9 anyone else?

10 She says, No, just me and his other daughter.

11 You go down, it says, Did Gary do this one time, a
12 couple of times, or a lot of times?

13 She says, A lot of times.

14 We've taken that chunk out that relates to the prior
15 victim, Judge. And anything else, after Your Honor views
16 the videos, that you deem the State needs to bring out, we
17 will, certainly, do that.

18 THE COURT: Does the State have any other motions?

19 MS. SUSTAKOVITCH: That would be all from the State,
20 Judge.

21 THE COURT: How about on behalf of Mr. Thompson?

22 MR. CHAMBERS: No, Your Honor.

23 THE COURT: Okay. So I've been advised that the jury
24 pool will be downstairs shortly. Given the length of the
25 videos that I'll have to watch -- and I can watch it in my

1 office -- I would propose that we come back at, say,
2 2:00 -- well -- we can come back at, say, 1:45 and pick
3 the jury, and then just have them come back in the
4 morning. I mean, by the time I watch it, I don't know if
5 we could get started today or not.

6 Is that suitable to everybody?

7 MS. SUSTAKOVITCH: Yes, sir, Your Honor.

8 MR. CHAMBERS: Yes, sir.

9 THE COURT: Okay. So I'll tell them to come back at
10 1:45. And we'll see y'all back then.

11 Thank you.

12 (WHEREUPON, a lunch break was taken.)

13 (WHEREUPON, Court's Exhibit Nos. 1, 2, 3, 4, 5, and 6
14 were marked for identification and admitted into
15 evidence.)

16 (WHEREUPON, State's Exhibit Nos. 4, 5, and 6 were
17 marked for identification only.)

18 THE COURT: Anything before we bring the jury pool
19 up?

20 MS. SUSTAKOVITCH: Nothing, other than the
21 stipulation, Your Honor, Defense counsel has signed, and
22 read, and approved. And we would like to have it marked
23 as a State's Exhibit. And we'll move to enter it and
24 publish it at the appropriate time.

25 THE COURT: Okay.

1 (WHEREUPON, State's Exhibit No. 7 was marked for
2 identification only.)

3 THE COURT: So there are four indictments.

4 MS. SUSTAKOVITCH: Judge, the State is going forward
5 on two indictments. That would be the direct presentment
6 for criminal sexual conduct with a minor under
7 2013-GS-23-0700, and then dissemination of obscene
8 material to a minor, 2010-GS-23-8831.

9 THE COURT: Okay. Thank you.

10 (Pause.)

11 (WHEREUPON, the jury panel entered the courtroom.)

12 THE COURT: Good afternoon, ladies and gentlemen.

13 We're going to select a jury in the case of the State
14 v. Gary Reece Thompson, Jr. This is a criminal case. And
15 before we get started, I want to, first of all, let you
16 know that the mere fact that a defendant in a criminal
17 case has been charged and indicted is not evidence of
18 anything. It doesn't even create a suspicion of guilt.

19 The Defendant in a criminal case is always presumed
20 innocent. And that presumption of innocence cannot be
21 removed unless and until all 12 members of the jury find
22 the State has proven each and every element of the crime
23 beyond a reasonable doubt.

24 Mr. Thompson doesn't have any burden of proof. The
25 burden of proof is entirely on the State to prove guilt

1 beyond a reasonable doubt. And he doesn't have to offer
2 any kind of evidence or explanation whatsoever.

3 Now, there are two indictments that I'm going to read
4 to you. And these indictments are merely the way that a
5 citizen is charged with a crime and let's him know what
6 he's charged with. And that is their sole purpose. It
7 allows this case to be started in this courtroom by the
8 State of South Carolina. The indictments are not evidence
9 of anything. They're merely allegations.

10 So the first indictment is case #2010-GS-23-08831.
11 It alleges that Mr. Thompson did in Greenville County
12 between September 21, 2006, and May 13, 2010, knowingly
13 and unlawfully disseminate obscene material to a minor
14 under the age of 12 years. This is in violation of
15 Section 16-15-355 of the South Carolina Code of Laws.

16 The second indictment alleges in 2013-GS-23-00700A
17 that Gary Reece Thompson, Jr., did in this county between
18 October 11, 2007, and May 13, 2010, willfully and
19 unlawfully commit the crime of criminal sexual conduct
20 with a minor in the first degree by engaging in a sexual
21 battery with the victim, initials R.M., who was less than
22 16 years old -- less than 16 years of age and the
23 Defendant had previously been convicted of, pled guilty,
24 or nolo contendere to or adjudicated delinquent for an
25 offense listed under 23-03-0433(C) in violation of

1 16-3-655(A)(2) of the South Carolina Code of Laws. Those
2 are the pertinent parts of the indictment.

3 And the first thing I want to do -- the next thing I
4 want to do, rather, is make sure that we can have a jury
5 that can be fair and impartial in this case. And, to that
6 end, I would ask the lawyers in the case to introduce
7 themselves and the people at their table.

8 And, yes, ma'am, Solicitor.

9 MS. SUSTAKOVITCH: Good afternoon.

10 My name is Christy Sustakovitch. I'm a prosecutor
11 with the Thirteenth Circuit Solicitor's Office. This is
12 my investigator, Lindsey Kicklighter, and the lead
13 investigator, Lieutenant Ty Miller with the Sheriff's
14 Office.

15 THE COURT: Mr. Chambers.

16 MR. CHAMBERS: Good afternoon.

17 My name is Randy Chambers. I practice law here in
18 Greenville. And I, also, do part-time work with the
19 Thirteenth Circuit Public Defender's Office. Seated
20 beside me is the person whom you'll hear referred to
21 throughout this trial as the Defendant. This is Gary
22 Thompson.

23 THE COURT: All right. Thank you.

24 JURY QUALIFICATION

25 THE COURT: Is anyone related by blood or marriage or

1 kin to in any way Ms. Sustakovitch, or Mr. Chambers, or
2 anyone they introduced? If so, please, stand.

3 (WHEREUPON, there was no response.)

4 THE COURT: Does anyone have any personal, social, or
5 business relationship with Ms. Sustakovitch, or
6 Mr. Chambers, or Mr. Thompson, or Ms. Kicklighter, or
7 Ms. Miller? If so, please, stand.

8 (WHEREUPON, there was no response.)

9 THE COURT: Does anyone know anything about this
10 case, other than what you've heard from me here this
11 afternoon? If so, please, stand.

12 (WHEREUPON, there was no response.)

13 THE COURT: The people who may testify in this case
14 include Christy Diachenko, Lieutenant Ty Miller, Dr. Nancy
15 Henderson, Linda Hutton, Victim [REDACTED], Tricia Austin,
16 Edward McMahan, Minor [REDACTED], Minor Victim [REDACTED], Chameka
17 Meadows, Jessica Thompson-Taylor, John Vandermosten, Mike
18 Rainey, Beverly Petit, Phyllis Lewis, and Wiley Garrett.
19 Those are just some of the potential witnesses I've been
20 advised of who may testify.

21 Is anyone related by blood or marriage or kin to any
22 of these potential witnesses? If so, please, stand.

23 (WHEREUPON, there was no response.)

24 THE COURT: Does anyone have any personal, social, or
25 business relationship with any of these witnesses? If so,

1 please, stand.

2 (WHEREUPON, there was no response.)

3 THE COURT: All right. The allegations in this case,
4 as you've heard, involve accusations of -- that involve
5 sexual issues and sexual abuse. And, therefore, I'm going
6 to ask the following questions. If anyone needs to
7 respond to any of these questions I'm about to ask, I'll
8 just ask that you come down here and talk to me
9 privately -- in a more private manner with the court
10 reporter on the record.

11 But the questions are as follows: Has anyone ever
12 been or had a member of their immediate family be -- and
13 by immediate family, I mean a parent, a child, a spouse,
14 or a sibling. Has anyone or any member of your immediate
15 family ever been arrested, charged with, accused of,
16 convicted of, or been the victim of a sexual assault or
17 sexual abuse? That's one question.

18 The second question is: Is there anyone who's ever
19 contributed to, whether it's your time, or your money, or
20 given any other kind of tangible support to any group
21 whose sole or major purpose is to promote victims
22 rights, or more aggressive prosecutions, or law
23 enforcement?

24 And the next question is: Is there anyone who has
25 been employed by or had a member of your immediate family

1 be employed by any kind of law enforcement agency,
2 including the Solicitor's Office, or Attorney General's
3 Office, or U.S. Attorney's Office, or the Justice
4 Department, or SLED, or anything like that?

5 So those are the questions. And if you need to
6 respond to those, I'll be glad to talk to you up here with
7 the court reporter.

8 (WHEREUPON, a sidebar was held with the Court, the
9 attorneys, and potential jurors.)

10 (WHEREUPON, Juror #168, Benjamin Roberts, came
11 forward.)

12 THE COURT: Come over here. She's got to be able to
13 hear what you say. So just if you could --

14 JUROR #168, BENJAMIN ROBERTS: My wife, as a child,
15 was sexually assaulted.

16 THE COURT: Now, do you think you could be fair and
17 impartial in this case, Mr. Roberts?

18 JUROR #168, BENJAMIN ROBERTS: Yes, sir.

19 THE COURT: Even given your wife's experience?

20 JUROR #168, BENJAMIN ROBERTS: Yes, sir.

21 THE COURT: And you could decide the case solely on
22 the evidence and the law, and not let that consideration
23 enter into your mind?

24 JUROR #168, BENJAMIN ROBERTS: Yes, sir.

25 THE COURT: All right. Thank you.

1 (WHEREUPON, Juror #168, Benjamin Roberts, was
2 seated.)

3 (WHEREUPON, Juror #210, Frankie White, came
4 forward.)

5 THE COURT: Hi.

6 JUROR #210, FRANKIE WHITE: My husband worked at the
7 Solicitor's Office.

8 THE COURT: Right. Anthony White?

9 JUROR #210, FRANKIE WHITE: Yeah.

10 And then we found out later after my daughter was an
11 adult that she had been abused by a family member. So I
12 have very strong feelings about it.

13 THE COURT: All right. Do you think you could be
14 fair and impartial in this case?

15 JUROR #210, FRANKIE WHITE: No.

16 THE COURT: All right. I'll excuse you.

17 Thank you.

18 (WHEREUPON, Juror #210, Frankie White, was seated.)

19 (WHEREUPON, Juror #155, Baron Pritchard, came
20 forward.)

21 THE COURT: Hi. How are you doing?

22 Tell me your name, sir.

23 JUROR #155, BARON PRITCHARD: My name is Baron
24 Pritchard. B-A-R-O-N P-R-I-T-C-H-A-R-D.

25 THE COURT: Thank you.

1 JUROR #155, BARON PRITCHARD: I and my wife have both
2 been victims.

3 THE COURT: All right. Do you think you could still
4 be fair and impartial in this case?

5 JUROR #155, BARON PRITCHARD: I doubt it.

6 THE COURT: All right. I'll excuse you.

7 Thank you.

8 (WHEREUPON, Juror #155, Baron Pritchard, was seated.)

9 (WHEREUPON, Juror #117, Martin Lee, came forward.)

10 THE COURT: Hi.

11 JUROR #117, MARTIN LEE: My name is Martin Lee, #117.

12 I have a younger brother who works for the U.S.

13 Marshall's Service in Charleston. I have an older brother
14 who retired from the South Carolina Department of
15 Probation and Parole.

16 THE COURT: All right. Would that affect your
17 ability to be fair and impartial?

18 JUROR #117, MARTIN LEE: No, sir.

19 THE COURT: You could decide the case solely on the
20 evidence and the law, Mr. Lee?

21 JUROR #117, MARTIN LEE: Yes, sir.

22 THE COURT: Thank you.

23 (WHEREUPON, Juror #117, Martin Lee, was seated.)

24 (WHEREUPON, Juror #72, Virginia Gilliam, came
25 forward.)

1 THE COURT: Yes, ma'am.

2 JUROR #72, VIRGINIA GILLIAM: I'm coming forward out
3 of an abundance of being careful.

4 THE COURT: Okay.

5 JUROR #72, VIRGINIA GILLIAM: Because I didn't
6 understand the question about have you or anyone in your
7 family worked, and then you said for court.

8 THE COURT: For what?

9 JUROR #72, VIRGINIA GILLIAM: I thought you said,
10 have you or anyone in your family worked for, and then you
11 said court.

12 THE COURT: Oh, okay.

13 JUROR #72, VIRGINIA GILLIAM: Back in the '80s, I was
14 court administrator for the City of Greenville.

15 THE COURT: Okay.

16 JUROR #72, VIRGINIA GILLIAM: And I may know
17 Mr. Chambers. Mr. Chambers may have represented a former
18 business partner of mine.

19 MR. CHAMBERS: What was his name?

20 JUROR #72, VIRGINIA GILLIAM: I'm getting old. He
21 rehabs houses.

22 MR. CHAMBERS: Okay. Yeah. I know who you're
23 talking about. But that was a long time ago. I barely
24 remember it.

25 JUROR #72, VIRGINIA GILLIAM: Like I said, I thought

1 I better come forward and say so.

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

4 JUROR #72, VIRGINIA GILLIAM: Absolutely not.

5 THE COURT: You could decide the case based on the
6 evidence and the law?

7 JUROR #72, VIRGINIA GILLIAM: Yes, sir.

8 THE COURT: Thank you.

9 (WHEREUPON, Juror #72, Virginia Gilliam, was seated.)

10 (WHEREUPON, Juror #131, Falicia Middleton, came
11 forward.)

12 THE COURT: Yes, ma'am.

13 JUROR #131, FALICIA MIDDLETON: My brother-in-law is
14 a Greenville County cop.

15 THE COURT: For the Sheriff's Office?

16 JUROR #131, FALICIA MIDDLETON: The Sheriff's Office,
17 yeah.

18 THE COURT: Would that affect your ability to be fair
19 and impartial?

20 JUROR #131, FALICIA MIDDLETON: No.

21 THE COURT: You could decide the case based on the
22 evidence and the law?

23 JUROR #131, FALICIA MIDDLETON: Yes.

24 MR. CHAMBERS: Do you like him?

25 JUROR #131, FALICIA MIDDLETON: Yes.

1 THE COURT: You're Ms. Middleton?

2 JUROR #131, FALICIA MIDDLETON: Yes.

3 THE COURT: Thank you.

4 (WHEREUPON, Juror #131, Falicia Middleton, was
5 seated.)

6 THE COURT: Anything else y'all want me to ask?

7 MS. SUSTAKOVITCH: No, sir.

8 MR. CHAMBERS: No, sir.

9 (WHEREUPON, the sidebar was concluded.)

10 THE COURT: Is anyone aware of any kind of bias or
11 prejudice they may have about anyone involved in the case,
12 or any issue, or any party to the case? If so, please,
13 stand.

14 (WHEREUPON, there was no response.)

15 THE COURT: We'll proceed with jury selection.

16 THE CLERK: Your Honor, may I have them stand in
17 place?

18 THE COURT: Yes. That's fine.

19 THE CLERK: When I call your name, if you'll, please,
20 stand in place and then await further instructions.

21 JURY SELECTION

22 THE CLERK: Juror #74 Gary Gregory.

23 (WHEREUPON, Gary Gregory, a white male, stood.)

24 THE CLERK: What says the State?

25 MS. SUSTAKOVITCH: Please present the juror.

1 THE CLERK: What says the Defendant?

2 MR. CHAMBERS: Excuse Mr. Gregory from this case,
3 please.

4 THE CLERK: All right. Sir, you may be seated. You
5 have been excused from this case.

6 Juror #158, Brian Pufahl.

7 (WHEREUPON, Brian Pufahl, a white male, stood.)

8 MS. SUSTAKOVITCH: Please present this juror.

9 THE CLERK: Thank you.

10 What says the Defendant?

11 MR. CHAMBERS: Swear Mr. Pufahl, please.

12 THE CLERK: Sir, please, bring your things. Come
13 have a seat in the jury box.

14 Jury #121, Christopher Marosek.

15 (WHEREUPON, Christopher Marosek, a white male,
16 stood.)

17 THE CLERK: What says the State?

18 MS. SUSTAKOVITCH: Please present this juror.

19 THE CLERK: Thank you.

20 What says the Defendant?

21 MR. CHAMBERS: Swear Mr. Marosek please.

22 THE CLERK: Sir, please, bring your things. Come
23 have a seat in the jury box.

24 Juror #72 Virginia Gilliam.

25 (WHEREUPON, Virginia Gilliam, a white female, stood.)

1 THE CLERK: What says the State?

2 MS. SUSTAKOVITCH: Please present this juror.

3 THE CLERK: What says the Defendant?

4 MR. CHAMBERS: Swear Ms. Gilliam, please.

5 THE CLERK: Ms. Gilliam, please, bring your things.

6 Come have a seat in the jury box.

7 Juror #108, Brian Knox.

8 (WHEREUPON, Brian Knox, a white male, stood.)

9 THE CLERK: What says the State?

10 MS. SUSTAKOVITCH: Please present this juror.

11 THE CLERK: What says the Defendant?

12 MR. CHAMBERS: Swear Mr. Knox, please.

13 THE CLERK: Mr. Knox, please, come have a seat in the
14 jury box.

15 Juror #168, Benjamin Roberts.

16 (WHEREUPON, Benjamin Roberts, a white male, stood.)

17 THE CLERK: What says the State?

18 MS. SUSTAKOVITCH: Please present this juror.

19 THE CLERK: What says the Defendant?

20 MR. CHAMBERS: Excuse Mr. Roberts from this case,
21 please.

22 THE CLERK: All right. Sir, please, be seated. You
23 have been excused from this case.

24 Juror #126, John McLees.

25 (WHEREUPON, John McLees, a white male, stood.)

1 THE CLERK: What says the State?

2 MS. SUSTAKOVITCH: Please present this juror.

3 THE CLERK: What says the Defendant?

4 MR. CHAMBERS: Swear Mr. McLees, please.

5 THE CLERK: Sir, please, bring your things. Have a
6 seat in the jury box.

7 Juror #15, Bryan Bennett.

8 (WHEREUPON, Bryan Bennett, a white male, stood.)

9 THE CLERK: What says the State?

10 MS. SUSTAKOVITCH: Please present this juror.

11 THE CLERK: What says the Defendant?

12 MR. CHAMBERS: Swear Mr. Bennett, please.

13 THE CLERK: Mr. Bennett, please, come have a seat in
14 the jury box.

15 Juror #14, Everett Bedenbaugh.

16 (WHEREUPON, Everett Bedenbaugh, a white male, stood.)

17 THE CLERK: What says the State?

18 MS. SUSTAKOVITCH: Please present this juror.

19 THE CLERK: What says the Defendant?

20 MR. CHAMBERS: Excuse Mr. Bedenbaugh from this case,
21 please.

22 THE CLERK: All right. Sir, please, be seated.

23 Juror #81, Brian Harris.

24 (WHEREUPON, Brian Harris, a white male, stood.)

25 THE CLERK: What says the State?

1 MS. SUSTAKOVITCH: Please present this juror.

2 THE CLERK: Thank you.

3 What says the Defendant?

4 MR. CHAMBERS: Swear Mr. Harris, please.

5 THE CLERK: Mr. Harris, please, come have a seat in
6 the jury box.

7 Juror #103, Patricia Jones.

8 (WHEREUPON, Patricia Jones, a white female, stood.)

9 THE CLERK: What says the State?

10 MS. SUSTAKOVITCH: Please present this juror.

11 THE CLERK: What says the Defendant?

12 MR. CHAMBERS: Excuse Ms. Jones from this case,
13 please.

14 THE CLERK: All right. Ma'am, please, be seated.
15 You have been excused from this case.

16 Juror #77, Patricia Haines.

17 (WHEREUPON, Patricia Haines, a white female, stood.)

18 THE CLERK: What says the State?

19 MS. SUSTAKOVITCH: Please present this juror.

20 THE CLERK: Thank you.

21 What says the Defendant?

22 MR. CHAMBERS: Excuse Ms. Haines from this case,
23 please.

24 THE CLERK: All right. Ma'am, please, be seated.

25 Juror #131, Falicia Middleton.

1 (WHEREUPON, Falicia Middleton, a white female,
2 stood.)

3 THE CLERK: What says the State?

4 MS. SUSTAKOVITCH: Please present this juror.

5 THE CLERK: Thank you.

6 What says the Defendant?

7 MR. CHAMBERS: Excuse Ms. Middleton from this case,
8 please.

9 THE CLERK: All right. Thank you.

10 Please be seated.

11 Juror #65, Zachary Franzen.

12 (WHEREUPON, Zachary Franzen, a white male, stood.)

13 THE CLERK: What says the State?

14 MS. SUSTAKOVITCH: Please present this juror.

15 THE CLERK: What says the Defendant?

16 MR. CHAMBERS: Excuse Mr. Franzen from this case,
17 please.

18 THE CLERK: All right. Sir, please, be seated.

19 Juror #187, Janet Stratton.

20 (WHEREUPON, Janet Stratton, a white female, stood.)

21 THE CLERK: What says the State?

22 MS. SUSTAKOVITCH: Please present this juror.

23 THE CLERK: What says the Defendant?

24 MR. CHAMBERS: Swear Ms. Stratton, please.

25 THE CLERK: Ma'am, please, come have a seat in the

1 jury box.

2 Juror #163, Natalie Reisinger.

3 (WHEREUPON, Natalie Reisinger, a white female,
4 stood.)

5 THE CLERK: What says the State?

6 MS. SUSTAKOVITCH: Please present this juror.

7 THE CLERK: What says the Defendant?

8 MR. CHAMBERS: Swear Ms. Reisinger, please.

9 THE CLERK: Ma'am, please, come have a seat in the
10 jury box.

11 Juror #162, Richard Reid.

12 (WHEREUPON, Richard Reid, a white male, stood.)

13 THE CLERK: What says the State?

14 MS. SUSTAKOVITCH: Please present this juror.

15 THE CLERK: What says the Defendant?

16 MR. CHAMBERS: Swear Mr. Reid, please.

17 THE CLERK: Sir, please, have a seat in the jury box.

18 Juror #217, David Wilson.

19 (WHEREUPON, David Wilson, a white male, stood.)

20 THE CLERK: What says the State?

21 MS. SUSTAKOVITCH: Please present this juror.

22 THE CLERK: What says the Defendant?

23 MR. CHAMBERS: Excuse Mr. Wilson from this case,
24 please.

25 THE CLERK: All right. You may be seated, sir. You

1 have been excused from this case.

2 Juror #135, Nina Mosley.

3 (WHEREUPON, Nina Mosley, a black female, stood.)

4 THE CLERK: What says the State?

5 MS. SUSTAKOVITCH: Please present this juror.

6 THE CLERK: What says the Defendant?

7 MR. CHAMBERS: Swear Ms. Mosley, please.

8 THE CLERK: Ms. Mosley, please, come have a seat in
9 the jury box.

10 Juror #42, Debra Castor.

11 (WHEREUPON, Debra Castor, a white female, stood.)

12 THE CLERK: What says the State?

13 MS. SUSTAKOVITCH: Please present this juror.

14 THE CLERK: What says the Defendant?

15 MR. CHAMBERS: Swear Ms. Castor, please.

16 THE CLERK: Ma'am, please, come have a seat in the
17 jury box.

18 THE COURT: All right. We'll have two alternates.

19 THE CLERK: Juror #130, Ronald Meyer.

20 (WHEREUPON, Ronald Meyer, a white male, stood.)

21 THE CLERK: What says the State?

22 MS. SUSTAKOVITCH: Please present this juror.

23 THE CLERK: What says the Defendant?

24 MR. CHAMBERS: Swear Mr. Meyer, please.

25 THE CLERK: Mr. Meyer, please, have a seat in the

1 jury box.

2 Juror #85, Angelia Hart.

3 (WHEREUPON, Angelia Hart, a white female, stood.)

4 THE CLERK: What says the State?

5 MS. SUSTAKOVITCH: Please present this juror.

6 THE CLERK: What says the Defendant?

7 MR. CHAMBERS: Swear Ms. Hart, please.

8 THE CLERK: Ms. Hart, please, come have a seat in the
9 jury box.

10 THE COURT: Any matters or motions related to the
11 selection process or --

12 MS. SUSTAKOVITCH: Just one matter to take up before
13 the Court.

14 THE COURT: Okay.

15 MR. CHAMBERS: Nothing from the Defense, Your Honor.

16 THE COURT: Yes, ma'am.

17 MS. SUSTAKOVITCH: I -- it's a legal matter. We
18 probably need to take it up outside the presence of the
19 jury.

20 THE COURT: All right. Well, can y'all just come up
21 here one second?

22 (WHEREUPON, a bench conference was held.)

23 THE COURT: Ladies and gentlemen, if you'll just go
24 to the jury room. Mr. Anderson will escort you to where
25 it is. Don't talk about the case. We'll resume in just a

1 few moments.

2 Thank you.

3 (WHEREUPON, the jury was excused from open court at
4 approximately 2:22 p.m.)

5 THE COURT: All right. And those of you who weren't
6 chosen, I just ask that you go out in the hallway just for
7 a few moments while we take up one matter. And,
8 hopefully, we'll be able to let you go in just a few
9 minutes.

10 (WHEREUPON, the remaining jury panel members exited
11 the courtroom.)

12 THE COURT: So, just to confirm, there's no Batson
13 motions or any motions related to the selection or the
14 composition of the jury. And I do find that it complied
15 with all statutory and Constitutional requirements.

16 It was brought to my attention and something I
17 independently observed that one of the jurors, upon her
18 selection to this trial jury, expressed visible anger and,
19 in fact, evidently -- I mean, I'll let Ms. Sustakovitch or
20 Mr. Chambers elaborate. But I, certainly, detected it
21 even from a good distance away. And she was huffing and
22 puffing, and evidently exhibiting other behaviors.

23 So does anybody have anything they want to put on the
24 record about that?

25 MS. SUSTAKOVITCH: Nothing, Your Honor.

1 The lead investigator heard her say something like,
2 This sucks. And then she got her stuff and threw it down.
3 And, as Your Honor was able to observe, she appears to
4 really not want to be here.

5 THE COURT: Okay. Well, we'll bring her out. And
6 I'll be delighted to talk with her.

7 MS. SUSTAKOVITCH: Judge, is Your Honor going to seat
8 her on the jury, or are you going to excuse her?

9 I would --

10 THE COURT: Well --

11 MS. SUSTAKOVITCH: I would not want her brought out
12 here questioned and then put back on the jury. I'm afraid
13 that would really -- I don't know if there was enough Your
14 Honor observed just to excuse her. But I, certainly, feel
15 like she would feel she was singled out, and may take it
16 personally against the State in that instance.

17 THE COURT: Why do you think she would take it
18 personally against you?

19 MS. SUSTAKOVITCH: Well, that I, I guess, observed
20 her not wanting to be here and stopped the selection
21 process to have her brought out and quizzed about it. I
22 think it could not sit well with her.

23 THE COURT: Yes.

24 Well, I think she knows that I saw it, too --

25 MS. SUSTAKOVITCH: Okay.

1 THE COURT: -- because I made -- sustained eye
2 contact with her after she made a little scene in the jury
3 box.

4 But if y'all want me just to ignore it, I'll ignore
5 it. But I kind of want to know what her problem is.

6 MR. CHAMBERS: I'm kind of on the fence, Your Honor.
7 Because on the one hand -- I mean, I didn't see it. But I
8 did ask my client about it. He said he saw it, you know.
9 Just from a general standpoint and my personal opinion is
10 it's not good to reward people for their disdain for jury
11 service. I feel like the Court needs to make some kind of
12 inquiry --

13 THE COURT: Yes.

14 MR. CHAMBERS: -- just to see what her mindset is.

15 THE COURT: What bothers me is maybe there's
16 something she hasn't told us that is making her
17 uncomfortable or angry about having to serve in this
18 particular case, given the nature of the case. I mean, I
19 can -- so I --

20 MS. SUSTAKOVITCH: Yes, sir, Your Honor.

21 I have no issue with that. I just would be concerned
22 if she sat on the jury at this point.

23 THE COURT: Well, I don't -- I mean, like
24 Mr. Chambers says, I'm not, at this point, interested in
25 indulging people's attitudes about jury service, if

1 they've been qualified and they can take the oath.

2 Okay. So Ms. Caster, can you bring her out?

3 THE BAILIFF: Yes, sir.

4 (WHEREUPON, Juror #42, Debra Castor, entered the
5 courtroom.)

6 THE COURT: Yes, ma'am. Ms. Castor, I couldn't help
7 but notice that when you were called to serve, you didn't
8 appear to be very happy with that. In fact, you displayed
9 some anger that I noticed on my own. And I was just
10 wondering if you were feeling okay today.

11 JUROR #42, DEBRA CASTOR: I'm fine.

12 THE COURT: Is there any reason why you displayed
13 that kind of behavior?

14 JUROR #42, DEBRA CASTOR: Just frustrated. And I
15 have a lot to do.

16 THE COURT: You do. Okay.

17 Well, is there something you need to do that we need
18 to know about that would disqualify you from jury service
19 or entitle you to an exemption?

20 JUROR #42, DEBRA CASTOR: No, sir.

21 I just need to be on a plane by Sunday.

22 THE COURT: Well, I understand it's inconvenient for
23 jury service and it disrupts everybody's Monday.

24 Where are you going on your trip? I'm just curious.

25 JUROR #42, DEBRA CASTOR: Scottsdale.

1 THE COURT: Scottsdale?

2 JUROR #42, DEBRA CASTOR: (Juror #42, Debra Castor,
3 nodded.)

4 THE COURT: I thought you might be going overseas.

5 But I just wanted to make sure that there wasn't
6 something going on that we needed to know about about this
7 case, in particular, that was disturbing you or making you
8 feel uncomfortable.

9 So that's all that it was?

10 JUROR #42, DEBRA CASTOR: (Juror #42, Debra Castor,
11 nodded.)

12 THE COURT: Is that a "yes" or a "no"?

13 JUROR #42, DEBRA CASTOR: That's all.

14 THE COURT: Okay.

15 JUROR #42, DEBRA CASTOR: I mean, this process
16 doesn't make anybody feel real comfortable, to be honest.

17 THE COURT: Right.

18 JUROR #42, DEBRA CASTOR: But it is what it is.

19 THE COURT: And it, certainly, imposes a burden on
20 people. People who are in North Korea, and Iran, and Iraq
21 don't have to be disrupted like this.

22 JUROR #42, DEBRA CASTOR: I understand that, sir.

23 THE COURT: All right. Thank you.

24 (WHEREUPON, Juror #42, Debra Castor, exited the
25 courtroom.)

1 THE COURT: Okay.

2 MS. SUSTAKOVITCH: Judge, I do believe she rolled her
3 eyes as she walked out of the courtroom.

4 MR. CHAMBERS: She did, Your Honor.

5 MS. SUSTAKOVITCH: I would ask that she be excused
6 and maybe sit on the back row and watch the trial.

7 THE COURT: Oh, I didn't see that.

8 MS. SUSTAKOVITCH: But I just feel like she cannot be
9 objective. And I would hate for this victim in this case
10 and this Defendant, either one of them, to have that held
11 against them.

12 MR. CHAMBERS: As she bent over to pick up her bag,
13 Your Honor, she visibly was rolling her eyes. She has --
14 I mean, she has -- I mean, it's clear she has nothing but
15 contempt for --

16 MS. SUSTAKOVITCH: -- this whole process.

17 MR. CHAMBERS: -- the Court and this whole process.

18 THE COURT: Well, I didn't observe that. But
19 we'll...

20 (Pause.)

21 THE BAILIFF: Your Honor, do you want the jurors out
22 in the hall to go downstairs?

23 THE COURT: Yes. They can go downstairs.

24 I'm just trying to look. I think the alternate would
25 have to be drawn by lot; isn't that right?

1 MS. SUSTAKOVITCH: I apologize.

2 THE COURT: We have two alternates, don't we?

3 MS. SUSTAKOVITCH: Yes, sir.

4 I think #130 was drawn first, and then #85 next.

5 THE COURT: But I think you have to draw them by
6 lot --

7 MS. SUSTAKOVITCH: Okay.

8 THE COURT: -- for the next --

9 Do y'all agree on that?

10 I mean, we don't go just the first alternate, second
11 alternate. We have to do that.

12 MS. SUSTAKOVITCH: Right.

13 MR. CHAMBERS: I would, certainly, defer to the
14 Court, Your Honor. Because I, honestly, don't know the
15 answer to that question.

16 THE COURT: I was just trying to find the -- the
17 reason I can't remember is it's different in civil court.

18 THE CLERK: Your Honor --

19 THE COURT: Just one second.

20 THE CLERK: Okay.

21 (Pause.)

22 THE COURT: Yes, ma'am. What were you going to tell
23 me?

24 THE CLERK: Oh, when you said lot -- that you had to
25 draw from lots, I just had the two names. If you want to

1 pick one, if you want to do that.

2 THE COURT: No. You can do it.

3 THE CLERK: Okay. It's Ronald Meyer, #130.

4 THE COURT: After all that.

5 THE CLERK: Okay.

6 (Pause.)

7 THE COURT: You can bring the juror back out here.

8 (Pause.)

9 THE COURT: He's not bringing all of them out here,
10 is he?

11 THE BAILIFF: You just want him to bring the one?

12 THE COURT: I just want him to bring Ms. Castor out.

13 THE BAILIFF: Who?

14 THE COURT: Ms. Castor.

15 THE BAILIFF: Okay.

16 THE COURT: Thank you.

17 (WHEREUPON, Juror #42, Debra Castor, entered the
18 courtroom.)

19 THE COURT: Yes, ma'am. It was brought to my
20 attention that you rolled your eyes as you left the
21 courtroom earlier. And, based on your responses to my
22 questions, and that occurrence, and the previous
23 disrespectful behavior, I'm just going to remove you from
24 this jury.

25 I'm not going to remove you from your obligation to

1 be on the jury this week. In fact, we'll let you observe
2 the trials as they come up. But I, certainly, don't want
3 to put your fellow citizens at risk from having such an,
4 obviously, disgruntled person sit in judgment on their
5 important affairs.

6 So you can go back downstairs, ma'am.

7 Thank you.

8 JUROR #42, DEBRA CASTOR: Thank you.

9 THE BAILIFF: Ma'am I need your badge.

10 JUROR #42, DEBRA CASTOR: Okay.

11 (WHEREUPON, Juror #42, Debra Castor, exited the
12 courtroom.)

13 THE COURT: We'll just send the rest of the jury
14 panel home. We're going to start tomorrow at 9:30 in the
15 morning.

16 MS. SUSTAKOVITCH: Yes, sir.

17 MR. CHAMBERS: And I assume we're just -- we're going
18 to move the first alternate in to take her place.

19 THE COURT: Well, we -- I think the statute says that
20 you have to do it by lot. And Ms. Troop did it by lot.

21 MR. CHAMBERS: Oh, okay. I'm sorry. So we've
22 already taken care of that. Got you.

23 THE COURT: We did that a minute ago. I'm sorry we
24 didn't have a drum roll for you.

25 MR. CHAMBERS: I heard you do that. I thought you

1 were picking a foreman.

2 THE COURT: No, no. But it's -- after all that, it
3 doesn't make any difference. It is the first alternate,
4 the same person.

5 MR. CHAMBERS: Okay.

6 MS. SUSTAKOVITCH: May it please the Court, Your
7 Honor.

8 For a point of clarification. On the interviewer --
9 the forensic interviewer of the child victim in this case
10 is here. And I wanted to clarify. I know Your Honor is
11 going to listen to the interviews and you have the
12 transcripts. And we will have someone here in the morning
13 to take out anything Your Honor deems necessary.

14 Do we need to put up Ms. Austin tomorrow morning?

15 I just wanted to make sure I have her back if we need
16 her as part of that pre-trial hearing. She won't be my
17 first witness. So, if not, then I won't have her back
18 here. But I needed something on the record as far as her
19 qualifications under the statute.

20 If Defense counsel is stipulating to her
21 qualifications, that's fine. If he would like us to put
22 her up with those foundation questions, we'd like to do
23 that, Your Honor.

24 MR. CHAMBERS: Well, I didn't think she needed to
25 testify for the purposes of anything pre-trial. But I

1 assumed that when they get ready to introduce the forensic
2 interview that she's going to take the stand and lay the
3 foundation at that point.

4 MS. SUSTAKOVITCH: No -- yes, sir. She is going to
5 do that. Usually, I put the person up pre-trial and just
6 lay their foundation questions. And then -- if Defense
7 counsel is stipulating to the fact that she's qualified in
8 that manner pre-trial so that Your Honor can make that
9 determination under 17-23-175 as far as her
10 qualifications, then we won't bring her back. I just
11 wanted to make sure which way we're going with that.

12 MR. CHAMBERS: Yeah. I will stipulate that she's
13 qualified --

14 THE COURT: Okay.

15 MS. SUSTAKOVITCH: Okay.

16 MR. CHAMBERS: -- to conduct the interview very
17 specifically.

18 MS. SUSTAKOVITCH: Then we will not have her back in
19 the morning.

20 Thank you, Your Honor.

21 THE COURT: Do you stipulate she's been trained in
22 conducting investigative interviews with children?

23 MR. CHAMBERS: Yes, sir.

24 THE COURT: Well, do you just want to maybe recite
25 her qualifications?

1 MS. SUSTAKOVITCH: Well, Judge, she's present.
2 She's -- I hate to put words in her mouth. But if we
3 could just briefly put her up there for that purpose.

4 THE COURT: Yes. Sure.

5 MS. SUSTAKOVITCH: The State calls Tricia Austin.

6 THE CLERK: Ma'am, if you'll, please, place your left
7 hand on the Bible and raise your right hand.

8 WHEREUPON,

9 TRICIA AUSTIN,
10 after first having been duly sworn, testified as follows:

11 THE CLERK: Thank you.

12 Please be seated.

13 DIRECT EXAMINATION

14 BY MS. SUSTAKOVITCH:

15 Q Ms. Austin, would you state your name for the record?

16 A Tricia Austin.

17 Q And where are you employed?

18 A At the Children's Advocacy Center in Spartanburg.

19 Q What's your position?

20 A I am a licensed professional counselor. And my
21 current position at the advocacy center is conducting
22 forensic evaluations.

23 Q Can you explain to Judge Hill your work experience
24 and training briefly?

25 A Yes. I have my undergraduate degree from Clemson

1 University in psychology. My masters is in counseling,
2 also, from Clemson University.

3 Following school, I worked at the Greenville Mental
4 Health Center at the child and adolescent division in
5 school-based services for approximately seven years.
6 During that time, in 1999, I obtained my professional
7 licensure, which is a licensed professional counselor
8 license. And I have maintained that since that time.

9 In November of 2005, I started working at the
10 Children's Advocacy Center in Spartanburg and have been
11 working there since, approximately eight years.

12 Q In the last eight years, can you estimate how many
13 children you've interviewed?

14 A My best estimate over that time is approximately
15 900-plus interviews.

16 Q And, in your interviews, are you interviewing
17 children where there's a concern of sexual abuse or
18 assault?

19 A Yes. The children who are referred to our center are
20 there for allegations of abuse, primarily sexual abuse.
21 We do see issues of extreme physical abuse as well.

22 Q And did you interview the victim in this case?

23 A Yes, I did.

24 Q At whose request did you interview the victim?

25 A She was referred to our center from Spartanburg

1 County law enforcement and, also, from the Greenville
2 County Department of Social Services.

3 MS. SUSTAKOVITCH: Judge, that would be her
4 qualifications related to interviewing.

5 THE COURT: Mr. Chambers.

6 MR. CHAMBERS: I have no objection to her testimony.
7 She's qualified.

8 THE COURT: All right. Thank you, ma'am.

9 Anything else before we break?

10 MS. SUSTAKOVITCH: Nothing from the State.

11 THE COURT: We'll just bring the jury back in and
12 I'll dismiss them.

13 (WHEREUPON, the jury came into open court at
14 approximately 3:00 p.m.)

15 THE COURT: Good afternoon, ladies and gentlemen.

16 We're going to, actually, begin this trial in the
17 morning because of some matters we have to resolve before
18 we can, actually, start the trial. So, hopefully, that
19 will make things run efficiently tomorrow.

20 But I just wanted to tell you right now, though, that
21 even though the trial has not begun, please, don't do any
22 kind of outside investigation about anything that might be
23 related to this case, or talk to anyone about the case, or
24 get on social media, whatever you might prefer to use, and
25 say that you're on a jury. That causes all kinds of

1 problems and can cause a mistrial in a case.

2 So I just wanted to emphasize that to you and ask you
3 to just come back in the morning at 9:30. And we'll get
4 underway then.

5 Thank you very much.

6 (WHEREUPON, the jury was excused from open court at
7 approximately 3:02 p.m.)

8 THE COURT: Okay. We'll see you back at 9:30.

9 Thank you.

10 (WHEREUPON, the proceedings were concluded at
11 approximately 3:02 p.m., to be reconvened on
12 Tuesday, January 14, 2014.)

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1 TUESDAY, JANUARY 14, 2014

2 (WHEREUPON, State's Exhibit Nos. 8, 9, 10, 11, 12, 13,
3 14, 15, and 16 were marked for identification only.)

4 THE COURT: We've got everybody present. I did
5 review the CDs -- DVD's. And I had a couple of questions
6 about the --

7 What is the Defendant's position on the interview
8 DVD's?

9 MR. CHAMBERS: I'm sorry, Your Honor.

10 THE COURT: What's your position on the interview
11 DVD's as far as the compliance with the statute?

12 MR. CHAMBERS: I believe with the redactions that the
13 Solicitor said she made that it complies with the statute
14 based on what I saw.

15 THE COURT: Right.

16 Are you -- it appeared to me there was quite a bit
17 of -- and maybe I missed this yesterday afternoon. But
18 there appeared to be quiet a bit of content related to
19 some corporal punishment and some physical attacks on the
20 mother.

21 Is that something you're seeking to exclude,
22 Mr. Chambers?

23 MR. CHAMBERS: I'll be honest with you, Your Honor.
24 For a tactical reason, I was kind of on the fence about
25 that. But, to be safe, I would probably ask that they be

1 redacted.

2 THE COURT: Well, and I understand. I didn't know if
3 you did have strategic reasons for that.

4 MR. CHAMBERS: No.

5 I mean, probably to keep the record clean, it would
6 be better to -- I mean, I would object and ask that that
7 be redacted as well. I don't want to get into why I
8 thought I might want it to come in, but I did have a
9 tactical reason for it. But, honestly, to keep the record
10 clean, it might be a good idea for that to be redacted.

11 MS. SUSTAKOVITCH: Your Honor, the State does have a
12 position on that at the appropriate time.

13 THE COURT: Okay. This is a good time.

14 MS. SUSTAKOVITCH: Okay. The relevance to that, Your
15 Honor, the co-defendant in this case is Jessica Thompson.
16 She was, also, charged with unlawful conduct to a child.
17 She has pled guilty to that charge. She has a deferred
18 sentence.

19 She is going to be testifying in this case with no
20 recommendation from the State. Naturally, she'll be
21 sentenced after this trial. But the substance and basis
22 of her charge is that the child told her she was being
23 abused and that Jessica did not get help for her.

24 The mother -- in one of the incidences that is spoken
25 about in the tape, it's the very night that the child

1 tried to reach out to her mother and tell her mother that
2 she was being sexually abused. It's, I believe, in the
3 second segment of this interview where she talks about
4 being jacked up against the wall. And that's when **Victim**
5 woke up.

6 And **Victim**'s testimony is going to be that that night
7 she woke up, her mom was up against the wall. And then
8 she tried to tell her mother -- or this is what the
9 anticipated testimony is -- that night or very shortly
10 after that this Defendant was hurting her.

11 I think it goes to the whole res gestae of this
12 dysfunctional family that was in existence that allowed
13 the abuse to occur that made this mother -- she was a --
14 you know, in an abusive situation. To understand why she
15 didn't get help, I think the jury needs to understand that
16 this was an abusive home.

17 And when it goes to those details about that night
18 and the reason the child later after hearing her mom being
19 abused in that matter -- you know, I would say maybe that
20 instance is what made her reach out and say I've got to
21 tell mom. But that is -- it's all wrapped up as the res
22 gestae of the child trying to get help. She didn't get
23 help from her mom. The mother is convicted on that
24 charge.

25 So that would be the State's position as far as

1 having that in. There are two other portions the State
2 would move to have taken out.

3 THE COURT: Okay.

4 MS. SUSTAKOVITCH: And I would address those whenever
5 Your Honor would like.

6 THE COURT: Go ahead.

7 MS. SUSTAKOVITCH: I would look to page -- on the
8 second interview, Your Honor, dated 6/22 on Page 8, Tricia
9 says, One thing I want you to know, **Victim**, and I think is
10 so important, you need to know Gary and people like him
11 always say those kinds of things. That's how they keep
12 kids quiet. She goes on, she says, I want you to know
13 you're not in trouble for anything that happened. You
14 didn't do anything wrong. Gary is the one that did
15 something wrong.

16 I would move to exclude that, Your Honor. I believe
17 that it -- in light of the Court's very clear guidance and
18 rulings, we -- the interviewer cannot articulate a
19 position as far as whether they believe the child or
20 whether they don't. And so the State's concern with you
21 didn't do anything wrong, Gary is the one that did
22 something wrong, the State would move to have that taken
23 out to keep the interview cleaner.

24 If Defense counsel does want it in, I would ask for
25 appellate reasons that there be a very clear reason stated

1 on the record for why that statement should stay in.

2 MR. CHAMBERS: I do want that to stay in, Your Honor.
3 And the very clear reason for that is, at that point, it's
4 our position that the interviewer strayed from the RATAC
5 protocol in suggesting that Mr. Thompson had done
6 something, which is contrary to RATAC protocol and, I
7 think, casts doubt on the entire interview at that point.
8 And I, certainly, would like for the jury to hear that.

9 MS. SUSTAKOVITCH: Judge, I --

10 THE COURT: Well, there's all kind of stuff in here
11 that's troublesome to me. I mean, I don't -- you know,
12 there's statements about whether Mr. Thompson was supposed
13 to be around the child. And there's statements about how
14 the interviewer is going to get counseling for the victim.
15 There's a lot of irrelevant stuff. I don't know why we
16 aren't just putting in the very discrete parts that are
17 concerning what, actually, occurred.

18 I mean, here is a part -- and I'm going by these
19 summaries. They're not -- they're entitled "transcripts."
20 But they -- as the State has already pointed out, they are
21 not even close to being a verbatim reproduction of what
22 was said. In fact, there are gaping and glaring omissions
23 and -- in what's written down.

24 So, just as a guide, I'm looking at this Court's
25 Exhibit No. 1 from June 15th and, you know, they start

1 talking about, Has Gary -- did you ever see Gary do this
2 to other kids? And that goes on at the top of Page 21.

3 MS. SUSTAKOVITCH: Yes, sir.

4 And the State is redacting that.

5 THE COURT: That's the part you wanted to redact?

6 MS. SUSTAKOVITCH: Yes, sir.

7 The State would concede, as I mentioned yesterday, we
8 have taken that whole section out subject to Your Honor's
9 ruling -- anticipated ruling on that.

10 THE COURT: Okay.

11 MS. SUSTAKOVITCH: From, Did you see Gary do that,
12 all the way down to -- on Page 21, So that's stuff that
13 Gary used to do, the sex stuff he used to do? That's all
14 out. We would agree that talks about the other victim.

15 THE COURT: Right.

16 MS. SUSTAKOVITCH: And, also, in the second
17 interview, she mentions the other child again. We've
18 taken that out on Page 11.

19 THE COURT: Okay.

20 MS. SUSTAKOVITCH: And on Page 7, she mentioned --
21 they talk about the other child again. Did you see him do
22 it to anyone?

23 No, just me and his other daughter.

24 They talk about his other daughter. And we've taken
25 out that chunk on Page 7 where they address that.

1 THE COURT: You're on which one?

2 MS. SUSTAKOVITCH: The second interview.

3 THE COURT: Yes.

4 MS. SUSTAKOVITCH: There are two references, one on
5 Page 7, which as I was trying to say yesterday and I could
6 have been confusing. But on Page 7, the reference to the
7 prior victim is being taken out. And then, also, on Page
8 11, two thirds down the page where she says, No, he only
9 wants me and his other kid.

10 THE COURT: Right.

11 MS. SUSTAKOVITCH: I'm taking out, And his other kid.

12 I would, for the Court's clarification, as far as the
13 first two interviews, the advocacy center there follows a
14 dual interview approach, which is a nationally-accepted
15 model. And **Victim** discloses different things in the second
16 interview she -- that she doesn't -- the interviewer cut
17 short the first interview and says, Well, I'll talk with
18 you again next week.

19 And the next week is when they discuss the
20 penile-anal penetration, the pornography where she's
21 forced to watch him masturbate, his tongue on her lips,
22 and the threats that he made.

23 The third interview is really, specifically, just
24 trying to narrow down the locations where the abuse
25 occurred. So there's not really additional information in

1 the third interview, other than to specify the locations
2 in that third interview.

3 If the Court wanted to consider -- I don't know --
4 potentially having us cover that third interview with more
5 questions, instead of putting that entire interview in,
6 you could consider that. I'm just trying to throw out --
7 I would say I believe it should come in.

8 But, in the alternative, we could have the forensic
9 interviewer state, you know, kind of similar to time and
10 place, and you brought her back in for a third interview,
11 specifically, to try to identify the locations where this
12 abuse occurred. What did she state? Boom, boom, boom,
13 boom. And if that would help in some way to cut down on
14 extraneous.

15 THE COURT: Okay. Well, I think that might be a wise
16 decision. I don't know -- and, of course, either side
17 could -- if they didn't like what the other one selected
18 could put in what they wanted to subject to objections and
19 rulings on the objections.

20 But, I mean, like on -- in the first interview on
21 Page 28, they start talking about how she has told her
22 father about what occurred, and what the father said, and
23 what the father was going to do.

24 MS. SUSTAKOVITCH: We can take all -- any and all out
25 that you want, Judge. We've got somebody who can redact

1 that. If you believe it falls outside the details of the
2 offense, then we are ready and prepared to do that.

3 THE COURT: But, I mean, I don't know if that's
4 something Mr. Chambers wants in there. I mean, I just
5 don't know. But I want to make sure we cover it.

6 MR. CHAMBERS: Your Honor, I would just -- there's a
7 lot in there that is objectionable. And, you know, my
8 initial thought was to move to just exclude the videos
9 entirely. Because I don't know that they can be
10 effectively redacted.

11 And, honestly, as I mentioned earlier, you know, I --
12 it appears to me, based on what I know about the RATAC
13 protocol, that this was not followed by this particular
14 interviewer. So -- but there's a tactical reason to have
15 it come in.

16 Because I think it shows that, basically, this
17 girl -- these were discussed with her on several
18 occasions, that these ideas were, basically, put in her
19 head. That said, you know, I think I've reconsidered that
20 position, you know. There is a lot in there that's
21 objectionable. I don't know that these can be effectively
22 redacted. And, also, I don't -- it is my opinion, based
23 on the RATAC protocol that they're supposed to follow,
24 that she didn't follow the protocol.

25 So, based on all that, I, at this point, would ask

1 that the tapes simply be excluded and that that particular
2 witness not be allowed to testify.

3 MS. SUSTAKOVITCH: Your Honor, the State's position
4 would be that in any analysis under 17-23-175, it's a
5 totality of the circumstances and are these statements
6 solicited by leading questions? The State's position is
7 you go through interview one, these are not leading
8 questions. I believe all of interview one is admissible,
9 absent the part where he discusses -- they discuss the
10 prior victim. And the State is already agreeing that that
11 needs to be taken out.

12 Again, as to the continuation of that in interview
13 two that -- I've had interviews redacted on the front end,
14 the back end, the middle. There's nothing that says
15 because you have extraneous talk on the front or the back
16 that the guts of it doesn't come in.

17 So the State is really bending over backwards to say
18 if there is something on either side of that that needs to
19 come out, we'll take it out. And we're prepared to do
20 that. But as to the core specifics of the crime, I
21 believe -- and Your Honor is going to be the Judge of
22 that -- but listening to the questions that this
23 interviewer, who has interviewed 900 some odd children,
24 has given this child, they are not leading. They are not
25 putting words in her mouth.

1 Yes, I would say the part that the State would move
2 to take out where it says, You didn't do anything wrong,
3 Gary is the one that did something wrong, that does trip
4 up into saying she is believing her over Gary. She's
5 trying to comfort the child and such. But I believe under
6 State v. Kromah, the Court's been clear, that comes out.

7 And I would strongly urge the Court we want that out. We
8 want this to be able to stand on -- if Defense counsel for
9 strategic reasons -- assuming the State were to get a
10 conviction -- is relaying to the Court that it has a
11 strategic reason for leaving that in, which he has, that's
12 one thing. But the State would still ask to take that
13 out.

14 And then there is one other portion on Page 9 that
15 the State would move to take out because it just falls
16 into the people that are trying to keep the child safe,
17 the police, Ms. Meadows, you know. I would move to take
18 that out because it goes away from the guts of the crime
19 and goes more into this -- you know, trying to reassure
20 the child, which, again, is not something that should be
21 admissible.

22 So we would move to take out, I want you to know
23 there's lots of people working to make you safe. And just
24 take it out to the bottom of the page where it says, You
25 don't need to worry. Now that we know this happened, he

1 can't bother you or anyone else. I think that that would
2 come out.

3 MR. CHAMBERS: Well --

4 MS. SUSTAKOVITCH: And then the State would, also,
5 not put in the third interview, if that's what Your Honor
6 is ruling, if that helps the situation. And we would
7 simply ask Tricia Austin as to the time and the place that
8 was stated in the individual -- in that third interview
9 where the child said these events occurred.

10 MR. CHAMBERS: And, Your Honor, if the interview is
11 going to come in, then I want the parts in where she is,
12 essentially, telling the child, We know he did something
13 wrong and we're here to protect you. Because, again, I
14 think that is a departure from protocol. And I -- in my
15 mind, it casts doubt on the integrity of the interview
16 process.

17 MS. SUSTAKOVITCH: And, certainly, Judge, he can --
18 strategically, I understand that position. He can go
19 after Tricia Austin with that. And he's laid out on the
20 record the reason he wants it in. I just wanted it to be
21 clear the State's position and the willingness to take it
22 out. But he, certainly, can attack her for that.

23 THE COURT: Well, if you want to leave it in for that
24 strategic reason, then it will be left in.

25 But what -- I want to go back to this whole choking

1 and whipping portion. I'm -- not knowing the case like
2 you do, Ms. Sustakovitch, I'm sure -- you want that in to
3 do what now?

4 MS. SUSTAKOVITCH: Well, I think, number one, we have
5 a delayed disclosure case where this is a dysfunctional,
6 abusive family. Jessica Thompson is a lot of things,
7 number one, a convicted felon right now and not a good
8 mother. But she, also, was the victim of domestic
9 violence.

10 And understanding the dynamics of this case, you have
11 to understand these kids were afraid of him. The mother
12 was afraid of him. When the child tried to reach out and
13 tell her mom she was being abused, the mom had just been
14 jacked up against the wall. And the mom didn't help her.

15 So the mom is going to explain why she didn't help
16 her, why she didn't do her job as a parent, why she didn't
17 call police. And I think if you sanitize it and try to
18 make this into just one happy family living in a trailer
19 in Greenville, it's not letting the jury understand the
20 dynamics of how this all fit together and how the child
21 perceived the threats of this Defendant. Were they real?
22 Were they reasonable the way the mother perceived the
23 threats of this Defendant? That would be the basis.

24 And, certainly, if Your Honor wants that taken out,
25 we will abide by that as well.

1 MR. CHAMBERS: I think it should be redacted, Your
2 Honor. I mean, essentially, if I hear what they're saying
3 correctly is that the reason -- that this little girl
4 disclosed to the mother. But the reason the mother didn't
5 seek any help was that she was being abused. And then, on
6 the other hand, the Solicitor is saying but we have
7 convicted her of not going to report this disclosure. You
8 can't have it both ways.

9 I mean, apparently, they feel like that she was
10 abused to the point that she couldn't go do it. But, yet,
11 they let her plead guilty to a crime that involved the --
12 you know, the intent not to report this. And, you know,
13 Jessica can, certainly, testify, I believe. And it would
14 be well within the rules that the reason she didn't report
15 it was that she was afraid of him. But that's different
16 than having it come from the child.

17 THE COURT: Yes, I agree. I think that needs to be
18 taken out.

19 MS. SUSTAKOVITCH: Your Honor, which page are we
20 referring to, so I can make sure?

21 THE COURT: All this stuff about spankings and --

22 MS. SUSTAKOVITCH: Judge, just a point of
23 clarification as far as the timing. The child did try to
24 tell her mother the night that all that abuse happened.
25 That was the State's position that it was part of the res

1 gestae of trying to reach out for help and being caught up
2 in that abusive situation with her mother. That's why the
3 State was arguing to have it in.

4 THE COURT: Well, it might be part of the res gestae,
5 but it still doesn't substantially outweigh the danger of
6 unfair prejudice.

7 MS. SUSTAKOVITCH: Yes, sir.

8 THE COURT: I'm on Page 11.

9 MS. SUSTAKOVITCH: The first interview, Judge?

10 THE COURT: Yes, ma'am.

11 And it goes all the way to Page 12.

12 MS. SUSTAKOVITCH: All right.

13 THE COURT: And Page 13.

14 MS. SUSTAKOVITCH: All right. So maybe, Judge, at
15 the top of Page 14, perhaps. It says --

16 THE COURT: Those first two lines of Page 14.

17 MS. SUSTAKOVITCH: Do I take it down to, it says, Did
18 mom ever fight Gary the way Gary did her? Did he ever hit
19 her, push her?

20 And then **Victim** says, No. Because if she did, Gary
21 would grab his belt.

22 Do you want that out?

23 And then it says, What other things did he do to hurt
24 your body besides the whippings?

25 Do you want that out?

1 THE COURT: Yes.

2 MS. SUSTAKOVITCH: Just start with, When our mommy
3 was gone --

4 THE COURT: Right.

5 MS. SUSTAKOVITCH: -- he would have you know what
6 with me.

7 THE COURT: Yes, ma'am.

8 MS. SUSTAKOVITCH: Okay. I'll take that out. All of
9 Page 13, and all of Page 12?

10 THE COURT: Right.

11 MS. SUSTAKOVITCH: And then, I guess, it says, Right
12 now, your mom and dad you live with now, tell me about
13 living with them. Okay. We need to take that out. I
14 mean, that doesn't make sense in how it flows together.

15 THE COURT: I'm sorry. Where are you?

16 MS. SUSTAKOVITCH: I'm trying to figure out where to
17 start the redaction with all this stuff after the
18 whippings.

19 THE COURT: So I think you would start at Page 11 on
20 the fourth line -- well -- yes, after she says she
21 asked -- well, wait a minute.

22 MS. SUSTAKOVITCH: Maybe -- I'm sorry, Judge.

23 THE COURT: Go ahead.

24 MS. SUSTAKOVITCH: I was going to suggest, it says,
25 Gary shouldn't be around Josh. She nods yes. And then it

1 kind of changes subjects. It says, So then you went to
2 live with your mom and dad, your stepmom, now. Start
3 there with the redaction?

4 Because then it starts talking about punishment at
5 their house, punishment with Gary.

6 THE COURT: Well, I mean, is there an objection to
7 the part about DSS and he's not supposed to be around us?

8 MS. SUSTAKOVITCH: I think part of that is going to
9 come in anyway. Because I do believe their claim is
10 that -- well, I don't know. My understanding is there's a
11 claim that he wasn't supposed to be in the house, so he
12 couldn't have done this anyway. I don't know. It's going
13 to be out there. He's on the registry anyway, so.

14 THE COURT: Is there an objection to it?

15 MR. CHAMBERS: Yes, Your Honor.

16 I would object to anything about a DSS investigation
17 coming in through the child. I think that would, clearly,
18 be hearsay.

19 THE COURT: So I would just maybe start at Page 9 and
20 start redacting right above that and -- where it says
21 12:38, that first line, [REDACTED], okay, did y'all always
22 live in a house with mom and Gary? I'd start right there,
23 start redacting.

24 MS. SUSTAKOVITCH: At 12:38?

25 THE COURT: The line right above 12:38, start

1 redacting there all the way down to Page 14. The first
2 two lines of Page 14 will be taken out. And then start
3 with the third line on Page 14.

4 MS. SUSTAKOVITCH: We can start with, What other
5 things did he do to hurt you beside the whippings. Or do
6 you want that out?

7 THE COURT: You may have a different copy than I do.
8 But I -- it's the third line starting with, When our mommy
9 was gone, he would have you know what with me.

10 MS. SUSTAKOVITCH: Okay. So we start right there?

11 THE COURT: Yes, ma'am.

12 And then I think everything is compliant with the
13 statute up to...

14 MS. SUSTAKOVITCH: Judge -- go ahead.

15 THE COURT: I'm sorry.

16 MS. SUSTAKOVITCH: I would -- if we're taking this
17 much out, I would ask just to put the third interview in
18 for point of -- to make it clearer to the jury, unless,
19 Judge, you want that.

20 THE COURT: Want what?

21 MS. SUSTAKOVITCH: The third interview -- since we
22 are taking out a good portion of this second one, just to
23 make it clear to the jury what she's talking about where
24 stuff happened, I would move to put it in. But, again, we
25 can handle it the other way, if Your Honor wants us to

1 shorten it.

2 THE COURT: Well, let's just stick with the first one
3 right now.

4 MS. SUSTAKOVITCH: Okay.

5 THE COURT: So then we go down to Page 20.

6 MS. SUSTAKOVITCH: Yes, sir.

7 THE COURT: About a third of the way down, where it
8 says, Did you ever see Gary do this to other kids?

9 MS. SUSTAKOVITCH: Yes sir.

10 Take that out?

11 THE COURT: That's what you were talking about
12 yesterday?

13 MS. SUSTAKOVITCH: Yes, sir.

14 THE COURT: And stopping and picking back up on Page
15 21 where she says, Has anybody else ever done that kind of
16 touching to you?

17 MS. SUSTAKOVITCH: Sure. Okay.

18 THE COURT: I mean, there's a part about -- on Page
19 24 where she gets into, Gary is not supposed to be around
20 me. And then, apparently, at the top of Page 25, So when
21 you were in Slater Marietta, he was not supposed to come
22 around and he would come while you were in the front yard?

23 I mean, is that something -- Mr. Chambers, do you
24 have any issue about that?

25 MR. CHAMBERS: Your Honor, I don't -- I'm not going

1 to object to that part.

2 THE COURT: All right. So then you've got Page 26,
3 there's a -- about a third of the way down, So we talked
4 about the sex, etc. We talked about the whippings.
5 Again, that's coming in. And we talked about the choking.
6 So I think all of that would have to come out.

7 MS. SUSTAKOVITCH: All right. So we start with, The
8 sex he did that he shouldn't have been doing. And then
9 you want it taken out to where, We talked about the
10 whippings, right there?

11 THE COURT: Yes.

12 And then you pick back up with Tricia about four
13 lines down saying, Okay, and how do you feel about being
14 here with dad and mom now?

15 MS. SUSTAKOVITCH: Okay. We will do that.

16 THE COURT: And then you get into Page 27, the fourth
17 line from the bottom, Did he ever do any of the whipping
18 or hurting you like he hurt mom when he would do the sex
19 with you? So I think from there all through the rest of
20 Page 27 --

21 Did you say you did want this in, the part about
22 telling the father?

23 MR. CHAMBERS: Yeah. I would move to have that
24 excluded, Your Honor.

25 THE COURT: Excluded you said?

1 MR. CHAMBERS: Yes, sir.

2 THE COURT: We'll take that out.

3 MS. SUSTAKOVITCH: All right. So going to Page 28
4 where --

5 THE COURT: On Page 28 --

6 MS. SUSTAKOVITCH: Yes, sir.

7 THE COURT: -- just pick up where it says, So who do
8 you sleep with now?

9 MS. SUSTAKOVITCH: Okay.

10 THE COURT: All right. So that's number one.

11 MS. SUSTAKOVITCH: Yes, sir.

12 THE COURT: Number two, you're taking out the part
13 on Page 7?

14 MS. SUSTAKOVITCH: Yes, sir.

15 THE COURT: All right.

16 MS. SUSTAKOVITCH: We're taking that part out and
17 starting with, Did you see him do it to anybody else?
18 We're starting there.

19 THE COURT: All right.

20 MS. SUSTAKOVITCH: And all the way down to, A lot of
21 times. We'll take that out, the reference to the prior
22 victim.

23 Now, I don't know, Judge. She does talk about, Did
24 Gary ever hurt your body? Did he do like he does mommy?

25 No, he only does that to mommy. That's at the bottom

1 of Page 7.

2 THE COURT: At then it says at the top of Page 8,
3 Hit, push her, spit on her, call her names.

4 MS. SUSTAKOVITCH: Okay.

5 THE COURT: So I think we'll just take all of that
6 out.

7 MS. SUSTAKOVITCH: Okay. And, Judge, Page 8 is where
8 Defense counsel is asking to keep that in. And the State
9 requested to remove it.

10 MR. CHAMBERS: That's correct, Your Honor.

11 THE COURT: Okay. So I would -- if Defense wants it
12 in, I think it's admissible.

13 MS. SUSTAKOVITCH: Okay.

14 THE COURT: Anything else in the second video,
15 Mr. Chambers?

16 MR. CHAMBERS: Let me just double-check, Your Honor.

17 MS. SUSTAKOVITCH: And, Judge, the State was moving,
18 again, for Page 9 from -- where she talks about keeping
19 the kids safe. And Defense counsel has stated for
20 strategic reasons they want it.

21 MR. CHAMBERS: That's correct, Your Honor.

22 THE COURT: Okay. Just let me know when you're
23 through, Mr. Chambers, looking at it.

24 MR. CHAMBERS: Yeah, Your Honor. I don't -- there's
25 nothing else in there that I would object to.

1 THE COURT: All right. So do y'all want to talk
2 about three, or is the State going to get into number
3 three?

4 MS. SUSTAKOVITCH: Judge, and the point -- the State
5 would be fine to streamline this and ask -- to try to
6 shorten that and just ask Tricia Austin on the stand, did
7 you meet with her a third time? And was the purpose of
8 that meeting to clarify the locations where the abuse took
9 place? And then did she indicate to you the place or
10 places where it occurred? And have her list off, boom,
11 boom, boom, boom. There's not any additional acts of
12 abuse that are, actually, alleged in that one. It's more
13 just trying to clarify the locations.

14 MR. CHAMBERS: I would agree with that, Your Honor.

15 THE COURT: Okay. That sounds good.

16 Anything else before we bring the jury in?

17 MS. SUSTAKOVITCH: Nothing from the State, Your
18 Honor.

19 MR. CHAMBERS: If I could just take about a
20 five-minute break, Your Honor.

21 THE COURT: That sounds like a good idea for
22 everybody. We'll take five minutes and come back and have
23 the opening statements.

24 (WHEREUPON, a break was taken.)

25 THE COURT: Anything before we bring the jury in?

1 MS. SUSTAKOVITCH: Nothing from the State, Judge.

2 THE COURT: Mr. Chambers, are you ready?

3 MR. CHAMBERS: Yes, sir.

4 THE COURT: Okay. Bring the jury in.

5 (WHEREUPON, the jury came into open court at
6 approximately 10:25 a.m.)

7 INTRODUCTORY REMARKS

8 THE COURT: Good morning, ladies and gentlemen.

9 I apologize for the late start we have this morning.
10 But we had some matters to take up, as indicated
11 yesterday, that, hopefully, will make this move along more
12 quickly once we have now started.

13 I want to give you just a few preliminary remarks
14 before we get the trial underway. The first thing I want
15 to do is, again, thank you for your service this week. I
16 know you probably groaned when you got the summons in the
17 mail to come down here this week.

18 And I know you're here in part, though, because you
19 understand, and respect, and recognize that the right to a
20 jury trial is a fundamental right in our country, and one
21 that our founders believed in so strongly that they put it
22 not only in the State and Federal Constitutions, but in
23 the Bill of Rights, it's mentioned three times, the right
24 to a jury trial is. So that's how strongly they felt
25 about it.

1 The founders, including John Adams, had strong
2 feelings about the way the English had deprived the
3 colonies of the right to a jury trial. And, in fact, John
4 Adams said that the right to vote and the right to a jury
5 trial were the heart and lungs of the democracy. So
6 you're making it possible for these parties this week to
7 see their right to a jury trial become a reality. And we
8 appreciate your being here to make that possible.

9 Now, you probably know that you got the summons in
10 the mail because you're either registered to vote, or you
11 have a driver's license, or you have an identification
12 card from the highway department. You might be curious as
13 to why you were selected for this particular case. And
14 the reason is because both sides in this case believe you
15 can be fair and impartial, and you could decide this case
16 without any kind of bias, or prejudice, or preconceived
17 notions.

18 Now, you met the lawyers. They introduced themselves
19 to you. And, again, I'm Gary Hill, one of the circuit
20 judges here in Greenville and Pickens Counties. And there
21 are other people who are essential to the process that you
22 haven't formally met. And I want to introduce them to you
23 and tell you what their jobs are. And then I'm going to
24 tell you what your job is.

25 The first person I'd like to introduce is Hollie

1 Jenkins. She's the court reporter. And, as you can see,
2 she's down here taking down every word that is said,
3 because circuit court is a court of record. And to her
4 right is Mary Troop. She's one of the assistant clerks of
5 court. And she helps with the jury selection, as you saw,
6 and the jury qualification, and helps the trials run
7 efficiently as well. The bailiffs in this case,
8 Mr. Anderson, and, Mr. Ford, who just stepped out, I
9 believe, they are here for your assistance while you're
10 serving on the jury. And if you have some need that they
11 can assist you with, that's what they are here for.

12 Now, everybody that I just introduced to you and,
13 certainly, I have done this and the lawyers have done it,
14 we've all taken an oath to do our job. And you're going
15 to take an oath to do your job at this time.

16 So I'm going to ask Ms. Troop to administer that
17 oath. And listen to it very carefully. The words are
18 important. They've been around a long time. And they
19 tell you in a nutshell what your job is, and then I'm
20 going to elaborate upon it.

21 So, yes, ma'am.

22 THE CLERK: Please stand and raise your right hand
23 for the oath. The proper response is "I will."

24 (WHEREUPON, the jury was sworn at approximately
25 10:30 a.m.)

1 THE CLERK: Thank you.

2 Please be seated.

3 THE COURT: Thank you.

4 So any time we have a trial before a jury in circuit
5 court, there are always two judges. There's the judge of
6 the law, which is the role that I fulfill, and there's the
7 judge of the facts, which is the role you, the jury,
8 fulfill. Let me tell you a little bit about my job as the
9 judge of the law, because it's much easier than yours.

10 The first thing I do as the judge of the law is I
11 rule on the admissibility of evidence. I know very little
12 about this case. That's just the way our system is
13 designed. But I anticipate we will have witnesses who
14 come in who are sworn and will tell you what they know
15 about this case.

16 It may be that a party objects to something a witness
17 is going to say or an exhibit that comes into court to be
18 admitted as evidence. And if there is an objection made
19 to evidence, one of my jobs, as the judge of the law, is
20 to rule on whether it is admissible as evidence.

21 So, usually, I can do that right on the spot and rule
22 on whether the objection should be sustained or overruled.
23 If I say it's sustained, it simply means that the evidence
24 is not proper for this particular case under the law. If
25 I overrule the objection, that means the evidence is

1 proper and something you can consider.

2 The second job I have, as the judge of the law, is
3 that I will tell you what the law is that applies to the
4 facts of this case. And I'll do that at the end of the
5 trial after you've heard all the evidence and all the
6 arguments of the lawyers.

7 Now, your job is to be the judge of the facts, as I
8 said. And when it comes to what the facts are, I'm not
9 going to comment on the facts or indicate in any way what
10 I think your verdict should be, or what the facts are in
11 this case. That is your job. And, under our Constitution
12 and system of justice, the jury and the jury alone
13 determines what the facts are in a trial. So, please,
14 don't interpret anything I do as any suggestion as to what
15 I think the facts are, because I don't have an opinion
16 that I could share with you under the law.

17 You, as the judge of the facts, must determine what
18 the facts are in this matter. And part of the reason we
19 need a jury is because there's some dispute about what
20 those facts are.

21 So how do you decide what the facts are? You do that
22 by weighing and evaluating the evidence you're going to
23 hear during this trial. Evidence consists of two sources,
24 the first is sworn witness testimony and the second is by
25 way of an exhibit.

1 An exhibit is simply a physical, tangible object. It
2 might be a map, or a photograph, or something of that
3 nature. But you'll know it is an exhibit and, therefore,
4 evidence you can use to determine the facts because it
5 will be back in the jury room with you after the case, and
6 it will have a sticker on it that says exhibit number so
7 and so.

8 So, as we go through this trial, remember, those are
9 the only two things you can use to determine what the
10 facts are, sworn witness testimony and exhibits, unless I
11 tell you otherwise.

12 Now, as the judge of the facts, you will have to, by
13 necessity, determine the credibility of all the evidence.
14 So that means for every witness who steps into this
15 witness box and every exhibit that is admitted into
16 evidence, you will have to gauge whether they're worthy of
17 belief.

18 And you can do that in the case of a witness who
19 testifies by using certain guidelines that you may or may
20 not find useful. You may consider whether the witness had
21 the opportunity to observe the things they're here to tell
22 you about. You may consider whether the witness has some
23 interest in the outcome of this case, that is whether
24 they're biased or prejudiced toward someone or some issue
25 involved in the case.

1 You may consider how the witnesses testimony stacks
2 up to the other evidence in the case. You may consider
3 the demeanor of the witness who testifies. And you,
4 certainly, may use whatever you use in your day-to-day
5 life to determine whether someone is believable. You can
6 then use your common sense, because it did not suddenly
7 evaporate when you walked into this courthouse.

8 Now, some evidence can be used for limited purposes.
9 And I'll tell you more about that later. But simply
10 because something comes into evidence for one purpose
11 doesn't mean you can use it for other purposes. So bear
12 that in mind as well. And remember, too, that this is an
13 important trial for both sides, of course.

14 And let me tell you just how important your job is as
15 the judge of the facts. You may see from time to time, or
16 read in the paper, or see it on the news where a case is
17 reversed on appeal. And we all know that happens from
18 time to time. But when that happens, that means the Judge
19 made a mistake about the law.

20 Almost invariably when a case is reversed, it means
21 the Judge made some mistake on the law. If I make a
22 mistake, it can easily be corrected on appeal. But if
23 you, the jury, make a mistake about what the facts are, it
24 can almost never be corrected. So bear that in mind. And
25 I know you'll do your job conscientiously.

1 And I know it's hard to sit there for long periods
2 and listen to testimony and other aspects of the case.
3 But, as we all know, once we start letting our minds
4 wander is when something important happens. We'll take
5 frequent breaks, so, hopefully, we'll keep everyone fresh.
6 And if someone needs a break before we have one scheduled,
7 just let the bailiff know or get my attention.

8 Now, this is a criminal case. And, as I told you
9 earlier, there are certain principles that are fundamental
10 to criminal trials that you need to know about. The first
11 is that the mere fact that Mr. Thompson was indicted isn't
12 evidence of anything. These indictments are not
13 witnesses. They're not exhibits. The indictment is
14 simply the formal way the case begins. These are the
15 tickets, so to speak, that allows the State to come in
16 this courtroom and present a case against a citizen, and
17 let's a citizen know what he's charged with.

18 Anyone charged with a crime, under our system of
19 justice, is presumed innocent of that crime. And, in
20 addition to that, Mr. Thompson doesn't have to prove his
21 innocence or prove he is not guilty. Instead, the burden
22 of proof is entirely on the State.

23 And part of your job, in addition to being the judge
24 of the facts, is to determine whether the State meets its
25 burden of proof. And that burden is proof beyond a

1 reasonable doubt. The only way Mr. Thompson can be
2 convicted and that presumption of innocence removed is if
3 you, the jury, unanimously find the State has proven each
4 and every element of the crime beyond a reasonable doubt.

5 You will recall that we have two charges in this
6 matter. And you'll have to separately weigh the evidence
7 as to each charge and not let your decision on one
8 influence your decision on the other. Because
9 Mr. Thompson is entitled to individual consideration on
10 each indictment.

11 Now, how many of y'all have served on a criminal case
12 before as a juror? If you could, just raise your hand.

13 (WHEREUPON, several jurors raised their hand.)

14 THE COURT: Well, some of you may know, also, from
15 your own experience if you haven't been a juror in a
16 criminal case a little bit about the structure of a
17 criminal trial, but let me just refresh your memory in
18 order to further demystify the surroundings for you.

19 In just a moment, you're going to hear the opening
20 statement of the Solicitor, Ms. Sustakovitch. And, of
21 course, the Solicitor in our state is the prosecutor. And
22 she will give you a brief outline of what she thinks the
23 evidence is going to show and what the issues are going to
24 be in the case. It's simply a road map, if you will, of
25 what the trial is going to be like from her perspective.

1 She goes first because the State bears the burden of
2 proof.

3 After you hear from her, Mr. Chambers, who's
4 representing Mr. Thompson, will have the opportunity, but
5 not the obligation, to give an opening statement as well.
6 After you hear the opening statement or statements, we'll
7 go into the evidence portion of the trial where the State,
8 again, bearing the burden of proof, will present their
9 evidence, which the Defense may confront.

10 After you've heard all the State's evidence, the
11 Defense will have the opportunity, but, again, not the
12 obligation, to present any evidence they wish to that the
13 State may then confront. And then after you've heard all
14 the evidence, we will have the closing arguments of the
15 attorneys where they will tell you what they think the
16 evidence showed and what your verdict should be. And then
17 I'll give you the instruction on the law that you are to
18 apply to the facts of the case. And then the case will be
19 in your hands for a decision and a verdict.

20 Now, until we reach that point, ladies and gentlemen,
21 where you are collectively deliberating as a jury, do not
22 talk about this case with anyone. Don't do any outside
23 investigation. And continue to keep an open mind. We
24 spent a good deal of time yesterday, and so did you,
25 trying to find a jury that could be open minded, and we

1 want to keep you that way.

2 And it would be easy for me to stop right there and
3 say just don't talk about the case or discuss it with
4 anyone. But let me tell you why it's so important. You
5 may hear this morning or this afternoon from a witness who
6 testifies. And if you went back after their testimony was
7 over and started talking about what that witness said, or
8 didn't say, or should have said, you're starting to draw
9 conclusions about the case. And you may very well hear
10 tomorrow or the next day from a witness who says something
11 completely different.

12 So these cases are often like jigsaw puzzles. And
13 you, certainly, wouldn't start working on a puzzle if you
14 didn't have all the pieces in the box. So don't start
15 talking about, or discussing, or analyzing the case until
16 you have all the tools you need to do your job.

17 Now, ladies and gentlemen, the lawyers in this case
18 are fine attorneys. And they are advocates for their
19 clients. They're going to zealously represent their
20 clients to the best of their ability.

21 You and I are not advocates. We don't have any
22 interest in the outcome of this case. And your job is
23 simply to be fair and impartial and to determine the facts
24 fairly and impartially, and determine whether the State
25 has met its burden of proof.

1 So thank you for your attention to me.

2 And, at this time, we'll have the opening statement
3 from the State.

4 MS. SUSTAKOVITCH: Thank you, Your Honor.

5 May it please the Court.

6 THE COURT: Yes, ma'am.

7 OPENING STATEMENTS

8 MS. SUSTAKOVITCH: Good morning, ladies and
9 gentlemen.

10 When [Victim] [REDACTED] turned six years old in [REDACTED] of
11 2006, [Victim] was like most young girls. She went to
12 school. She loved playing with her three sisters. She
13 loved her toys.

14 But the evidence in this case will show that [Victim]'s
15 life changed. It became a living hell inside the very
16 walls that she lived because she was being sexually
17 assaulted by her stepfather. And her mother did nothing
18 to stop it. [Victim] was just a little girl, nine years old,
19 when she disclosed the abuse at the hands of her
20 stepfather, this man, Gary Reece Thompson.

21 My name is Christy Sustakovitch, as I introduced
22 myself yesterday. And I'm a prosecutor with the
23 Greenville County Solicitor's Office. As a prosecutor,
24 it's my job to present to you the evidence in this case to
25 prove to you beyond a reasonable doubt that this Defendant

1 is guilty of two crimes, one is criminal sexual conduct
2 with a minor in the first degree, and one is dissemination
3 of obscene material to a minor.

4 I just want to say from the outset, these crimes are
5 ugly crimes. The words that we have to use to do our job
6 are awful words. They're uncomfortable. You will be
7 uncomfortable.

8 And I can say from the get-go, the State welcomes --
9 thanks you, as Defense counsel does, as the Court does for
10 listening and being fair, and listening to all the facts.
11 And I apologize in advance, but some of what you're going
12 to have to hear is going to be difficult.

13 You're going to hear more about the law at the end of
14 this case from Judge Hill. But, very briefly, so that you
15 can understand as the evidence comes in, criminal sexual
16 conduct with a minor is, essentially, this: It's when a
17 person commits a sexual battery on a child under the age
18 of 16. And that person, in this case, this Defendant, has
19 previously been convicted of a certain crime and is on the
20 sex registry. In this case, the evidence will be that
21 he's been committed -- he's been convicted, rather, of the
22 crime of criminal sexual conduct with a minor in the first
23 degree.

24 What is a sexual battery? Sexual battery is several
25 things. It could be oral sex with a child, it could be

1 vaginal intercourse with a child, having the child do oral
2 sex on him, having it go back on her. It's oral sex, anal
3 sex, vaginal intercourse, penetration, however slight, of
4 the genital regions of a child is what we're talking about
5 with a sexual battery.

6 The dissemination of obscene materials charge is,
7 basically, what you would think. It's when you have a
8 child under 12 who is exposed to obscene material at the
9 hands of a grown up, us. In this case, the evidence will
10 show that **Victim** [REDACTED] was brought into a room by this
11 Defendant and forced to watch pornography as he
12 masturbated.

13 As Judge Hill discussed, there's different kinds of
14 evidence. And most of the evidence in this case is going
15 to be direct evidence right from this witness stand.
16 Witnesses will raise their hand. They will take the oath.
17 And they will testify to you. Simply put, these crimes,
18 often times, don't have a ton of other evidence. So
19 listen very carefully.

20 You will hear from the victim, **Victim** [REDACTED]. She
21 disclosed the abuse in June of 2010. She will walk into
22 this courtroom, some three odd years later, and she will
23 tell you about it.

24 You'll hear the background of this Defendant and
25 **Victim** 's mother, about how they met in 2005 at a Bojangles'

1 where Jessica Thompson, [Victim]'s mother, was working. And
2 you'll hear how Jessica, the mother, decided within about
3 four weeks it was a good idea to move this Defendant into
4 the home. And he moved in with [Victim] and her three young
5 sisters. You'll hear how this Defendant married [Victim]'s
6 mom in 2006. And life just rolled on.

7 Then you'll hear how things started falling apart for
8 [Victim] [REDACTED]. You will hear how she was subjected to
9 oral sex, vaginal sexual battery, anal sex. You will hear
10 how she was exposed to pornography and threatened what
11 would happen if she told.

12 You will hear from her mother in this case. She was,
13 also, charged. When the charges came out, she was charged
14 with unlawful conduct to a child. Why? Because when
15 [Victim] tried to get help and tell her mother, the evidence
16 will show, she didn't...

17 Jessica Thompson will testify, not that the State
18 needs her to prove our case at all. I would say to you
19 she's a convicted felon. And she will testify simply so
20 you can understand the dynamics of what was happening in
21 that family.

22 Time passes. And you will hear how DSS takes these
23 children into protective custody in May of 2010, gets them
24 out of that house. And it is only after [Victim] is no
25 longer in the abusive situation that she discloses in

1 June, and tells the story of what has happened. You'll
2 hear her forensic interview in this case when she was
3 interviewed, a nine-year-old detailing the abuse that she
4 suffered.

5 And what is this case about? It's about a crime
6 against a young girl who should have been protected by the
7 two people on the planet that should have protected her
8 most, her own God-given mother and then her stepfather.
9 And neither one, the evidence will show, did it.

10 This should be a short trial, ladies and gentlemen.
11 Hopefully, we should be done tomorrow. And I would ask
12 you to listen very attentively to all the evidence. These
13 crimes don't happen on crowded streets with people passing
14 by. They happen behind closed doors.

15 And everyone's job in this case is very, very
16 important. I have my job to present to you the evidence
17 to prove beyond a reasonable doubt that this Defendant is
18 guilty of these two crimes. Defense counsel has his job
19 to zealously defend his client within the bounds of the
20 law. And Judge Hill, as he stated, is the sole finder of
21 the law in this case.

22 But, with all deference to Judge Hill, you have the
23 most significant job of anyone in this courtroom. You
24 alone will determine what you believe the truth is in this
25 case. And, at the end of all the evidence, I will ask you

1 to return a verdict that speaks justice.

2 Thank you.

3 THE COURT: Thank you, Ms. Sustakovitch.

4 Mr. Chambers.

5 MR. CHAMBERS: May it please the Court, Your Honor.

6 Solicitor.

7 MS. SUSTAKOVITCH: Thank you.

8 MR. CHAMBERS: Ladies and gentlemen, as you were
9 introduced to him yesterday, this is Gary Thompson seated
10 here beside me. And you're going to hear him throughout
11 this trial and, in fact, you already have heard him
12 referred to as the Defendant, the Defendant.

13 I started my career as a Navy lawyer. And one of the
14 things I liked about the military system is when someone
15 was going to stand trial, they were referred to as the
16 accused. To me, that's a more appropriate term. Because,
17 as His Honor has already told you, the indictments that
18 were read to you earlier and the indictments that the
19 Solicitor referred to when she was talking to you, and the
20 indictments that contain the elements of the offenses that
21 she has to prove to you beyond a reasonable doubt are
22 nothing more than accusations. And, now, they have to
23 back those up.

24 Now, I've tried a lot of cases over the years. And
25 one of the things that I know is that there are, at least,

1 some of you sitting there now who believe that Gary
2 Thompson must have done something wrong. You believe he
3 must have done something wrong or he wouldn't be sitting
4 there, and we wouldn't be calling him the Defendant, and
5 these people wouldn't have brought these charges against
6 him, and they wouldn't believe, as I will tell you they,
7 clearly, do that Gary Thompson is guilty of what he's
8 charged with.

9 That's even more so in this case because you know
10 right up-front because it's an element of the offense that
11 he was convicted back in 1993 of a sex offense. And he is
12 on the sex offender registry. So that's out there.
13 You're going to know that.

14 But I, also, know, ladies and gentlemen, from having
15 done this over the years that you folks took an oath a
16 little while ago that you are going to well and fairly try
17 this case. And you are going to decide this case only on
18 the evidence. And you're going to decide it beyond a
19 reasonable doubt. And I always like to take a little time
20 to talk about that at the outset of a trial, because it is
21 a very important concept. His Honor already talked to you
22 a little bit about that.

23 But what you really need to know about that is it is
24 the highest burden that's placed on any juror that's going
25 to hear a case. There are other courtrooms in the

1 courthouse today and people that are in the same jury pool
2 that you were in that are trying -- are sitting in the
3 trial of a civil case, what's referred to as Common Pleas
4 here in South Carolina.

5 And I can tell you, because I practice in that court
6 as well, that there are some very important issues that
7 are decided in the Court of Common Pleas. People who have
8 been killed or people who have been maimed forever, and
9 large amounts of money are at stake. But, in that
10 courtroom, the jury only has to apply the standard of
11 beyond -- of by a preponderance of the evidence.

12 In other words, if we start out with a scale that's
13 perfectly balanced at the beginning of a trial and the
14 Plaintiff in that particular case, who is the party who
15 has the burden of proof, they only have to move that scale
16 just a little bit in their favor. In other words, the
17 greater weight of the evidence will determine who wins and
18 who loses in that forum.

19 There are other courts, and arbitration panels, and
20 things like that that apply a concept of clear and
21 convincing evidence. Just by its name alone, you know
22 that that is a substantial burden. And if we look at that
23 scale, then that scale has to be moved even more by the
24 party who has the burden of proof.

25 But we reserve in the criminal court, in the Court of

1 General Sessions, the highest burden of all. And the
2 reason that we do that is because there's a lot more at
3 stake. People can go to prison for the rest of their
4 lives based on what a jury decides in a case. In other
5 words, when we think about that scale, that scale has to
6 be moved almost all the way.

7 Now, His Honor will tell you when he instructs you at
8 the end of this, they don't have to remove all doubt. And
9 it would be impossible to do that. I mean, it would be --
10 we could make a credible argument that the sun might not
11 come up tomorrow, but that's not a reasonable doubt.
12 Certainly, it could happen. We hope it doesn't. But that
13 is not a reasonable doubt. But you have -- they have to
14 remove any reasonable doubt from your mind.

15 And the way that I always look at it is this, you
16 hear it referred to a lot as being firmly convinced.
17 That's usually the way the Judges will define it. And
18 what that means is definitely sure. If you had to bet
19 something that was really important to you, would you do
20 it? Would you feel comfortable with it? Or would you
21 leave here with lingering doubts? When you go back to
22 deliberate, if you're filled with questions and you feel
23 like there wasn't enough evidence, that's reasonable
24 doubt. And that's the way you need to think about this as
25 the Solicitor presents her case.

1 Now, obviously, I have some idea of what she is going
2 to put up. But I, like you, will watch as she puts her
3 witnesses up and they testify. And you folks, as the
4 trier of fact, are going to be called upon to do what most
5 of you do to one degree or another every day, and that is
6 to make judgements about whether you are being told the
7 truth. And you do that based on the demeanor of the
8 witnesses.

9 But, also, I think even more importantly, you're
10 going to use your common sense. You're going to use the
11 wisdom that's been gained over time from the walk -- and
12 you all come from different walks of life. You're going
13 to use that to determine, does this make sense to me? And
14 what you're going to ask yourself is, is there anything
15 that corroborates it? Is there anything there, any
16 physical evidence that supports it? These are all the
17 things that you're going to look at. And you're going to
18 ask yourself, do I believe what I'm being told? But, more
19 importantly, do I believe it beyond a reasonable doubt?
20 It's not enough to say, hey, you know, I think that's
21 probably true. But do I believe it beyond a reasonable
22 doubt? And that is the standard that all of you have to
23 keep in mind.

24 Now, the Solicitor told you a little bit about what
25 she plans to prove to you as this case goes on. I think

1 that the evidence in this case, as it unfolds, is not
2 going to be quite as clear cut as she indicated to you. I
3 mean, what you're going to hear is that this was a family
4 that by any stretch of the imagination -- and I'm not just
5 talking about the family in the household where Gary
6 Thompson lived, but all of the family that was related to
7 **Victim** [REDACTED] in this case, it was a very dysfunctional
8 group. And they didn't live the kind of life that most of
9 us live every day.

10 You're going to hear that this little girl made
11 allegations in the past, that there was, in fact, an
12 investigation that was done against an uncle of hers, a
13 Mark McMahan. And that as part of that investigation
14 because Gary Thompson was a registered sex offender, he
15 was pulled into that investigation.

16 And you're going to find out that when given the
17 opportunity, no disclosures were made by **Victim** [REDACTED].
18 You're going to find out that she went through a medical
19 exam as part of that examination, and no disclosures were
20 made. You're going to find that those cases were what are
21 called unfounded, and nothing went forward.

22 You're going to find out that it later came out that
23 **Victim** [REDACTED] made up the story about her Uncle Mark,
24 because her mother, Jessica, told her to do that. And she
25 did it. You're going to hear that when these allegations

1 were later made, it came as a result of a weekend visit to
2 **Victim** 's father's house, BJ. And that BJ later wanted
3 custody. And so these allegations come about. You're
4 going to hear all that as their witnesses take the stand
5 and they go through cross-examination.

6 You're going to hear that there was no physical or
7 medical evidence of any kind that would show that this
8 girl, who was nine years old at the time that these
9 disclosures were allegedly made, who claims that there was
10 vaginal intercourse, that there was no physical or medical
11 evidence to support that. Those are things that you are
12 going to hear in this case.

13 All we're asking you to do, folks, is to keep an open
14 mind, to hold them to their burden in this case, and to
15 focus on this case and this case only.

16 As His Honor said, this is an important day. This is
17 an important day for Gary Thompson. He has been living
18 with the specter of these allegations. In fact, he's been
19 sitting in jail, essentially, since these allegations were
20 made for the last couple of years waiting for trial. And
21 that day has, finally, come when they have to prove the
22 accusations that they made against him.

23 I want to join the Solicitor in saying we appreciate
24 you being here. You know, I don't like the thought of
25 giving a civics lesson, but I do want to underscore what

1 His Honor said to you. And that is, if it weren't for
2 juries and people like you who are willing to sacrifice
3 their time and other things they'd much rather be doing,
4 then people would just be carted off to jail, based on
5 mere accusations and the belief of a prosecutor or a
6 police officer. But you're here as that last stop against
7 the Government, to hold them to their burden of proof, to
8 make sure that if we're going to deny somebody their
9 liberty, we're going to do it based on hard evidence
10 proven to you beyond a reasonable doubt.

11 Thank you very much.

12 I look forward to sitting through the Solicitor's
13 case along with you.

14 THE COURT: Thank you, Mr. Chambers.

15 You may call your first witness.

16 MS. SUSTAKOVITCH: Thank you, Your Honor.

17 The State calls **Victim [REDACTED]**.

18 THE CLERK: **Victim 1**, if you'll, please, come forward.

19 And if you'll pause and stop right here at the end of
20 the bench where the Bible is.

21 Please place your left hand on the Bible.

22 Left hand. There you go. Raise your right hand.

23 WHEREUPON,

24 **Victim [REDACTED]**,

25 after first having been duly sworn, testified as follows:

1 THE CLERK: Thank you.

2 Please be seated.

3 Would you, please, tell us your name, please.

4 THE WITNESS: Victim .

5 THE CLERK: Thank you.

6 DIRECT EXAMINATION

7 BY MS. SUSTAKOVITCH:

8 Q Good morning, Victim .

9 Can you hear me?

10 A Yes, ma'am.

11 Q Are you nervous?

12 A Yes, ma'am.

13 Q How old are you, Victim ?

14 A 13.

15 Q And where do you go to school?

16 A Holly Springs-Motlow.

17 Q And what grade are you in, Victim ?

18 A Sixth.

19 Q Where do you live now?

20 A Gowensville.

21 Q Where is that? I'm sorry.

22 A Gowensville.

23 Q And is that -- what county is that?

24 A I have no idea.

25 Q Okay. Spartanburg County?

1 A I think so.

2 Q Okay. What's your favorite class in school?

3 A I would probably have to say math.

4 Q And, Victim, do you have brothers and sisters?

5 A No. I used to have a brother, but he died. I have
6 three sisters.

7 Q And what are their names, Victim?

8 A Minor, Minor, and Minor.

9 Q Are they older or younger than you?

10 A Minor is older than me. And Minor and Minor are
11 younger than me.

12 Q What's your mother's name, Victim?

13 A My real mom, or my stepmom?

14 Q Your biological real mom.

15 A Jessica.

16 Q Do you currently live with your biological real mom?

17 A No, ma'am.

18 Q Who do you live with?

19 A My stepmom and my real dad.

20 Q Okay. And what are their names?

21 A Edward McMahan and Melissa McMahan.

22 Q Have you -- since you started living with your
23 biological dad, have you had any contact with this

24 Defendant, with Gary Thompson? Have you seen him since
25 you were placed with your real dad?

1 A No, ma'am.

2 Q Victim i, do you know why you're in court today?

3 A Yes, ma'am.

4 Q Why are you here today, Victim ?

5 A Because of what Gary did to me.

6 Q Do you see him in the courtroom?

7 A Yes, ma'am.

8 Q And you've not seen him in over three years; correct?

9 A Yes, ma'am.

10 Q Is your mother, to your knowledge, still married to
11 him?

12 A No, ma'am.

13 Q Before we get into what happened with your -- and let
14 me ask you this. When your mother -- was she married to
15 this Defendant at some point to -- what did you call him?
16 Gary, or dad? Or what did you call him?

17 A Sometimes, I would call him dad.

18 Q Okay. Was your mom, actually, married to Gary?

19 A Yes, ma'am.

20 Q I want to take you back a little bit, Victim . Now,
21 where -- you said -- which grade are you in right now?

22 A Sixth.

23 Q And when is your birthday, Victim ?

24 A [REDACTED] [REDACTED].

25 Q I want to take you back to when your family with

1 Jessica and Gary were all living together here in
2 Greenville County. Can you think back to that time?

3 A Yes, ma'am.

4 Q And I want to take you back. What do you recall
5 about -- before things started happening with Gary, what
6 do you recall about him? Did you get along with him okay
7 when your mom first met him? Do you have any memories of
8 that time when you were five, six?

9 A Not really.

10 Q Okay. Did the two of you get along okay, or did you
11 have problems?

12 A Yes, ma'am. We had problems.

13 Q Okay. And what kind of problems did you have?

14 A He would like drag us by the ears and scream at us,
15 and like grab our mom by the throat and pull her up to the
16 wall and scream in her face.

17 Q Victim, I want to take you back. You said you're here
18 because of what your stepfather did.

19 A Uh-huh.

20 Q Can you tell the jury, what did Gary do to you, your
21 stepfather?

22 A He molested me.

23 Q And we have to help the jury understand what that
24 means. How old were you when it started?

25 A Six.

1 Q And you say "molested," what does that mean to you?

2 A He would try to put his thing inside of me. And when
3 he did, it burned.

4 Q Okay. When you talk about a thing -- on a girl, what
5 do you call your front private part?

6 A My poo-poo [phonetic].

7 Q Your what?

8 A My poo-poo.

9 Q And what do you call the front part on a male?

10 A A wiener.

11 Q A wiener. So Gary would try to put his wiener in
12 your poo-poo, is that what you're saying?

13 A Yes, ma'am.

14 Q What would it feel like when he would do that?

15 A It would hurt.

16 Q And then you said it would burn afterwards; is that
17 right?

18 A Yes, ma'am.

19 Q Besides -- with him putting his wiener in your
20 poo-poo, did that happen one time, or a lot of times, or
21 how often would you say it happened?

22 A A lot of times.

23 Q Where would your sisters be when this would happen to
24 you?

25 A They would usually be outside playing, or in their

1 bedrooms playing.

2 Q In their bedrooms playing?

3 A Uh-huh.

4 Q Where would your mom be when this was going on?

5 A She would usually be on the couch sleeping, or paying
6 the landlord.

7 Q Paying the landlord. Besides your stepfather putting
8 his private in your poo-poo, did he ever do anything with
9 his private else [sic] to you? Did he make you do
10 anything with his private?

11 A I don't quite understand.

12 Q Okay. I'm not asking the best question.

13 Did he ever put his private near your mouth is, I
14 guess, what I'm asking?

15 A Yes, ma'am.

16 Q Explain to me what happened there.

17 A He would make me suck on his wiener. And he would
18 threaten me saying if you don't do it, then I'm going to
19 hurt you, or like just threaten me with words that
20 shouldn't have been done [sic].

21 Q When you say "suck on his wiener," did anything ever
22 come out of his wiener when he would have you do that?

23 A Yes, ma'am. It -- like white stuff would come out.

24 Q You were a young child, seven, eight, nine when this
25 is going on. Did you understand what that white stuff was

1 then?

2 A No, ma'am.

3 Q You're 13 now. Do you understand what the white
4 stuff is now?

5 A Yes, ma'am.

6 Q What would you call that now?

7 A I believe it's called cum, but I'm not sure.

8 Q When your stepfather would have you suck on his
9 private and that would come out, was there any smell
10 attached to it that you can remember when he -- when the
11 white stuff came out of his private?

12 A Yes, ma'am.

13 Q How would you describe that to the jury?

14 A It smelled like an old trash can sort of, like an old
15 filthy dirty trash can.

16 Q So it didn't smell good to you?

17 A Yes, ma'am, it didn't.

18 Q Did your stepfather ever try to put his mouth on your
19 poo-poo, your private?

20 A Yes, ma'am.

21 Q Please tell the jury what happened there.

22 A He would try to lick my private. And then when he
23 done that, I tried to get away from him. But he was
24 too -- like he was on top of me, so I couldn't get away.

25 Q Going back -- and I don't mean to jump around. But

1 when you had to suck on his private, did that happen one
2 time or multiple times over the course of those years?

3 A Multiple times.

4 Q Okay. You just testified that Gary would lick your
5 poo-poo?

6 A Yes, ma'am.

7 Q Did that happen one time or multiple times?

8 A Multiple.

9 Q Apart from putting his private -- I think you called
10 it a wiener into your front part or trying to, did he ever
11 try to put his private into any other part of your body?

12 A Yes, ma'am.

13 Q Can you describe that to the jury? What happened
14 there?

15 A He would try to put his wiener in my backside.

16 Q What -- you call it a backside?

17 A Uh-huh.

18 Q How would it feel when he would try to do that?

19 A It would hurt really bad like because he -- it was
20 spreading when he was trying to do it.

21 Q What was spreading?

22 A My butt.

23 Q Did that happen one time or more than that?

24 A More.

25 Q You testified your mom would be asleep or your

1 sisters were outside. Was she ever anyplace working or
2 any other places that she would be away from the home that
3 you can recall during those years?

4 A No, ma'am.

5 Q I want to ask you, did your stepfather, Gary, ever
6 show you any videos that he should not have shown you?

7 A Yes, ma'am.

8 Q What do you recall about them?

9 A He would show me videos of these girls in stockings
10 in short skirts. And they would be taking cucumbers and
11 sticking them up their privates.

12 Q Okay. And when you say "stockings," are these things
13 that you put on your legs?

14 A Yes, ma'am.

15 Q That ladies put -- or women put on their legs?

16 A Yes, ma'am.

17 Q Did you watch one of those, or a couple, or a bunch?
18 How would you describe what you saw?

19 A A bunch.

20 Q Okay. Now, was anyone else present when he was
21 showing you those videos, or was it just you and him?

22 A Just me and him.

23 Q Was he showing them to you on a TV, or a computer, or
24 what was he showing it to you on?

25 A A computer.

1 Q Okay. Victim, I want to -- you talked about Gary
2 would sometimes abuse your mom?

3 A Uh-huh.

4 Q Were you scared of him?

5 A Yes, ma'am.

6 Q Tell me about the -- you talked a moment ago about
7 threats. What did he say to you about telling what he was
8 doing to you during these years?

9 A Like he said that if I didn't do this, then he was
10 going to kill me and saying that he was going to hurt my
11 mom.

12 Q Did you believe him?

13 A Yes, ma'am.

14 Q Did you understand why a stepfather would say
15 something like that to a stepdaughter?

16 A No.

17 Q There were times when DSS was around you, and you
18 could have told them about it. Were you scared to tell
19 because of his threats?

20 A Yes.

21 Q I want to talk about your mom. How do you feel about
22 your mother, Jessica?

23 A I don't really like her because she didn't do nothing
24 about it.

25 Q What do you think a mom is supposed to do for a

1 daughter?

2 A She's supposed to help them when that happens.

3 Q What do you think a mom's job is related to a
4 daughter? To protect them?

5 A (Witness nodded.)

6 Q I want to ask you, when this was going on with your
7 stepfather, did you try and tell your mom and get help
8 from your mom?

9 A Yes.

10 Q What can you recall about trying to reach out to your
11 mother and tell her what Gary was doing to you?

12 A I would go up to her and I would try to talk to her
13 about it, but she would just ignore me.

14 Q Do you recall any night, in particular, where you
15 tried to reach out to her?

16 A No, ma'am. I can't remember the day that I --

17 Q Oh, you can't remember the day. But you remember --
18 how many times would you say you tried to reach out, a
19 couple of times, or one time, or what do you recall?

20 A A couple.

21 Q And her reaction was to do what?

22 A Just ignore me, like she would just ignore me.

23 Q Victim 1, you had to do -- you had to talk to a lot of
24 people about three years ago. Have you -- there were
25 videos recorded of your interviews. Have I ever sat down

1 and shown you those interviews, or anyone else shown you
2 those interviews that you did three years ago?

3 A No, ma'am.

4 Q Did you observe your stepfather, Gary, doing these
5 things to your sisters?

6 A (Witness shook her head.)

7 Q Did you see him doing what he did to you, or did he
8 just do it to you?

9 A I don't know.

10 Q Victim, I want to ask you, there was a time when you
11 made an allegation about your dad's brother, Mark McMahan,
12 doing things to you; is that correct?

13 A Yes, ma'am.

14 Q Why did you do that, Victim?

15 A Because my biological mom threatened me. She told me
16 to say it.

17 Q Okay. And at the time you said that, Gary was, in
18 fact, abusing you; is that correct?

19 A Yes, ma'am.

20 Q Did you understand it was wrong to say that about
21 your Uncle Mark?

22 A Yes, ma'am.

23 Q When you say your mom threatened you and you
24 were scared of her, that is why you did that; is that
25 correct?

1 A Yes, ma'am.

2 Q I want to go back to your mother. DSS came in and
3 took you and your sisters in May of 2013 [sic]; is that
4 correct?

5 A Yes.

6 Q And who did you go live with after that?

7 A My -- I didn't really live with nobody. I lived in
8 this home for kids who don't have nobody for probably
9 about a couple of weeks. And then I had to go and live
10 with my real dad. And I've been living with him ever
11 since.

12 Q So you went to a group home first?

13 A Uh-huh.

14 Q What about your mother, how much has she seen you in
15 the three years since you disclosed what Gary had been
16 doing to you?

17 A I don't know.

18 Q I mean, do you get to see her on visitation, or have
19 you not seen her at all? I'm sorry. I'm not asking the
20 best --

21 A Yes. We get to see her on visitation.

22 Q You testified that you don't like your mother in many
23 ways. What do you feel your mom should have done for you
24 when you told her about the abuse?

25 A I feel that she should have helped and told him to

1 stop, but she didn't.

2 Q Victim, how do you feel about having to be in court
3 today and having to look at this jury and testify about
4 what Gary did to you?

5 A I feel that it's the right thing to do.

6 Q Did you want to have to come in here and testify
7 today?

8 A No, ma'am.

9 Q Why do you think it's the right thing to do for this
10 jury to hear from you?

11 A Because I think he should be punished for what he
12 did.

13 Q Is there any person or anything in this world that
14 would make you come in here three years later and make
15 this up if it didn't happen to you?

16 A I don't quite understand.

17 Q Is there anybody that could make you make up this
18 story about Gary Thompson and tell this jury this
19 happened?

20 A No, ma'am.

21 Q And are you telling them truthfully about what
22 happened to you over those years?

23 A Yes, ma'am.

24 MS. SUSTAKOVITCH: I have no further questions.

25 THE COURT: Mr. Chambers.

CROSS-EXAMINATION

BY MR. CHAMBERS:

Q Victim, you indicated that when the Solicitor was asking you questions a few minutes ago that you remember talking to DSS a few years ago; is that right?

A Yes, sir.

Q All right. And you said you don't remember very well when you were six; is that right?

A No, sir.

Q Okay. But this is -- but that's when you say that these things that you say Gary did that they started when you were six?

A Yes.

Q Do you remember that, in 2007, DSS was investigating -- doing an investigation based on the condition of the home that you were living in with your mom, and Gary, and your sisters?

A Yes, sir. I remember that.

Q And do you remember that as part of that, because Gary had been a registered sex offender, that there was an investigation into possible abuse against you or your sisters? Do you remember that?

A Yes, sir.

Q Do you remember that at that time -- and that was back in 2007; is that what you recall?

1 A I think so, yes.

2 Q Do you remember that you talked to the police and
3 that you indicated that nothing had happened?

4 A Yes, sir.

5 Q Do you remember that you were, also, taken to the
6 Children's Advocacy Center here in Greenville, that you
7 were -- and you saw a doctor? I believe her name was
8 Dr. Henderson. Do you remember going to see her?

9 A No, sir.

10 Q Do you remember having a medical exam?

11 A Yes.

12 Q And do you remember that they asked you some
13 questions about whether anybody had done anything to abuse
14 you? Do you remember being asked those questions?

15 A No, sir.

16 Q All right. So you don't have any recollection of
17 saying whether or not anything had occurred between you
18 and Gary at that time to a doctor that was doing this
19 medical exam?

20 A I don't quite understand what you're --

21 Q Okay. In other words, you said you remember the
22 medical exam; am I right?

23 A Yes, sir.

24 Q And you remember that was part of this investigation
25 about whether you had been sexually abused or not?

1 A Yes, sir.

2 Q But you didn't make -- you didn't say that Gary did
3 anything at that point, did you?

4 A No, sir.

5 Q In fact, you said he didn't do anything to you; am I
6 right?

7 A Yes, sir.

8 Q All right. And then you, also, talked with the
9 Solicitor a little bit about that a couple of years ago
10 that you made allegations against your Uncle Mark; is that
11 right?

12 A Yes, sir.

13 Q And your Uncle Mark is your father's brother; is that
14 correct?

15 A Yes.

16 Q And you referred to your dad earlier as Edward. Do
17 people, also, call him BJ?

18 A Yes, sir.

19 Q All right. And do you recall that, specifically, the
20 allegation that you made against Uncle Mark was that Mark
21 stuck his privates in your behind?

22 A Yes, sir.

23 Q That's what you told the police?

24 A Yes, sir.

25 Q All right. And did you, also, go for an interview at

1 the Children's Advocacy Center and sit down with somebody
2 who interviewed you?

3 A Yes, sir.

4 Q And you told that interviewer that Uncle Mark stuck
5 his privates in your behind, didn't you?

6 A Yes, sir.

7 Q Do you recall that as part of that, you said that you
8 tried to tell your grandmother about what Mark was doing
9 to you, but that your grandmother didn't listen?

10 A I don't recall that.

11 Q You don't recall. Let me ask you a little bit more,
12 specifically, and see if you recall. Do you recall, at
13 some point, that your mother said to you that it's
14 important for you to tell the truth --

15 MS. SUSTAKOVITCH: Your Honor, I'm going to object --

16 BY MR. CHAMBERS:

17 Q -- about what happened with Mark?

18 MS. SUSTAKOVITCH: -- to hearsay. He's quoting the
19 mother said -- what the mother said. And it's hearsay
20 upon hearsay he's trying to question this child about.

21 THE COURT: Overruled.

22 BY MR. CHAMBERS:

23 Q Do you recall that your mother said to you that
24 it's -- Victim, it's important to tell the truth about what
25 Uncle Mark did to you?

1 A Yes, sir.

2 Q You do remember her saying that. And, in response,
3 you then said that Uncle Mark did, in fact, stick his
4 privates in your behind; am I right?

5 A Yes, sir.

6 Q And do you remember that you said that at your
7 grandmother's house in Cowpens that you tried to tell her
8 about Uncle Mark, but she wouldn't listen to you?

9 A I don't remember that.

10 Q You don't remember that now. Okay.

11 When did you tell somebody that what you were saying
12 about Uncle Mark wasn't true?

13 A What is that -- what are you trying to ask me?

14 Q In other words, you're saying now that Uncle Mark
15 didn't do anything to you, aren't you?

16 A Yes, sir.

17 Q So when did you, finally, tell somebody that you were
18 not telling the truth about your Uncle Mark?

19 A When I had, finally, left Gary and Jessica's home.
20 Because Jessica was threatening me.

21 Q Okay. Now, in this particular case, when you made
22 these allegations, you had an opportunity to talk to the
23 police; is that right?

24 A Yes, sir.

25 Q You had already talked to, I guess, your -- you'd

1 been to your dad's house; am I right?

2 A Which --

3 Q Well, I'm talking about your dad, Edward. There was
4 a period of time, wasn't there, where you didn't go visit
5 with your dad; is that correct?

6 A Yes, sir. I think so.

7 Q Several years, in fact; is that correct?

8 A Yes, sir.

9 Q And then there was some visitation arranged and you
10 went to stay a weekend with your dad; is that right, with
11 Edward, BJ?

12 A Yes.

13 Q And it was after that weekend when you made the
14 allegation against Gary; is that right?

15 A Yes, sir.

16 Q All right. So that's the first time that that came
17 up, the first time you told anybody?

18 A Yes, sir.

19 Q All right. And then after that, you then talked to
20 the police and you made those allegations; is that right?

21 A Yes, sir.

22 Q And you had another medical exam where they -- the
23 doctor brought you in and looked you over to see if there
24 was any trauma to you, or anything like that, and to ask
25 you about what happened. Do you remember that?

1 A Yes, sir.

2 Q All right. Do you remember going to Spartanburg to
3 be interviewed by a lady named Tish [sic]?

4 A No, sir. I don't remember that.

5 Q You don't remember? You don't remember them taking
6 you into a room and telling you they were going to talk to
7 you about what happened, and that there was a video camera
8 that was videotaping the interview. You don't remember
9 any of that?

10 A Oh, yes, sir.

11 Q You do remember that. Okay. And you met with her on
12 three different occasions; is that correct?

13 A Yes, sir.

14 Q All right. In fact, do you remember -- and you may
15 not remember these times, these dates -- okay -- but
16 that -- June 15th in 2010. So in the summer of 2010, do
17 you recall that you met with her then?

18 A Yes, sir. I think so.

19 Q And you had a pretty lengthy interview with her; is
20 that correct?

21 A Yes, sir.

22 Q And then you went back a week later and had another
23 interview with her for a fairly lengthy period of time.
24 Do you remember that?

25 A Yes, sir.

1 Q And then there was a third interview a week after
2 that. Do you remember that?

3 A Yes.

4 Q All right. Now, we talked about the allegations
5 against Uncle Mark. I believe that you told the
6 interviewer that nobody else had ever done anything to you
7 other than Gary; is that right?

8 A Yes, sir.

9 Q Now, do you recall that, at some point, when you were
10 in elementary school that you came home and reported
11 that --

12 MS. SUSTAKOVITCH: Your Honor, I'm going to object.
13 May we approach real quick?

14 THE COURT: Sure.

15 (WHEREUPON, a bench conference was held.)

16 THE COURT: Ladies and gentlemen, just take a short
17 recess. Don't talk about the case. And continue to keep
18 an open mind.

19 (WHEREUPON, the jury was excused from open court at
20 approximately 11:26 a.m.)

21 THE COURT: Let's see. You want --

22 Victim, you want to just step outside for a few
23 minutes and take a little break.

24 Thank you.

25 (WHEREUPON, Victim exited the courtroom.)

1 THE COURT: All right. The State is objecting to
2 what?

3 MS. SUSTAKOVITCH: Your Honor, the State's objection
4 would be based on the motion in limine that was made
5 pre-trial related to rape shield, 16-3-659.1. If Defense
6 counsel is trying to allege that this child has made up
7 any allegation about anybody else besides Mark McMahan,
8 which we discussed pre-trial, the statute, clearly, says
9 that the State has to be put on notice about that. There
10 has to be a pre-trial hearing about that. And there has
11 to be proper testimony in-camera. It can't be done in
12 court with the witness on the stand as a surprise.

13 So, number one, the State has no idea the guts of
14 what Mr. Chambers is going to say. But it does seem as if
15 he's going to try to allege she's made something up about
16 someone else. And we would say that that runs afoul with
17 rape shield and should be excluded.

18 THE COURT: I do recall the motion in limine.

19 And, also, Mr. Chambers, you said you didn't know of
20 any reason why that was going to be an issue. So where
21 are we, sir?

22 MR. CHAMBERS: Well, Your Honor, rape shield is there
23 to keep, basically, somebody from attacking the victim as
24 far as their sexual experiences go. What I'm talking
25 about is they have -- her veracity is very much an issue

1 as is any witness when they get up there and take the
2 stand to testify.

3 And I have some information that she made a complaint
4 about a little girl that tried to sexually molest her at
5 school. They've, also, said that she -- you know, had
6 made no prior allegation, in fact, in the interview. And
7 that's the reason I asked the question, Did you -- you
8 never said that anybody ever did anything to you other
9 than Gary? And we have some information that that's not
10 true, that she did, in fact, go home from school and say
11 that she had been assaulted by a girl at school. And
12 that's -- I mean, she can answer yes or no. That's really
13 all I'm going for with it. But I don't think rape shield
14 even applies to this issue.

15 MS. SUSTAKOVITCH: Judge, if I may respond. It hits
16 squarely on rape shield. And where you have to, also,
17 consider rape shield, you, also, have to consider the
18 Boiter test.

19 If a defense attorney is going to try to argue an
20 alleged prior false allegation, that is not sprung on a
21 witness testifying at trial. That's hashed out pre-trial.
22 The State is put on notice of it. And there's a whole
23 test that the Court has to do under State v. Boiter and
24 State v. Sprouse. To violate rape shield, they,
25 essentially, have to meet the elements of the Boiter test,

1 which, number one, we don't even know their allegation
2 other than right now. But it, frankly, can't meet it.

3 Under Boiter, if the Defense attorney tries to admit
4 a prior false allegation by the victim, the Judge must
5 determine if, in fact, the prior report was, in fact,
6 false. We've had no opportunity to investigate anything.
7 If so -- if the Judge deems it to be false, then you have
8 to make another determination on whether it's admissible
9 assuming it's false. If it's too remote, it still doesn't
10 come in. And then you have to consider the similarities
11 of the two offenses.

12 So you have to -- the starting point here is, number
13 one, it is a violation of rape shield for it to come in
14 and -- violate rape shield. It would have to pass the
15 Boiter test, Judge. And, frankly, we have been given no
16 notice about any prior false allegation, no opportunity to
17 investigate it. And right now in the middle of trial is
18 the improper time to do that.

19 The State has requested reciprocal discovery. The
20 time you do this is pre-trial, not as the witness -- the
21 victim is on the stand.

22 MR. CHAMBERS: Your Honor --

23 MS. SUSTAKOVITCH: I have no way to be able to prove
24 whether this is, in fact, true or not. I can't go
25 research school records. I haven't even been able to

1 speak with this witness about it. And she's under oath
2 right now.

3 MR. CHAMBERS: Your Honor, I don't know whether it's
4 a false allegation or not. My question is simply did she
5 make the allegation --

6 MS. SUSTAKOVITCH: But it should not --

7 MR. CHAMBERS: Did she say it happened --

8 MS. SUSTAKOVITCH: -- even --

9 THE COURT: Y'all just -- give everybody a chance to
10 speak.

11 MS. SUSTAKOVITCH: Yes, sir.

12 THE COURT: All right. So tell me what you're going
13 to ask her exactly.

14 MR. CHAMBERS: What I asked her is, did she -- while
15 she was in elementary school, did she go home and relate
16 that a girl had tried to sexually assault her in a stall
17 at school?

18 THE COURT: What's your foundation for that?

19 MR. CHAMBERS: Well, the foundation for that, Your
20 Honor, is if you remember the question that I asked prior
21 to that was had -- when she was interviewed one of these
22 three times, had she -- she was, specifically, asked if
23 anybody else had ever done anything to her. And she said
24 only Gary.

25 THE COURT: I mean, where are you getting the

1 information from?

2 MR. CHAMBERS: I got it from my client.

3 THE COURT: Okay.

4 MS. SUSTAKOVITCH: Judge, I have the two cites for
5 Boiter and Sprouse, if Your Honor needs them.

6 But I would move -- we can't come into trial right
7 now and based on this Defendant and what he says his
8 information is ask this child, under oath, this question.
9 The State -- number one, assume this is a fact, which
10 we're not. But assume that to be true, this would have to
11 be brought up pre-trial where Your Honor would have to go
12 through the Boiter test to determine even if it was a
13 prior false allegation whether, in fact, it should come
14 into evidence.

15 We have been ambushed with this. We can't defend it.
16 We can't -- and the fact that the State made a pre-trial
17 motion in limine related to rape shield and Defense
18 counsel, specifically, said on the record there was
19 nothing that would need to be addressed, need to be hashed
20 out, I believe that this should be excluded. The State
21 has no opportunity to investigate.

22 MR. CHAMBERS: Your Honor, we're not ambushing
23 anybody. You know, I have -- I still don't believe rape
24 shield applies. It's not a rape shield issue, you know.
25 I'm asking her whether she reported that or not, whether

1 she said that happened to her. She can say yes, or she
2 can say no.

3 MS. SUSTAKOVITCH: Judge, rape shield, basically,
4 says it limits admissibility of opinion evidence,
5 reputation evidence, or specific instances of sexual
6 activity by the victim with other people. And you have to
7 look at rape shield in relation --

8 MR. CHAMBERS: And --

9 MS. SUSTAKOVITCH: -- to the Boiter test if you're
10 making an analysis on a prior --

11 MR. CHAMBERS: And --

12 MS. SUSTAKOVITCH: -- false allegation, which is
13 what he's --

14 MR. CHAMBERS: And --

15 THE COURT: Wait. Let her finish.

16 MS. SUSTAKOVITCH: Which is what he's asserting. It
17 is a prior false allegation. The State advised the Court
18 that we were aware that she had made a prior false
19 allegation related to Mark McMahan. We put on the record
20 that we intended for that to come out. Defense counsel
21 was asked whether there was anything else and they said it
22 is not an issue, no, there wasn't.

23 So I do believe that it would be improper to allow
24 this line of testimony when the State has no opportunity
25 to investigate any of it.

1 MR. CHAMBERS: Your Honor, rape shield has nothing to
2 do with false accusations. It has everything to do with
3 the sexual history of a -- an alleged victim in a case.
4 It has everything to do with keeping somebody from coming
5 into court and, basically, calling a witness a whole, or
6 impugning her character through that kind of evidence. It
7 doesn't have anything to do with false accusations.

8 She read the rule and, apparently, didn't understand
9 it when she read it just now.

10 THE COURT: Well, I mean, let's keep on the --

11 MR. CHAMBERS: You know, I'm simply asking her if she
12 made this allegation. It's not ambush. It's not
13 surprise. And it doesn't fall under rape shield.

14 MS. SUSTAKOVITCH: Judge, the last thing I'll say
15 would be that, according to Boiter, the proper procedure
16 would be an in-camera hearing like other rape shield
17 evidence where the Defendant must proffer the evidence to
18 the Court. The Defendant would have the burden of proving
19 that the victim's allegation was, in fact, false, unless
20 there's a recantation by the victim, or a showing that --
21 in this instance, the Defendant has a burden to offer
22 something in camera that would prove to Your Honor that
23 this child, in fact, made a prior false allegation for it
24 to even come in. And to say that it's based on this
25 Defendant, I would say his credibility is -- if that's all

1 it's based on, that would be not enough to bring it in.

2 MR. CHAMBERS: Well, that's, obviously, not even an
3 issue, Your Honor. I asked her a question that she can
4 respond yes or no to.

5 THE COURT: Well, let's bring her in and find out
6 what she's going to say outside the presence of the jury.

7 (WHEREUPON, Victim entered the courtroom and
8 was seated on the witness stand.)

9 THE COURT: Mr. Chambers.

10 CROSS-EXAMINATION

11 BY MR. CHAMBERS:

12 Q Okay. Victim, I want to go back to the question that
13 I asked you just before we stopped. Do you remember at
14 some point when you were in elementary school that you
15 either told somebody at school, or went home and told
16 Gary, or your mom, Jessica, that a little girl had come
17 into the stall in the bathroom at school and had tried to
18 sexually assault you, to do something to you?

19 A Yes, sir.

20 Q You remember doing that?

21 A Yes, sir.

22 Q Did that happen to you?

23 A Yes, sir.

24 Q Okay. Did anything happen after that as a result of
25 you saying that happened?

1 A Not that I can recall, sir.

2 MR. CHAMBERS: Okay.

3 (Pause.)

4 THE COURT: All right. Thank you.

5 Do you have any questions, Ms. Sustakovitch?

6 MS. SUSTAKOVITCH: No, sir.

7 THE COURT: You can go back out, yes, ma'am.

8 (WHEREUPON, Victim [REDACTED] exited the courtroom.)

9 THE COURT: So Boiter is out.

10 And it would come within rape shield, wouldn't it?

11 MR. CHAMBERS: Our position is that it doesn't, Your
12 Honor. I mean, it's not voluntary behavior by her. She
13 was assaulted by somebody else.

14 THE COURT: Which she says happened. So Boiter is
15 about false accusations and threshold determination. And
16 I think it would come within the rape shield statute and
17 Rule 412, given the record as it now stands after that
18 proffer.

19 So I don't know of any other rule that would allow it
20 to come in. Because it's hearsay to begin with.

21 MR. CHAMBERS: Well, I would disagree, respectfully,
22 with the Court that it's hearsay, Your Honor. Because
23 she's the one that experienced it and she relayed it.

24 THE COURT: Yes.

25 But you're asking her about a prior statement she

1 made out of court; right?

2 MR. CHAMBERS: I'm asking her if she reported it,
3 yes, sir.

4 THE COURT: So it's hearsay.

5 MR. CHAMBERS: Okay, Your Honor.

6 THE COURT: I mean, I understand where you're coming
7 from. But I don't -- and I want to give you every
8 opportunity to confront the witness. But the rule --

9 MR. CHAMBERS: That's fine, Your Honor. We'll move
10 along.

11 THE COURT: All right.

12 MR. CHAMBERS: It's not that important.

13 MS. SUSTAKOVITCH: Judge, for planning purposes, we
14 did have one more witness after **Victim**. And then we could
15 stop for lunch, or our next witness may be lengthy. I
16 just wanted to let Your Honor --

17 THE COURT: Your next witness might be lengthy?

18 MS. SUSTAKOVITCH: Yeah -- well, we have one more
19 that shouldn't be that long. And then the one after that
20 would be lengthier, or we could try to fit two more in.

21 THE COURT: Well, does anybody need a break right
22 now, or do y'all want to keep going?

23 MR. CHAMBERS: I don't --

24 MS. SUSTAKOVITCH: I need to use the restroom --
25 well, keep going.

1 THE COURT: Well, let's just take about a
2 three-minute break and let everybody -- while we've got
3 the opportunity.

4 (WHEREUPON, a break was taken.)

5 THE COURT: Okay. Do you want to go ahead and ask
6 her to come back in?

7 And go get the jury, please.

8 Thank you.

9 (WHEREUPON, Victim [REDACTED] entered the courtroom and
10 was seated on the witness stand.)

11 MS. SUSTAKOVITCH: Judge, may I ask one question
12 before they come in?

13 Just for clarification. These transcripts that I
14 prepared, they were not used for Court's -- for her to be
15 cross-examined out of or anything. They're, basically, a
16 work product for the State to help us redact.

17 I just want to make sure Defense counsel is not
18 relying on that or going to try to use that. Because I
19 would say it's just not court ready. And I simply had it
20 as a point of reference to take out objectionable parts.
21 He may not be. I just wanted to make sure that's not
22 where we're headed.

23 MR. CHAMBERS: Well, Your Honor, I don't plan on
24 putting it into evidence, but I wouldn't preclude the
25 thought that I might ask somebody a question -- I mean, it

1 is after all what was in the video.

2 MS. SUSTAKOVITCH: I would say the State created that
3 document as a work product to use in redaction. And I
4 would object if he's going to walk up using that, which I
5 relayed to the Court is not accurate as to nodding and
6 things like that.

7 He saw the video. He can cross-examine her from
8 anything in that video. But I would object -- as I've
9 stated from the get-go, that is just not prepared for the
10 purposes of cross-examining. And I hope I made that clear
11 at the beginning. It was just to aid in the redaction
12 process.

13 THE COURT: It's not in evidence; right?

14 MS. SUSTAKOVITCH: No, sir.

15 THE COURT: So you can ask her about the statements,
16 but --

17 MR. CHAMBERS: Exactly.

18 MS. SUSTAKOVITCH: I just didn't want him standing
19 there flipping through my transcript, which is not
20 accurate, and trying to use that. He can use questions
21 that are in there certainly from what he saw. I just
22 didn't want him using the work product that is not -- you
23 know, flipping through that to try to cross-examine her.
24 I mean, I guess he's not planning on doing that.

25 MR. CHAMBERS: I don't know if I'm planning on it or

1 not, Your Honor. But I think I can hold anything I want
2 in my hand and ask my questions. They don't know what I
3 have in my hand. I'm not going to refer to it.

4 And it's not work product at this point. I mean,
5 first of all, it is a rough transcript of something that
6 she plans on putting into evidence. And she has turned it
7 over to Your Honor.

8 THE COURT: I mean, I think -- I don't know. But I
9 gather she's saying that she doesn't want you showing it
10 to the witness and pointing to it --

11 MR. CHAMBERS: No, sir.

12 THE COURT: -- like it's some statement.

13 Is that right? Is that what you're getting at?

14 MS. SUSTAKOVITCH: I am.

15 And, as we relayed to the Court, it was not made for
16 the purposes of being admitted. It was simply to aid in
17 redactions.

18 So I would not want him looking at that and asking
19 questions from it. He looked at all the videos. He can
20 ask his own questions. I -- that's what I say about that
21 transcript.

22 THE COURT: Well, I don't think, respectfully, that
23 he could be prohibited from looking at it. I mean, I,
24 certainly, had to look at it when I was making rulings.

25 And given that it's not going into evidence and

1 there's not going to be any reference to it as some kind
2 of document that is consisting of prior statements or a
3 transcript, I'm not going to hobble Mr. Chambers by not
4 letting him carry it around.

5 All right. Bring the jury in.

6 Thank you.

7 (WHEREUPON, the jury came into open court at
8 approximately 11:51 a.m.)

9 THE COURT: Yes, sir, Mr. Chambers.

10 CONTINUED CROSS-EXAMINATION

11 BY MR. CHAMBERS:

12 Q ████████ Victim, now, just reviewing a little bit. You
13 indicated earlier that you recall that you went for a
14 medical exam in this case, and you talked to a doctor as
15 part of that medical exam. You remember that?

16 A Yes, sir.

17 Q Do you recall that you went to Spartanburg and you
18 sat down for three separate interviews with an interviewer
19 there? Is that correct?

20 A Yes, sir.

21 Q And, during that interview, do you remember the back
22 and forth that you had with this lady, her name was
23 Tish? Do you remember that her name was Tish?

24 A No, sir.

25 Q Okay. But you remember the interviewer and the

1 interview; is that correct?

2 A Yes, sir.

3 Q Do you remember her assuring you during the interview
4 that you hadn't done anything wrong, that Gary was the one
5 that had done something wrong? Do you remember her saying
6 that to you as you went through the interview?

7 A Yes, sir.

8 Q And talking about the fact that Gary had done
9 something wrong?

10 A Yes, sir.

11 Q All right. And we talked about the fact that you
12 talked, obviously, to the police. Do you remember
13 Investigator Miller, who's now Lieutenant Miller, who's
14 sitting over here? Do you remember talking to her?

15 A No, sir. I don't remember that.

16 Q You didn't talk to her. You talked to your parents
17 about it?

18 A I can't remember.

19 Q Well, when you've been -- since you've been living
20 with BJ, I mean, y'all have had discussions about what
21 happened in this case, and the fact that you were going to
22 come to court and testify, and those things, haven't you?

23 A Yes, sir.

24 Q Yeah.

25 A I was telling my stepmom how I have nightmares and

1 stuff about what happened.

2 Q And you've met with this lady right here, I would
3 say, on, at least, a few occasions, haven't you?

4 A Yes.

5 Q And she probably brought you over here to the
6 courtroom at some point, didn't she?

7 A Yes, sir.

8 Q And she put you up there where you're sitting right
9 now so that you -- she could go through what was going to
10 happen when you came into court?

11 A Yes, sir.

12 Q And she went over all the questions that she was
13 going to ask you prior to you coming in here to testify,
14 didn't she?

15 A Yes, sir.

16 MR. CHAMBERS: All right. That's all the questions I
17 have for you.

18 Thank you, Victim 1.

19 REDIRECT EXAMINATION

20 BY MS. SUSTAKOVITCH:

21 Q Victim, I just want to clarify. When we came down to
22 court, I sat you in that chair; is that correct?

23 A Yes, sir -- yes, ma'am.

24 Q But isn't it a fact I did not go through your court
25 questions in that chair prior to court? Is that not a

1 fact?

2 A (There was no response.)

3 Q When you came in here, you sat in the chair to see
4 where you'd be sitting; correct?

5 A Yes, ma'am.

6 Q And, isn't it true, I didn't go through all your
7 questions you were going to answer in court today;
8 correct?

9 A No.

10 MS. SUSTAKOVITCH: Thank you for clarifying.

11 THE COURT: Anything further?

12 MR. CHAMBERS: No, Your Honor.

13 THE COURT: Okay. You may step down.

14 Thank you.

15 MS. SUSTAKOVITCH: Your Honor, may this witness be
16 excused? She's still under subpoena.

17 THE COURT: Any objection?

18 MR. CHAMBERS: No, Your Honor.

19 THE COURT: Yes, ma'am. You may call your next
20 witness.

21 MS. SUSTAKOVITCH: Thank you.

22 Your Honor, at this time, the State moves to admit
23 State's Exhibit No. 7, and permission for Your Honor to
24 publish it at this time.

25 MR. CHAMBERS: And the Defense has no objection, Your

1 Honor.

2 (WHEREUPON, State's Exhibit No. 7 was admitted into
3 evidence.)

4 THE COURT: Ladies and gentlemen, you're about to
5 hear a stipulation of evidence. I told you just a little
6 while ago when I was giving my opening remarks that there
7 are two sources of evidence, witness testimony and
8 exhibits, unless I tell you otherwise. Well, I'm going to
9 tell you otherwise right now. There is another source of
10 evidence that's known as a stipulation that sometimes
11 occurs in trials. And I didn't want to bother you with
12 that at the beginning, but I will now.

13 And a stipulation is simply an agreement by both
14 sides in a case that a certain fact exists, and it's
15 something you can accept without any further evidence as
16 conclusive.

17 Now, this particular stipulation, before it is read
18 to you, I want to instruct you on something else. And
19 you'll, also, recall that I made what probably seemed a
20 curious statement earlier as well. And that is that you
21 can use some evidence for one purpose and one purpose
22 only, and not for any other purpose. And this stipulation
23 you're about to read [sic] can only be used by you, the
24 jury, for a very limited purpose. And that purpose is
25 simply on the issue of whether the State has met its

1 burden of proof as to an element of the crime of criminal
2 sexual conduct with a minor in the first degree.

3 And you can give this stipulation whatever weight you
4 decide to in that regard. You may not consider this
5 stipulation for any other purpose. Your oath forbids you,
6 for example, from using the evidence of this stipulation
7 as proof of whether Mr. Thompson committed the acts for
8 which he's on trial here today, except on that issue of
9 that element of the offense.

10 So the law doesn't allow you to use the stipulation
11 as proof of Mr. Thompson's guilt for any charge that he's
12 on trial for here today, except for deciding whether the
13 State has met its burden of proof about a prior offense.

14 So do you want me to read the stipulation?

15 MS. SUSTAKOVITCH: However Your Honor -- if Your
16 Honor prefers that.

17 THE COURT: All right. So the stipulation is that
18 the Defendant, Gary Reece Thompson, has been convicted of
19 criminal sexual conduct with a minor first degree, an
20 offense listed pursuant to South Carolina Code Section
21 23-4-430(C), and is currently on the South Carolina Sex
22 Offender Registry.

23 So you can accept the stipulation for the limited
24 purpose that I've instructed you that you can consider it
25 for, and no other purpose.

1 MS. SUSTAKOVITCH: Thank you, Your Honor.

2 The State calls Lieutenant Ty Miller.

3 THE CLERK: Ma'am, please, place your left hand on
4 the Bible and raise your right hand.

5 WHEREUPON,

6 TY MILLER,

7 after first having been duly sworn, testified as follows:

8 THE CLERK: Thank you.

9 Please be seated.

10 Please state your name for the record.

11 THE WITNESS: Lieutenant Ty Miller.

12 DIRECT EXAMINATION

13 BY MS. SUSTAKOVITCH:

14 Q Good afternoon, Lieutenant Miller.

15 Where are you employed, ma'am?

16 A I'm employed at the Greenville County Sheriff's
17 Office.

18 Q And how long have you been employed there?

19 A This year will be 15 years.

20 Q What's your position at the Sheriff's Office?

21 A I'm currently a lieutenant over in the administrative
22 division.

23 Q And can you, for the jury, just go back with your 15
24 years? What different jobs have you held at the Sheriff's
25 Office?

1 A I started in '99 as a uniform patrol deputy. We
2 respond to general calls, calls for service, crimes and
3 security, and generate basic code five information. From
4 there, that information is sent up to an investigative
5 unit.

6 I was promoted to master deputy -- actually, at that
7 point, I went -- after there, I went to sex crimes. And
8 then I was promoted to a master deputy in sex crimes. I
9 was in sex crimes until 2011 when I was promoted to
10 sergeant of the school enforcement unit. And then in
11 2013, I moved to lieutenant.

12 Q All right. I want to take you back to the summer of
13 2010. What was your position back in the summer of 2010?

14 A I was a sex crimes investigator and, also, a family
15 violence investigator.

16 Q And, as a sex crimes investigator, how do different
17 sex crimes investigations come to the Sheriff's Office?
18 What are the different avenues that they come in?

19 A A lot of times, they're sent in from our uniform
20 patrol division as calls for service from the road, or
21 they're, also, sent in to us from outside agencies such as
22 the Department of Social Services, or advocacy centers.

23 Q Are you familiar with a man by the name of Gary
24 Thompson?

25 A I am.

1 Q And were you serving in your capacity as a sex crimes
2 investigator that led you to have to be in court today
3 with this case involving Gary Thompson?

4 A Yes.

5 Q How did the investigation into sexual assault charges
6 against this Defendant come to the Sheriff's Office for
7 your review?

8 A We were contacted -- our agency was contacted by the
9 Spartanburg County Children's Advocacy Center in regards
10 to allegations that were made in Spartanburg, but took
11 place in Greenville County --

12 Q And -- I'm sorry. Go ahead.

13 A That's okay. So we took an incident report and
14 pursued investigation here.

15 Q And who, specifically, from the Children's Advocacy
16 Center in Spartanburg referred the case to Greenville
17 County?

18 A Forensic interviewer Tricia Austin.

19 Q When did that referral first come in?

20 A June 17th, 2010.

21 Q So when you got this referral on June 17th, 2010, it
22 came from the Children's Advocacy Center; correct?

23 A Correct.

24 Q What was your initial role in the investigation?
25 What did you do once you received this referral?

1 A As soon as I received it, I contacted the Children's
2 Advocacy Center and requested copies of their interviews
3 that they had done previously with this victim and,
4 also -- once they were sent, I reviewed those interviews.

5 Q Okay. And what were the dates of the interviews that
6 you reviewed?

7 A June 15th and June 22nd, 2010.

8 Q All right. And after those first two interviews, did
9 you contact Tricia Austin and ask that she clarify the
10 locations where the assaults occurred?

11 A I did in order to justify -- or to determine
12 jurisdiction. This family had moved a lot. And we needed
13 to know what happened where.

14 So researching my records, DSS records, and with
15 Ms. Austin, I requested that we work -- we, actually, all
16 work together to try to determine what those locations
17 were so that I could take pictures of those locations.

18 Q All right. And, as part of your investigation, did
19 you figure out where this family, actually, lived within
20 Greenville County?

21 A I did.

22 Q Did -- I believe you just testified, but did they
23 stay in one place, or did they move around a lot?

24 A No. This family was extremely -- moved around a lot,
25 a lot. It was very difficult to follow.

1 Q Okay. I'm going to show you what's marked as --
2 well, first, piecing together the timeline, what were you
3 able to put together as far as where Jessica Thompson and
4 this Defendant lived in Greenville County through those
5 times?

6 A Originally, going back, we were able to research
7 previous medical records and DSS records. We determined
8 that, originally, as far as back as I could determine, [REDACTED]
9 [REDACTED] Drive. That was up until the victim was about
10 six. Then at [REDACTED] Highway, between six and seven
11 years old. Then from there, [REDACTED] Highway, which was
12 in March of 2009. [REDACTED] Road, April to May '09.
13 [REDACTED] Highway, October '09 to March of 2010. And then
14 [REDACTED] Street from March of 2010 until the children
15 were taken into care on May 13th, 2010. And those are all
16 locations in Greenville County.

17 Q All right. You say "taken into care," what does that
18 mean? Who takes them into care?

19 A I'm sorry. The Department of Social Services took
20 them into custody and away from their parents --

21 Q All right. And --

22 A -- or their mother and stepfather.

23 Q And finish that. I cut you off. I apologize.

24 A That's okay. They removed them from their home here
25 in Greenville County.

1 Q And who did they remove them from?

2 A From Jessica Thompson and Gary Thompson.

3 Q All right. I'm showing you what's marked as State's
4 Exhibit Nos. 10, 11, 12, 13, 14, and 15. Will you take a
5 look at those exhibits, and just look through them.

6 A (Witness complied.)

7 Q Do you recognize those exhibits?

8 A Yes. These are pictures -- after I was able to
9 determine these locations, I was at -- I went out and took
10 pictures of these residences.

11 Q All right. And let's --

12 MS. SUSTAKOVITCH: At this time, Your Honor, the
13 State moves to admit State's Exhibit Nos. 10 through 15
14 into evidence.

15 MR. CHAMBERS: No objection, Your Honor.

16 THE COURT: All right. They're in evidence.

17 (WHEREUPON, State's Exhibit Nos. 10, 11, 12, 13, 14,
18 and 15 were admitted into evidence.)

19 BY MS. SUSTAKOVITCH:

20 Q Just briefly, I'd like to go through these so the
21 jury has some idea where this family lived, at least, part
22 of the time. I believe you testified they lived at
23 [REDACTED] in 2006; is that correct?

24 A Yes.

25 Q All right. And we don't have pictures of all the

1 different locations, do we?

2 A No, we don't.

3 MS. SUSTAKOVITCH: Judge, I -- here we go.

4 BY MS. SUSTAKOVITCH:

5 Q All right. Just briefly, Lieutenant Miller,
6 what's -- did you take this photograph of this address?

7 A I did. That was a camper -- actually, there's no
8 camper there, I don't believe, now. But that was where
9 the family lived in a camper at -- I believe this is [REDACTED]
10 [REDACTED] Highway.

11 Q All right. This is another photograph of that
12 camper. So I believe if you look over here, I do see a
13 camper with a blue tarp. Is this the location where they
14 lived?

15 A Yes. That's it.

16 Q Okay. And then I'm going to go to State's Exhibit
17 No. 12. I'm sorry. This technology is -- this machine...

18 Okay. Essentially, we see the trailer. This is
19 where they lived. Can you give us the time frame again
20 there?

21 A That's April 2009. That's [REDACTED] [REDACTED] Road.

22 Q Okay. And that's just another picture of the
23 location.

24 This final picture, that's another address they moved
25 to; is that correct?

1 A Yes. That's [REDACTED] Highway. That was October of
2 '09 to March of 2010.

3 Q And this is just a close-up of that.

4 After that, where did they move to again?

5 A [REDACTED] Street. And that was until they were taken
6 into custody by DSS.

7 Q All right. Did you, as part of your investigation,
8 end up coming in contact with this Defendant and his wife
9 co-defendant, Jessica Thompson?

10 A Yes, I did.

11 Q When and how did you come in contact with them?

12 A After reviewing the forensic interviews and gathering
13 evidence, warrants were issued. And they were arrested
14 and brought to the law enforcement center for an
15 interview.

16 Q Are you aware of where they were, actually, arrested?

17 A I can't recall. I believe it's [REDACTED] Street, but
18 I'm not 100 percent sure. They were taken in by, I
19 believe, our warrants division.

20 Q All right. And you believe it was [REDACTED] Street.
21 Were they together when they were arrested?

22 A Yes.

23 Q All right. Did you -- so they were brought in. They
24 were under arrest at this point. Did you make an effort
25 to -- first, describe the interaction with Jessica

1 Thompson.

2 A Initially, making contact with her, she -- I
3 separated the two parties. And I took her into another
4 room and, basically, asked her if she wanted to speak to
5 me about what charges were made --

6 MR. CHAMBERS: Objection, Your Honor. I object to
7 them getting into whether or not -- I mean, Jessica, I
8 assume, is going to testify whether or not there was any
9 interviews or anything done at this point.

10 MS. SUSTAKOVITCH: I believe it's relevant whether,
11 in fact, she gave a statement that day. I think it'll
12 come up under her testimony at trial to know what she was
13 saying back then.

14 THE COURT: Overruled.

15 BY MS. SUSTAKOVITCH:

16 Q So Investigator Bracken [sic], did -- talk about
17 Jessica -- co-defendant Jessica's demeanor. Again, how
18 would you describe her? She's under arrest. What is her
19 demeanor at that time?

20 MS. SUSTAKOVITCH: And you can turn the lights on, if
21 you will, please, Mr. Alexander [sic].

22 Thank you.

23 THE WITNESS: Her demeanor -- she was very afraid.
24 She was afraid that what we discussed would get back to
25 Mr. Thompson.

1 BY MS. SUSTAKOVITCH:

2 Q She was afraid of this Defendant?

3 A Yes.

4 Q Did you ask her if she wanted to give you a statement
5 at that time?

6 A I did.

7 Q And did she, in fact, give you a statement?

8 A Yes, she did.

9 Q I'm showing you what's marked as State's Exhibit Nos.
10 8 and 9. What date did she give you that statement?

11 A I believe it's September 20th.

12 Q It was the time she -- at the time she was arrested
13 in September; correct?

14 A Yes.

15 Q All right.

16 A I'm sorry.

17 Q Based on your entire investigation, at this point,
18 did you and law enforcement take a search warrant over to

19 [REDACTED] Street and try to execute a search warrant?

20 A Yes, we did.

21 Q And were you present when that was served?

22 A Yes, I was.

23 Q What, if any, evidence was seized as part of that
24 search warrant?

25 A There were numerous hard drives taken, as well as CDs

1 and DVDs from the residence.

2 Q All right. And I believe you testified that when
3 they were arrested at [REDACTED] Street, this Defendant was
4 present with Jessica Thompson; correct?

5 A Yes, he was.

6 Q Going back to what was seized. I'm showing you
7 what's marked as State's Exhibit No. 16. Do you recognize
8 that?

9 A Yes. It's our property and evidence sheet.

10 Q If you could speak up just a little bit to make sure
11 everybody hears.

12 A That is our property and evidence sheet.

13 Q Thank you.

14 So different hard drives were taken. Are you aware
15 of how many different hard drives were taken out of that
16 residence?

17 A I believe...

18 Q Several hard drives?

19 A Yeah, like seven or eight.

20 Q Okay. Was an effort done to forensically examine the
21 hard drives in this case to determine if there was
22 anything, in fact, on the hard drives that would be of
23 assistance in the investigation?

24 A Yes.

25 Q And was anything located on the actual hard drives,

1 pornography, anything like that on the hard drives that
2 would assist in this investigation?

3 A No.

4 Q All right. As to the disks -- the CDs that were
5 located. I'm showing you -- well, first, was pornographic
6 material found in the residence at [REDACTED] Street?

7 A Yes, it was.

8 Q How many different pornographic CDs were located?

9 A There was a lot of material. I know two CDs,
10 specifically, that we examined.

11 Q Two. Okay. I'm showing you what's marked as State's
12 Exhibit No. 6. Do you recognize that?

13 A Yes. It's one of the CDs that was taken from the
14 residence during the search warrant.

15 Q And were you present when this was taken into
16 evidence?

17 A I was.

18 Q And do you recognize this as one of the items that
19 was taken from that residence that is part of the search
20 warrant?

21 A Yes.

22 Q I'm showing you what's marked as State's Exhibit
23 Nos. 1, 2, and 3. Do you recognize those items?

24 A Yes. Those are pictures from this -- the processing
25 of the CD.

1 Q All right. And let me ask. Did law enforcement
2 take -- are these still shots from images on this CD?

3 A Yes.

4 MS. SUSTAKOVITCH: At this time, the State moves to
5 admit State's Exhibit Nos. 6, 1, 2, and 3 into evidence.

6 MR. CHAMBERS: No objection, Your Honor.

7 (WHEREUPON, State's Exhibit Nos. 1, 2, 3, and 6 were
8 admitted into evidence.)

9 MS. SUSTAKOVITCH: All right. If we could, Judge,
10 I'm --

11 BY MS. SUSTAKOVITCH:

12 Q Investigator Miller, I'm -- these are entered into
13 evidence. And I'm going to allow the jury to view them.
14 I'm going to publish one of them.

15 Could you relay to the jury what is on these
16 photographs?

17 A Yes. These are -- we consider this corroborating
18 evidence. When we were looking for specific videos that
19 the child had described that she had been forced to watch,
20 specifically, women with stockings on with no bra's,
21 skirts with no panties. And so this material was very
22 close to what she said she viewed.

23 Q All right. I'm just going to publish one of them and
24 let the jury look at whatever else they want to in the
25 jury room.

3 A That's correct.

5 THE COURT: Sure.

6 | (Pause.)

9 THE WITNESS: Sure.

11 BY MR. CHAMBERS:

15 A Not to corroborate this case.

19 | A Yes, sir. That's fair to say.

22 | A Correct.

25	A	No.

1 Q These pictures that were taken from these videos,
2 these all involved consenting adults?

3 A Correct.

4 Q Do you recall from -- you were the lead investigator
5 on this case; is that right?

6 A Yes, I was.

7 Q So you reviewed any evidence, or any reports, or
8 anything that was generated about this case after you took
9 it over; is that right?

10 A That's correct.

11 Q And do you know from that -- the initial report came
12 from the paternal grandmother in this case?

13 A Our initial report was generated through the advocacy
14 center in Spartanburg.

15 Q But were you aware from your investigation that it
16 got to the advocacy center -- it started with a report of
17 the alleged abuse by the paternal grandmother in this
18 case?

19 A Okay.

20 Q Is that right?

21 A I'm sure that's in the record. I don't have that
22 with me up here, but --

23 Q Okay. So you would agree then that that's --

24 A I would agree --

25 Q All right.

1 A They had to get the referral somehow.

2 Q But you got it from child advocacy. And is that the
3 center in Spartanburg?

4 A Yes.

5 Q Is it unusual that you would get a Greenville case
6 from Spartanburg child advocacy like that?

7 A No, not necessarily unusual. We get -- it depends on
8 where the crime occurs at. So we get them from advocacy
9 centers in Ohio. If that person has disclosed in Ohio,
10 but it happened here, it's our responsibility to
11 investigate that.

12 Q But it's your understanding from this case that
13 everything, including the disclosure, occurred here in
14 Greenville, isn't it?

15 A When they lived here, yes. But the children were
16 living in Spartanburg at the time of the disclosure.

17 Q Were you aware as part of your investigation that she
18 had made a prior false allegation involving her uncle?

19 A Yes.

20 MR. CHAMBERS: All right. That's all the questions I
21 have for you.

22 THE COURT: Any redirect?

23 MS. SUSTAKOVITCH: Nothing further from the State,
24 Judge.

25 THE COURT: You may step down, Ms. Miller.

1 All right. You can call your next witness.

2 MS. SUSTAKOVITCH: Your Honor, the State calls Wiley
3 Garrett.

4 (Pause.)

5 THE CLERK: Mr. Garrett, if you'll, please, place
6 your left hand on the Bible and raise your right hand.

7 WHEREUPON,

8 WILEY GARRETT,
9 after first having been duly sworn, testified as follows:

10 THE CLERK: Thank you.

11 Please be seated.

12 Would you, please, state your name for the record?

13 THE WITNESS: Wiley Garrett.

14 THE CLERK: Thank you.

15 DIRECT EXAMINATION

16 BY MS. SUSTAKOVITCH:

17 Q Good afternoon, Mr. Garrett.

18 A Good afternoon.

19 Q Where are you employed, sir?

20 A I'm a clinical social worker. I'm in private
21 practice. And work at the Children's Advocacy Center in
22 Spartanburg. And I, also, have a private practice as
23 well.

24 Q All right. Could you relay to the jury your basic
25 training and experience as a licensed social worker?

1 A Sure. I have a Master of Social Work from the
2 University of South Carolina in Columbia. And I finished
3 there in 1994. I was licensed as a social worker then,
4 and have continued to be a licensed social worker in
5 either North or South Carolina since then in -- working in
6 the field. I'm, also, a clinical social worker supervisor
7 in the State of South Carolina.

8 Q All right. When you stated you work for the -- or
9 you work at the Children's Advocacy Center in Spartanburg,
10 what exactly is your position there with them?

11 A I do two things, one is a forensic evaluator and the
12 other is a therapist.

13 Q And as a therapist, specifically, what training and
14 experience have you had as a therapist regarding children
15 where there's a concern of abuse?

16 A I've been a therapist with children for 25 years. I
17 began my career working in the psychiatric unit for
18 children and have done that -- worked with children in
19 different capacities such as therapeutic foster care until
20 I went into, you know, therapy full-time and private
21 practice many years ago. Let's see. I think that that
22 was 2001, I think that was.

23 And then I began at the Children's Advocacy Center in
24 2002. And I have done that consistently since then. I've
25 been to many trainings all over the nation in therapy and,

1 specifically, in practice -- trauma-focused types of
2 therapy.

3 Q Okay. A total of how many years would you say you've
4 been counseling children where there's a concern of sexual
5 abuse or assaults?

6 A 25 years.

7 Q 25 years. And can you estimate the number of
8 patients you may have seen over the years in your
9 counseling? Would it be 50, a hundred, a thousand? What
10 are we --

11 A It's, certainly, well over a thousand, but I -- it's
12 just too many to count.

13 Q All right. Have you been qualified in the courts of
14 this state or any other state in the -- as an expert in
15 the field of child sexual abuse counseling and treatment?

16 A Yes, I have.

17 Q Which courts have you been qualified as an expert,
18 Mr. Garrett?

19 A A number of -- Spartanburg County, Union County,
20 Cherokee County, Oconee County, York County.

21 Q Multiple times?

22 A Multiple times.

23 MS. SUSTAKOVITCH: Your Honor, at this time, the
24 State moves to admit this witness as an expert in the area
25 of counseling children where there's a concern of child

1 sexual abuse or assault.

2 MR. CHAMBERS: I have no objection to him being
3 declared an expert as far as child counseling goes, Your
4 Honor.

5 THE COURT: All right.

6 BY MS. SUSTAKOVITCH:

7 Q Mr. Garrett, in your 25 years of experience in
8 counseling children where there's a concern of abuse, can
9 you educate the jury on the term delayed reporting or
10 delayed disclosure? What does that mean?

11 A It means that most children do not tell right away
12 for many different reasons.

13 Q And can you elaborate on some of the reasons why most
14 children delay disclosure?

15 A The core reason is fear. They're -- they are afraid
16 that they'll be in trouble. They feel afraid and ashamed.
17 They're afraid they'll make their mother cry. They're
18 afraid their father will be angry.

19 Sometimes, there are threats by the people who hurt
20 and abuse children. And they're afraid of that. If
21 you're a child and you're abused by somebody -- you know,
22 you're small and you're abused by somebody who's, you
23 know, five and a half, six feet tall, that person is,
24 also, much larger than you are.

25 We, also, teach children to respect authority

1 figures, to respect older people, to be respectful, to
2 listen to them. And most children are sexually abused by
3 somebody they know pretty well. And most children are,
4 also, sexually abused by somebody who's larger than they
5 are.

6 And so they're afraid. They're really confused.
7 They haven't been prepared for this. Nobody has ever sat
8 down with them and said, for the most part, you know, if
9 this happens -- they haven't been trained in that area.

10 Q Okay. Is it common or uncommon in your experience
11 for children to sometimes wait weeks, months, even years
12 to delay disclosure of abuse?

13 A That's very common. I mean, just as recently as
14 yesterday, I had a woman tell me that she was sexually
15 molested at 12. And she did not disclose until she was 37
16 years old.

17 I have quite often had adults tell me that they were
18 sexually molested as children and have not -- and I've
19 been often told -- I'm going to -- I've heard these words,
20 I'm going to tell you something I've never told anyone.
21 And, most of the time, what they're going to tell me is
22 that they were sexually molested as children.

23 Q In your experience, is it common or uncommon for the
24 perpetrator of the abuse to try to silence a child by
25 threatening a child with harm if they tell anybody?

1 A Children tell me this all the time in therapy and,
2 also, in interviews that, you know, they were told not to
3 tell. If you tell, you'll get in trouble. If you tell,
4 your mother won't love you. If you tell, you'll be put in
5 foster care.

6 There are many different -- sometimes, they say that
7 if you tell, I'll hurt your parents. There are all kinds
8 of many different ways. Children are -- you know, they're
9 small. And they're -- you know, it's really easy to
10 frighten and threaten children so they're afraid.

11 Q Is it common or uncommon in your experience for a
12 child to be more comfortable in disclosing once they're
13 outside of the environment where the actual abuse is
14 occurring?

15 A I see that all the time. That's very common. And
16 it, also, plays a role many times in delayed disclosure.
17 Because this person was around visiting in the home. They
18 were very afraid of this person.

19 And then when they are able to get into a safer
20 place, a place where they feel like that they're not going
21 to have to see this person, then -- and I've had many
22 children tell me that. That's exactly what -- why they --
23 because I ask the question. So many times it's, so why
24 did you not tell? And then why did you tell? And those
25 are the answers I hear.

1 Q In your experience, is it common or uncommon for a
2 child to have more specific memories of one incident over
3 another for -- when you have chronic abuse that goes over
4 periods of years?

5 A Yes. If you have an event happen to you one time,
6 then you're -- it's going to be easier to remember that
7 specific time and more, specifically, the details of that
8 one time. Anything that happens to you, even traumatic
9 events that happen to you many, many times, it becomes
10 more and more difficult to separate them out.

11 This -- I've interviewed children this week who've
12 told me just that, that -- you know, can you tell me about
13 the first time?

14 Well, no, I can't.

15 Can you tell me about the last time?

16 Well, no, I can't.

17 Can you tell me about any time?

18 And they really can't separate out those in
19 distinctive instances. Now, they can tell me that it
20 happened, they can tell me what was done, they can tell me
21 what rooms it happened in. They may remember some
22 details.

23 But, as far as separating all that, it's -- you know,
24 any time you're traumatized, you're afraid. It's just
25 like when you have a car wreck and somebody starts asking

1 you questions about the car wreck. Well, what was the
2 other driver wearing? Whatever it is, you know, you're in
3 shock, so you're not going to remember all those details
4 specifically or explicitly.

5 Q All right. And so, in your experience, it would not
6 be uncommon several years after abuse is disclosed for a
7 child not to remember exactly how she said it when she
8 disclosed the abuse; is that correct?

9 A It would -- that's very common for kids who are
10 abused. That's, actually, very common for most people;
11 right?

12 I mean, if you ask me what I said a year or two ago,
13 it's very highly unlikely I'm going to remember exactly
14 what I said. And, also, that -- also, many times goes to
15 credibility. Because we don't -- you know, I wouldn't
16 expect a child to tell about the same event in exactly the
17 same way each time.

18 Q All right. In your experience, is it common or
19 uncommon for children to be abused by people that have
20 positions of authority in their lives and trust?

21 A It's very common. Because, again, when you talk
22 about positions of authority, that could be a parent, it
23 could be a caregiver, it could be a baby-sitter, it could
24 be -- you know, any kind of authority figure. Because
25 that's what we teach kids that, you know, adults are

1 authority figures, so. And that's extremely common.

2 Q Did you have contact with a little girl by the name
3 of Victim ██████ related to this case?

4 A I did.

5 Q And how did you come in contact with Victim ██████?
6 What was your contact with her?

7 A She was referred to the Children's Advocacy Center.
8 And she was referred to me to be her therapist.

9 Q When was she referred to you, Mr. Garrett?

10 A The -- I can tell you when the first time I saw her,
11 which was October the 26, 2010.

12 Q What was the purpose of you meeting with Victim ██████. You
13 stated counseling, which is obvious. But what was your --
14 what were her treatment goals in coming to see you after
15 this disclosure?

16 A The treatment goals were, first of all, to help her
17 feel comfortable in therapy and comfortable in that
18 setting. Secondly, to help her learn about feelings --
19 about the skills that she needs to be able to help
20 recognize her feelings and to be able to have some
21 intervention, some specific things that she can do in
22 order to help her make herself feel better.

23 We call these distress tolerance skills. And they
24 include mindfulness skills, and conscious breathing, those
25 sorts of things. And then, also, then to go into creating

1 a trauma narrative where that child is able to be in a
2 safe setting. And because they're able to now have some
3 control over their feelings and not feel like their
4 feelings are controlling them, they're able to develop
5 that narrative -- that trauma narrative.

6 Q When you speak about trauma, in your experience as a
7 therapist in these 25 years, have you seen different
8 trauma symptoms that crop up with various patients
9 throughout the years that are kind of common when they've
10 been the victim of a child sexual assault?

11 A Yes, I have.

12 Q Okay. Can you elaborate on what some of those would
13 be?

14 A Most common are the sorts of things that we would
15 expect from any traumatic event, difficulty concentrating,
16 problems going to sleep, staying asleep, waking up, not
17 being able to go back to sleep, nightmares, restlessness,
18 anxiety, fears, sadness, depression, crying, tearful.

19 Q Related to **Victim**, did she have any of these symptoms
20 related to her abuser, any nightmares relayed to you, and
21 things like that?

22 A Yes, she did. She had nightmares -- recurring
23 nightmares where she would have nightmares about someone
24 coming to hurt her, hurt her parents, kill her. She told
25 me about this often.

1 Q And were the nightmares specific to the abuser?

2 A They were.

3 Q What about her mother, Jessica Thompson? Did she
4 exhibit any -- during your therapy any feelings about her
5 mother?

6 A Yes. She was very angry at her mother. She said --
7 she stated that her mother knew about this, but allowed it
8 to go on.

9 Q I guess looking at your notes, **Victim** participated in
10 something called a youth survivor's game --

11 A It's called survivor journey.

12 Q Oh, I'm sorry. The youth survivor's journey. I'm
13 using the wrong words.

14 Going to February of 2011, when she's in therapy,
15 what -- tell me about that therapy session, specifically,
16 and what happened during this youth survivor's therapy
17 session where she -- what was she supposed to do? And
18 what did she relay to you?

19 A What is that date again?

20 Q I'm sorry. It's February of 2011.

21 A I had two sessions with her during February. I'm not
22 sure which one you're talking about --

23 Q Okay.

24 A -- but on February the 8th, she did tell me about
25 nightmares related to the alleged perpetrator trying to

1 hurt her, kill her father and mother. And then she, also,
2 described some bad things that he did.

3 Also, in that -- on February the 22nd, she was
4 tearful, angry, withdrawn, upset. She talked about
5 thinking about the bad things that happened to her while
6 she was in bed, that sort of thing. I'm not sure what
7 you're referring to, but that's --

8 Q That's where I was going -- referring to the
9 nightmares that she was experiencing, based on your notes.

10 A And these were nightmares that she could --
11 repeated -- repeatedly told me about.

12 Q Did -- when did **Victim** -- did she finish up counseling
13 with you?

14 A She did not.

15 Q Okay. And tell me about that.

16 A Well, her father said he just didn't have gas
17 money -- the money for gas to drive her to therapy. And
18 so she was not going to be able to come.

19 Q Okay. And that was her biological father that said
20 he just --

21 A That was her biological father. That's correct.

22 Q He couldn't get her there for therapy?

23 A That's what he said.

24 Q Got it. In your opinion, were the symptoms such as
25 nightmares and hurting herself, were those consistent with

1 child sexual assault trauma symptoms?

2 A Yes, they are. The primary indicator, of course, of
3 child sexual abuse is disclosure by the child to a
4 professional.

5 And secondary to that are symptoms of depression and
6 anxiety. Depression being all the sad features, feeling
7 hopeless. The other part is anxiety, which encompasses
8 all the sleep problems, nightmares, fears, panic attacks,
9 all of those sorts of things.

10 MS. SUSTAKOVITCH: Thank you, Mr. Garrett.

11 Please answer any questions for Defense counsel.

12 CROSS-EXAMINATION

13 BY MR. CHAMBERS:

14 Q So you met with her. How frequently would these
15 meetings occur?

16 A Well, they were supposed to be weekly. It began in
17 October. Her parents didn't always come on a regular
18 basis. So I began in October. I think the first session
19 I met with them was October the 26th, 2010. And the last
20 one was April the 12th, 2011.

21 Q So for several months, you met with her, discussed
22 these things with her?

23 A We met in therapy.

24 Q And you discussed -- I mean, you just talked about
25 having discussions with her. That's all I'm asking. You

1 didn't sit there in silence. You had discussions about
2 her case, and how she was doing, and all these sorts of
3 things?

4 A We did activities. And, out of those activities, she
5 talked.

6 Q Well, I'm not asking you about activities. I'm --

7 A I'm sorry.

8 Q -- asking you -- I thought it was a real simple
9 question. I'll try again.

10 Y'all -- based on what you were talking about a few
11 minutes ago, y'all had discussions with each other about
12 the events that she alleged; is that right?

13 A She talked about those. I just hesitate with the
14 word "discussion." It sounds like you're -- you know,
15 that's the kind of thing I do with adults. But, with
16 kids, I mostly have activities, and that sort of thing,
17 let them draw on other things. We're hoping they're going
18 to spontaneously talk.

19 Q Well, you interviewed -- I mean, you testified at
20 length a few minutes ago about things that she said to
21 you?

22 A Yes.

23 Q I assume that that's part of a discussion that you
24 were having with her, a dialogue?

25 A Yeah. We -- if you want to put it that way, that's

1 okay.

2 Q Well, I mean, seriously, I didn't -- I don't want to
3 belabor this. But how else would you put it, other than
4 you were talking to her, and she is saying things to you?

5 A She is.

6 Q Okay. So is that not a conversation?

7 A We did have conversations, yes.

8 Q Or a discussion; am I correct, a conversation,
9 discussion?

10 A Yeah. We had conversations.

11 Q All right. Let's move on.

12 A Okay. That's fine. I'm not -- really, I apologize.
13 I'm really not trying to be difficult. But I just --
14 that's just not a word I usually use.

15 Q And you said that they stopped coming to you because
16 of the gas issue. The stepmom, actually, contacted you at
17 some point and said they were having trouble getting her
18 to go; is that right?

19 A There were several conversations with the stepmother
20 related to a number of different issues the stepmother
21 had. I remember, you know, for one thing, she wrote me a
22 letter saying that she thought that **Victim** -- that the
23 child should see a female therapist, that she'd be more
24 comfortable, except that wasn't my experience. And she
25 had a number of objections. And I don't really remember

1 what they all were.

2 Q You don't -- do you remember that she told you that
3 they, basically, had to fight with **Victim** every time that
4 they were trying to get her to come see you?

5 A I do remember that.

6 Q Okay.

7 A I do remember that.

8 Q Do you recall having any discussions with her about
9 her having a -- making a disclosure that her Uncle Mark
10 had molested her?

11 A That -- actually, **Victim** did bring that up, yes.

12 Q And did she go into specifics with you about that?

13 A What she said was that -- I can't remember if it was
14 mother or -- I guess it was mother or stepmother, one of
15 the two, had told her to tell a lie in order to get this
16 person in trouble. And that she didn't want to, but she
17 was made to tell -- make up something -- make up a lie
18 about what he did that was bad.

19 Q Did she tell you that she told the police that her
20 Uncle Mark had put his privates in her behind?

21 A I don't recall all those details. But I do -- the
22 thing I mostly recall is her saying that her -- I guess
23 it's her mother forced her, made her, threatened her until
24 she told a lie.

25 Q Now, you said that the primary -- one of the primary

1 indicators of abuse is disclosure. That would be a
2 disclosure, would it not?

3 A It sounds like it would, yes.

4 Q Okay. Looking at -- do you have your progress notes
5 in front of you?

6 A I do.

7 Q Do you have -- look at the one that's dated, I
8 believe -- if I'm reading your writing correctly, that is
9 1/18/11.

10 A Okay.

11 Q And not -- I'm not casting dispersions, because I'm
12 as guilty of it as you are. But your handwriting is a
13 little bit hard to read.

14 But I'm looking at about four lines up. You say --
15 and you put this in quotation marks that she, apparently,
16 said to you, He child molested me, talking about Gary.

17 A I see that. I see it.

18 Q Oh, you do see it?

19 A Oh, I see it.

20 Q I'm sorry.

21 A Oh, yes, I see it.

22 Q And so that was the terminology she used, He child
23 molested me?

24 A That's correct.

25 Q All right. And that's, also -- that same meeting is

1 where she was talking about Mark, but saying that she had
2 lied about that?

3 A Yeah. She stated that Jessica made her say Mark did
4 bad things so he would get in trouble, because she doesn't
5 like him.

6 Q I mean, are you aware that based on those allegations
7 that she, actually, had to talk to the police, and she
8 recounted that to the police?

9 A I don't -- I didn't -- if I knew that, I don't
10 remember it.

11 Q So you were never made aware of that?

12 A We really -- what I -- all I know is that is what she
13 was telling me. Because in this process of being a
14 therapist, it's really different from a forensic
15 interview. Because we're really not trying -- we're
16 really just trying to help the child. We're not trying to
17 get them to tell us all the details and really trying to
18 get a disclosure. I didn't go into that at all.

19 Q Basically, you come at it -- the referral has been
20 made to you?

21 A Yes.

22 Q You're not concerning yourself with anything that
23 happened before. You're just trying to go through
24 treatment and meet treatment goals with the alleged victim
25 in a case; is that correct?

1 A In trauma therapy, you're really teaching the child
2 skills so that they can help calm themselves down and make
3 themselves feel better, and so -- you know, so that they
4 can not be as anxious and not be as depressed.

5 Q So I take it then that you didn't know a whole lot
6 about her background?

7 A Only what the parents told me in the initial
8 interview. And I think I may have read the interview
9 that -- I think there was an interview done at the
10 children's center. And I probably read that as well.

11 Q So you weren't aware then -- or maybe you were. I'll
12 just ask. Were you aware of the fact that she,
13 essentially, lived in a very unstable lifestyle where they
14 moved on numerous occasions?

15 A I didn't go into that. My impressions of the family
16 were based on my meetings with them, the mom and dad.

17 Q Were you aware that there had been some hostility, in
18 fact, some Family Court action involving the -- her
19 biological father and her biological mother?

20 A We did not get into that.

21 Q Were you aware -- did anybody ever let it be known to
22 you that she had been exposed in that home to her mother
23 having sex with Gary Thompson, that she had seen that?

24 A No. If I knew that, I don't remember it.

25 Q And all of those things --

1 A She -- I think in that same session, she did talk
2 about her mother took off all her clothes, came in the
3 living room, and was shaking her -- shaking -- was having
4 some not really positive behavior.

5 Q But issues like that where somebody wrote -- oh, and
6 the other question was, were you aware that DSS had,
7 actually, investigated these folks at times because of the
8 condition of their home, that it was just so nasty and
9 unsanitary --

10 A Which folks are you talking about?

11 Q I'm talking about the home that she lived in with
12 Gary Thompson and with Jessica --

13 A No. I wasn't -- I didn't -- we didn't get into
14 that.

15 Q All of these things could be traumatic to a young
16 child, could they not?

17 A They could, yes.

18 MR. CHAMBERS: Thank you.

19 That's all the questions I have for you.

20 MS. SUSTAKOVITCH: Nothing from the State, Your
21 Honor.

22 THE COURT: Thank you, Mr. Garrett.

23 You may step down.

24 MS. SUSTAKOVITCH: May this witness be excused, Your
25 Honor?

1 THE COURT: Any objection?

2 MR. CHAMBERS: No, Your Honor.

3 THE COURT: All right. He's excused.

4 MS. SUSTAKOVITCH: Judge, may we approach briefly for
5 scheduling purposes?

6 THE COURT: Sure.

7 (WHEREUPON, a bench conference was held.)

8 THE COURT: We're at a good stopping point for lunch.
9 So just come back and be in the jury room back there at
10 2:00. And we'll start the case then.

11 Thank you.

12 Don't talk about the case. And continue to keep an
13 open mind.

14 (WHEREUPON, the jury was excused from open court at
15 approximately 12:42 p.m.)

16 THE COURT: See you all back at 2:00.

17 (WHEREUPON, a lunch break was taken.)

18 (WHEREUPON, State's Exhibit No. 17 was marked for
19 identification only.)

20 THE COURT: I understand we have the witness now.

21 MS. SUSTAKOVITCH: Yes, we do, Your Honor.

22 THE COURT: Is everybody ready?

23 MS. SUSTAKOVITCH: Yes, sir.

24 MR. CHAMBERS: Yes, sir.

25 THE COURT: Okay. Bring the jury in.

1 (WHEREUPON, the jury came into open court at
2 approximately 2:53 p.m.)

3 THE COURT: Ladies and gentlemen, I apologize for the
4 late start. We had some confusion about the time, but
5 nevertheless.

6 Ms. Sustakovitch, you may call your next witness.

7 MS. SUSTAKOVITCH: Thank you, Your Honor.

8 May it please the Court.

9 The State calls Dr. Nancy Henderson.

10 THE CLERK: Dr. Henderson, if you'll, please, place
11 your left hand on the Bible and raise your right hand.
12 WHEREUPON,

13 NANCY HENDERSON, M.D.,
14 after first having been duly sworn, testified as follows:

15 THE CLERK: Thank you.

16 Please be seated.

17 Please state your name for the record.

18 THE WITNESS: Nancy Henderson.

19 THE CLERK: Thank you.

20 DIRECT EXAMINATION

21 BY MS. SUSTAKOVITCH:

22 Q Good afternoon, Dr. Henderson.

23 A Good afternoon.

24 Q What is your occupation, Doctor?

25 A I'm a child abuse pediatrician.

1 Q And how long have you been a child abuse
2 pediatrician?

3 A Well, I became board certified in 2009. It's a new
4 sub-specialty in the area of pediatrics.

5 Q How long have you been a physician?

6 A I graduated from medical school in 1984.

7 Q It's a long time?

8 A Yeah.

9 Q Can you explain or describe to the jury your work
10 experience at this present time?

11 A Yes. I graduated from Bowman Gray School of Medicine
12 in Winston-Salem, North Carolina, and got my medical
13 degree. I then did a three-year pediatric residency at
14 T.C. Thompson Children's Hospital, which is in
15 Chattanooga, Tennessee. I worked there in the outpatient
16 clinic for a couple of years, and then moved to Greenville
17 in 1991, South Carolina.

18 So I'm board certified in medicine. I took my boards
19 in general pediatrics. I've been with Greenville Health
20 System since 1991, initially, in the area of general
21 pediatrics. And then I became sub-board in the area of
22 adolescent medicine. And then in 2009, I became sub-board
23 in the area of child abuse pediatrics. And that's,
24 primarily, what I do full-time now.

25 Q Thank you.

1 Can you elaborate a little further into your
2 particular training in the field of sexual assault and
3 abuse in children?

4 A Right. The -- well, prior to there being a board
5 certification, a lot of my work was done in evaluation of
6 outpatient concerns about abuse and neglect. And I was
7 working as a member of the hospital team, but working at
8 two different advocacy centers evaluating children who may
9 have been referred. A lot of those children were referred
10 for child sexual abuse concerns.

11 And then over the years, I became more involved in
12 inpatient concerns, which deals with a lot of physical
13 abuse and other areas of neglect. And then with the
14 addition of the sub-board in the area of child abuse in
15 order to qualify to, actually, take a three-hour written
16 exam, 50 percent of your practice had to involve child
17 abuse and neglect over a five-year period. And that had
18 to be referred to be able to have a placement for that
19 exam. And then that has to be recertified every 10 years.
20 And, along with that, you have to take continual medical
21 education credits to keep that certification.

22 Q And have you had occasion to perform exams on
23 children where there's a concern of sexual abuse or
24 assault?

25 A Yes, I have. As I had mentioned, even prior to

1 getting that sub-board, I examined approximately 200 to
2 300 children a year in the outpatient setting. And,
3 again, primarily those concerns are involving child sexual
4 abuse concerns.

5 Q And how many years have you been seeing 200 to 300
6 children a year?

7 A Probably, at least, for the last 10.

8 Q Okay. Have you ever testified in the courts of this
9 state in the area of pediatrics and child sexual abuse?

10 A Yes, ma'am.

11 Q And how many times have you testified, Dr. Henderson,
12 in that area?

13 A I'm probably in court probably two to three times a
14 month. Sometimes it's involving physical abuse or sexual
15 abuse concerns.

16 Q And have you ever been qualified as an expert in the
17 area of pediatrics and child sexual abuse?

18 A Yes.

19 MS. SUSTAKOVITCH: Your Honor, at this time, the
20 State moves to admit Dr. Henderson as an expert in the
21 area of pediatrics and child sexual abuse.

22 THE COURT: Any voir dire, Mr. Chambers?

23 MR. CHAMBERS: No, Your Honor.

24 I don't have an objection to her being qualified as
25 an expert in those fields.

1 THE COURT: All right. She's qualified.

2 Go ahead.

3 MS. SUSTAKOVITCH: Thank you, Your Honor.

4 BY MS. SUSTAKOVITCH:

5 Q Dr. Henderson, did you examine a child that's led you
6 to have to be in court today and testify?

7 A Yes, I did.

8 Q And did you examine a child by the name of Victim
9 Victim ?

10 A Yes, I did.

11 Q When did you first meet Victim ?

12 A I examined her on February 8th of 2007.

13 Q And what was the reason that she was referred to --
14 first, where was she -- when you examined her, where did
15 you examine her?

16 A I examined her at the Greenville Children's Advocacy
17 Center, which now is called the Julie Valentine Center.

18 Q And why was she referred in January -- you said
19 January or --

20 A February.

21 Q February, rather, 2007, to the Julie Valentine
22 Center?

23 A She was referred from Greenville DSS for concerns
24 about some sexualized behaviors and concerns about some
25 contact with a registered sex offender.

1 Q All right. How old was **Victim** at the time that you
2 performed this exam on February 8th, 2007?

3 A She was six.

4 Q And can you explain to the jury when you see a
5 six-year-old and there's -- they bring them in for a
6 concern about this or the other, what does the child have
7 to go through during that type of an exam?

8 A Sure. So what we do when children come in for
9 concerns about abuse and neglect, I have a child life
10 specialist that works with me. And she'll meet the child
11 and whoever is accompanying them, bring them back to the
12 exam room, and gives them an opportunity to kind of see
13 exactly what's going to happen that day.

14 So it's, typically, a complete head-to-toe physical
15 exam. So they get to just look at the otoscope and the
16 ophthalmoscope. And we, also, use something called a
17 colposcope, which is not anything invasive, but it allows
18 for an excellent light source and magnification of the
19 genital area. And the child gets to see all that, so that
20 they're not uncomfortable for the exam.

21 After that, I usually come in and spend some time
22 gathering health information from the caretaker that's
23 accompanying them. Because I'm not their ongoing medical
24 provider. And then I do try to talk to the child by
25 themselves, if they're able to separate from that

1 caretaker, to get a better understanding of why they're
2 there, what may have happened to them, what medical
3 concerns they have had.

4 And then I offer to them some choices as far as who
5 they'd like to have with them during the exam, anything to
6 make it more comfortable. And we use a lot of distraction
7 techniques now with the iPad. That's been the best
8 distraction for children so that they can feel more
9 comfortable during the exam, especially while I'm looking
10 at the genital area.

11 And so they can decide to have the caretaker with
12 them or not. And then the child life specialist stays
13 with them during the entire exam. We complete the exam,
14 and then let them get dressed, decide if we need to do any
15 tests for any kind of infections, based on the history and
16 based on the examination. And then, at the conclusion of
17 the exam, we let them get dressed and decide what needs to
18 happen from that point on from a medical standpoint.

19 Q All right. In February of 2007, when you saw **Victim**
20 who was her caregiver that brought her in for that exam?

21 A Her mom.

22 Q Her -- and what's her mother's name?

23 A Jessica Thompson.

24 Q So the child is accompanied with Jessica Thompson?

25 A Yes, ma'am.

1 Q Did the child disclose any abuse to you at that time?

2 A She disclosed a little physical abuse of being hit by
3 her dad, but did not disclose any sexual abuse.

4 Q And so the results of that exam as far as sexual
5 abuse, what would they be, Dr. Henderson?

6 A She had a normal exam at that time.

7 Q Okay. And we're going to discuss that further in a
8 minute. But let's go on to, did you have any other
9 interaction with **Victim** after that exam in February
10 of 2007?

11 A Yes. I saw her one more time.

12 Q All right. What date did you see **Victim** again?

13 A I saw her July 20th of 2010.

14 Q And why was **Victim** referred to you at this point?

15 A She was, again, referred for concerns about sexual
16 abuse. And a referral was made by DSS and law
17 enforcement, I believe.

18 Q All right. Take me back through -- first, before we
19 get into --

20 MS. SUSTAKOVITCH: I beg the Court's indulgence one
21 second here.

22 THE COURT: Sure.

23 BY MS. SUSTAKOVITCH:

24 Q First, before we get into the results of that exam,
25 Dr. Henderson, talk to me about -- educate the jury on

1 what it means to have a chronic exam versus an acute exam
2 when it comes to child sexual assault and abuse?

3 A So those terms of acute and chronic are really kind
4 of taken after what we think about as adult kind of rape
5 exams. And they have just kind of been transferred to --
6 the same terms have been transferred to children.

7 But an acute exam would be when the abuse assault has
8 occurred within a 72-hour time frame. And the reason why
9 it's considered acute is because most often those people
10 who have that type of exam disclose right away. They have
11 a new injury. They go right to the emergency room,
12 typically, to not only have their examination, but, also,
13 look for DNA evidence of what has happened to them.

14 And, usually, that type of collection is very, very
15 time sensitive. So the sooner after something like that
16 happens, the quicker the child is seen and the better the
17 collection of evidence. And that's what's considered an
18 acute exam.

19 The chronic exam is an examination done any time
20 thereafter, after that 72-hour period. And that,
21 typically, is what happens with children. The acute exam
22 is fairly uncommon. Children, typically, don't have
23 something happen to them and feel safe and disclose right
24 away.

25 So, for many reasons, there often is a delay in their

1 disclosure. And, sometimes, it's months or years before
2 they feel comfortable in talking about it. And those are
3 considered chronic exams.

4 Q So, in your practice, do you perform more often
5 chronic exams or acute exams?

6 A In the outpatient practice, we primarily are chronic
7 exams. Every now and again, we may get a call that
8 something has just happened. And we can divert a child
9 going to the emergency room. And we'd much rather see a
10 child directly ourselves than have to kind of see them two
11 step, see them in the ER and then, again, in our office
12 practice.

13 So we will see them -- it's pretty infrequent, maybe
14 a handful of times a year that we'll see an acute exam as
15 an outpatient. And, again, most of the inpatient exams
16 that we do are usually in the area of physical abuse. And
17 it's pretty rare for us to have to do an acute sexual exam
18 for an inpatient evaluation.

19 Q All right. And, in the delay in reporting, I believe
20 you touched on that. That's most common what you see at
21 the -- in your practice?

22 A Yes.

23 Q Going back to the exam on **Victim** [REDACTED]. As part of
24 your diagnosis and medical treatment of **Victim** did you ask
25 her what had happened to her, meaning what type of sexual

1 battery, if any, she had had performed on her?

2 A Are you referring to -- which exam?

3 Q The one from the summer of 2010.

4 A The second one?

5 Q In the matter of this case, yes.

6 A Yes, I did.

7 Q All right. And what did **Victim** state to you as far as
8 if a sexual battery had occurred?

9 A She had shared that someone had put their private
10 part in her private part, her front part and her back
11 part. She, also, had referred to them putting their mouth
12 on her chest.

13 Q Okay. Without stating the name of the person she
14 gave, if she did, did she relay to you whether she had any
15 symptoms when the -- something was put in her front part
16 and back part? Did she have -- relay any symptoms such as
17 pain, burning, anything like that?

18 A Let me just -- she did talk about pain, but she did
19 not talk -- she denied having any bleeding.

20 Q And so, as a doctor, for a patient to have a medical
21 history of vaginal penetration, anal penetration, and have
22 pain, what, if anything, does that mean to you?

23 A Well, those are very common questions that I ask all
24 the time. The information about bleeding is important.

25 Because when we look at -- in children when they

1 describe bleeding, the likelihood of having kind of
2 medical evidence on the exam, it's much higher if they
3 have that in their history. Because they are relaying
4 some type of trauma that caused some tear to the skin that
5 caused the bleeding. So when there is an absence of that,
6 there, certainly, is less common history of -- a less
7 common finding of something on the exam.

8 And pain, I think that is important because that is
9 just something else that adds to the information that
10 they're sharing, not only what happened, but how it felt.
11 So using some of the senses to disclose some of that
12 information is often very important.

13 Q Did **Victim** relay to you the time frame that this abuse
14 occurred?

15 A She said it had happened from when she was six till
16 nine, which is -- she had stated that's when she was nine
17 at the time I saw her.

18 Q And did she indicate to you the place or places where
19 the abuse took place?

20 A She did not share that with me.

21 Q All right. In the case of her medical exam, what
22 were the findings on your report listed?

23 A Her examination was normal.

24 Q Okay. And explain to the jury when you have a
25 history of vaginal penetration and anal penetration and

1 you say the exam is normal, does that to you, as a doctor,
2 indicate that abuse did not occur?

3 A No. And I think what she said to me was, you know,
4 his private part -- his genital part went in her genital
5 part. But children, especially young children, before
6 they go through puberty and really learn their anatomy,
7 they usually just have one term for their genital area,
8 whatever that might be. And it's often very varied.

9 So it's very common for me to hear in my practice
10 that someone has put something in their private area,
11 their -- whatever their term may be and it not -- it may
12 not necessarily be into the vaginal area like we consider
13 as true sexual intercourse. But it went into between the
14 labia into their genital area. And their disclosure is
15 very, very clear, but it's not in adult terminology.

16 Q So the fact that you don't see ripping and tearing
17 and all this on your exam, does that in any way indicate
18 to you that this child was not abused consistent with her
19 history?

20 A No. It absolutely does not mean that. A lot of
21 times -- again, it goes into the genital area. It causes
22 pain. But it doesn't cause any tears or actual trauma,
23 bleeding to that area. A lot of times, again, when there
24 is a delay in disclosure, if there are small tears or
25 abrasions, those areas can heal very, very frequently.

1 But the majority of time, about 90 percent or more,
2 children have normal exams when there is that type of
3 disclosure.

4 Q And when you have a disclosure of anal penetration,
5 is the fact that that exam comes back normal, does that in
6 any way indicate to you that that abuse did not occur?

7 A No. Even with anal penetration, it is even less
8 common to have findings on the exam. And I think it makes
9 perfect sense to me. Because the rectal area is a muscle.
10 It allows for things to -- that are large to come out.

11 So it's not surprising that things that are larger
12 can go in in the opposite direction without causing any
13 trauma. Again, just like the vaginal area, the rectal
14 area has an extremely good blood supply. So small tears
15 there can heal very, very well and, therefore, have a
16 normal exam.

17 MS. SUSTAKOVITCH: Please answer any questions from
18 Defense counsel.

19 CROSS-EXAMINATION

20 BY MR. CHAMBERS:

21 Q You testified you examined **Victim** on two
22 occasions; correct?

23 A Yes, sir.

24 Q All right. And the first time was on February the
25 8th of 2007; is that correct?

1 A Yes, sir.

2 Q Do you have your report with you?

3 A Yes, sir.

4 Q Okay. Now, when somebody comes in -- and you said
5 that you do 200 or 300 of these a year. You've been doing
6 it for 10 years. And this is, basically, what you've
7 decided you want to focus your career on; is that correct?

8 A Child maltreatment?

9 Q Yes.

10 A Yes.

11 Q So, in other words, at some point, you felt like that
12 was something that -- where you could contribute, this is
13 what you wanted to do, and this is pretty much what you do
14 at this point?

15 A I do that. And I, also, teach residents about
16 general pediatrics at the other part of any practice.

17 Q And so most of the time when you're getting a
18 referral, it's coming from the Children's Advocacy Center,
19 or the Julie Valentine Center, or someplace like that in
20 this area; is that correct?

21 A It's usually coming from the Department of Social
22 Services, law enforcement, another pediatrician, another
23 physician who has concerns for whatever reasons, yes, sir.

24 Q And one of the things you want to do, given that this
25 is your area of concentration, is when a child comes in,

1 you want to make them feel as comfortable and as safe as
2 possible; is that right?

3 A That's correct.

4 Q And you make it clear to them that you can be open
5 and honest with me, whatever you tell me, you're safe
6 here; is that right?

7 A Those are not words that I, typically, will say at
8 all to the child.

9 Q So you don't try to convey that to the child?

10 A I -- that's not anything that I will say. I just --
11 they know that they're here for a medical exam. And I
12 just ask them, you know, what happened, if they could
13 share what concerns they have about their body, what may
14 have happened, and those -- that's, typically, how I work
15 with them.

16 Q Now, this first exam, she came in with her mother,
17 Jessica; is that correct?

18 A That is correct.

19 Q And I believe that when you were getting the history
20 that you put in your report, It's --

21 MS. SUSTAKOVITCH: Your Honor, I'm going to object
22 as -- just to hearsay. The history is not from the child.
23 It's from the caregiver, Jessica, and various people. So
24 I would -- or we can approach and --

25 MR. CHAMBERS: Well, I would just say, Your Honor,

1 that, you know, she has made medical findings and she took
2 a history, which I believe is admissible.

3 THE COURT: Overruled.

4 MS. SUSTAKOVITCH: Okay.

5 BY MR. CHAMBERS:

6 Q But either Jessica or someone making the referral
7 indicated to you that there had been eight prior reports
8 made regarding this child; is that correct?

9 A That's correct.

10 Q And what were the nature of those reports? Do you
11 know?

12 A I don't know.

13 Q So you just know that there were reports made. And
14 by "reports," were those reports to DSS, reports to
15 police? I mean, when you wrote that, what was your
16 understanding?

17 A Reports to DSS.

18 Q All right. So DSS had been in the home where this
19 child resided, at least, eight times before she came
20 through your door for a medical exam?

21 A That was the information I received.

22 Q Okay. And did the mother indicate to you in giving
23 you the history that **Victim** had had -- shown some
24 sexualized behavior prior to this?

25 A Yes.

1 Q Did she expound on what she meant by that?

2 A She had said that she was rubbing herself a lot. And
3 that there was a lot of hitting with her -- another
4 person. But it was a lot of rubbing was what she had
5 shared.

6 Q And you indicated a few minutes ago that she didn't
7 disclose any sexual abuse, but she did say that her father
8 had hit her?

9 A At that first visit, yes, sir.

10 Q Okay. And the father you're talking about, if I read
11 your notes correctly, is, actually, her biological father,
12 BJ?

13 A That's what she had said to me.

14 Q Not Gary Thompson, who's seated over here?

15 A She did not share about Gary at that first visit.

16 Q In fact, she indicated to you that BJ hits her
17 sometimes on the leg, hits her all the time because he
18 doesn't like her and that she doesn't like him; is that
19 correct?

20 A That's what she said to me, yes, sir.

21 Q She, also, denied that she had ever been exposed to
22 any type of pornography; is that correct?

23 A That is correct.

24 Q And you said that when she was in there at this time
25 at age six that other than -- I believe there was some

1 contact dermatitis on her hands, but it was a normal exam?

2 A The physical exam was normal, yes.

3 Q Like I said, except for some -- I believe you noted
4 that she had contact dermatitis?

5 A Right. I think some dental cavities, but that was
6 the only findings on her exam, yes, sir.

7 Q That there were no tears, or scarring, or anything
8 like that to her genitalia or to her anus; is that
9 correct?

10 A That is correct.

11 Q There was nothing to indicate that she had been
12 physically abused in any way?

13 A I did not see any signs of that.

14 Q Okay. So then you saw her again on July 20th of
15 2010?

16 A That's correct.

17 Q So, roughly, three years later?

18 A That's correct.

19 Q All right. And, on this particular occasion, you
20 were aware when she came to you -- or before she came to
21 you that she had now made, supposedly, a disclosure that
22 she had been sexually molested; is that correct?

23 A There were concerns about that, yes.

24 Q All right. And she indicated to you that she had had
25 a grown man who had penetrated her vagina with his penis,

1 and penetrated her anus with his penis?

2 A Well, that's not exactly how she put it to me. But
3 she had said -- and I can -- she said that he put his
4 thing up her front part and back part.

5 Q All right. But that, obviously, would mean what I
6 just said, wouldn't it?

7 A No. I -- it doesn't. Because that's what I had just
8 explained that, you know, children, at that point, don't
9 really understand that they have a vagina, that they have
10 where they go to the bathroom from, kind of the whole kind
11 of vulva area. So they use one term to describe that --
12 their entire genital area.

13 So what she is saying, that he put his private part
14 up her genital area, you know -- and could it have been in
15 her vagina? That's, certainly, a possibility, but it
16 doesn't necessarily have to be.

17 Q So it could have been -- where else would it have
18 been?

19 A Well, there's a -- in your genital area, you have
20 your labia, which is the outer covering. And then
21 there's -- inside of that kind of the next area is called
22 your vulva area.

23 So, typically, what happens in children, there often
24 is a lot of contact of genital contact or digital contact
25 to that vulva area. It hurts. It's inside that labia.

1 Especially in pre-puberal children, it's very dry. They
2 don't have a lot of secretions. So it will cause pain if
3 it rubs up against their urethra, which is where they pee.
4 So, sometimes, it causes burning and irritation to that
5 area. And then there, also, is the vagina that's located
6 in that area as well.

7 Q So it sounds like that based on your physical
8 findings then that it's probably unlikely that an adult
9 male, actually, inserted his penis into this little girl's
10 vagina or into her anus?

11 A Well, as I mentioned talking about the front genital
12 area, you know, it is possible it went in. It's possible
13 it went in just a little bit. It possibly just went into
14 the outer part of that vulva area. All those things are
15 possible and her still have a very normal exam.

16 As related to the anus area, now, that's a -- that is
17 different in that you can have anal penetration, but
18 there's not a whole lot of area for the -- genital area --
19 male genital area to go, except into the rectal area.

20 Q We're talking about a girl who was ages six to nine,
21 according to when the disclosure was made?

22 A Yes.

23 Q Obviously, when -- both times that you saw her, she's
24 still growing. In fact, I would guess that she was quite
25 a bit more developed at age nine than she was when you saw

1 her at age six?

2 A No. She hasn't -- she hadn't started going through
3 puberty, even at the second time that I had seen her.

4 Q Okay. And so she wasn't menstruating at the time?

5 A No.

6 Q So it is extremely unlikely -- and I don't mean to be
7 overly graphic, that she would have -- as you said, she
8 would have been dry. In other words, there would have
9 been no type of lubricant or anything?

10 A No. They don't have a lot of secretions. A lot of
11 the estrogen that starts when you start going through
12 puberty was not there for her.

13 Q And so a normal-sized man entering a six to
14 nine-year-old girl, who doesn't have those secretions,
15 would cause a great deal of pain in all likelihood?

16 A That's true.

17 Q And, in all likelihood, it would cause some type of
18 bleeding?

19 A Well, it depends on where the male genital area went.

20 Q But if the male genital area, as she said, was
21 inserted into her vagina, in all likelihood, there would
22 be bleeding?

23 A Well, that's not -- she didn't use the term vagina to
24 me.

25 Q Well, she said her front part.

1 A Yeah.

2 Q Okay. So what you're saying then -- I mean, it seems
3 pretty clear that it is -- that your physical findings are
4 inconsistent with the male genitalia having been inserted
5 into this little girl's vagina?

6 A No. It's not inconsistent. Because when you go back
7 and look at the literature of children that have disclosed
8 penetration, like we just talked about, about 90 percent
9 of the children have normal exams. So it's not
10 inconsistent.

11 Q But you didn't find -- your exam was normal. You
12 didn't find anything?

13 A That's correct.

14 Q And she didn't report any bleeding?

15 A That's correct.

16 Q And there was no scarring?

17 A That's correct.

18 Q And there was no tearing?

19 A That's correct.

20 Q And there was nothing, except what she told you?

21 A What she told me, and it was part of her history.

22 Q And did she tell you in giving you the history that
23 she had made a similar report against her Uncle Mark?

24 A She did not share any information with me about that.

25 Q So she did not share with you that she had reported

1 earlier that Uncle Mark had stuck his penis into her anus?

2 A She did not share that with me.

3 Q Okay. And, again, in addition to not finding -- or
4 this being a normal exam and not finding any trauma to the
5 anal area or the vaginal area, you didn't find any -- you
6 didn't have any findings that would be consistent with
7 physical abuse of this child, did you?

8 A She did not have any bruises, scars, or anything like
9 that.

10 Q And when you talked to her in July, I believe she
11 told you that the last episode of this had been in --
12 around Easter?

13 A That's correct.

14 Q So that would have been, you know, two or three
15 months prior?

16 A Yes.

17 Q All right. And did she indicate to you that this had
18 happened on a frequent basis, in other words, that this
19 penetration that she alleges had happened a lot?

20 A She didn't give me an actual number. She said that
21 it had happened from ages six to nine.

22 Q Did you ask her about the frequency?

23 A I did not ask about the actual number. Because she
24 was getting a forensic interview as well. So whether it
25 happened five or 10 times, I'm still going to do the exact

1 same evaluation.

2 Q I understand. But if what she had said about this
3 was that it happened a lot, that it happened on a frequent
4 basis, wouldn't that make it more likely that there would
5 be physical findings?

6 A Not necessarily. Because it all goes back to exactly
7 as far as what happened, so.

8 MR. CHAMBERS: Okay. Thank you very much.

9 THE WITNESS: You're welcome.

10 THE COURT: Redirect?

11 REDIRECT EXAMINATION

12 BY MS. SUSTAKOVITCH:

13 Q Dr. Henderson, just briefly. You've studied lots of
14 literature related to sexual assaults and the case studies
15 on sexual assaults. And going back to you just testified
16 that in 90 percent of the cases where a child discloses
17 penetration, either to the anus or the vaginal area, the
18 exam comes back normal; is that correct?

19 A That is correct.

20 MS. SUSTAKOVITCH: All right. Thank you.

21 THE COURT: Thank you.

22 You may step down.

23 MS. SUSTAKOVITCH: Your Honor, may this witness be
24 excused?

25 THE COURT: Any objection?

1 MR. CHAMBERS: No objection.

2 THE COURT: She's excused.

3 You may call your next witness.

4 MS. SUSTAKOVITCH: Thank you, Your Honor.

5 The State calls Jessica Thompson.

6 THE CLERK: Ma'am, if you'll, please, come forward.

7 If you'll, please, pause at the end of the bench.

8 Place your left hand on the Bible and raise your
9 right hand.

10 WHEREUPON,

11 JESSICA TAYLOR,

12 after first having been duly sworn, testified as follows:

13 THE CLERK: Thank you.

14 Please be seated.

15 Would you, please, state your name for the record?

16 THE WITNESS: Jessica Natalie [phonetic] Taylor.

17 THE CLERK: Thank you.

18 DIRECT EXAMINATION

19 BY MS. SUSTAKOVITCH:

20 Q Jessica -- do you mind if I call you Jessica?

21 A Yes.

22 Q How do you know this Defendant?

23 A He's my ex-husband.

24 Q When did he become your ex-husband?

25 A March the 23rd of last year, I think.

1 Q You've been divorced since then?

2 A Yes, ma'am.

3 Q Explain to the jury -- you are a co-defendant in this
4 case; correct?

5 A Yes, ma'am.

6 Q And I am the Prosecutor on your case; correct?

7 A Yes, ma'am.

8 Q You have entered a guilty plea to unlawful conduct to
9 a child?

10 A Yes, ma'am.

11 Q And do you have any deal or agreement with me
12 whatsoever related to that guilty plea?

13 A No, I don't.

14 Q Do you understand that that charge carries up to 10
15 years potentially in jail?

16 A Yes, I do.

17 Q Are you here to testify truthfully today?

18 A Yes.

19 Q You have a problem with that sometimes; correct?

20 A Yes.

21 Q I will advise you you're under oath.

22 A Yes, ma'am. I understand.

23 Q Jessica, I want to go back. And point of
24 clarification, when did you enter your guilty plea? How
25 long ago was that?

1 A I really don't remember.

2 Q May of last year?

3 A It was last year, yes, ma'am.

4 Q All right. And you've met with me with your attorney
5 present to discuss your testimony in this case; correct?

6 A Yes, ma'am.

7 Q And you've met with me since to discuss your
8 testimony?

9 A Yes, ma'am.

10 Q All right. I want to take you back so the jury can
11 understand a little bit more about your family. When did
12 you meet Gary Thompson?

13 A I don't remember.

14 Q Okay.

15 A I was working at Bojangles', 2006.

16 Q All right. I'm going to show you what's marked as
17 State's Exhibit Nos. 8 and 9. I'm not trying to trip you
18 up. Take a look at State's Exhibit Nos. 8 and 9.

19 A (Witness complied.)

20 Q Do you recall giving a statement to law enforcement
21 when you were first arrested?

22 A Yes, ma'am.

23 Q All right. Just look at the very top of that
24 statement to refresh your recollection.

25 A (Witness complied.)

1 Q And would it be accurate that you met him in 2005,
2 actually?

3 A Yes, ma'am. It was right after I had my daughter,
4 **Minor**.

5 Q Okay. And you were working at Bojangles'. What type
6 of job did you have at Bojangles'?

7 A I was the cashier.

8 Q Did he work at Bojangles', or was he--

9 A He was a customer.

10 Q All right. So you and -- let's back up. You have
11 how many children?

12 A I have four living.

13 Q Four living. And you've lost a child?

14 A Yes, ma'am.

15 Q I'm sorry.

16 Prior to meeting this Defendant, who were you -- were
17 you married to anyone else? Who's the childrens father?

18 A Edward McMahan.

19 Q All right. And what are the names of your children?

20 A **Minor** **Minor**, **Victim** **Minor**, and
21 **Minor**.

22 Q So you're married to Mark [sic] for how long before
23 you two get divorced?

24 A Edward.

25 Q I mean -- excuse me, Edward. How long were you

1 married to him before you got divorced?

2 A Four years.

3 Q And when did you get divorced from Edward?

4 A 2004, because I was still pregnant with **Minor**.

5 Q All right. So you met Gary in 2005 when you were
6 working at Bojangles'. How long was it before you let him
7 move into your home?

8 A A month.

9 Q And when he moved into your home, who all lived in
10 your home?

11 A My mother, my four children, myself, and my brother,
12 Kenneth.

13 Q Okay. Where did you all live when you met him?

14 A Road.

15 Q And what county is that in?

16 A Greenville.

17 Q When did you get married to Gary Thompson?

18 A In 2006.

19 Q All right. You, Gary, and the girls, did you guys
20 stay put or did you move around a lot?

21 A We moved around a lot.

22 Q I want to take you back to some of the places that
23 you lived. You stated you lived at when you and
24 Gary got married?

25 A Yes, ma'am.

1 Q Where else do you recall living after that?

2 A [REDACTED] Street, Cleveland. We lived in a camper that
3 didn't have a physical address, one more place. We lived
4 like five places.

5 Q Jessica, I'm going to show you what's previously been
6 admitted as State's Exhibit Nos. 10 through 14. So you
7 started out at [REDACTED] when you first got married?

8 A Yes, ma'am.

9 Q Is that a trailer, a home? What was that?

10 A It's a trailer.

11 Q Okay. And were you working and Gary was working?
12 What was the situation?

13 A We was working off and on with Tommy Hartin that owns
14 Hartin Farms. We didn't, actually, have a physical job.

15 Q When you say "working off and on," what did Tommy
16 Hartin do?

17 A He's a farmer. He owns like a farm. And then he
18 owned a business right beside there that he sold his
19 produce at.

20 Q Okay. I'm showing you what's marked as State's
21 Exhibit No. 10. Now, you were just talking about
22 [REDACTED], then you moved to another location. Is this --
23 what is this location I'm looking at here?

24 A That's the camper, and Mary and Tom Hartin's
25 business. Their business is right there. And the camper

1 would be behind this tarp.

2 Q Okay. Was there a time when you, and this Defendant,
3 and your four girls lived in that camper?

4 A Yes, ma'am.

5 Q And when I'm talking camper, we're talking about this
6 right here with the blue tarp?

7 A Yeah. The camper is, actually, behind the blue tarp.

8 Q All right. Can you guess around about when you lived
9 there?

10 A I'm not too sure.

11 Q Looking at your statements, would around March of
12 2009 seem about accurate for that?

13 A Yes. Because it's before Mary and Tom opened their
14 business back up for the summer.

15 Q All right. And do you recall lying to DSS about you
16 guys living in this camper because you were afraid they'd
17 find out that the girls were all living in there on
18 tables, and you didn't have the proper amenities?

19 A Yes. Actually, it was -- the table let down and then
20 you put the cushions -- you put it out like a bed. So,
21 yes, that's true.

22 Q All right. But DSS got involved because they were
23 concerned the four girls were living in this camper, and
24 running water was an issue, that type of thing; correct?

25 A Yes. It had no water.

1 Q It had no water. Where would --

2 A It --

3 Q I apologize. Go ahead.

4 A It had power, but no water.

5 Q Where would you go to the bathroom?

6 A They, actually, had a port-o-john, I guess you call
7 it, the people that owned the place.

8 Q Mary and Tom, or someone else?

9 A Mary and Tom Hartin rented it from a company and
10 brought it out there, or we would go to Echo. And then we
11 would go to Mary and Tom's house, and eat supper, and take
12 a shower, and wash and dry clothes.

13 Q All right. This is another photograph of just the
14 camper. And I guess this is the gas station?

15 A That's Echo.

16 Q That's what?

17 A That's Echo Valley.

18 Q Okay. Do you recall living in this trailer on [REDACTED]
19 Road?

20 A Yes.

21 Q Was that after the camper?

22 A Yes, ma'am. Yes -- well, actually, we lived in one
23 more place before this one.

24 Q I'm sorry. Hold on.

25 I probably don't have pictures of all your addresses.

1 A Oh, yes, ma'am.

2 Q You did live in this address at some point; right?

3 A Yes, ma'am.

4 Q All right. And then -- you can refer to your
5 statement, if you need to. But up until about March of
6 2010, did you live over here on [REDACTED] Highway?

7 A Yes -- no. That's not [REDACTED] Highway. That's
8 Cleveland.

9 Q You're calling it Cleveland?

10 A Yes.

11 Q Is this within Greenville County?

12 A Yes.

13 Q All right. After that, where did you move?

14 A To [REDACTED] Street.

15 Q To [REDACTED] Street?

16 A [REDACTED] [REDACTED] Street.

17 Q [REDACTED] [REDACTED] Street is where you were, actually -- where
18 the children were taken by DSS; correct?

19 A Yes, ma'am. That's correct.

20 Q And they were taken -- do you recall the date when
21 they were taken?

22 A May the 17th of 2010.

23 Q Do you know why they were taken by DSS?

24 A They said that Gary Thompson went to the school and
25 had lunch with [REDACTED] Minor -- [REDACTED] Minor [REDACTED].

1 Q So DSS came in and took the children?

2 A Yes, ma'am.

3 Q After the children were gone, did Gary live in that
4 home again with you?

5 A Yes. He moved back in.

6 MS. SUSTAKOVITCH: I beg the Court's indulgence.

7 (Pause.)

8 BY MS. SUSTAKOVITCH:

9 Q During all these different places that you guys
10 lived -- and I didn't have photographs of all of them.
11 But were there times when you would be asleep and Gary
12 would be up with the girls, or you would be out at the
13 doctor, or wherever, but Gary would be alone with the
14 girls?

15 A Yes.

16 Q And did you ever notice any treatment of **Victim**
17 looking back, that was different from the other girls?

18 A Yes.

19 Q Explain that.

20 A Well, when I got on to **Victim**, he would sort of get on
21 to me for getting on to her, which, at the time, I didn't
22 understand, because I punish my kids all the same. But he
23 would get mad about **Victim** and **Minor** and not the others, like
24 he treated **Victim** different.

25 Q So he wouldn't get as mad at **Victim** about stuff? He'd

1 cut her some breaks is what you're saying?

2 A Yes, ma'am.

3 Q I want to go to your relationship with Gary. Was
4 Gary Thompson abusive to you?

5 A Yes.

6 Q Can you explain that?

7 A Well, there was one time [Victim] -- my daughter, [Victim],
8 went to the next door neighbor's house, Michael and
9 Cameron, some friends, and called the law. Because [Victim]
10 had -- Gary had me -- picked me up by my neck and had my
11 feet dangling against the wall. And [Victim] saw it and went
12 to the neighbor's.

13 And then one time, my mother -- when we lived at
14 [REDACTED], my mother saw him choking me in the closet.
15 And then there's another incident where my brother,
16 actually, took a chair and cut his eye open --

17 Q Okay. And I don't want to go into too much. But
18 Gary was abusive to you?

19 A Yes, ma'am.

20 Q Were you, during the relationship, scared of him at
21 times?

22 A Yes.

23 Q I want to talk about [Victim] and the fact that this
24 Defendant was abusing her in your home. Did [Victim] ever
25 try to tell you about the abuse?

1 A Yeah, she did.

2 Q Tell me what you remember about that.

3 A The very first time I remember washing dishes and she
4 kept on saying Gary was being mean to her. And I
5 thought -- at the time, I didn't think sexual abuse.

6 So I told her to go back to bed. And, you know, it
7 was bedtime. And then the next time she said Gary was
8 being mean to her and she took her hand and went like
9 that.

10 Q And isn't it a fact you said that **Victim** motioned to
11 her privates and said Gary was touching her there? Was
12 this the same night that you got jacked up on the wall,
13 or --

14 A No. It was a different night.

15 Q All right. So do you recall exactly when this is
16 that **Victim** is pointing to her genitals and saying that
17 Gary is hurting her?

18 A No. I just remember her telling me that.

19 Q Jessica, you're her mother.

20 A Yes, ma'am.

21 Q Why didn't you do something right then to help her?

22 A I was scared. And I didn't really think it was going
23 on.

24 Q Okay. I want to take you back to . Did you
25 ever see anything -- and you can refresh your memory with

1 your -- that statement. But did you ever see anything
2 where -- well, let me ask this first.

3 Did you ever yourself witness Gary Thompson sexually
4 abusing [Victim] meaning trying to put his private in her
5 front part, the back part, making her perform oral sex,
6 that type of thing?

7 A No. The only thing I witnessed is I was asleep on
8 our mattress because we didn't have a floor [sic], and the
9 computer was like at the foot of the bed. And [Victim] and
10 Gary was on the floor. And he was playing on the
11 computer. And when I woke up, his face was like -- looked
12 like it was down there. And [Victim] was closing her legs
13 real quick. And I asked what was going on. And Gary
14 Thompson said that he was tickling her.

15 Q When you say "down there," do you mean her crotch?

16 A Yes, ma'am.

17 Q Do you -- but that was one incident back -- where did
18 you live when that occurred?

19 A [REDACTED].

20 Q And, again, referencing your statement, is this
21 information you gave to the police back in 2010?

22 A Yes, ma'am.

23 Q All right. I'm going to show you what's been entered
24 as State's Exhibit Nos. 1, 2, 3, and 6. When you met with
25 me, did I show you some of the pornography that was

1 collected?

2 A Yes.

3 Q Will you take a look at State's Exhibit Nos. 1, 2,
4 and 3?

5 A (Witness complied.)

6 Q Did you and Gary Thompson have pornography in your
7 home?

8 A Yes.

9 Q And do you recall images such as this being part of
10 the porn that y'all had?

11 A Yes, ma'am.

12 Q Talk to me about the pornography. Specifically, in
13 this picture, we see a girl in stockings bent down. We
14 see a girl with no -- in State's Exhibit No. 2, what do
15 you see in that picture?

16 A A guy putting his privates up a girl's -- I mean
17 backside.

18 Q And she has on stockings with no bra; correct?

19 A Yes, ma'am.

20 Q I want to talk about your relationship with Gary
21 Thompson sexually. Did you have a sexual relationship
22 with your husband, meaning did you and Gary have sex?

23 A Yes.

24 Q All right. Did he have any particular preferences
25 related to stockings or anything like that that he made

1 you engage in?

2 A Yes.

3 Q Tell the jury about that.

4 A He told me -- he bought some stockings and made me
5 wear them. And he said that he would like to see my hair
6 up in ponytails. And I had small feet like little kids.
7 And he wanted me to call him "Daddy."

8 Q And he wanted you to pretend to be what?

9 A His little girl.

10 Q I want you to refer back to your statement from
11 September of 2010. Is that when you relayed that
12 information to police?

13 A Yes.

14 Q Jessica, what about your girls? We've heard about
15 2007 when DSS had a concern that he was living in your
16 home and, also, the girls were sexually acting out. Did
17 you observe **Victim** and the other girls acting in a
18 sexualized manner?

19 A Not together. But they would lay on their bed and
20 like put their hands on their self [sic] and move up and
21 down.

22 Q And as far as the children, **Victim** or any of the
23 girls, walking in and seeing you and Gary engaged in sex,
24 did that occur?

25 A Yes.

1 Q What happened when they walked in?

2 A I tried to stop and Gary said, No.

3 Q Gary didn't care if they saw that?

4 A No.

5 Q How often would that kind of behavior happen?

6 A It just happened once.

7 Q Is that referenced in your statement as well?

8 A Yes, ma'am.

9 Q I want to go back to talk about your ex-husband, not
10 Gary, but your first ex, the children's father, Edward.
11 You don't like him, do you?

12 A Not really.

13 Q All right. And I want to go back. During this time
14 when **Victim** is six, seven, eight years old, at some point
15 in there, did you tell your daughter to lie and say that
16 her uncle had sexually abused her?

17 A Yes.

18 Q Why?

19 A Because I was scared. I didn't want them to go back
20 down there. Gary told me it would be for the best for
21 everybody if the kids didn't go down there.

22 Q Do you understand what a big deal it is to tell a
23 child to say something like that?

24 A Not at the time. Now -- I realize now.

25 Q All right. Tell me again when you got divorced from

1 this Defendant. What was the date? Was it this past
2 spring?

3 A March the 22nd or 23rd.

4 Q When you were first arrested and you gave that
5 statement in September of 2010, what was your initial
6 contact like with this Defendant? When he was
7 incarcerated, did you write him and communicate with him?

8 A Yes.

9 Q What kind of things did you say to him?

10 A I told him I believed him, and I still loved him, and
11 that we was going to get through this. I thought
12 everything that was going on and what he was telling me
13 was the truth.

14 Q As far as the DSS involvement in your life, DSS has
15 been involved in your life many times; correct?

16 A Yes, ma'am.

17 Q And these cases were not specific to **Victim**, though;
18 is that correct?

19 A No, ma'am.

20 Q What were they about?

21 A Different things.

22 Q Like what? Running water? What are we talking
23 about?

24 A No. That just happened at the camper.

25 Q Okay. But these -- to be clear, these unfounded DSS

1 cases were not about your daughter [Victim] --

2 A No.

3 Q -- they were about -- give me some examples. What
4 other stuff?

5 A I'm not too sure. There was a bunch other -- well,
6 one was at [REDACTED] that -- because all the kids was
7 sharing one room. They had a problem with all four of my
8 kids sharing one room. That was one case.

9 And then there was another case they said that
10 somebody called in on us saying that all four of the kids
11 was in the green van by their self while we was in the
12 house. There was one case where they said we had roaches.

13 Q When you had roaches?

14 A Yes.

15 Q Okay.

16 A And that's the ones I can remember offhand.

17 Q Jessica, do you see any problem with moving in
18 someone you met for four weeks into your home with four
19 girls?

20 A I see a very big problem with it. I if I knew what I
21 know now, I wouldn't have.

22 Q Going back to [Victim]. Do you feel that you should
23 have done anything different by your daughter when she
24 told you and pointed to her vaginal area and said she was
25 being hurt? Do you feel that you should have done

1 something different then to help that child?

2 A Yes.

3 Q Do you feel, as a mother, that you did for her what
4 you should have done?

5 A No.

6 MS. SUSTAKOVITCH: Please answer any questions
7 Defense counsel has.

8 CROSS-EXAMINATION

9 BY MR. CHAMBERS:

10 Q Now, how many -- you have four daughters; is that
11 correct?

12 A (Witness nodded.)

13 Q And tell me again, what are their names?

14 A [Minor], [Victim], [Minor], [Minor] [redacted].

15 Q All right. And what are their age?

16 A 14, 13, 11, and nine.

17 Q So is [Victim] the second oldest?

18 A Yes.

19 Q So how old was she when you and Gary hooked up with
20 each other?

21 A I don't know.

22 Q You don't remember. So what year was it?

23 A 2005.

24 Q All right. So she would have been about five; is
25 that correct?

1 A That -- yeah. Because she started kindergarten at
2 Slater.

3 Q All right. And y'all dated for a while and then he
4 moved in. You were still married to BJ when y'all first
5 moved in together, weren't you?

6 A Yes.

7 Q Okay. And so how old were the two younger daughters
8 at that point?

9 A **Minor** was a newborn. And **Minor** would have been three.

10 Q Okay. And after you moved out, broke up with BJ, and
11 y'all weren't living together, what was -- did BJ see the
12 kids?

13 A No.

14 Q And why is that?

15 A I don't -- to tell you the truth, I really don't
16 know. I had to pay his mother gas money to come see the
17 kids.

18 Q Did you keep the kids from him?

19 A No.

20 Q Did you have a problem with the kids going over
21 there?

22 A No -- well, not until I met Gary.

23 Q Okay. But you didn't -- so you didn't have a problem
24 with them going over there, but BJ didn't exercise any
25 visitation?

1 A No.

2 Q All right. Now, two of your children have some sort
3 of a disability; is that correct?

4 A One of my child [sic] has a disability, not two, only
5 one.

6 Q And which one is that?

7 A That's my oldest daughter, [Minor]. She's got
8 Downs.

9 Q She has Downs Syndrome. And she draws a check each
10 month; is that correct?

11 A As to my knowledge, she still draws it.

12 Q And do you know how much it is?

13 A Not now, no.

14 Q When you knew something about it, was it around \$700,
15 give or take, a month?

16 A No. It was six something a month when I had her.

17 Q Okay. Six something.

18 All right. So wherever she goes, that check goes
19 with her; is that right?

20 A That would be correct.

21 Q Now, let me ask you about BJ. Does BJ have any kind
22 of disabilities?

23 A Not -- it hasn't been proven.

24 Q Okay. But he's not one who's able to work very well;
25 is that right?

1 A He has a job. He's been working since I've been
2 knowing him. So, to be truthful, I don't know. He's been
3 holding a job down for 15 years.

4 Q Okay. And, as already indicated, I mean, you've had
5 a pretty unstable life; is that correct?

6 A What do you mean "unstable"?

7 Q Well, you -- as you indicated with the Solicitor, you
8 moved on several occasions while the children were very
9 young?

10 A To be honest with you, sir, until I met Gary
11 Thompson, I lived in one place and one place only.

12 Q But you met Gary Thompson --

13 A Yes.

14 Q -- and you were living with Gary Thompson. And so
15 y'all moved several times while these children were very
16 young; is that correct?

17 A Yes, sir.

18 Q And the living conditions in most of these places
19 were very poor; is that correct?

20 A No.

21 Q Well, we heard issues about no running water, about
22 roaches. I mean, you've been investigated by DSS on eight
23 separate occasions.

24 A Well, actually, that's true. But all the cases was
25 unfounded when DSS came out there and we -- and they

1 checked it. Only when we got locked up and when the kids
2 got took when I was with Gary. So I don't see your point
3 when all the cases was unfounded, but this one.

4 Q Okay. So you were investigated all those times --

5 A Yes.

6 Q -- and you say that they were all unfounded?

7 A Yes, besides one.

8 Q All right. And sometime around 2010 -- or was it --
9 2009 is when **Victim** made this allegation against her Uncle
10 Mark; is that right?

11 A Yes.

12 Q And she was around her Uncle Mark at times; is that
13 correct?

14 A I don't remember. But there was one time, but, no...

15 Q And are you aware that the specific allegation that
16 she made -- it was very specific -- is that he put his
17 private part in her behind?

18 A No. Because I wasn't told exactly what she said.

19 Q All right. Do you remember that when you took **Victim**
20 in and she made the disclosure that you had told her that
21 she needed to tell the truth about what happened?

22 A Yes.

23 Q And then that's what she told the police -- or she
24 told them something?

25 A Yes. But I do not know what **Victim** actually, said.

1 That was not disclosed to me.

2 Q So if she said to the police that he put his private
3 in her behind, that's not something you told her to say?

4 A No, I did not.

5 Q All right. So if she said that, that was her own
6 words then?

7 A Once again, I have no idea what she has said.

8 Q All right. But you said you were the one that told
9 her to say it?

10 A I didn't tell her what to say.

11 Q Well, how would she know what to say if you didn't
12 tell her?

13 A I don't know. I am -- I didn't -- I'm telling you
14 the only thing I told her, if they asked, was to say Mark
15 touched her. I didn't tell her to tell them that he put
16 his thing in her behind. That was not -- I did not say
17 that.

18 Q So you got her at some point and you sat her down and
19 you said, okay, **Victim**, I've got something I want to talk
20 to you about. I want you to go tell a lie about your
21 Uncle Mark and I just want you to say that he touched you?

22 A Yes. I did not use the word penis. I did not use
23 the word behind. I didn't say that.

24 Q And she just said yes. And then everything unfolded
25 from there. Is that what your testimony is today?

1 A I'm just telling you exactly what I said.

2 Q Well, what exactly did you say?

3 A I told her to tell her -- whoever asked that Mark
4 touched her. I did not use the word penis. I didn't use
5 the word butt.

6 Q Okay. So how did you know somebody was going to ask
7 her?

8 A I don't know.

9 Q Did you call?

10 A No. Why would I -- I don't know -- why would I call
11 on my own self? I mean --

12 Q Well, you said you're telling her to tell a lie. Did
13 you call the police and say, hey, my daughter --

14 A Why would I call the police and get DSS involved with
15 my family?

16 Q That's a good question. So could it be that you
17 didn't tell her to lie?

18 A I didn't -- you're trying to sit here and say that I
19 said something that I didn't say.

20 Q Well, I mean, but you're the one that brought it up.
21 That's where I'm going. You said that you told her to
22 lie. And, yet, you seem to be having trouble telling me
23 what it is you told her to say?

24 A The only thing I told her if anybody asked -- because
25 Gary is the one that said it would be for our families

1 best interest to say that it was her Uncle Mark.

2 Q But you said you're the one that talked to her.
3 You're trying to drag Gary into it. But aren't you the
4 one that talked to her?

5 A Yeah. Because I told her exactly what Gary told me
6 to say.

7 Q Okay. And, apparently, what he -- according to you,
8 what you told her was simply, if anybody asks, just say
9 Mark touched you. But you didn't get any more specific
10 than that --

11 A I did not say -- I'm not trying to be smart. But I
12 did not use the word penis. I did not use the word butt.

13 Q So if she said that, that didn't come from you?

14 A No.

15 Q All right. And you said, in response to the
16 Solicitor's questions, that these girls were showing
17 sexualized behavior; is that right?

18 A Yes.

19 Q And not just **Victim**?

20 A No, **Minor**, too.

21 Q And you said that they were touching themselves?

22 A That would be correct.

23 Q Would it be as if they were masturbating themselves?

24 A I don't -- I guess.

25 Q Well, where were they touching themselves?

1 A They was touching their privates laying on their beds
2 going up and down.

3 Q Okay. Well, so would that -- that would be then
4 masturbation. Would that not be fair to say?

5 A I guess.

6 Q All right. And did you tell them to stop?

7 A Yes. I got on to them and told them that was
8 inappropriate.

9 Q Okay. And so that's what you said to them, that's
10 inappropriate?

11 A Yes.

12 Q Did it continue?

13 A Yes.

14 Q All right. And did you just keep telling them it was
15 inappropriate?

16 A No. I talked to them and told them that it was
17 inappropriate, little girls shouldn't act that way. And I
18 asked them where did it came [sic] from.

19 Q And you said that on, at least, one occasion that
20 they witnessed you and -- or, at least, **Victim** witnessed
21 you and Gary having sex with one another?

22 A I didn't say who witnessed. She asked me did my kids
23 witness.

24 Q Okay. Well, which kids witnessed?

25 A I don't know. I guess all of them was in there. I

1 don't know. I just know I saw my kids in the hallway and
2 I tried to stop.

3 Q So all the kids walked in on you having sex?

4 A I said I didn't know. I saw kids in the hallway.
5 Because we slept in the living room on the let-out [sic]
6 couch.

7 Q And, by and large, y'all lived in very close quarters
8 at just about everywhere that you lived, didn't you?

9 A Yes.

10 Q And there was pretty much always somebody there?

11 A Yes.

12 Q All right. If -- I mean, the kids were pretty much
13 always together. And you had four of them?

14 A Well, actually, some of them would stay outside, some
15 would go inside. They didn't, actually, stay altogether
16 all at one time.

17 Q And you weren't gone from the house very often?

18 A Well, I would go to my rent lady and pay the
19 rents [sic].

20 Q But that's just right there in the same area; right?

21 A It's across the road.

22 Q Okay. And I don't know if you were in here when
23 **Victim** testified. Would it surprise you to know that her
24 testimony was that you were always there?

25 A That's not true.

1 MS. SUSTAKOVITCH: Your Honor, I would object to
2 pitting at this point.

3 MR. CHAMBERS: I'm sorry, Your Honor. I'll move
4 along.

5 BY MR. CHAMBERS:

6 Q And you and Gary engaged in sexual intercourse with
7 each other on a fairly frequent basis; correct?

8 A No.

9 Q You didn't?

10 A No.

11 Q You just said that he -- that y'all would have sex
12 and he bought some stockings for you to wear?

13 A That don't mean we had sex all the time.

14 Q And were the stockings like the ones that were in
15 that picture?

16 A They was white and some black ones. But the black
17 ones he had prior to us getting together in his red bag.

18 Q Were they like the ones that were in that picture?

19 A Yes.

20 Q Okay. So grown-up lady stockings?

21 A Yes.

22 Q Okay. And you indicated that you were constantly
23 physically abused by Gary, and that you lived in fear?

24 A Yes.

25 Q And, yet, you were with him for how many years?

1 A Well, I left him and got back with him.

2 Q And he -- so you left him and came back?

3 A Yes.

4 Q So this person that you were afraid of, you,
5 actually, moved out and decided I think I'll go back?

6 A Yes.

7 Q Okay. And he -- you said that somebody called the
8 police a couple of times. He was never charged with
9 criminal domestic violence, was he?

10 A No. When **Victim** called the law, they took him to JD
11 and Linda's house.

12 Q And you've had -- I mean, it's not like -- I mean,
13 you were able to walk away from one husband. So if
14 another husband was being abusive and you were scared of
15 him, you wouldn't have any problem walking away from him
16 either?

17 A Well, see, that's where you've got everything wrong.
18 My first husband left me when I was at work.

19 Q Okay. Well, I -- you talked about this a little bit
20 and I want to go into it a little bit. Once he was
21 arrested, Gary, he was taken to jail. He's been in jail
22 pretty much ever since; right?

23 A Yes.

24 Q All right. And, at that point, you didn't have to
25 have anything else to do with him, thank God; right?

1 A Yes.

2 Q But what did you do?

3 A I wrote letters and went and saw him.

4 Q You wrote letters to him just about every day, didn't
5 you?

6 A No.

7 Q Over -- for the better part of two years, you were
8 writing him on almost a daily basis.

9 A Well, that won't [sic] be true. I wrote him a lot,
10 but not every day.

11 Q So you -- not every day, but a lot?

12 A Yes.

13 Q More than once a week; right?

14 A Probably.

15 Q And, sometimes, you would give him an envelope that
16 had two or three letters in it, wouldn't you?

17 A Not -- probably. I don't remember.

18 Q And you called him on the phone, y'all talked?

19 A No. He called me. I can't call him.

20 Q I understand. But you made it possible. I mean, if
21 somebody calls from the jail, it's not going to go through
22 unless you've made arrangements for them to be able to
23 call you; right?

24 A Actually, he would call Mary Hartin and Mary Hartin
25 would accept the calls and hand me the phone.

1 Q All right. Well, you took his calls?

2 A Yes.

3 Q You talked to him?

4 A In the beginning, yes.

5 Q Well, for the better part of two years; right?

6 A No. That's not true.

7 Q And you even went to the jail to see him?

8 A At first, yes.

9 Q Well, you say "at first," but from 2010 well into
10 2011, you were going to the jail to see him?

11 A That's not true. I quit seeing him.

12 Q All right. And the only reason you ever quit seeing
13 him is because you started a relationship with a guy,
14 Steven, the guy that you're with right now; is that not
15 correct?

16 A No. I quit seeing Gary before I got with Steven.

17 Q And, as you already indicated, you shared with Gary
18 when you talked to him that everything was going to be all
19 right, because he hadn't done anything wrong?

20 A He convinced me he didn't.

21 Q Well, this is a person you claim to just be petrified
22 of, scared of. You didn't have to have anything to do
23 with him, but you did. And, now, you're coming in here
24 and testifying saying he convinced you that he didn't do
25 anything; is that right? Is that what you're saying?

1 A Yes. I mean, when you're scared of somebody, you'll
2 do whatever.

3 Q But you didn't have to be afraid of somebody that was
4 in jail, did you?

5 A No.

6 Q All right. You didn't have to have anything to do
7 with him at that point, did you?

8 A No. And when I come to realize what he was and who
9 he was, I quit having anything to do with him. I tried to
10 get a divorce from him for three years.

11 Q You're aware of the fact, aren't you, that this whole
12 investigation into Gary was started by a report made by
13 BJ's mother; right? You knew that.

14 A No. I, actually, didn't know who filed the report.

15 Q And you knew that it started after visitation had
16 started back up with BJ; right?

17 A Once again, you're trying to make me say something
18 that I did not know, and I did not realize it. I don't
19 know who made the report. I just know we went to jail.

20 Q Okay. Well, let's put aside who made the report.
21 The report came about after BJ started exercising
22 visitation again with **Victim**; is that right?

23 A No.

24 Q That's not right. Okay.

25 A Can you repeat your question?

1 Q So, in other words, there was a period of time you
2 already said when BJ didn't visit with **Victim** or any of the
3 kids?

4 A That's correct.

5 Q And then there was a weekend, I believe, in 2010
6 where visitation started again with BJ; is that right?

7 A No. That's not correct.

8 Q So there was never any visitation?

9 A Yes. When we lived over at **[REDACTED]**, it was
10 Christmastime.

11 Q Okay. Sometime after that is when these allegations
12 came up; is that right?

13 A I guess.

14 Q Okay. And you don't -- you're telling me today that
15 you don't remember ever saying that BJ and his family
16 started this whole thing because they wanted to get
17 custody?

18 A For the last time, I have no idea, no idea who made
19 the allegations against Gary and me. The only thing I
20 know is September the 21st of 2010, we got locked up.
21 That's all I know. I don't know who called in and who
22 made a report. I don't know what was said and who said
23 it.

24 Q All right. And, as you sit here today, you pleaded
25 guilty to what?

1 A I -- whatever I got charged with.

2 Q You don't know what it was?

3 A Child negligence.

4 Q Okay. And, as the Solicitor said, you're facing 10
5 years?

6 A Yes. That's correct.

7 Q But you haven't been sentenced yet, have you?

8 A No, I have not.

9 Q All right. Now, this case was scheduled for trial
10 once before, wasn't it, back in November?

11 A I guess so.

12 Q Do you remember getting subpoenaed to be here?

13 A Yes.

14 Q And do you remember the day before you were supposed
15 to come in here and testify calling the police and telling
16 the police that Gary had made a phone call to you
17 threatening your life?

18 A Actually, I told a deputy that knows me at my
19 workplace that.

20 Q Okay. But, at any rate, you made a report that he
21 had threatened your life if you came to testify; is that
22 right?

23 A (There was no response.)

24 Q That he even -- you said he even said, I hired a hit
25 man to come while you're asleep and put a shotgun in your

1 mouth and blow your head off so you can't talk anymore.

2 Do you remember that?

3 A Yes.

4 Q You made all that up, didn't you?

5 A Yes.

6 Q Every bit of that?

7 A Yes.

8 Q You called the police and made that report because
9 you didn't want to have to come in her and testify, did
10 you?

11 A No. That's not true.

12 Q Well, that's a pretty elaborate lie to call the
13 police and tell.

14 A I didn't call the police. I went and talked to a
15 deputy that I knew and told him that I was afraid. Then I
16 called Christy and told her that on her voice mail.

17 Q All right. So you -- but you reported it to the
18 police and you called the Solicitor about it?

19 A Yes.

20 Q And, as a result, they started a police
21 investigation. And that's what you told them, that
22 elaborate lie that I just read to you; is that right?

23 A Yes.

24 Q And then they checked into it. It's pretty easy to
25 find out whether somebody has called from the jail or not;

1 am I right?

2 A I -- yes, I guess.

3 Q I mean, they keep records of that and they record
4 those phone calls, don't they?

5 A Yes.

6 Q And guess what? He never made a call to you, did he?

7 A No.

8 Q You flat-out lied?

9 A Yes.

10 Q And so you've admitted today that you've lied -- you
11 lied to the police. And, I mean, you've admitted lots of
12 lies. I mean, basically, you're a pretty practiced liar,
13 that would be fair to say, would it not?

14 A No.

15 Q You're not?

16 A No. I was scared. I mean, when you go in front
17 of -- I've never been in trouble a day in my life up until
18 now. I was scared.

19 Q Just scared --

20 A I was --

21 Q So being scared makes you lie --

22 A -- scared --

23 THE COURT: Wait, wait. Y'all just let each other
24 finish.

25 Go ahead.

1 THE WITNESS: I was scared. I was terrified. I have
2 never been in trouble, never. Not one time have I been in
3 trouble.

4 BY MR. CHAMBERS:

5 Q And you're scared of whether you're going to go to
6 prison or not, aren't you?

7 A Who wouldn't be?

8 Q Because you pleaded guilty over a year ago; right?

9 A (There was no response.)

10 Q Well, about a year ago.

11 A I don't know.

12 Q It was a long time ago, though. It didn't happen
13 just yesterday, did it?

14 A Well, of course not, no.

15 Q And you haven't been sentenced yet?

16 A No.

17 Q Now, you said with the Solicitor that they hadn't
18 made any promises. You don't have any deals; is that
19 right?

20 A That's correct. She has not promised me not one
21 thing. The only thing she said over and over is I'm
22 facing 10 years. She has told me that more than once.

23 Q But, clearly, they wanted to wait and see how you
24 testified here today before you had to stand in front of a
25 judge to be sentenced.

1 A I don't know. Once again, I have never been in
2 trouble. So all of this is new to me.

3 Q And so it would be reasonable to assume that there's
4 some expectation on your part that based on your
5 cooperation, they're going to go easy on you when you're,
6 finally, sentenced?

7 A Well, again, Christy has told me more than once that
8 I'm facing 10 years. Nobody has offered me nothing
9 besides them telling me that I am facing time. They have
10 not promised me not one thing.

11 Q But they made sure before you came in and testified
12 today that you knew you were facing time; right?

13 A Well, I knew from when I got locked up I was facing
14 time.

15 Q And so you gave them the statement. And you talked
16 to them before coming in here. And you came in here and
17 you testified?

18 A Yes.

19 Q And, yet, when you were talking to Gary, do you
20 remember indicating to him that the only reason you ever
21 gave a report to the police is they told you what to say
22 and you signed it?

23 A No. I did not say that.

24 MR. CHAMBERS: All right. That's all the questions I
25 have for you.

1 Thank you.

2 THE COURT: Redirect?

3 MS. SUSTAKOVITCH: Very briefly on redirect.

4 REDIRECT EXAMINATION

5 BY MS. SUSTAKOVITCH:

6 Q Point of clarification. Your statement to police,
7 again, was given September 20th of 2010; is that accurate?

8 A That's correct.

9 Q So it would be a fact that you didn't just get talked
10 to and told what to say and come in this courtroom?

11 A No.

12 Q You documented your statements that you've told this
13 jury on that statement from three years ago; is that not a
14 fact?

15 A That's correct.

16 Q Well, before you met me or anybody related to this
17 courthouse; correct?

18 A Even before I met my own lawyer.

19 Q Okay. Going to the masturbation. You talked about
20 that. You stated -- you were talking about where did the
21 girls learn that from and the sentence got cut off. Where
22 did the girls learn the masturbation from?

23 A They said Gary.

24 Q They said Gary taught them. Okay.

25 And then as far as the stockings that you say you had

1 some of these similar to what's in the pornographic
2 videos. Did Gary ever make statements to you about
3 whether the police got all the porn?

4 A No.

5 Q What did he say about the porn and whether the police
6 got all the porn?

7 A He said they didn't get all of it. He's told me --
8 he took CDs before and put them in the microwave, and told
9 me that if you burn the CDs, they can't find out what's on
10 them.

11 Q Very briefly, timeline wise. Jessica, the testimony
12 you've given is that you did tell **Victim** to make this story
13 up?

14 A Yes.

15 Q And your statement was Gary said it was in our
16 families best interest to say that your ex-husband's
17 brother touched her?

18 A Yes.

19 Q And I believe your testimony was so that the kids
20 wouldn't have to go back to BJ's house; right?

21 A That's correct.

22 Q And Gary said that that was in your families best
23 interest; correct?

24 A That's correct.

25 Q And isn't it, also, a fact that that story that you

1 told the child to make up came out first. And then in the
2 summer of 2010, when [Victim] was in there over that very
3 allegation about whether something had happened with Uncle
4 Mark, the disclosure about Gary came out; is that not a
5 fact?

6 A Yes.

7 Q And then after the disclosure about Gary, that's when
8 you --

9 MR. CHAMBERS: At this point -- objection, Your
10 Honor. At this point, she's leading her witness.

11 THE COURT: Sustained.

12 BY MS. SUSTAKOVITCH:

13 Q Were you arrested in September of 2010?

14 A Yes.

15 Q Last point. Before this case was called to court in
16 November, you called in and made up a story, the one that
17 Mr. Chambers just went through with you; correct?

18 A Yes.

19 Q Are you aware -- you spoke with Investigator Ty
20 Bracken; correct?

21 A Yes.

22 Q Are you aware that she got a warrant for your arrest
23 for lying about Gary saying he was going to put a gun in
24 your mouth and all of that? You're aware of that?

25 A Yes.

1 Q And a judge didn't issue the warrant, but she tried
2 to get one?

3 A Yes.

4 Q Do you understand how serious it is what we're doing
5 today?

6 A It's very serious.

7 MS. SUSTAKOVITCH: I have no further questions.
8 Thank you.

9 THE COURT: Redirect -- recross? Excuse me.

10 MR. CHAMBERS: Nothing else, Your Honor.

11 THE COURT: You may step down.

12 Thank you, Ms. Thompson.

13 MS. SUSTAKOVITCH: Your Honor, may this witness be
14 excused?

15 MR. CHAMBERS: No objection.

16 THE COURT: Yes. Yes, ma'am.

17 MS. SUSTAKOVITCH: Thank you.

18 That would conclude the State's witnesses for today.

19 THE COURT: Ladies and gentlemen, we're just going to
20 resume in the morning. And this case seems to be jinxed
21 somewhat on the scheduling. I have to go to a
22 presentation of the Chamber of Commerce in the morning
23 that's been scheduled for a long time.

24 So just be back in the jury room at 10:00 and we'll
25 start then. Hopefully, we'll complete the case tomorrow.

1 But don't do any outside investigation and continue
2 to keep an open mind. And we'll see you back at 10:00.

3 Thank you.

4 (WHEREUPON, the jury was excused from open court at
5 approximately 4:12 p.m.)

6 THE COURT: Anything else before we break?

7 MS. SUSTAKOVITCH: No, sir. Nothing from the State.

8 MR. CHAMBERS: No, Your Honor.

9 THE COURT: All right. Let me just --

10 Mr. Thompson, you're still under oath, sir. I just
11 want to go over your right to testify or not. You can
12 stay right -- he can stay right where he is.

13 MR. CHAMBERS: Okay. You can sit down.

14 THE COURT: You have the right to testify in this
15 case and present any evidence you wish to. If you do
16 testify, sir, you just need to be aware that you'd be
17 subject to being cross-examined, just as your lawyer
18 cross-examined the State's witnesses. That means you can
19 be asked about anything that might bear on your
20 credibility, or might be relevant to the case, or anything
21 that might be admissible in terms of impeachment as far as
22 a prior record that you may have.

23 If you don't testify, obviously, the jury wouldn't
24 have the opportunity to hear about any prior record, other
25 than what they've already heard. And if you didn't

1 testify, you would, also -- if you didn't testify or
2 present any evidence, you would, also, have the right to
3 have your lawyer make the last final argument in front of
4 the jury. Of course, he will make a final argument no
5 matter what. But if you don't present evidence, you, as
6 the Defendant, would be entitled to the final closing
7 argument. Otherwise, the State gets the final closing
8 argument, if you do present evidence.

9 So whether you testify or not is entirely up to you,
10 sir. It's your right. It's a personal right to you. You
11 just have to make sure you understand the consequences of
12 testifying or not testifying.

13 And if you choose not to testify, of course, I'll
14 tell the jury, as I've already told them, that you don't
15 have to produce any evidence in the case. The burden of
16 proof is entirely on the State. And I'll further tell
17 them that they can interpret your failure to testify -- or
18 your choice to claim your Constitutional right to not
19 testify, they cannot interpret that in any way that is
20 unfavorable to you. And they can't draw any kind of
21 conclusion from it. Because you do have a
22 Constitutionally-guaranteed right to silence.

23 Do you understand all of those things, sir?

24 DEFENDANT THOMPSON: Yes, sir.

25 THE COURT: Do you have any questions of me about

1 your right to testify or not testify?

2 DEFENDANT THOMPSON: No, sir.

3 THE COURT: And you don't have to tell me your
4 decision now. I just want to make sure you understand
5 those things. I know you've gone over it with your
6 lawyer, and you'll confer further with him about your
7 choice, and the strategic reasons for your choice. But I
8 just want to make sure you understand all of that.

9 Thank you.

10 DEFENDANT THOMPSON: Yes, sir.

11 THE COURT: All right. Thank you very much.

12 (WHEREUPON, the proceedings were concluded at
13 approximately 4:15 p.m., to be reconvened on
14 Wednesday, January 15, 2014.)
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1 WEDNESDAY, JANUARY 15, 2014

2 (WHEREUPON, State's Exhibit Nos. 18 and 19 were marked
3 for identification only.)

4 THE COURT: Anything before we bring the jury in?

5 MS. SUSTAKOVITCH: Just very briefly, Judge.

6 THE COURT: Okay.

7 MS. SUSTAKOVITCH: The Defense counsel and the State
8 have spoken about the redacted copies of the interviews
9 here.

10 THE COURT: Right.

11 MS. SUSTAKOVITCH: There are two options. One was
12 where the audio was muted and you could still see moving
13 pictures. And the next one we did was -- basically, will
14 flash -- move slowly to black and come back. We asked
15 Defense counsel which one they preferred. The one with
16 moving pictures makes it very obvious there's a big chunk
17 that's taken out. There's really no way to not have it be
18 apparent at some point. But Defense counsel opted for the
19 one where there's a small break with a flash to black and
20 it comes back.

21 MR. CHAMBERS: That's true, Your Honor.

22 I think -- in my mind, it's preferable to having
23 people talking and them not being able to hear. I know
24 what's going to happen. They're going to come back and
25 say, can we hear what was being said, so.

1 THE COURT: All right.

2 MS. SUSTAKOVITCH: And, Judge, the last thing. I may
3 have missed it, but just my motion by way of the record
4 and keeping it clear. Did Your Honor put on the record
5 anything related to the interviews and their totality as
6 far as under 17-23-175(B), whether you made a ruling on
7 whether they were elicited by leading questions?

8 I know that there was a stipulation the interviewer
9 had been trained in conducting interviews with children,
10 but, also, whether it contained a detailed account of the
11 offense, whether it had internal coherence. And I just
12 wanted to ask that that be put on the record.

13 THE COURT: Certainly.

14 I do find that consistent with 17-23-175, the
15 statement was given in response to questioning conducted
16 during an investigative interview of the child. It was
17 recorded visually and in audio form, and preserved by
18 electronic means.

19 The child did testify at trial and was cross-examined
20 about the allegations. And the opportunity to
21 cross-examine her about anything related to these
22 statements was, certainly, there and pursued.

23 And looking at the totality of the circumstances, as
24 opposed to just the circumstances, of course, the making
25 the statement did have particularized guarantees of

1 trustworthiness. After viewing it in-camera, I find that
2 the statements predominantly were elicited by non-leading
3 questions. The interviewer was trained in conducting
4 investigative interviews of children. The statement
5 contains detailed accounts of the offenses. The statement
6 has internal coherence. And I'm determining that to mean
7 that it could be understood. And so I find that it
8 complies with the statute.

9 MS. SUSTAKOVITCH: Thank you, Your Honor.

10 THE COURT: All right. You can bring the jury on in.

11 (WHEREUPON, the jury came into open court at
12 approximately 10:50 a.m.)

13 THE COURT: Ladies and gentlemen, I apologize for
14 getting started late today. That's my fault this time. I
15 had that event at the Chamber. And it just took a lot
16 longer than I thought. And we are ready to proceed,
17 though.

18 So, yes, ma'am, Ms. Sustakovitch. You may call your
19 next witness.

20 MS. SUSTAKOVITCH: Thank you, Your Honor.

21 May it please the Court.

22 Good morning.

23 The State calls Tricia Austin.

24 THE CLERK: Ma'am, if you'll, please, place your left
25 hand on the Bible and raise your right hand.

1 WHEREUPON,

2 TRICIA AUSTIN,

3 after first having been duly sworn, testified as follows:

4 THE CLERK: Thank you.

5 Please be seated.

6 Please state your name for the record.

7 THE WITNESS: Tricia Austin.

8 THE CLERK: Thank you.

9 DIRECT EXAMINATION

10 BY MS. SUSTAKOVITCH:

11 Q Good morning, Ms. Austin.

12 Where are you currently employed?

13 A I work at the Children's Advocacy Center in
14 Spartanburg, South Carolina.

15 Q And what is your profession?

16 A I'm a licensed professional counselor. And,
17 currently, I'm conducting forensic evaluations at the
18 advocacy center.

19 Q Can you explain to the jury your work experience and
20 your training?

21 A Yes. My undergraduate degree is in psychology from
22 Clemson University. I graduated in 1994. I have a
23 Masters in Counseling, also, from Clemson that is -- I
24 graduated in 1996.

25 Since that time, I started working at Greenville

1 Mental Health in the child and adolescent division under
2 the school-based services for approximately seven years.
3 That was -- let's see, 1996 to 2003.

4 And then in November of 2005, I started working at
5 the advocacy center and have been working there since for
6 approximately eight years. In 1999, I received my
7 professional licensure as a licensed professional
8 counselor.

9 Q Do you have any training in the area of forensic
10 interviewing?

11 A Yes. Prior to working at the advocacy center, I
12 attended a week-long advanced evaluator training that was
13 really meant for masters-level clinicians who had been
14 working in the field already. That was my introduction to
15 conducting forensic evaluations.

16 Since that time, all of my continuing education has
17 been in the area of child abuse and neglect, child abuse
18 assessment, and things of that nature. And that's, at
19 least, a minimum of 40 hours every two years.

20 Q Very briefly, just explain what it means to interview
21 a child in this manner.

22 A A forensic interview is a child friendly and
23 objective way of understanding about a child's
24 experiences, especially their experiences regarding the
25 allegations, while giving them time and safety to share

1 about those experiences. The role of the evaluator is to
2 elicit as accurate and detailed account of the facts
3 regarding those experiences from the child.

4 Q And are there nationally-recognized protocols that
5 are used by different centers with forensic interviews?

6 A Yes, there are. And, at our center, we use the
7 strategy that is set forth by the NCAC, which is the
8 National Children's Advocacy Center, and it's supported by
9 APSAC, the American Professional Society on the Abuse of
10 Children. And it's a flexible structure that is
11 nationally recognized and research based.

12 Q Okay. In the past, can you estimate how many
13 children you may have done interviews on?

14 A My best estimate is approximately 900 --

15 Q And --

16 A -- plus or minus.

17 Q I'm sorry. Did you receive a referral in this case
18 related to **Victim** **[REDACTED]**?

19 A Yes, we did.

20 Q And how did the referral come in?

21 A The referral came from the Spartanburg County
22 Sheriff's Office, as well as from Greenville County DSS.

23 Q And what was the basic concern in the referral that
24 was made to you?

25 A The concern was that an allegation had been made that

1 **Victim** had been sexually abused by her paternal uncle, Mark
2 McMahan.

3 Q All right. And on what date did you see **Victim**?

4 A My first interview with her was June the 15th of
5 2010.

6 Q All right. And so backing up. This referral comes
7 in, there's an allegation that her uncle may have done
8 something; correct?

9 A Yes. That is correct.

10 Q And at the time you met with her on July -- June
11 15th, 2010, was there any disclosure about Gary Thompson
12 doing anything?

13 A No. Prior to that date, there had been no
14 information given to me that there had been any disclosure
15 made against Gary Thompson by **Victim**.

16 Q All right. Did you have occasion to conduct a
17 forensic interview with her?

18 A Yes, I did.

19 Q And tell me again the dates that you met with her.

20 A I met with her on June the 15th, 2010, June the 22nd,
21 2010, and August the 23rd, 2010.

22 Q All right. How old was **Victim** at the time you did the
23 forensic interviews?

24 A She was nine years old.

25 Q And did you make audio recordings of the interviews?

1 A Yes, I did.

2 Q All right. I'm showing you what's marked as State's
3 Exhibit Nos. 18 and 19. Subject to the Court's
4 instructions, have you viewed these -- well, first, do you
5 recognize these CDs?

6 A Yes, I do.

7 Q And, subject to the Court's instructions, do these
8 CDs materially represent the interviews that you conducted
9 with [Victim] [REDACTED]?

10 A Yes, they do.

11 Q And on what dates did you conduct those interviews
12 with [Victim] [REDACTED]?

13 A June 15th, 2010, June 22nd, 2010, and August 23rd.

14 Q All right. Do there appear to be any major
15 alterations or deletions apart from any instructions from
16 the Court?

17 A No, there do not.

18 MS. SUSTAKOVITCH: Your Honor, at this time, the
19 State moves to admit State's Exhibit Nos. 19 -- 18 and 19
20 into evidence.

21 MR. CHAMBERS: No objection, Your Honor.

22 THE COURT: All right. They're in evidence.

23 (WHEREUPON, State's Exhibit Nos. 18 and 19 were
24 admitted into evidence.)

25 MS. SUSTAKOVITCH: Your Honor, at this time,

1 permission to publish State's Exhibit No. 18.

2 THE COURT: All right.

3 (WHEREUPON, State's Exhibit No. 18 was played in open
4 court.)

5 BY MS. SUSTAKOVITCH:

6 Q Ms. Austin, before we go to the continued interview,
7 I want to ask you, first. Before [Victim] sat down with you
8 on June the 15th, 2010, did you sit down and tell her, I'm
9 here to ask you about Mark, or anything like that? Did
10 she know what she was doing when she came into that room
11 as far as the questions you were going to ask?

12 A No. We had no prior discussion about what the
13 questions would be or what the topic --

14 Q So when you guys walk in the room and we see the
15 video start, that's how your interaction with [Victim] went
16 that day?

17 A Yes, absolutely.

18 MS. SUSTAKOVITCH: Judge, the next interview is about
19 30 minutes. I -- do you want to continue on, or take a
20 break?

21 THE COURT: Yes. Let's --

22 MS. SUSTAKOVITCH: Okay.

23 BY MS. SUSTAKOVITCH:

24 Q And point of clarification before we start this one.
25 So [Victim], at this point, is living with her biological

1 father in June of 2010; correct?

2 A Yes.

3 Q Are you aware of when she was taken away from her
4 mother in May of 2010?

5 A My understanding was it was May of 2010.

6 Q All right.

7 A Just prior to this.

8 MS. SUSTAKOVITCH: All right. Thank you.

9 (WHEREUPON, State's Exhibit No. 19 was played in open
10 court.)

11 BY MS. SUSTAKOVITCH:

12 Q Ms. Austin, after these two interviews, what, if
13 anything, did you do at that point? Did you make a
14 referral based on the information that you had received in
15 June of 2010?

16 A Yes. I was in contact with Greenville County law
17 enforcement to inform them of the information since that
18 is where the family had lived.

19 Q Where the incidents occurred?

20 A Yes, where the incidents occurred.

21 Q Based on the two forensic interviews that we just
22 saw, did you have occasion to talk with Lieutenant Ty
23 Miller of the Sheriff's Office?

24 A Yes, I did. I spoke with her about the information
25 that had been gathered thus far. And she obtained some

1 photographs of different residences that the family had
2 lived in, and provided those to me so that we could
3 utilize those for some further conversation.

4 Q All right. Did you meet with **Victim** another time to
5 go over locations where abuse may have occurred?

6 A Yes. When I met with her on August 23rd of 2010,
7 that was our purpose was to discuss location.

8 Q In the interest of time, we're not going to show that
9 video. But I wanted to make clear, was there any new
10 allegation of abuse that was given in that interview from
11 **Victim**?

12 A No. In the third interview, it was simply locations
13 that we were discussing, the incident locations.

14 Q So you, in that interview, were clarifying where the
15 actual abuse occurred; correct?

16 A Yes. There were no new acts of abuse discussed.

17 Q First, I'm showing you what's previously been
18 admitted as State's Exhibit No. 10 -- oops. I'm sorry.
19 Technology is not my thing.

20 This has been previously admitted as State's Exhibit
21 No. 10. Did you show this picture to **Victim**?

22 A Yes, I did.

23 Q And was she able to detail clear abuse at this
24 location?

25 A She did not make a disclosure of abuse occurring at

1 that location.

2 Q All right. I'm showing you what's marked -- and
3 before we get through the rest of these. In this third
4 interview, did you discuss with her that the family had
5 moved many, many times? Is that correct?

6 A We discussed that they had lived in several different
7 places. And I had some pictures of some of those places
8 that I wanted to show her.

9 Q I'm next showing you -- I'll show you this one first,
10 what's previously been admitted as State's Exhibit No. 13
11 and was previously identified as [REDACTED] Road. And I'm
12 showing you now State's Exhibit No. 12, which has been
13 previously admitted, also, [REDACTED] Road. Did [Victim]
14 disclose abuse occurring at this trailer?

15 A Yes, she did.

16 Q All right. Next, I'm showing you what's marked as
17 State's Exhibit -- has been previously admitted as State's
18 Exhibit Nos. 14 and 15 and previously identified as [REDACTED]
19 [REDACTED] Highway. Did [Victim] disclose abuse at this location?

20 A Yes, she did.

21 Q And did she disclose whether she had been exposed to
22 pornography at this location?

23 A Yes, she did.

24 Q This would be State's Exhibit No. 15, which has been
25 previously admitted, another picture of what's been

1 identified as [REDACTED] Highway.

2 And, finally, the last location where the family
3 lived on [REDACTED] Street, did you have a photograph of
4 that location?

5 A I did not have a photograph of that location.

6 Q Did [REDACTED] Victim 1, in fact, though, when you talked with her
7 about it, was she able to disclose whether abuse occurred
8 at that location?

9 A Yes, she was able to.

10 MS. SUSTAKOVITCH: I beg the Court's indulgence one
11 moment.

12 (Pause.)

13 BY MS. SUSTAKOVITCH:

14 Q Now, after your contact, Ms. Austin, with [REDACTED] Victim
15 during these -- this extended evaluation, did you have any
16 further contact with her?

17 A No, I did not.

18 Q And, after you turned these evaluations over to law
19 enforcement, what, if any, contact did you have with
20 Investigator Bracken?

21 A Following that, I think I was just informed of any
22 efforts they were going to do from that point. I don't
23 recall any specific conversations.

24 Q Okay. And did you, in fact, refer [REDACTED] Victim on to
25 counseling?

1 A Yes, yes. I made a referral for **Victim** to attend
2 counseling at the Children's Advocacy Center in
3 Spartanburg.

4 Q And are you familiar with who her counselor was?

5 A Yes. She saw Mr. Wiley Garrett.

6 MS. SUSTAKOVITCH: Please answer any questions
7 Defense counsel has.

8 CROSS-EXAMINATION

9 BY MR. CHAMBERS:

10 Q So you are, I guess, by trade a forensic interviewer;
11 is that correct?

12 A That is my current position at the advocacy center.
13 By trade, I'm a counselor, a licensed professional
14 counselor.

15 Q Well, how long have you been a forensic interviewer?

16 A Since November of 2005 is when I started work.

17 Q Is that when you first took that -- I believe you
18 said it was a 40-hour course that you took, the first
19 course?

20 A That was an initial week-long course for advanced
21 forensic evaluator training. That was my initial
22 training, yes.

23 Q All right. And since then, you've conducted a lot of
24 forensic interviews; is that correct?

25 A Yes, I have.

1 Q All right. And there are several models that are
2 used nationally for forensic interviewing; is that
3 correct?

4 A Yes.

5 Q Are you familiar at all with the RATAC method?

6 A Yes. I am familiar with that.

7 Q Do you use that procedure?

8 A We do not use that procedure. Ours is very similar.
9 But that is not the structure that we use. We use the
10 flexible structure I had referred to earlier.

11 Q Are you familiar with the NICHD investigative
12 interviewing?

13 A Yes. I am familiar with that.

14 Q And is that -- that's not the one you use either?

15 A All of our -- all of those structures are very
16 similar. There are some small differences. Ours that we
17 use is nationally recognized. It is supported and set
18 forth by the NCAC, the National Children's Advocacy
19 Center. And it is supported by APSAC, the American
20 Professional Society on the Abuse of Children. And it is
21 research based.

22 Q Would it be fair to say that the approach that you
23 use and really all the approaches -- because you said you
24 had some familiarity with them -- are that you are there
25 not to make any judgments or assumptions about anything;

1 is that correct?

2 A That is correct. It is an objective assessment.

3 Q You are simply there to try to get that child to open
4 up and tell you things about what may or may not have
5 happened to him or her?

6 A My job is to understand about their experiences
7 through conversations with the child. And through those
8 conversations, my goal is to illicit as accurate and
9 detailed account of their experiences from the child.

10 Q And, for the most part, what you -- you will use
11 open-ended questions; am I right?

12 A The questioning format that we use, if you think
13 about a continuum of questions, they are all
14 non-suggestive and non-leading in nature. The best way to
15 think about the questioning format is to think of the
16 shape of a funnel with the top of the funnel being very
17 broad and open ended, and it comes down in size to a
18 smaller opening.

19 So if you think about that shape, the beginning
20 questions that we use in the interview itself and in
21 multiple exchanges throughout the interview start off very
22 open-ended and broad. And we call them narrative invites
23 or focused narrative invites. And that's when we ask the
24 child to tell us about something. It can be something
25 very broad. It can be a very specific topic that we want

1 to understand about that.

2 Depending on how the child responds to that line of
3 questioning, that can be impacted by their developmental
4 level, their communication abilities. Lots of things can
5 impact whether or not they can negotiate that type of
6 exchange. Or they may answer those questions a certain
7 way that calls us to sort of come down that funnel maybe
8 to more direct questioning, more direct closed-ended
9 questioning like the who, what, when, where questions
10 where it's still open-ended, but we're asking about
11 something very specific.

12 At the bottom of that, you know, there are many
13 children that need queue's to understand what the
14 evaluator is trying to understand about. And so we might
15 use a question that requires a yes/no answer, or a
16 question that's multiple choice.

17 And the best way to understand about the multiple
18 choice would be if I'm trying to understand about where a
19 child lives, if I might say tell me about where you live,
20 or tell me about the place you live. Place can mean a lot
21 of things to a child. It could mean the community. It
22 could mean the city. It could mean the actual residence
23 that they live in.

24 So I might give a multiple choice of do you live in a
25 house, a trailer, an apartment, or something else. And

1 that just queues the child and let's them know exactly
2 what I'm trying to understand about. And so that allows
3 for that conversation to go further.

4 Q So those are more -- what you're talking about, these
5 follow-up questions, are more just focus questions?

6 A They are more focus questions, yes.

7 Q It's still very important based on the training you
8 have and the protocol that follow that you are not in any
9 way leading this child to a certain conclusion; is that
10 right?

11 A Absolutely.

12 Q And you are not supposed to do anything to convey to
13 the child that you have a belief one way or another about
14 anything that that child is saying?

15 A In avoiding leading questions -- a leading question
16 implies the answer in the question. So any questioning
17 format that we use is going to be non-leading,
18 non-suggestive. You can queue a child to what you're
19 trying to understand about without suggesting what you
20 expect the answer to be.

21 Q And the same would be true for any statements you
22 make. Forget about questions. But if you make a
23 statement to the child that in it has a conclusion that
24 bears on what the child has had to say, that would go
25 against protocol as well, would it not?

1 A There are many statements that I might make that --
2 can you ask the question again? Could you, please --

3 Q Yeah. In other words, as you're going through this
4 process, we know that you're trying to give this child an
5 opportunity to give you information. And you're not
6 trying to convey to that child that you have a belief one
7 way or another about what the child has to say; is that --
8 that's correct, based on the protocol; am I right?

9 A There may be information I share with the child that
10 might provide them reassurance or safety to continue
11 talking. And that might be information...

12 Q Well, let me give you an example.

13 A Okay.

14 Q Do you recall in the video that, at one point, you
15 said to **Victim 1**, I want you to know that Gary should not
16 have been doing those things?

17 A Well, I think that that is not a statement of -- a
18 non-objective way of understanding what she has shared
19 with me. She has already shared with me lots of
20 information and lots of rich detail about the things that
21 have occurred with Gary.

22 So, in saying those things to her, that, to me, is
23 a -- me expressing a body safety understanding to her that
24 her body and her private parts are hers and no adult
25 should be doing anything -- no adult should be doing

1 anything to hurt or bother her privates. That's a
2 discussion of body safety and something that I would teach
3 any child.

4 Q But doesn't the protocol -- and there are things in
5 the protocol that set forth how you are supposed to make a
6 child feel safe and secure; correct?

7 A Well, first of all, we don't even use the word
8 protocol. What we use is -- it's referred to as a
9 flexible structure. We are all licensed clinicians. And
10 we are allowed to use clinical judgment throughout using
11 that structure. We have certain guidelines that we
12 follow. But we use that structure. And we vacillate.

13 We have -- use clinical judgment in providing whether
14 we need to go back and discuss something, or whether or
15 not we need to make judgments about additional times to
16 see them. And if there's an issue of safety or
17 reassurance and I need to help that child understand some
18 basics about what should and should not be happening to
19 their body, we have the ability to do that within --
20 there's nothing -- again, we don't have what's called a
21 protocol where we have to follow step A, B, C, and D.

22 Q So it's -- you don't believe that it's necessary.
23 You don't believe that you could have expressed to her
24 that she is safe without expressing the conclusion on your
25 part that Gary had done something to her?

1 A I don't think I expressed the conclusion that Gary
2 had done something to her. I think I expressed to her
3 that the things she had already in very much detail shared
4 with me were things that should not have been happening to
5 her body.

6 Q Okay. And that was -- do you recall that you made
7 that statement in the first interview; correct?

8 A You'll have to -- I know we just watched them --

9 Q Well, if you don't -- you either recall or you don't?

10 A Well, I know we discussed it in the second. And I
11 believe that we did have some brief conversation about it
12 in the first.

13 Q Now, do you recall --

14 A Yes, at the end. Because we discussed body safety.

15 Q Now, do you recall in the first interview that she
16 told you that Gary had never made any threats to her, had
17 never said anything about doing anything wrong to her? Do
18 you recall that?

19 A My recollection from the first interview is that she
20 told me he told her not to tell. But she did not express
21 any threats that were made.

22 Q And do you recall when she came back for the second
23 interview, after having been home for a week, that she
24 then came in and said that he had made these threats that
25 he would kill her, that he would kill members of her

1 family, that he would do those types of things?

2 A I do know that it was during the second interview
3 that she shared that information.

4 Q And do you recall that during the second interview,
5 you said, One thing I want you to know, **Victim**, that is so
6 important. You need to know that Gary and people like
7 Gary always say those types of thing to kids. That is how
8 they keep kids quiet. That is how they keep kids from
9 telling. Because they scare them and it worries them.
10 And it is scary to someone to say that to you. But that's
11 what lots of people say to kids to keep them quiet. Do
12 you remember saying that?

13 A I do remember saying that. And my reasoning for
14 saying that was in response to she had just shared with me
15 that a threat had been made to others that she might tell
16 and to her own life if she told.

17 So, at that point, my efforts were to reassure her of
18 her safety and of the reason that someone might share that
19 with her so that she would know that it was okay to -- my
20 efforts to keep her reassured and feeling safe were so
21 that she could continue to share about that. The goal of
22 my interview is to continue to obtain information and
23 continue to get more detail. And so she's expressed that
24 fear.

25 The other thing that I went into that second

1 interview with was knowledge from her family that during
2 the week from the first time I saw her to the time that I
3 saw her the second time that she was having repeated
4 nightmares about the abuse. She was verbalizing about
5 those nightmares. She was verbalizing about the abuse
6 fairly outwardly with family members, with her sisters,
7 and people she had not shared with previously.

8 And she was having the family walk her from door to
9 door multiple times to check the locks and be sure that
10 she was safe and that the doors were locked. They were
11 having to reassure her of her safety so that she could
12 sleep at night.

13 So having that knowledge going into that second
14 interview, in addition to the fact that she did verbally
15 tell me there had been threats made, provided me with an
16 understanding that I needed to make sure -- in order to
17 continue with our conversation and trying to obtain
18 information, I needed to make sure that she felt reassured
19 and safe to continue her discussion.

20 Q So you're telling me that before you met with her on
21 each of these occasions, you, apparently, had lengthy
22 discussions with the family that she was living with?

23 A It is absolutely our best practices that prior to
24 meeting with the child to begin with, we do a caregiver
25 interview -- a non-offending caregiver interview. So

1 that's family history background information. And that
2 had happened prior to the first time I met with her.

3 Prior to the second time that I met with her, her
4 family wanted me to be aware of her fearfulness and the
5 things that she had been exhibiting at home in terms of
6 behaviors just so that I could be aware that she was
7 afraid and she was exhibiting those behaviors at home.

8 Q So you interviewed her three separate times?

9 A I did.

10 Q Basically, a week apart?

11 A Her first two interviews were a week apart. Her
12 second was further.

13 Q And the first time -- the first interview, she showed
14 up and her dad, BJ, and her stepmom were with her.
15 Anybody else?

16 A No. That's all that was there. I do not recall
17 whether her sisters were in the waiting room or not.

18 Q And you had had some discussions with the family. So
19 you had some -- you had -- they had shared details and
20 told you things. And so you had that knowledge going into
21 that first interview?

22 A We always do. We always have knowledge from the
23 non-offending caregiver interview. It helps us understand
24 who people are, many things, developmental level for the
25 child. There's lots of information that we need to know

1 going into a conversation with a child of a certain age,
2 of any age.

3 And so absolutely I had information from that. I,
4 also, had reviewed information that was sent over in the
5 referral packet. So there's lots of information that we
6 take in as part of understanding about the case prior to
7 meeting with the child.

8 That doesn't change -- it might change, you know,
9 where I think we need to -- you know, what I need to
10 understand about, things we need to have conversations
11 about. It does not change the questioning format and my
12 ability to have conversations with her and ascertain
13 information in an objective and a non-leading and a
14 non-suggestive way.

15 Q So then after the first interview, she goes home with
16 her parents. She comes back. You talk to the parents
17 again?

18 A I spoke with them very briefly about concerns they
19 had about her behaviors, and things she was verbalizing,
20 yes.

21 Q And that's when they shared with you that she was
22 scared?

23 A Yes.

24 Q And so you said, based on that, going into that
25 interview not only were you, at that point, determined to

1 get information from her, but you were, also, determined
2 to make her feel safe and secure?

3 A That's not what I said. What I said was that I take
4 that information into that room so that I know that I want
5 to have conversations with her to determine whether she
6 shares about fearfulness.

7 Now, those conversations came up spontaneously when
8 we talked about things he had said, whether or not he had
9 told her not to tell. And she shared with me that she had
10 been threatened. And it was following that prompt.

11 So it was both the prompt of what she shared with me,
12 as well as the background knowledge I had regarding her
13 fear that I felt like we needed to discuss body safety
14 things that shouldn't -- should or should not have
15 happened, as well as the fact that she was safe and
16 reassure her so that she could continue to share
17 information.

18 Q But she shared those threats with you for the first
19 time after the first interview.

20 A Yes. And that's absolutely not out of the norm. The
21 whole point of doing a multiple interview and extended
22 forensic assessment is the understanding that if we
23 provide children with the time and safety that they need
24 and let them go at their pace that using good open-ended
25 questions that we will probably obtain more rich detail

1 over time that we will, you know, most likely get
2 additional details with the times that we talk with the
3 children. Because that -- their narrative accounts and
4 the information they give will probably elicit new
5 information.

6 And **Victim**'s interviews were a perfect example of how
7 that extended interview can be helpful. Because not only
8 did she share additional acts of abuse from session one to
9 session two, she shared lots of rich detail about methods
10 that were used, locations. There was just so much more
11 new information that was shared.

12 So that's -- absolutely follows the normal flow of
13 disclosure, which is a process. And so it's absolutely
14 very well documented in the research that children will
15 provide additional information.

16 Q And so you not only did -- took steps to assure her
17 of her safety, which, again, as we pointed out and we
18 read, you, actually, commented that Gary had done
19 something to her and that people like Gary do those sorts
20 of things. I mean, you used Gary, specifically?

21 A I did use his name. But his -- I did not introduce
22 his name into that conversation. We were two interviews
23 in to her sharing with me what Gary had done,
24 specifically. And so us discussing what Gary had done in
25 my referencing that Gary and other people who might make

1 threats like that to children are utilizing that as a way
2 to keep her quiet.

3 So, yes, I did use his name to reassure. But I did
4 not introduce his name or introduce the details that she
5 had already been providing.

6 Q Okay. And you not only talked to the parents prior
7 to this, but you, also, talked to **Victim**'s siblings as part
8 of your background; is that right?

9 A I did do what we call collateral interviews with her
10 siblings.

11 Q And, as part of that, you were able to gain
12 information that **Victim** and her sisters had watched a movie
13 with a naked lady and man having sex while they were at
14 their grandmother's house; is that right?

15 A I would have to reference my report. I can tell you
16 that there was lots of information that was obtained from
17 the sisters.

18 A collateral interview is utilized for many purposes.
19 It not only can provide information about whether another
20 person has witnessed or had shared experiences with the
21 child, we're, also, assessing whether or not they had any
22 occurrences where their safety was an issue. And so there
23 was lots of information that was shared. I'm not sure
24 what --

25 Q Well, do you remember that one of the girls shared

1 with you that they had watched dirty movies over at
2 grandma's house?

3 A Which -- can you, please, let me know which sister so
4 that I can appropriately reference it?

5 Q [Minor] .

6 A Okay.

7 MS. SUSTAKOVITCH: Your Honor, I just would object to
8 hearsay. He's trying to elicit testimony about another
9 child and what they may have -- may have said or may not
10 have said. It's just direct hearsay. It's not what [Victim]
11 said.

12 THE COURT: Overruled.

13 THE WITNESS: Okay. I do see that [Minor] did share
14 information about that. That does not negate all the
15 details that [Victim] shared.

16 BY MR. CHAMBERS:

17 Q Well, I wasn't asking --

18 A It's just additional information.

19 Q -- you whether it negated it. I was simply asking
20 you --

21 A She did.

22 Q -- whether she shared --

23 A She did share it.

24 Q -- that with you?

25 A Yes, yes.

1 Q Okay. And when you got this referral, the initial
2 complaint was that Uncle Mark McMahan was the one that had
3 sexually abused this child; correct?

4 A Yes. The original allegation was an allegation
5 against Mark McMahan.

6 Q And that's how it came to you --

7 A Yes.

8 Q -- was a referral that Mark McMahan had abused this
9 child?

10 A Uh-huh. That is correct.

11 Q And -- but when the child then came to live with
12 you -- I mean came to interview with you, she was living
13 with -- not with her mother and Gary, but had been removed
14 from the home in May; correct?

15 A That is correct.

16 Q And she had been living with Mark's family, BJ,
17 stepmom. Do you recall that?

18 A She was living with her father, and her stepmother,
19 and with her stepmother's family.

20 Q All right.

21 A That is the family.

22 Q Well, you heard -- she did say in the interview that
23 Nanny, her dad's mother, and all these other family
24 members lived upstairs; right?

25 A Those were not her dad's family members. Those were

1 her stepmother's family members that lived upstairs.

2 Q There was family that lived nearby?

3 A There was family in the area that we discussed that
4 was her paternal grandparents and paternal uncle.

5 Q Okay. So -- and she talked about having contact with
6 her paternal grandmother?

7 A Yes. She did talk about having contact.

8 Q Were you aware that her paternal grandmother is the
9 one that, initially, made the report that Gary Thompson
10 had molested **Victim**?

11 A No. Like I said previously, I was aware of no
12 previous disclosures being made by **Victim** that accused or
13 alleged that Gary Thompson had sexually abused her in any
14 way.

15 Q So when **Victim** came and you interviewed her after she
16 had been living with BJ McMahan and her stepmother, she
17 said that nobody else, other than Gary, had ever done
18 anything to her?

19 A That is correct. She denied any other adults or
20 children ever sexually abusing her.

21 Q And, now, she's saying that Gary did those things?

22 A She made a disclosure that Gary had done those
23 things.

24 Q Were you --

25 A She never made a disclosure to me about Mark McMahan.

1 Q I understand. We saw the interviews.

2 A Yeah.

3 Q Did you -- were you aware of any of the specifics
4 about what she alleged about Mark McMahan?

5 A I was aware of some specific statements. I was aware
6 that, at some point, **Victim** made a statement -- a
7 disclosure statement about Mark McMahan. I was, also --
8 it was, also, my understanding that that information was
9 reported and brought forth by her mother.

10 Q Okay. And was it your understanding that,
11 specifically, she had said, among other things, that Mark
12 had stuck his private part into her behind, or her butt?

13 A I was aware of some specific disclosure statements.

14 Q All right. And -- but she denied that Mark had done
15 anything to her?

16 A She did. She absolutely -- on two occasions, we
17 discussed, specifically, him, as well as others, and she
18 did -- she denied any fearfulness, worries, or anything
19 occurring to her by him.

20 Q And she, also, specifically, denied, when you were
21 going through the interview process with her, that anybody
22 had told her to say anything about Mark or anybody else,
23 didn't she?

24 A She did. During the interview, she did deny that.
25 My understanding is that after time had passed that she

1 shared additional details, but not with me.

2 Q Well, the three interviews that you had, she never
3 said anything about somebody --

4 A She did not during --

5 Q -- telling her --

6 A -- that time.

7 Q So if she said that about Mark and then later said
8 that Mark didn't do anything, then, at some point, she's
9 not telling the truth, wouldn't that be fair to say?

10 A Well, my understanding is that she made a statement
11 to someone about Mark. I do not have information as to
12 who she made that to. My only understanding is that she
13 made that disclosure. And then her mother brought it
14 forward.

15 So I don't know how all of that was generated. My
16 understanding is, also, that later she acknowledged
17 conversations with her mother and being instructed to say
18 those things.

19 Q But, at least, you know that until you sat down and
20 talked to her, after her being carried there by her
21 father, BJ McMahan, that -- I mean, you -- as far as you
22 knew, Mark McMahan was still the suspect in the case?

23 A Absolutely. When I met with her, the allegation was
24 against Mark McMahan. There were merely concerns about
25 the fact that she had been living in the home with a

1 registered sex offender. Those were simply concerns.

2 We began lots of interviews and assessments with
3 concerns concerning behavior, concerning information.
4 That doesn't -- it just is what it is. The goal of the
5 interview is to understand the child's experience. And
6 those conversations are what led to the spontaneous
7 disclosure about Gary Thompson made directly to me by
8 **Victim** [REDACTED].

9 Q Well, you say it's spontaneous, but you were asking
10 her questions?

11 A I was asking lots of questions about family. But I
12 say it's spontaneous in that we were not discussing sexual
13 abuse. We were not discussing body safety or parts of her
14 body. We were discussing family history. We were
15 discussing who she lived with, and sort of everyday family
16 life, and other events that had occurred.

17 And, in response to a question that followed that
18 discussion, **Victim** spontaneously made the statement that
19 began her disclosure about Gary Thompson.

20 Q And, presumedly, she knew what she was -- why she was
21 going to see you. She didn't think -- it wasn't just that
22 she was popping in there to --

23 A I would not begin to presume that she understood that
24 when I asked her, specifically, about why she had to move,
25 what had happened that made her have to move from her

1 mom's to her dad's. She did not share that she understood
2 that. She, actually, shared that that was adult
3 information. And she did not share any knowledge about
4 why she was there to see me.

5 MR. CHAMBERS: Listen, I appreciate you answering my
6 questions.

7 Thank you.

8 THE WITNESS: Thank you.

9 MS. SUSTAKOVITCH: Very briefly, Your Honor.

10 REDIRECT EXAMINATION

11 BY MS. SUSTAKOVITCH:

12 Q Just two issues, Ms. Austin. One, Defense counsel
13 just stated, did you know that it was **Victim**'s paternal
14 grandmother that made an allegation against Gary Thompson
15 first? I draw your attention to Page 2 of your report.
16 You looked at all kinds of documents going into this
17 interview, Spartanburg County Sheriff's Office reports,
18 court records, Sheriff's Office reports from Greenville
19 County from various years. Is there ever any mention in
20 any of these documents that this woman was the one who
21 ever made an allegation against Gary Thompson?

22 A There was nothing in the information that I reviewed
23 or had been told that indicated that his paternal -- that
24 her paternal grandmother made any allegations against Gary
25 Thompson.

1 Q So the first that anybody heard about Gary Thompson
2 doing anything, to your knowledge, is in that room on the
3 interview that we just watched?

4 A Yes, it is.

5 Q Very briefly. Defense counsel asked you about **Minor**
6 and the dirty movies. I draw your attention to that page
7 in your report. It says, **Minor** stated she and her
8 sisters watched a move with a naked lady and a man
9 hunching when they were at their house and their
10 grandmother's house. Do you see that?

11 A Yes.

12 Q And then she stated -- she clarified hunching meant
13 sex. She reported Jessica, Gary, and all the sisters
14 watched this move?

15 A Yes.

16 Q Does **Minor** ever talk about this porn movie,
17 including anything to do with stockings, and no panties,
18 and the things that **Victim** related to you that she observed
19 when the Defendant was masturbating in front of her?

20 A No, she did not. And, in fact, in looking back over
21 this report, you know, she identifies this movie occurring
22 at her grandmother's house.

23 Q Okay.

24 A And she identifies her mother, Gary Thompson, and her
25 sisters watching the movie. And without looking back at

1 the specific exchange, you know, I don't know which
2 grandmother -- you know, the children talk about mom's
3 grandmother, so.

4 Q Right. I just wanted to clarify the description --

5 A Yes.

6 Q -- of the porn.

7 A Yes.

8 MS. SUSTAKOVITCH: Thank you.

9 No further questions.

10 THE WITNESS: No, she did not.

11 MR. CHAMBERS: No recross, Your Honor.

12 THE COURT: All right. Thank you.

13 You may step down, ma'am.

14 MS. SUSTAKOVITCH: Your Honor, may this witness be
15 excused?

16 MR. CHAMBERS: No objection, Your Honor.

17 THE COURT: She's excused.

18 Ladies and gentlemen, we're going to take a lunch
19 break now. If you'll just be back in the jury room at
20 1:45. Don't talk about the case. Continue to keep an
21 open mind. Be back at 1:45.

22 (WHEREUPON, the jury was excused from open court at
23 approximately 12:30 p.m.)

24 THE COURT: How many more witnesses do you have?

25 MS. SUSTAKOVITCH: Your Honor, the State would be

1 resting.

2 THE COURT: Mr. Chambers, do you know if you're going
3 to be presenting witnesses, sir?

4 MR. CHAMBERS: Your Honor, in all likelihood, no.

5 THE COURT: Okay.

6 MR. CHAMBERS: We've discussed it. And I think that
7 we're not going to put up any evidence.

8 THE COURT: Well, you don't have to tell me
9 definitively now. I'm just trying to get some --

10 MR. CHAMBERS: I may change -- I'm kind of hinging
11 just a little bit. Because we may change our mind.

12 THE COURT: That's fine.

13 MR. CHAMBERS: But that's how we're leaning now right
14 now.

15 THE COURT: Okay. We'll see you back at 1:45.

16 Thank you.

17 (WHEREUPON, a lunch break was taken.)

18 THE COURT: Are we ready to proceed?

19 MS. SUSTAKOVITCH: Judge, I -- oh, I'm sorry. I'll
20 let Defense counsel --

21 THE COURT: Mr. Chambers.

22 MOTIONS

23 MR. CHAMBERS: Your Honor, now that the Prosecution
24 has rested, for the record, I'd like to make a motion for
25 directed verdict.

1 THE COURT: Yes, sir.

2 MS. SUSTAKOVITCH: And, Judge, I don't believe I put
3 on the record that we rested. So I would make a note that
4 the State does, at this time, rest.

5 THE COURT: Do you want to --

6 MS. SUSTAKOVITCH: Do you want to bring the jury back
7 in for that?

8 THE COURT: Let's argue this motion and then we'll --
9 I'll let you rest in front of the jury.

10 MS. SUSTAKOVITCH: Okay.

11 THE COURT: Yes, sir.

12 MR. CHAMBERS: Your Honor, I would argue that the
13 only evidence in this case that tends to prove the element
14 of sexual battery in this case is rife the inconsistencies
15 and falsehoods that are apparent in the record. And so
16 even considering the evidence in the light most favorable
17 to the Solicitor, I would make a motion that the evidence
18 falls short. And, as a matter of law, that we'd ask the
19 Court to direct a verdict of not guilty in this case.

20 THE COURT: All right. Well, of course, I can't
21 weigh the evidence or determine its credibility at this
22 stage. I can only determine whether it exists. And I
23 think there is sufficient evidence as to each element of
24 each crime.

25 So I would have to, respectfully, deny the motion

1 based on Rule 19.

2 MS. SUSTAKOVITCH: May we get the evidence back out
3 so that -- if we're going to go straight to closings so
4 that --

5 THE COURT: Oh, is that what we're doing?

6 MR. CHAMBERS: Your Honor, I consulted with my client
7 and he fully understood his rights concerning testimony as
8 you explained it to him earlier. And, after great
9 deliberation and discussion on our part, he has decided
10 not to plead guilty [sic].

11 Do you want to stand up?

12 THE COURT: Is that your choice, Mr. Thompson?

13 DEFENDANT THOMPSON: Yes, sir.

14 THE COURT: Thank you.

15 MR. CHAMBERS: And we don't plan to put up any other
16 evidence.

17 THE COURT: Let me --

18 MR. CHAMBERS: Oh, I'm sorry. I meant not testify.
19 I believe I, for some reason, blurted out "plead guilty."
20 But I want to make it clear on the record not testify.

21 THE COURT: Right. I understand.

22 Are there any specific jury charges either side
23 wishes for me to consider?

24 MS. SUSTAKOVITCH: Yes, sir.

25 The State has three that I've passed to Defense

1 counsel. First is the no corroboration charge under
2 16-3-657. The next is just penetration however slight
3 under State v. Mathis. And the next is just that time is
4 not an essential element of a CSC.

5 MR. CHAMBERS: And I don't have any charges to
6 submit, Your Honor.

7 As to the first charge, I would simply ask that the
8 Court read the statute. I believe it is pretty much
9 self-explanatory that criminal sexual conduct testimony
10 need not be -- of a victim need not be corroborated under
11 16-3-652. I would object to the other case cites that
12 elaborate on it further.

13 The other two charges, I don't have any objection to.

14 THE COURT: I may be misstating this. I haven't
15 looked at the case in a while, but I believe Rayfield
16 doesn't require that 16-3-657 be charged.

17 It just says it's not reversible error to charge;
18 isn't that right?

19 MS. SUSTAKOVITCH: Your Honor, I would agree with
20 Your Honor. Normally, I get that charge. It's just Your
21 Honor's discretion. Certainly, it is South Carolina law.
22 And I do believe that it, in these cases, is helpful to a
23 jury to understand that that is the law in South Carolina.

24 So I would, respectfully, ask that you would charge
25 it.

1 THE COURT: Well, I can understand why you would want
2 me to charge it. The reason I, typically, don't charge it
3 and I'm not going to charge it here is because it is
4 discretionary. And I think that it's not necessary to be
5 charged. You, certainly, can argue that. But I believe
6 there are reasons set forth in the dissent in that case
7 that were compelling as to why a judge may not decide in
8 his discretion to charge it.

9 Is there any request for any lesser-included offense?

10 MS. SUSTAKOVITCH: No, sir. None from the State.

11 MR. CHAMBERS: Not from the Defense either, Your
12 Honor.

13 THE COURT: And that's a strategic choice as well?

14 MR. CHAMBERS: Yes, sir.

15 THE COURT: Is that right, Mr. Thompson? Do you
16 agree with that?

17 DEFENDANT THOMPSON: Yes, sir.

18 THE COURT: I have prepared a verdict form. I just
19 ask y'all to look at that and make sure I haven't done
20 anything improper or made a mistake on it.

21 MS. SUSTAKOVITCH: I believe the indictment number
22 may be off on the dissemination charge. Can we just
23 double-check that?

24 THE COURT: Sure.

25 MS. SUSTAKOVITCH: I think it may be 2010.

1 THE CLERK: It's 2010.

2 MS. SUSTAKOVITCH: Is it? Okay.

3 And I think that's the only thing, Judge.

4 THE COURT: Okay. I'll change that.

5 Is that 700 -- it says "A" on the indictment. Is
6 that what it is?

7 MS. SUSTAKOVITCH: My indictment is 700. In the
8 Clerk's Office, they list it under A or something when
9 it's a direct presentment, but --

10 THE CLERK: It's a direct presentment.

11 MS. SUSTAKOVITCH: But my actual -- or the State's
12 actual indictment just says 700.

13 Is that right? Is that what's on top?

14 THE COURT: I didn't know if that meant amended.

15 Do you see what I'm saying?

16 THE CLERK: Oh, but there's still an A at the end
17 because it's a direct presentment.

18 MS. SUSTAKOVITCH: Oh, okay. They wrote that in at
19 the Clerk's Office, actually. That's just how they do it
20 down there.

21 THE CLERK: Yes. It has to be there for direct
22 presentment.

23 MS. SUSTAKOVITCH: Okay. My indictment does not have
24 that, but if that's what the Court has, through the
25 Clerk's Office, that's fine. It is the same, in fact,

1 indictment.

2 THE COURT: I have to step out for one second. I'll
3 be right back.

4 (Pause.)

5 (WHEREUPON, Court's Exhibit No. 7 was marked for
6 identification and admitted into evidence.)

7 THE COURT: Bring the jury in, please.

8 (WHEREUPON, the jury came into open court at
9 approximately 1:58 p.m.)

10 THE COURT: Good afternoon. We'll now turn back to
11 the evidence.

12 And, yes, ma'am, Ms. Sustakovitch.

13 MS. SUSTAKOVITCH: Thank you, Your Honor.

14 At this time, the State would rest.

15 THE COURT: Mr. Chambers.

16 MR. CHAMBERS: Your Honor, the Defense rests as well.

17 THE COURT: All right. Ladies and gentlemen, we've
18 reached the stage of the trial where you've heard all the
19 evidence and now we're going to have the closing
20 arguments. And then I'll give you the instruction on the
21 law.

22 So, at this time, Ms. Sustakovitch.

23 CLOSING ARGUMENTS

24 MS. SUSTAKOVITCH: Thank you, Your Honor.

25 May it please the Court.

1 Good afternoon, ladies and gentlemen.

2 I hope you'll forgive me. I've taken some notes
3 pretty quickly. And this is such a serious matter that
4 I'm going to refer to them sometimes to try to make sure I
5 can recall everything.

6 But thank you again for your time.

7 I'm here because of what he did to me. Do you
8 remember those words? She should have helped me. She
9 should have made it stop. Do you remember those words?
10 Those were the words of a young girl that came into this
11 courtroom yesterday in front of all of us, in front of all
12 of you, strangers, and had to get on that witness stand
13 and tell some of the most embarrassing, graphic, horrific
14 details that any person, much less a 13-year-old, should
15 ever have to tell.

16 What is this case about? It's about a young girl who
17 in her own home was not protected by the two people -- the
18 two people on the planet that should have been protecting
19 her most, her own mother and her stepfather. But within
20 those walls, there was no protection. Within that hideous
21 home life, there she was by herself with an awful mom
22 amidst the porn, amidst all the -- you saw it all. That
23 was **Victim** [REDACTED]'s reality.

24 Who is this case about? **Victim** [REDACTED], and what
25 happened to her those years until she disclosed at the age

1 of nine years.

2 This is a court of justice. And I can't thank you
3 enough. I said it at the beginning and I know Defense
4 counsel said it as well. We both join in saying thank
5 you.

6 When you walked into this courtroom and you sat back
7 there, you had no idea what you were getting into. You
8 had no idea what was going to be thrown at you and what
9 you were going to have to hear. And we all recognize
10 that. You're doing a civic duty. And it is very
11 appreciated. But this is a search for the truth. And
12 there's no more important time, no more critical time for
13 the victim in this case and this Defendant than this
14 moment at 2:02 on this day.

15 The Defense's job -- and this is not particular to
16 Mr. Chambers. He's an excellent attorney, a nice man.
17 But his job, ladies and gentlemen, as the Defense, is to
18 cloud the issues. It is to make you, just one of you,
19 take your eye off the ball. Look over here. Look over
20 here. Look over here. Look at the shiny object right
21 over here. And don't look at what's right in front of
22 you, what's smacking you in the face, the reality of what
23 we've just seen. Look over here. Because that will throw
24 one of you off; right? I ask you to not let that happen.

25 And, again, it is not a personal thing. It is his

1 job to zealously defend his client within the bounds of
2 the law. But I ask you to keep your eye on the ball.

3 The State has the burden to prove to you every
4 element of the two crimes beyond a reasonable doubt. And
5 this Defendant is charged with criminal sexual conduct
6 with a minor in the first degree. He's, also, charged
7 with dissemination of obscene materials to a minor.

8 I will tell you as to the first charge one thing that
9 we can get off the table. Criminal sexual conduct with a
10 minor in the first degree, as I told you at the beginning
11 and you'll hear at the end from Judge Hill, is when you
12 have a person, in this case this Defendant, who commits a
13 sexual battery, that's oral sex, anal intercourse, vaginal
14 intrusion however slight on a child under the age of 16.

15 In this case, we know she was six, seven, eight, nine
16 in those years. We have a sexual battery on a child under
17 16 and the person has been convicted of a crime -- and
18 you'll -- it's listed as 23-3-430, essentially, criminal
19 sexual conduct with a minor first degree. He has to have
20 a prior conviction for some crime that falls within that
21 statute. In this case, the State and the Defense have
22 stipulated that this Defendant does have a prior
23 conviction for criminal sexual conduct with a minor in the
24 first degree and he is on the sex offender registry. So
25 that element is already met.

1 And what you really have to get down to is, is this
2 child telling you the truth? Or is this all a big
3 charade? What are we doing here?

4 I want to start with the starting point for a
5 criminal sexual conduct case, which is this, the starting
6 point is that you could convict on the uncorroborated
7 testimony of a victim alone, you could. And what that
8 means is because of the nature of criminal sexual conduct
9 cases, they don't happen at 12:00 noon in a church parking
10 lot, and, usually, perpetrators don't invite five friends
11 over. So, usually, it's a crime in secret. There won't
12 be witnesses. There won't be all this other evidence.

13 So the starting point I always tell juries is this,
14 we could have just brought **Victim** in. And if you believed
15 **Victim** **[REDACTED]**, if you believed her, that is enough for you
16 to convict. But the State has brought you much more than
17 that in the way of corroborating evidence.

18 And what is corroborating evidence? I want to take
19 you back through it and just remind all of us some of what
20 we've heard. And I will tell you one thing about how this
21 all works. I speak first and then Defense counsel does.
22 I am going to forget something. There is going to be some
23 point that Defense counsel brings out that I didn't
24 remember, or didn't think of. And what I will tell you is
25 I don't get to pop back up and address it. What I'm

1 trusting is your common sense and your memory, your recall
2 of all the evidence that you saw to guide you to the
3 verdict that speaks the truth about this case. It all
4 boils down to, do you believe the child is telling the
5 truth?

6 I want to go back and look at her. What is the
7 motive? Three years later -- let's quickly -- I know you
8 heard a lot of evidence. So let's go back timeline wise,
9 what do we have? We have this Defendant entering the
10 scene in about 2005 after the mother of **Victim** meets him at
11 Bojangles'. She's working at Bojangles'. I believe she
12 said she was a clerk. And she met this Defendant. And
13 she saw fit to bring him into the home. I think many
14 people might disagree with that decision. She brought him
15 into the home within four weeks. In 2006, they were
16 married. And you heard the testimony.

17 The State doesn't even have all the different
18 addresses these people lived. We don't. They moved all
19 the time from place to place to place. Sometimes, even
20 living in this camper. How sad is that for four children
21 to be living on table beds in a camper?

22 We fast-forward. And what do we know happened?
23 During this time, based on **Victim**'s testimony, she is being
24 abused at different locations by this Defendant. And then
25 what do we know? Time frame wise, May of 2010 comes and

1 DSS takes the kids.

2 The next big marker in time is June of 2010. **Victim**
3 goes in for a forensic interview. At that interview --
4 the allegation, at that point, is that her uncle had done
5 something to her. I'll just address that from the get-go.
6 It is one of those things that you just have to face. I
7 wish that child had never been in that environment. You
8 heard her testify that she had -- yes, she said that about
9 her uncle. You heard her mother say, yeah, I told her to
10 make that up. And why? Because Jessica Thompson didn't
11 want **Victim** going up to visit her dad.

12 And then you heard **Victim**'s counselor talk about
13 counseling. While she's in counseling in the fall of
14 2010 -- or maybe it was winter 2011 how **Victim** told him her
15 mom terrorized her and she had to make that up, but she
16 didn't want to. So the bottom line is the State is not
17 happy with that. We don't condone that. But these cases
18 never are perfect.

19 And what you come back to is this, the child was
20 brought in. And in her forensic interview in June of
21 2013 [sic], that is why she was there. And you saw it
22 played out for you before you in this courtroom how the
23 disclosure came out about Gary Thompson. It was once she
24 was out of that home, once there were no more threats for
25 her. She felt safe. She felt like she could tell.

1 Another issue that Defense counsel will most,
2 certainly, raise is, well, why didn't she just tell Tricia
3 Austin right then? I don't know. I don't know. She has
4 since said, yeah, my mom made me say that. Her counselor
5 says it. It's a fact in the record.

6 But I go back to this. What is her motive when you
7 look at what she has detailed as far as Gary Thompson?
8 What would be her motive now three years later? Her
9 mother is divorced. She never has to see this man another
10 day in her life ever. What is the motive? There's no
11 motive, except the evidence brings back one harsh reality,
12 which is she is the victim of sexual assault, repeated
13 sexual assault.

14 You go back to her testimony. She stated on the
15 stand that he tried to put his thing inside her front
16 private, vaginal penetration, in her backside, anal
17 penetration. She described oral sex. She described the
18 white stuff. She described all of that for you. Those
19 are all different forms of sexual battery. You go back to
20 the detail that **Victim** gave here in the courtroom and,
21 also, in her forensic interview. And I want to talk more
22 about the forensic interview in just a moment.

23 But, next, you go through everything that she told
24 you, the threats, the fear of this Defendant. I tried to
25 get my head around -- and maybe I didn't hear this right.

1 But this always pops up in a case. There's always a
2 Defense theory. Sometimes, it just bubbles up as the case
3 goes along. But I heard something about did the
4 allegation about Gary Thompson come out by the father's
5 mother. That's just not based on reality, or fact, or
6 anything.

7 Where Gary Thompson and the allegation about her came
8 to light was right here, right here. Tricia Austin
9 testified for you right here. Ty Miller -- Lieutenant Ty
10 Miller was asked on the stand -- I was trying to wrap my
11 head around it. I said, What did she say? The evidence
12 in this case is that **Victim** was brought in based on the
13 allegation about her uncle. And in that setting away from
14 her father, she disclosed what was really going on, the
15 years of abuse at the hands of Gary Thompson.

16 So I'll just touch on that for a second, because I
17 expect that to be, I guess, a big defense for the Defense.
18 I just -- it's not based on facts that are in this record.
19 To be clear, Gary Thompson -- no one knew until this
20 interview what he was doing to **Victim**.

21 And then you heard the testimony from Tricia Austin
22 where she contacted law enforcement in Greenville. And
23 Lieutenant Ty Miller took over. Lieutenant Miller is an
24 excellent officer. She wasn't involved on the front end
25 of this case, she just wasn't.

1 What did she do? She got the interviews. She took
2 the statement from the co-defendant in this case, **Victim**'s
3 mom. She did the search warrant. She got the porn.
4 We're going to talk more about the porn in a minute -- or
5 we can talk about that now, so I don't forget.

6 Here's the thing with the porn, the State has the
7 burden of proving dissemination of obscene materials to a
8 minor. All right. I want you to know, as a point of
9 fact, I have no idea if this is the exact video that this
10 man showed her, probably not. I doubt it. And the reason
11 I only published one of these is you can look at all of
12 this in the jury room. I don't want to shock you. I
13 don't want to do anything like that.

14 The reason this is important is that **Victim** disclosed.
15 You saw her in the video. That moment was just when she
16 pushed back from the chair. Did any of you catch that?
17 She pushed back from the chair. And every question -- she
18 was just answering what Tricia asked her. And she said,
19 Did he do anything to your body? No. Did he make you do
20 anything to him? No. Did he do anything to his body?
21 And I'm paraphrasing. She pushes back. And did any of
22 you at that moment just go, wow. I mean, yeah, she saw
23 that. That's that poor child's reality. She saw that.

24 So the reason this porn, which I know is very
25 offensive and I'll just put this down for your looking at

1 in the jury room, is relevant and important is this. In
2 these cases, often times we don't have the porn. A child
3 may say, yeah, I was exposed to porn. We don't have it.
4 We go get the search warrant, and there's nothing there.
5 Well, actually, in this case, we do have it.

6 But what's important is that it is similar to what
7 the child described. It appears Gary Thompson likes women
8 with stockings doing sexual acts. Why was the testimony
9 from Jessica Thompson -- and we're going to talk about her
10 in a minute. She talked about how she had to dress up for
11 him, call him daddy, wear pig tails and stockings. Weird
12 stuff, weird, not normal. But it all corroborates the
13 child's story.

14 So **Victim** is not out there flailing in the wind naked
15 with this story. We've got corroborating evidence that,
16 yes, this is the content that was in the home that she
17 lived in and found. It's exactly -- it's what she
18 described. So, again, I don't know that this is the same
19 porn. And if I had to put a bet on it, I'd say no. You
20 heard Jessica Thompson say that he tried to put some of
21 the CDs in the microwave and destroy them and that he said
22 we didn't get all the porn. He's probably correct on
23 that.

24 You go to Wiley Garrett. What did we hear from Wiley
25 Garrett? 25 years of counseling children. And he, I

1 think, was helpful. Because if you're not used to dealing
2 with these cases, all these questions are good questions
3 that come to your mind, which is like why did she wait?
4 Well, in **Victim**'s case, she's trying to tell her mom. Mom
5 didn't help her. I can think of a lot of adjectives for
6 her mom. The number one being a convicted felon, and an
7 idiot, and not a good mom, a failure, lots of things.

8 But Wiley Garrett explained a lot of things about
9 delayed disclosure, why kids do that, how common it is for
10 them to disclose once they get in a safe environment,
11 which is exactly what she did. If you're trapped in that
12 little scenario and your own mom is not helping you, what
13 do you do?

14 He, also, talked about many of the symptoms that
15 **Victim** had. And this is in therapy, so I find this
16 important, too. What -- he talks about, I guess, February
17 2011, she's tearful, angry, withdrawn, having nightmares,
18 repeatedly worried that this Defendant will kill her. Is
19 she just that good of an actress? Does she just have it
20 in her to just keep on going through February? It makes
21 no sense. This is corroborating rape trauma symptoms of a
22 child who's been through hell.

23 You go to Dr. Henderson. And I'll try to be brief.
24 Dr. Henderson has been treating kids for years. And I
25 think, as I listened to her testimony, the Defense

1 attorney tried so hard to get her to say that because you
2 didn't have ripping, or tearing, or all this just
3 devastation to [Victim]'s vaginal area, that proves it didn't
4 happen. And what Dr. Henderson says is, no, that does not
5 mean that.

6 What stuck in my mind was 90 percent of cases in her
7 studies, which she is learned on and qualified as an
8 expert, in 90 percent of the cases where there is a
9 history of penetration, it's a normal exam. She went on
10 to explain. And this is all the uncomfortable part of
11 y'all having to be on this jury. But you have to consider
12 the female -- for guys, the female anatomy.

13 And she talked about the labia, and the lips of the
14 vagina, and how the penis could be going through those and
15 pressing in on the vaginal opening and it's -- the
16 definition here is penetration however slight. It's not
17 what we as grown ups who may engage in having sexual
18 intercourse with our husband's or wives -- it's not that.
19 For a child, it is penetration however slight, rubbing,
20 grinding between those -- labia, that lip -- the pressing
21 on the hymen and penetrating that area.

22 She talked about anal penetration. You're not going
23 to have evidence there. And I know these are all hard
24 topics to hear and for me to just talk to you about like
25 we're talking about the weather.

1 The key thing from Dr. Henderson was that there is
2 nothing about her exam that would be inconsistent with
3 what **Victim** described to her. One thing the Defense
4 attorney may point out -- and this is -- there's always --
5 I would say it like this. In these cases, there's always
6 this moment. And I don't know if this will happen. But
7 it's usually something that's said in the forensic or it's
8 something the child said, but it's this got-you moment.
9 It's like, all right, here is how you know she's lying.
10 And it's this one detail taken in abstract and pulled out
11 of the entire case. And that's what is presented to you
12 as this is how you know she's a big fat liar. I don't
13 know what it will be in this case. I don't know. But you
14 have all the facts before you. And you have the ability
15 to listen to the totality of everything and take that all
16 in.

17 And one last point on Wiley Garrett. He explained to
18 you how children that are abused chronically, things are
19 going to blur together. Was she six when this started? I
20 don't know. She said it. She told Dr. Henderson that.
21 In her forensic, she said eight. I hope it was eight. I
22 hope it was eight. But does that matter? No. As Wiley
23 Garrett said, children that are chronically abused, things
24 blur together.

25 We go back to Jessica Taylor. And here is what I

1 would say about her. I believe I told you in my opening,
2 the State didn't need her to prove our case. And I went
3 back and forth about whether to put that woman up. The
4 reason the State did is this, I have a fundamental faith
5 in juries. We didn't need her to prove anything about our
6 case. But what was important if we didn't put her up?
7 You would not have seen the whole depravity of what life
8 was like. How could you ever imagine?

9 Probably as she was testifying, your jaw was just
10 going, wow, wow, in the confines of my county, this is
11 going on. You may have gone home to your kids last night
12 and you look in there and you're like, wow, I just heard
13 this woman testify talking about having sex in front of
14 the kids and porn. You know, you probably were a little
15 shocked. And you heard her testify how these little kids
16 were all in a camper by a gas station. And DSS had to
17 come in and get them.

18 Jessica Taylor, number one, is a co-defendant. She
19 has no deal with the State. I believe she testified to
20 that. She is looking at 10 years. I have no clue what
21 she will get.

22 The reason she was important was so you could hear
23 the totality of the circumstances. And, look, a few
24 things that she mentioned that would be worthy of noting,
25 she did talk -- number one, her statement was given

1 September 20th, 2010. Defense counsel asked her a
2 question along the lines, did you talk about what you were
3 going to do when you get up there? No. She gave a
4 statement. And I think her testimony was that it was
5 before I even met my lawyer.

6 So what she's testifying to is what she said three
7 years ago, not what she's cooked up to walk in here and
8 sell to you. Good, bad, or indifferent, that's her
9 testimony.

10 We heard about how right before trial -- and
11 Mr. Chambers brought this out, and rightfully so. Right
12 before trial last time, she made up a big fat lie and said
13 that the Defendant was threatening her and was potentially
14 going to blow her head off. All I can say to that is that
15 she is an idiot. And she is a convicted felon.

16 And she is, clearly, very afraid of Gary Thompson.
17 You heard about the abuse in that home. Gary Thompson ran
18 that home. You heard of her being choked up against the
19 wall, abused by him. It's not to excuse anything that she
20 did or didn't do. But that is what was going on.

21 One thing -- she talked about telling **Victim** to lie,
22 to make up that lie. And the key thing that hit me on
23 that was when she said, Gary thought it would be -- Gary
24 told me to tell her to say that, it would be in our
25 family's best interest. How does that make sense? Well,

1 if you're Gary Thompson and you know that you've been
2 abusing your stepdaughter for three years, what better way
3 to screw it up, say somebody else is doing something, not
4 me, not me.

5 Ladies and gentlemen, finally, we go to Tricia
6 Austin. And you heard -- I hope you heard the interviews.
7 I hope it was loud enough. [Victim] detailed very
8 photographic abuse. And Randy -- Defense counsel -- I'm
9 calling him Randy. But Defense counsel challenged her on
10 some part where -- one specific part was where she says,
11 And I want you to know you're not in trouble or anything.
12 This is the second interview on June 22nd. And you didn't
13 do anything wrong, Gary is the one that did anything
14 wrong. And what the child -- you can go back and watch it
15 if you want to. But what the child had just relayed to
16 her is, what did Gary say about telling other people?
17 That he will come after the person that told and kill
18 them. What else did he say? He said if I tell, he will
19 come after me and kill me. That's what she heard, the
20 forensic interviewer.

21 So that -- she explained I think better than I ever
22 could why she went along that line, which there was
23 nothing wrong with that. She was trying to reassure the
24 child. She, also, testified about the knowledge she had
25 between the two interviews of what was going on in [Victim]'s

1 mind. Can you imagine being nine years old and having to
2 worry about whether your doors are locked, telling your
3 caretaker, in this case her dad, go check, check the
4 doors, make sure nobody is coming back in here to get me.
5 That was her reality.

6 Ladies and gentlemen, in closing, I ask you to not
7 follow the rabbit trail. Don't take your eye off the
8 ball. The State has no interest in convicting innocent
9 people, none. The State has an interest in protecting
10 children who are abused and holding those people that hurt
11 them accountable. That's it.

12 I ask you, at this point, to just remember the
13 evidence that you heard. Use your common sense. And I
14 ask you to return a verdict that speaks justice and tells
15 Gary Thompson what he did was so very wrong.

16 Thank you.

17 THE COURT: Thank you, Ms. Sustakovitch.

18 Mr. Chambers.

19 MR. CHAMBERS: Thank you, Your Honor.

20 May it please the Court.

21 Solicitor.

22 Ladies and gentlemen, Abraham Lincoln said once upon
23 a time about lying, it's not your dishonesty that bothers
24 me, it's the fact that I can never trust you again. When
25 somebody lies to us, we will never trust them again. We

1 will never believe anything that they have to say again.

2 In the case that the Solicitor has presented to
3 you -- and they get to decide who to call, who not to
4 call, what evidence to bring, what not to bring -- it is
5 built on a foundation of lies. In fact, the two most
6 important witnesses they brought you are admitted liars.
7 And that is **Victim**, and that is Jessica. They both
8 admitted to you that they did not tell the truth.

9 Now, the Solicitor spent a lot of time talking to you
10 about what I might do or what I might say, which is a
11 clear indication that she realizes that her case is a
12 shaky case. Because why worry about what I might say and
13 what I might do. If the evidence is there, simply stand
14 up and say this man is guilty beyond a reasonable doubt.
15 Here is how you know. Here is the evidence in the case.
16 Go back and find him guilty.

17 But I'm not a magician. I'm not here to lead you
18 down a rabbit trail, as she said. I'm not trying to
19 distract you from the evidence in this case. No, I want
20 you to focus very clearly on the evidence. I want you to
21 think about every witness that took that stand, what they
22 told you, how they told it to you, what their demeanor
23 was, what their attitude was, what they had to say. Was
24 there anything to corroborate what they had to say? I
25 want you to focus on it. I want y'all to go back there

1 and discuss it with one another.

2 If you have any doubts or disagreements about it, I
3 want you to ask the Court, let us hear that testimony
4 again, let us watch that video again. I want you to take
5 your time, ladies and gentlemen, and deliberate this case.
6 Because it is an important case. This is a case where
7 your decision -- and you are the fact finders in this
8 case, you are the only ones that are going to decide what
9 the facts are. You could send this man to prison for the
10 rest of his life.

11 MS. SUSTAKOVITCH: Your Honor, I'd object as to
12 talking about penalty.

13 THE COURT: All right. Sustained.

14 MR. CHAMBERS: This is an important case. And, at
15 the outset, I told that you that that burden of beyond a
16 reasonable doubt is reserved for criminal cases because
17 this is where the stakes are the highest.

18 So what did the Solicitor bring you by way of
19 evidence in this case? And, like the Solicitor, I don't
20 normally use notes. I try to impress people with my
21 memory. But this is an important case. And so I want to
22 make sure that I've gotten things right.

23 But now here, here is something that I want to make
24 sure y'all understand and reiterate. If I say something
25 that you don't agree with or that you don't recall,

1 remember the evidence -- we've got -- Hollie over here
2 took everything down and she can replay it for you, if she
3 needs to. You can watch the videos again. I want you to
4 consider the evidence in this case.

5 First, **Victim** came in and testified. She told you
6 that she -- I mean, this -- these allegation came about
7 three years ago. And we heard that since he was arrested
8 that my client has been sitting in jail all that time
9 waiting for this trial.

10 And she's now 13. Since that time, we know that she
11 has talked to police. We know that she has talked to a
12 medical doctor. We know that she has talked to the
13 forensic interviewer. We know that she has talked to a
14 therapist. We know that she has talked to the Solicitor,
15 and that the Solicitor even brought her in here. At this
16 point, she is invested in this process and what's going
17 on.

18 And let me go ahead and acknowledge. These people,
19 they all believe Gary Thompson is guilty. And they want
20 you to substitute their judgment for yours. Because they
21 believe it, they then work backward, how can we support
22 this contention? And everybody involved in the process
23 has engaged in that.

24 I mean, you -- just recall -- and she talked about me
25 trying to give people a hard time. But recall

1 Dr. Henderson -- and I want to talk some more about this
2 in a little bit -- how hard it was, that give and take, to
3 just get her to answer the questions. When the forensic
4 interviewer was on the stand and I would ask her what I
5 thought would require a fairly short answer, she would go
6 off and go all through the procedure and stuff. That's
7 because they want you to substitute their judgment for
8 theirs -- they want you to substitute their judgment for
9 yours. That's what they want you to do in this case.

10 So **Victim** takes the stand. And she said when she
11 testified yesterday in court that, among other things, she
12 was never alone with Gary. That was her testimony
13 yesterday on the stand. And, again, if you don't remember
14 it that way, you can listen.

15 Why is that important? It's important because, first
16 of all, it's probably true. These people moved a lot.
17 These people lived in close quarters. It was not just
18 Gary, but it was Jessica and it was those four girls.
19 And, as you heard, at different times, there were other
20 people visiting and people in and out. And this wasn't a
21 big house. It was people -- a lot of people living in
22 small spaces. And, at one point, they were living in a
23 small camper, at other points, living in single-wide
24 trailers.

25 She, also, said that she had seen her mom and Gary

1 having sex with one another on, at least, one occasion.
2 So she is somebody who has experienced sex in front of
3 her. We know because it came out in the background
4 information with the forensic interviewer that they had
5 watched dirty movies at grandma's house. So there's no
6 question. And they had this sexualized behavior that you
7 heard about -- okay -- where they were, apparently,
8 masturbating. And Jessica didn't think there was anything
9 to worry about, although she blamed it on Gary. She
10 blames everything on Gary. Everything is Gary's fault.

11 She said -- Jessica -- or **Victim** said she remembered
12 that DSS had been in the home. She didn't remember how
13 many times. But we know from other testimony they had
14 been in there eight different times for different things.
15 Now, it wasn't for allegations of sexual abuse. But,
16 certainly, if something was going on, she had ample
17 opportunity to tell somebody of authority what was going
18 on.

19 All right. And I want you to compare her testimony
20 when she testified to those videos. First of all, she
21 said that she was never alone with Gary, and that the
22 abuse started when she was six. But then, in the first
23 forensic interview, she said that there were times that
24 she was alone with Gary, because her mom would go off to
25 the rent lady's house. And that the abuse started when

1 she was eight. I want you to consider that she talked
2 about abuse in the house, and threats and things being
3 made. But in that first forensic interview, none of that
4 is there, none of that is there. In fact, she said he
5 never threatened her.

6 But then she goes home for a week with her natural
7 dad, BJ, and stepmom. And she comes back for that second
8 interview, the one where beforehand they told the forensic
9 interviewer that she had been having these nightmares and
10 stuff, and then all of the sudden she says, well, he
11 threatened me, and he said that he would get me, and he
12 would get other family members, and I'm scared of him.
13 She didn't say that in the first interview.

14 So what happened over the course of that week? Every
15 time that this child has testified, she has testified
16 differently. All right. She admitted -- well, at least,
17 she said -- I really don't know what the truth is on this
18 one.

19 We know that there was an allegation made that Uncle
20 Mark put his penis in her anus. I believe the words she
21 used -- and this was confirmed by Lieutenant Ty Miller
22 that the way that it was phrased was that he put his
23 private part in her butt, I believe is the language that
24 was used. She said that in very specific detail about her
25 Uncle Mark. Lieutenant Miller, also, said that it was

1 indicated in the report that the mother, Jessica, was
2 there, that Jessica had told her to tell the truth about
3 what happened, and that's what she said.

4 Now, it's funny, when I talked to Jessica and Jessica
5 said that she was -- that she told the little girl to lie
6 about Uncle Mark, she said that all she said was, tell
7 them Uncle Mark touched you. And she said she told her to
8 tell them that because Gary made her do it. But that's
9 not what the little girl said. The little girl didn't say
10 Uncle Mark touched me. She very, specifically, said he
11 put his penis in my anus. He put his privates in my butt.
12 That's what she said. And she acted like she had never
13 heard that before.

14 So maybe Uncle Mark did put his penis in her anus,
15 maybe that really happened. We don't know. Or maybe the
16 little girl lies. She says she lied. She said her mother
17 told her to lie, and that she did what her mother told her
18 to do.

19 So if we -- let's assume that she did tell her to
20 lie. We know that the little girl is prone to telling a
21 lie if prompted by somebody else to do so. She admitted
22 that. But then strangely enough, when she goes in for
23 these three separate forensic interviews and she's asked
24 over and over, did anybody else touch you? No. No,
25 nobody else touched me. Did anybody tell you to say that

1 somebody else touched you? And she, specifically, said,
2 no.

3 Now, what's important about that? What changed?
4 What changed from the time that she said Uncle Mark did
5 something to her to when she went in for the forensic
6 interview? Well, I'll tell you what changed. She was
7 removed from the home by DSS in May of 2010, and she went
8 to live with her dad, BJ, the brother of Uncle Mark, and
9 with her stepmom. And she had frequent contact with all
10 of the family members, all of Mark's family.

11 So, low and behold, when she goes in to give the
12 forensic interview to talk to the forensic interviewer,
13 who said that when the referral was made to her the
14 allegation that she had heard about was that Uncle Mark
15 had done something to her, they're now blaming it on Gary.

16 And Gary is a convenient scapegoat because, as we
17 know, he has been convicted back in 1993 of criminal
18 sexual conduct. That's been stipulated to. It is before
19 you. And it satisfies one of the elements they have to
20 prove to you. So he is a convenient scapegoat. And when
21 the child goes in, she now says it was Gary who did these
22 things to me.

23 And the forensic interviewer went on about how she
24 had all these rich and contextual details and things about
25 it. But I want you to think about those videos. There

1 weren't a lot of details. And the details that she gave
2 she was inconsistent about. I mean, in the first
3 interview, for example, she says he did it a lot, he did
4 it like every other week. She said in the first one, it
5 only happened in the house where we were living, in mom
6 and dad's bed. And that's what she said. When she tried
7 to get her to give more specific details, she couldn't do
8 it.

9 Then she goes home for a week, comes back. In
10 addition to bringing up the threats for the first time,
11 now, she says that it happened everywhere we lived. And
12 if you look at the way the question was asked to her, this
13 forensic interviewer said to her, did it happen at these
14 other locations? She then said, yeah, it happened at all
15 of them. It happened at every one of them. And it
16 happened every day.

17 So you think about that. Give her the benefit of the
18 doubt. It was somewhere between every other week and
19 every day. Do you really believe -- does it make sense to
20 you that in those close quarters that that was going on
21 and nobody else knew about it, or nobody cared?

22 Now, I know that they've demonized Jessica Thompson.
23 And she's not a great mom. I'm glad she didn't raise me.
24 But she surely wouldn't let something like that go on in
25 front of her that she just flat out knew about. I don't

1 think anybody would. And, surely, if that's going on as
2 much as they say, those eight times that DSS was there,
3 you would say something. Okay.

4 Or maybe you would say something in 2007 when because
5 DSS was involved and they said, hey, you're living in the
6 house with somebody who's on the sex offender registry,
7 we're worried that there might be sexual abuse going on.
8 And she's taken to see Dr. Henderson and she's taken for a
9 forensic interview. And she says, no, nothing is going
10 on. Nobody is doing anything to me. But, at least, on
11 the occasion of when she came in here and testified on the
12 stand, she said that the abuse started when she was six
13 and continued on a frequent basis when she was six, seven,
14 eight, nine. So if she was telling the truth when she
15 testified on the stand, it would have been going on in
16 2007. And she would have had an opportunity to tell
17 Dr. Henderson.

18 Now, with Dr. Henderson, the thing that is
19 interesting is this, she testified that in both of
20 those -- she said in 2007, there was no disclosure of any
21 sexual abuse and it was a normal physical exam. And then
22 in 2010, July of 2010, this was after the forensic
23 interview, she discloses. And she said, as you heard in
24 the forensic interview and as you heard from
25 Dr. Henderson, that Gary Thompson penetrated her poo-poo,

1 which is her vagina, and her butt with his penis, with his
2 private parts.

3 And the Solicitor talked about how we had this back
4 and forth, and I kept trying to twist her words. Not at
5 all. I mean, here is what I was going after. And this is
6 what -- I think where -- again, where common sense comes
7 in. This was a six, seven, eight, nine-year-old girl,
8 prepubescent, no sexual maturity at all. She had not
9 begun to menstruate. She does not have, for lack of a
10 better way of saying it, the natural lubricant that might
11 occur in normal sexual intercourse between two adults. So
12 any entry into her vagina would be painful. She is a
13 child.

14 Common sense would tell you that if a normal-sized
15 adult male entered a six, seven, eight, nine-year-old
16 girl's vagina that there would be some injury. There
17 would be some injury. She didn't report any bleeding.
18 She didn't on any of the times that she talked about it
19 talk about there being a great deal of pain. She talked
20 about there being some burning. There was no lacerations.
21 There was no scarring. There was nothing of that kind.

22 Now, the Doctor did say, well, something could have
23 still happened and it would have been a normal exam. But,
24 listen, here is where the back and forth happened. What
25 she kept saying was when kids say things like that happen,

1 it doesn't necessarily mean penetration the way we think
2 about penetration. More likely, what it was is he was
3 putting his penis up there next to it and kind of mashing
4 in and that would have hurt a little bit. But she didn't
5 say that. She said about Uncle Mark, he put it in my
6 butt. She said about him, he put it in my vagina and he
7 put it in my butt. That's what she said about it.

8 Now, you can consider that for what it's worth, but
9 you get to consider that. So there's nothing about that
10 exam that corroborates what that little girl said --
11 okay -- when she testified in here. I mean, it's easy
12 enough to say. I mean, basically, what they're trying to
13 tell you is a normal exam means he did it. Well, a normal
14 exam doesn't mean that at all. And, in fact, you can
15 consider the fact that there were no physical findings.
16 In fact, there is no forensic evidence of any kind, no
17 eyewitnesses, no physical or forensic evidence of any
18 kind.

19 Lieutenant Miller testified. She told you that they
20 went into that house with a search warrant. And they
21 found some porno CDs of consenting adults engaging in
22 sexual activity with one another. And that's what they
23 found. There is nothing to show ownership of those, how
24 they got there, nothing like that.

25 She said they even went back at another point to look

1 for some more and they didn't find anything. They looked
2 at seven or eight hard drives, and browser histories, and
3 all those things. And they didn't find anything. Most
4 important, they didn't find any child porn, which you
5 would think somebody that is so heavily invested in sex
6 with kids if he was going to look at porn, that's the kind
7 he would look at. They didn't find anything like that.

8 You heard from Wiley Garrett. Wiley Garrett was -- I
9 mean, obviously, when she went to a therapist -- he has --
10 and she's been sent to me because she's experienced some
11 kind of trauma, and I'm going to provide therapy for that.
12 And that's what he did. Okay. She made disclosures to
13 him, as he told you. But it's the same disclosure she had
14 already made.

15 Interestingly enough, she used -- when he asked her
16 what had happened to her, she said that Gary had child
17 molested me, child molested me. That's not -- that's
18 somebody that has said something to her. That is,
19 certainly, somebody that has suggested you were molested.
20 It's just when she was in the forensic interview, she kept
21 calling it, we had the sex. He never talked to me. He
22 never said anything to me about what was going on. He'd
23 just come and get me, and drag me in, and we would have
24 the sex.

25 He, apparently, didn't know that she had had such an

1 unstable lifestyle. He didn't know that she had moved
2 multiple times. He didn't know that DSS had investigated
3 them, at least, eight times. He didn't know any of that.
4 And he said that that could lead to trauma.

5 Also, he acknowledged that there came a time when
6 **Victim** quit going. And **Victim** quit going, supposedly,
7 because mom and dad didn't have the gas to take her.
8 Well, first of all, that seems ridiculous in and of
9 itself. If somebody really needs the therapy, if somebody
10 needs the help, I wouldn't think gas would stand in the
11 way.

12 But he, also, acknowledged, after I asked him, that
13 it wasn't just that, that **Victim**'s parents had indicated
14 that she didn't want to go. In fact, it was a fight every
15 time to try and get her to go. Why wouldn't she want to
16 go? Maybe because she was tired of going in and
17 discussing something that didn't happen, or didn't happen
18 the way that they want you to believe it happened.

19 We talked about Dr. Henderson. You can consider the
20 fact -- I mean, basically, there were no physical
21 findings. Essentially, she had nothing to offer when she
22 came in here and testified. If anything, what she had to
23 offer showed that this little girl was not telling the
24 truth about Gary Thompson.

25 Jessica Thompson. Now, they said they didn't have to

1 call Jessica Thompson. But Jessica Thompson said a lot of
2 stuff that they really wanted her to say. She, first,
3 gave a statement, as you heard, back in September of 2010.
4 And they say that's proof because it was so long ago,
5 that's proof that it doesn't -- that you can believe her.
6 Because, at that point, she didn't have any reason to lie.
7 But that's not true, folks.

8 What do we know about Jessica Thompson at the time
9 she gave that statement? Not only had Gary Thompson been
10 charged, but she had been charged with a crime that she
11 later pled guilty to. So, in giving a statement, what's
12 the natural thing to do? Throw Gary Thompson under the
13 bus, say Gary Thompson was a monster, Gary Thompson ruled
14 that house with an iron fist. We were all afraid of him.
15 He was abusive. He was terrible. And we would have done
16 anything to avoid him doing something to hurt us. And
17 that's, essentially, what she told you. That he had sex
18 with me and made me put stockings on. That's what she
19 told you. All right.

20 Well, we know, first of all, that she's dishonest.
21 Because she said that she told the little girl to lie
22 about Uncle Mark. So either she did tell her to lie about
23 Uncle Mark and **Victim** did lie about Uncle Mark, or she made
24 it up after the fact because she was trying to lay it on
25 Gary. I don't know. But we know she's dishonest.

1 We, also, know that she's dishonest because the first
2 time that she was supposed to come in here and testify,
3 the day before, she tells a deputy sheriff this big, very
4 meticulous, very detail-oriented lie about how he not only
5 threatened her, but he threatened that he was going to
6 hire a hit man who would come to her home, put a shotgun
7 in her mouth, and blow her head off, along with some other
8 details. And the police, doing the easiest thing that you
9 could do in that situation, said, well, you know, he's in
10 jail. We listen to those phone calls. Let's go back and
11 see. Guess what? No phone call. So she had to admit
12 that she made it up.

13 So she's a very accomplished liar. She's very good
14 at making up lies. And she's very good at making up
15 detailed lies, especially when it suits her, when it's
16 going to help her.

17 So she wanted the police to believe and she wanted
18 you to believe that she was scared to death of this man,
19 that he was abusing this child and that she didn't do
20 anything about it because she was afraid of him. Well,
21 guess what? He's gone. He's in jail. What does she do?
22 She writes him letters almost every day for the better
23 part of two years. She had to admit that that was true.

24 Not only did she write him letters, but she said she
25 told him in the letters I don't believe you did anything.

1 I think this is all going to work out. She went to visit
2 him. She was on his visitors list. She said she sent
3 money to him so that he would have money there in jail
4 that he could use. She even took phone calls from him.
5 And this went on for a couple of years. And it went on
6 until she hooked up with another guy. And then all the
7 sudden, she didn't do it. And it, also, went on,
8 basically -- because you heard her, that she pled guilty
9 about a year ago. Okay. It was about a year ago. And,
10 strangely enough, she hasn't been sentenced yet.

11 Now, they say they don't have a deal with her and
12 they haven't promised her anything. But, you know,
13 they're taking pleas up there in courtroom eight as we --
14 right now as we're here. And if you were up there, you
15 would see that everybody walks up right here, takes an
16 oath, pleads guilty. As soon as they're done and the
17 Court accepts their guilty plea, they get sentenced. They
18 get probation or they go to jail, or whatever. That's the
19 way it happens.

20 When does it not happen that way? It doesn't happen
21 that way when the Solicitor wants you to testify. And the
22 reason that they defer sentencing is because they want to
23 see how you to testify. Why does that matter? Well,
24 because if they do a good job for you, then what you're
25 going to do is you're going to say, you know what, they

1 cooperated with us fully, have mercy. And that is what
2 Jessica Thompson is hoping for in this case.

3 And then you saw the forensic interview. And I've
4 talked a little bit about that. But you heard Tricia
5 Austin say that it is supposed to be sort of a
6 non-suggestive, just tell me what happened kind of an
7 atmosphere. That's not exactly how it went. And I'm not
8 going to spend a whole lot of time on it, because you
9 folks watched it. And I don't need to insult your
10 intelligence by telling you what I think about it. But I
11 think it is important that on, at least, two different
12 occasions, she asserted, clearly, her belief that Gary
13 Thompson had done something, and that she didn't have to
14 worry about Gary Thompson any more.

15 It is, also, a -- very important that you consider
16 that there was a weeks span between each of these
17 interviews. And the details are different each time. And
18 that each time not only is she getting background
19 information from the girls dad, BJ, and the stepmom, and
20 who knows who else, but she said she talked to the little
21 girls, and she talked to the police, and she talked to a
22 lot of other people. She's then going home for a week at
23 a time between each interview and coming back and saying
24 different stuff. So you have all that to consider when
25 you go back there and you begin to deliberate in this

1 case.

2 Now, folks, there are two things -- and I'm going to
3 be real honest about this -- that worry me about this case
4 when y'all go back there and deliberate. One is all of
5 you know, because it's one of the elements they had to
6 prove, that he is a convicted sex offender and he's on the
7 sex offender registry. But I want you to keep in mind
8 that you are only to consider that because it satisfies
9 one of the elements.

10 There may be some of you who believe -- and it would
11 be perfectly natural that you did -- if he did it once, he
12 did it again. He should have never been living in that
13 home. Well, he was. He was living there. DSS knew that
14 he lived there. DSS even went the extra step to have an
15 investigation done back in 2007, when all of this was
16 supposed to be going on, and there was no disclosure, and
17 there was no finding of any kind. And they were fine with
18 him continuing to live in the house.

19 You know, I always think about the old thing about
20 just because somebody is a prostitute doesn't mean they
21 can't be raped. You have to determine independently
22 whether he committed the crime of criminal sexual conduct
23 in the first degree, whether he committed a sexual
24 battery, very specifically. And the sexual battery means
25 that he penetrated some orifice of hers. That's what you

1 have to decide. You have to do it based on the evidence
2 in this case. So if anybody gets back there and there's
3 any thought about, oh, well, he's done this before, that
4 is not proper deliberation.

5 The other thing that gives me pause is this -- and
6 this is really, you know, a decision that always weighs
7 heavy on my mind -- my client didn't testify. All right.
8 He doesn't have to. He doesn't have anything to prove.
9 They have everything to prove. And His Honor is going to
10 tell you that that's not anything for your consideration.

11 Here is why that's important, though. When you look
12 at this case, there's no reason for him to testify. I'm
13 not going to go back through everything I just went
14 through. But I want to stress to you, this is a case that
15 is so clearly built on a foundation of lies and
16 uncorroborated by any kind of independent evidence in this
17 case that it is ripe [phonetic] with reasonable doubt.

18 And that's based on the witnesses they called.
19 Consider the ones they didn't call that would be important
20 in this case. At the very least, you would think that you
21 would hear from the natural father, BJ, and, perhaps, the
22 stepmother in this case. They provided background and
23 contextual details about -- to the forensic interviewer in
24 this case, to the police in this case.

25 And do you really believe if you really look at this

1 with common sense that she's removed -- that **Victim** is
2 removed from the home in May, she goes to live with her
3 father and her stepmother, and this allegation is out
4 there about Uncle Mark. And then they go in the middle of
5 June, late June for these three interviews. Do you really
6 believe that in that span of time that there wasn't some
7 discussion about Uncle Mark, supposedly, doing something
8 to this little girl? Do you not believe that in the
9 safety of that home that they would have said -- that she
10 would have said to them, hey, you know, Uncle Mark didn't
11 do anything to me. My mom told me to say that, but I want
12 you to know Uncle Mark didn't do anything to me, that it
13 was Gary.

14 Apparently, according to the forensic interviewer,
15 that's not what happened. She said they heard about it
16 for the first time. I don't know. But we'll never know
17 because they didn't call those people. These are people
18 that provided background, and details, and had this girl
19 living in their home.

20 We heard some hearsay about what, supposedly, went on
21 in the house with the little girl being scared with the
22 nightmares and stuff. But the very people that could tell
23 you about that, you didn't hear from. And the Solicitor
24 made the choice not to bring them in.

25 Here is what you have, though. This is really what

1 it comes down to. You've got those two videos ripe with
2 inconsistencies. You have the physical exams that give
3 you nothing and, in fact, probably show that he could not
4 have abused her repeatedly by putting his penis in her
5 vagina or her anus. And then you have two witnesses who
6 are admitted and proven liars.

7 Now, there's a part of me that says keep talking,
8 keep going through the evidence. But I'm not going to do
9 that to you. Y'all came here to do a job. You're going
10 to go back there and deliberate. I know if I miss
11 something, you're going to pick it up.

12 And I wanted to say to you, again, here is what we
13 want you to do, the Defense. I don't want to lead you
14 down a rabbit trail. I don't want you to go astray. I'm
15 not trying to trick you. I don't know why she said all of
16 those things.

17 What I want you to do is dig into this evidence. Do
18 you feel comfortable? Are you firmly convinced? Will you
19 be able to leave here having convicted Gary Thompson on
20 this evidence and not have some kind of second thought?
21 It's not enough even that you might think he's probably
22 guilty. You have to believe it beyond a reasonable doubt,
23 folks. That's the standard. That's what you have to do.

24 I'm going to do the hardest thing I'm going to do all
25 day, I'm going to go sit down. And I'm probably going to

1 start thinking about all the things I wish I'd told you.
2 But, like I said before, I've done this a few times. And
3 I know how conscientious all of you are. And I know
4 you're going to go apply the law that His Honor is going
5 to give you and you're going to apply it to the facts of
6 this case. And you're going to go back there and you're
7 going to deliberate. And each one of you is going to
8 speak your mind. And you're going to stand up for what
9 you believe in.

10 If there are disagreements, you'll sort it out among
11 each other through proper deliberation, or looking at
12 evidence again. Take your time. Don't be in a hurry. I
13 know it's 3:00. But if you don't finish up tonight, you
14 can always deliberate through tomorrow. It's an important
15 decision, a very important decision. But I do want you to
16 dig in and focus on the evidence.

17 I can tell you that Gary Thompson appreciates you
18 being here. It's been hanging over his head. In fact,
19 he's been sitting in jail now for the better part of three
20 years waiting for this to be resolved. He'd like to get
21 on with his life. We look forward to your decision in
22 this case. Our position is and we believe the proper
23 verdict in this case would be not guilty. It is simply
24 not supported by the evidence in this case.

25 Thank you very much.

CHARGE ON THE LAW

THE COURT: Thank you, Mr. Chambers.

Ladies and gentlemen, you've heard all the evidence you're going to hear in this case. And you've heard the closing arguments. And it's now my duty to instruct you on the law that applies to the facts of this case. And it's your duty to determine the facts from the evidence you've heard during this trial.

And, to those facts, you must apply the law as I give it to you. And you should not be concerned with what you think the law should be, but with what it is. And you should not be concerned with any undue sympathy, or biases, or prejudices, or personal likes or dislikes you may have. And that means you must decide this case solely on the evidence before you and according to the law. And you will recall, you took an oath to do just that when we began this trial.

Now, in following my instructions, you must follow them all and not single out some and ignore others, because they're all equally important. And do not read into these instructions or into anything I may have said or done during this trial as any indication as to what I think the facts are, or what your verdict should be. Because, as I told you at the outset, under our Constitution and system of justice, you and, you alone,

1 are the sole and exclusive judge of the facts of the case.

2 You decide what the facts are by evaluating and
3 weighing the evidence you've heard during this trial.
4 There's no way for you to do that in a literal sense.
5 I'm, certainly, not going to give you a set of scales to
6 go back and conduct experiments. What I'm talking about
7 is weighing the evidence and evaluating it by using your
8 good common sense, your sense of logic and reason, and
9 your life experiences. And you bring those things to bear
10 on what you've heard during this trial.

11 I told you, also, at the beginning of the case that
12 evidence consists of several things, the first is sworn
13 witness testimony, the second is exhibits. And we've,
14 also, had a third form in this case, which is a
15 stipulation. And I told you that the purpose for which
16 you can use evidence is sometimes limited. And to that
17 evidence that I've said you can only use for a limited
18 purpose, you're, of course, required to do just that and
19 not use it for any other purpose.

20 Now, I, also, told you about the credibility of the
21 evidence and that you, as jurors, would have to
22 necessarily gauge the credibility or believability of the
23 evidence. And I'm not going to go back over that with
24 you, because I know you heard me the first time.

25 But I will tell you that you, also, may consider in

1 deciding credibility witnesses testimony in such a way
2 that you believe everything they say, or you may believe
3 nothing a witness says. You may believe parts of a
4 witnesses testimony, and disbelieve other parts. You may
5 believe one witness over several, or several over one.
6 But I know you will decide this matter of credibility
7 using reason, and logic, and your good common sense and
8 not do it arbitrarily.

9 Now, there are, also, two sources of -- or types of
10 evidence, rather. And what I'm talking about now is
11 direct evidence and circumstantial evidence. Direct
12 evidence is the testimony of someone who claims to have
13 direct and actual knowledge of a fact such as an
14 eyewitness. Direct evidence is evidence that, if it is
15 believed, immediately establishes a fact.

16 Circumstantial evidence is indirect evidence. Put
17 another way, circumstantial evidence is proof of a chain
18 of facts from which you could find that another fact
19 exists, even though it has not been proven to you
20 directly. The law makes no distinction between the weight
21 or value to be given to either direct or circumstantial
22 evidence. You may consider both kinds. And there's not a
23 greater degree of certainty required of one over the
24 other.

25 Now, ladies and gentlemen, there are certain things

1 that -- or certain witnesses who come in who are qualified
2 and described as experts. These are people who by reason
3 of their training, education, and experience have achieved
4 expertise in their field. And they are, unlike other
5 witnesses, entitled to give their opinions about things
6 they have observed.

7 However, expert witnesses share this with all other
8 witnesses, and that is that you, the jury, are the sole
9 judges of their credibility. You may accept their
10 testimony, or reject it, or give it whatever weight you
11 think it deserves. You're not required to accept even the
12 uncontradicted opinion of an expert.

13 Now, there are certain principles that apply in
14 criminal cases. And I'm going to go over those again with
15 you now. The first is that the mere fact that
16 Mr. Thompson was indicted and charged doesn't constitute
17 evidence of any kind. The fact that a person has been
18 indicted doesn't even create a suspicion of guilt. I
19 explained to you that these indictments are simply the
20 formal manner in which a case begins. And they,
21 certainly, don't constitute evidence against Mr. Thompson.

22 Mr. Thompson pled not guilty to these indictments,
23 and that put the burden of proof solely and squarely on
24 the State. And he can only be convicted if all 12 of you
25 agree the State has proven each and every element of the

1 charge beyond a reasonable doubt.

2 You are, also, required to weigh each one of these
3 two charges separately and consider the evidence as to
4 each one separately, and determine whether the State has
5 met its burden of proof as to each element of the crime.

6 Mr. Thompson is presumed innocent. And that
7 presumption of innocence is not some legal technicality.
8 It is a fundamental right that every person enjoys in this
9 country. And it can only be removed if the State
10 convinces you with proof beyond a reasonable doubt as to
11 every element of the crime.

12 So what is a reasonable doubt? A reasonable doubt is
13 defined as the kind of doubt that would cause a
14 reasonable, sincere, honest, and conscientious person to
15 hesitate to act in an important matter in their own
16 affairs. Proof beyond a reasonable doubt is proof that
17 leaves you firmly convinced of the Defendant's guilt. The
18 law does not require proof that overcomes every possible
19 doubt.

20 So, if based on your view of the evidence, you are
21 firmly convinced that the Defendant is guilty of the crime
22 charged, you must find him guilty. On the other hand, if
23 you think there's a real possibility that he is not
24 guilty, you must give him the benefit of that doubt and
25 find him not guilty. A reasonable doubt may arise from

1 the evidence or from a lack of evidence.

2 And a Defendant is entitled to every reasonable doubt
3 that may arise in the case. And that means that as to any
4 issue of fact that is essential to a finding of guilt you
5 have some reasonable doubt as to how that issue should be
6 resolved, it's your duty to resolve it in Mr. Thompson's
7 favor.

8 You have heard evidence that the Defendant was
9 convicted of a crime other than the one for which he is
10 now on trial. This testimony, if you conclude it is true,
11 may only be considered by you for the limited purpose for
12 which I told you that it could be. And that is whether
13 the State has met its burden of proof as to an element of
14 the crime for criminal sexual conduct in the first degree
15 with a minor. You may not consider it for any other
16 reason or any other purpose. You may not and must not
17 consider this evidence of the commission of another
18 offense as proof of Mr. Thompson's guilt of the crime that
19 we are charging -- guilt of the crime that he is on trial
20 for here today, other than to the extent I've told you
21 that you could do so.

22 Now, ladies and gentlemen, the fact that a Defendant
23 in a criminal trial does not testify is not something you
24 can consider in any way in your deliberations, or your
25 consideration of the guilt or innocence of the Defendant.

1 The fact that a Defendant in a criminal trial does not
2 testify and claims his right to not testify, which is
3 guaranteed by both the State and federal Constitutions, is
4 not something that you can even discuss in the jury room.
5 And it would not be in keeping with your oath to consider
6 it, discuss it, or give it any weight whatsoever.

7 A Defendant has the Constitutional right to remain
8 silent. And the claiming of this right cannot be
9 considered in any way. So you are to draw no conclusion
10 whatsoever from the fact that Mr. Thompson did not testify
11 in this case. The burden of proof is entirely on the
12 State. And the Defense has no obligation or requirement
13 to prove himself innocent or not guilty.

14 Now, in order to establish criminal liability, the
15 State must prove criminal intent. And criminal intent is
16 a matter that must be determined by you from the facts.
17 And there's no way to prove criminal intent to a
18 mathematical certainty.

19 So the law says that criminal intent may be inferred
20 from the circumstances. It is not necessary to establish
21 intent by direct evidence. Intent may be established by
22 circumstantial evidence taking into account the
23 circumstances that are at issue. Criminal intent is a
24 mental state of conscious wrongdoing. It is up to you to
25 determine what the Defendant intended to do based on the

1 circumstances shown to have existed.

2 Now, the offense that we're, first, going to discuss
3 is criminal sexual conduct with a minor first degree. In
4 order to convict Mr. Thompson of this offense, the State
5 must prove several things beyond a reasonable doubt.
6 First, the State must prove that Mr. Thompson engaged in a
7 sexual battery with the victim.

8 Sexual battery is sexual intercourse, cunnilingus,
9 fellatio, anal intercourse, or any intrusion, however
10 slight, of any part of a person's body or of any object
11 into the genital or anal openings of another person's body,
12 except when the intrusion is accomplished for
13 medically-recognized treatment or diagnostic purposes.

14 The State must next prove beyond a reasonable doubt
15 that the victim was less than 16 years old at the time of
16 the sexual battery, and that the Defendant has previously
17 been convicted of an offense listed in Section
18 23-3-430(C), or has been ordered to be included in the sex
19 offender registry.

20 Consent, willingness, indifference, or ignorance on
21 the part of the minor, if any, as to what was taking place
22 does not in any way affect the charge of criminal sexual
23 conduct with a minor. The specific date and time of the
24 alleged offense is not an element that the State must
25 prove.

1 The next charge is dissemination of obscene material
2 to a minor prohibited by Section 16-15-355 of the South
3 Carolina Code, which makes it unlawful for an individual
4 18 years of age or older to knowingly disseminate to a
5 minor 12 years of age or younger material which he knows
6 or reasonably should know to be obscene.

7 And, ladies and gentlemen, in order to convict
8 Mr. Thompson of this offense, the State must prove beyond
9 a reasonable doubt that he knowingly disseminated, which
10 is defined as published, exhibited, or otherwise make
11 available, to a minor under the age of 12 anything
12 obscene. Knowledge of the conduct -- of the content of
13 the material or performance or failing after reasonable
14 opportunity to exercise reasonable inspection that would
15 have shown the content of the material or performance.

16 Material is considered obscene if to the average
17 person applying contemporary community standards, the
18 material shows or describes sexual conduct in a patently
19 offensive way that the average person applying
20 contemporary community standards relating to the showing
21 or description of sexual conduct would find the material
22 taken as a whole appeals to the prurient interest and sex.
23 To a reasonable person, the material taken as a whole
24 lacks serious literary, artistic, political, or scientific
25 value. And the material as used is not otherwise

1 protected or privileged under the Constitution of the
2 United States or this state.

3 Now, many of the terms I've just used in describing
4 obscene material have special definitions for purposes of
5 this crime. Sexual conduct means vaginal, anal, or oral
6 intercourse, actual or simulated normal or perverted
7 between human beings, animals, or a combination of an act
8 that depicts actual or simulated touching, caressing, or
9 fondling of or other similar physical conduct with the
10 covered or exposed genitals, pubic, or anal regions or
11 female breast nipple, whether alone or between humans,
12 animals, or a human and animal of the same or opposite sex
13 in an act of actual or apparent sexual stimulation or
14 gratification.

15 Patently offensive means obviously and clearly
16 disagreeable, objectionable, repugnant, displeasing,
17 distasteful, or obnoxious to contemporary standards of
18 decency and propriety within the community.

19 Prurient interest means a shameful or morbid interest
20 in nudity, sex. It shows an arousal of lewd and
21 lascivious desires and thoughts.

22 Nudity, in and of itself, is not obscene. Materials
23 showing or depicting nude men and/or women may be
24 provocative without being obscene. Also, the candid
25 display of male or female genitals is not in itself

1 obscene. In other words, sex and obscenity are not
2 synonymous. Contemporary community standards means the
3 current, modern standards within Greenville County.

4 In deciding whether the materials in this case are
5 obscene, you are not to base your decision on your
6 personal tastes or personal standards. Instead, you must
7 decide whether an ordinary adult in this county would find
8 the materials to be obscene, as I have defined that term
9 to you. The materials must be judged as a whole in their
10 entire context.

11 Now, those are the principles of substantive law that
12 you must apply to this case. And let me just give you a
13 few closing instructions on your deliberations.

14 The verdict form I've created is very straight
15 forward. It just asks whether you find Mr. Thompson not
16 guilty or guilty of each offense. And the Foreperson, who
17 I understand you don't have yet, but I'm going to ask you
18 to select once you go back to the jury room, will just be
19 authorized to sign this once the verdict is unanimous.

20 Now, ladies and gentlemen, you weren't chosen to be a
21 juror in this case, or any case, to be a partisan or
22 advocate for either the State, or Mr. Thompson, or anyone
23 else. You were chosen to be a juror in this case because
24 both sides in this case believe you could be fair and
25 impartial, and you could decide this case without any kind

1 of bias, or prejudice, or preconceived ideas.

2 So you are judges, judges of the facts. And your
3 sole interest is to determine what the facts are, take the
4 law I just gave to you, and apply it to those facts using
5 your life experiences, and your common sense, and your
6 sense of logic and reason. And once you do that, you'll
7 be able to reach a verdict in this case.

8 Now, each of you has a vote in this case. And your
9 vote is exactly that, it's your vote and no one else's.
10 So don't be afraid to change your mind if you are of
11 different minds and the discussion that you have persuades
12 you that you should change your mind. But don't change
13 your mind simply to get the case over with or to reach a
14 unanimous verdict. Because, obviously, this case is very
15 important to both sides and all concerned.

16 The record is closed. There are not going to be any
17 more witnesses. There are not going to be any more
18 exhibits. So if something was referred to during the
19 trial that you want to have but you don't have back there
20 in the jury room as an exhibit, I can't get it for you.
21 So keep that in mind.

22 And don't start talking about the case until you get
23 the verdict form, which I'm going to trade you the verdict
24 form and the exhibits for your written note as to who you
25 select as the Foreperson.

1 And just go back to the jury room and select the
2 Foreperson, and let me know who that is by the note. And
3 we'll send back the verdict form and the exhibits and you
4 can start your deliberations.

5 Thank you for your cooperation and patience.

6 (WHEREUPON, the jury was excused from open court at
7 approximately 3:19 p.m.)

8 THE COURT: Okay. If you could bring Ms. Hanks [sic]
9 back out here, Mr. Ford.

10 Any objection or exception to the charge?

11 MS. SUSTAKOVITCH: None from the State, Judge.

12 MR. CHAMBERS: No, Your Honor.

13 THE COURT: Have you all got all the exhibits?

14 If y'all would do a favor for me, too, and look at
15 that verdict form one more time and make sure it's
16 accurate and correct.

17 MR. CHAMBERS: Assuming the indictment number is
18 correct, Your Honor, it's fine.

19 THE COURT: Okay.

20 MR. CHAMBERS: And she's going to check it.

21 (Pause.)

22 MS. SUSTAKOVITCH: Yes, sir. It's correct.

23 THE COURT: Thank you.

24 (WHEREUPON, Juror #85, Angelia Hart, entered the
25 courtroom.)

1 THE COURT: Ms. Hanks --

2 THE CLERK: It's Ms. Hart.

3 THE COURT: Is it Ms. Hart?

4 JUROR #85, ANGELIA HART: Hart.

5 THE COURT: I don't know how I got Hanks. I'm sorry.

6 The law doesn't allow you to go back in the jury room

7 now. So we just wanted to thank you for your service.

8 Just call back after 6:00, and they'll let you know

9 about tomorrow.

10 JUROR #85, ANGELIA HART: Okay.

11 THE COURT: And we appreciate it.

12 You can stick around or you're free to go, whatever

13 you want to do.

14 JUROR #85, ANGELIA HART: Okay. Thank you.

15 THE COURT: Thank you.

16 (WHEREUPON, Juror #85, Angelia Hart, exited the

17 courtroom.)

18 (Pause.)

19 THE COURT: Mr. Marosek was elected the Foreperson.

20 MR. CHAMBERS: Okay.

21 MS. SUSTAKOVITCH: Okay. Thank you, Judge.

22 (WHEREUPON, the proceedings were recessed at

23 approximately 3:23 p.m.)

24 (WHEREUPON, Court's Exhibit No. 8 was marked for

25 identification and admitted into evidence.)

1 THE COURT: I've been advised we do have a verdict.

2 Before we bring the jury out, I want to ensure that
3 it is noted that there was a note from the jury that I've
4 made a Court's Exhibit. I shared the note with the
5 Solicitor and Defense counsel. We discussed how to
6 respond to it. They were asking to see the DVD and, I
7 believe, the testimony of one of the witnesses, I believe
8 Jessica.

9 Nevertheless, what we did with the consent of both
10 parties was I asked the Foreman to come out into the
11 hallway. And given the hour, I asked him if they might
12 just want to come back in the morning. And they -- he
13 indicated that they could view the videos back in the jury
14 room. He thought they could do that more efficiently back
15 there.

16 So we had the DVD player brought back to the jury
17 room with everyone's knowledge and consent. And that's
18 the last contact we had with the jury.

19 Does that fairly and accurately state what occurred?

20 MS. SUSTAKOVITCH: Yes, sir, Your Honor.

21 MR. CHAMBERS: Yes, Your Honor.

22 THE COURT: Okay. And the other thing is I'd like to
23 thank both counsel for their excellent representation.
24 Both of y'all did an outstanding job.

25 Yes, sir. Bring the jury in.

1 (WHEREUPON, the jury came into open court at
2 approximately 6:18 p.m.)

3 THE COURT: Mr. Foreman, has the jury reached a
4 unanimous verdict?

5 JUROR #121, CHRISTOPHER MAROSEK: We have.

6 THE COURT: If you'd hand the verdict form to the
7 bailiff, we will receive it and publish it.

8 VERDICT

9 THE CLERK: Your Honor, in the case of
10 2013-GS-23-0700 and 2010-GS-23-8831, the State of South
11 Carolina v. Gary Reece Thompson, we, the jury, unanimously
12 find the Defendant -- as to indictment 2013-GS-23-0700,
13 criminal sexual conduct with a minor in the first degree,
14 we find the Defendant, Gary Reece Thompson, guilty.

15 As to indictment 2010-GS-23-8831, disseminating
16 obscenity to a minor, we find the jury -- the Defendant,
17 Gary Reece Thompson, guilty. This is signed by
18 Mr. Marosek, our Foreperson.

19 Ladies and gentlemen, if you agree these are the
20 verdicts you reached in your deliberation room, would you,
21 please, raise your right hand.

22 (WHEREUPON, all jurors raised their hand.)

23 THE CLERK: Thank you.

24 THE COURT: All right. Any matters or motions before
25 the jury is discharged from the Defense or the State?

1 MS. SUSTAKOVITCH: None from the State, Your Honor.

2 MOTIONS

3 MR. CHAMBERS: Your Honor, I make a motion for a
4 judgment notwithstanding the verdict, and a motion for a
5 new trial.

6 THE COURT: Okay. Would you like the jury polled?

7 MR. CHAMBERS: Yes, Your Honor.

8 THE COURT: Okay.

9 THE CLERK: The verdict that was just published was
10 the verdict you reached in your jury room, I ask you, was
11 it your verdict then and is it your verdict now?

12 When I call your name, please, answer "yes" or "no."

13 Christopher Marosek?

14 JUROR #121, CHRISTOPHER MAROSEK: Yes.

15 THE CLERK: Brian Pufahl?

16 JUROR #158, BRIAN PUFAHL: Yes.

17 THE CLERK: Virginia Gilliam?

18 JUROR #72, VIRGINIA GILLIAM: Yes.

19 THE CLERK: Brian Knox?

20 JUROR #108, BRIAN KNOX: Yes.

21 THE CLERK: John McLees?

22 JUROR #126, BRIAN MCLEES: Yes.

23 THE CLERK: Bryan Bennett?

24 JUROR #15, BRYAN BENNETT: Yes.

25 THE CLERK: Brian Harris?

1 JUROR #81, BRIAN HARRIS: Yes.

2 THE CLERK: Janet Stratton?

3 JUROR #187, JANET STRATTON: Yes.

4 THE CLERK: Natalie Reisinger?

5 JUROR #163, NATALIE REISINGER: Yes.

6 THE CLERK: Richard Reid?

7 JUROR #162, RICHARD REID: Yes.

8 THE CLERK: Nina Mosley?

9 JUROR #135, NINA MOSLEY: Yes.

10 THE CLERK: Ronald Meyer?

11 JUROR #130, RONALD MEYER: Yes.

12 THE CLERK: Thank you.

13 THE COURT: Any other matters before the jury is
14 discharged?

15 MS. SUSTAKOVITCH: None from the State, Your Honor.

16 MR. CHAMBERS: No, Your Honor.

17 THE COURT: Ladies and gentlemen, thank you for your
18 service.

19 I don't know about the trial for tomorrow.

20 Do we have any instructions from the jury coordinator
21 about that?

22 THE CLERK: To call in after 6:00, which is now.

23 THE COURT: Call the other number -- or the number
24 you have when you get home and there will be a message on
25 there.

1 And we appreciate your service. And have a good
2 evening.

3 Thank you.

4 (WHEREUPON, the jury exited the courtroom at
5 approximately 6:22 p.m.)

6 THE COURT: All right. The motion for new trial, do
7 you want to be heard on that, Mr. Chambers?

8 MR. CHAMBERS: Your Honor, I would just reiterate
9 what I had indicated to the Court before. And that is
10 that the evidence that was presented was such that it
11 couldn't -- in our position, it couldn't sustain the
12 conviction in this case. And, for that reason, I'd ask
13 for a new trial.

14 THE COURT: Okay, sir. Well, I, respectfully, deny
15 that based on the juries prerogative to determine the
16 credibility. I do find there's sufficient evidence to
17 support the verdict, if believed.

18 And any other motion is denied at this time related
19 to the new trial.

20 Anything further right now?

21 MR. CHAMBERS: No, Your Honor.

22 THE COURT: Are you ready for sentencing?

23 MS. SUSTAKOVITCH: Yes, sir, Your Honor.

24 THE COURT: Let's see. Mr. Ford...

25 We're just going to wait a few minutes.

1 MS. SUSTAKOVITCH: I heard one of the jurors say they
2 wanted to come back for sentencing.

3 THE COURT: Yes. Many of them do want to come in.

4 MS. SUSTAKOVITCH: I'll just sit down for a second.

5 (Pause.)

6 (WHEREUPON, the jury entered the courtroom at
7 approximately 6:26 p.m.)

8 THE COURT: Yes, ma'am, Ms. Sustakovitch.

9 MS. SUSTAKOVITCH: May it please the Court.

10 Your Honor, this Defendant's prior conviction for
11 criminal sexual conduct with a minor involved a five and a
12 six-year-old -- a five to six-year-old little girl by the
13 initials TL. That offense occurred around 1993. His
14 conviction is 94-GS-23 -- excuse me, 94-GS-23-2933.

15 The State would like to make part of the record the
16 notice of the State's intent to seek life without parole
17 based on his prior conviction for the sexual assault on
18 that child.

19 (WHEREUPON, Court's Exhibit No. 9 was marked for
20 identification and admitted into evidence.)

21 THE COURT: All right, ma'am. Anything else from the
22 State at this time?

23 MS. SUSTAKOVITCH: No, sir.

24 Thank you.

25 THE COURT: Yes, sir, Mr. Chambers.

1 MR. CHAMBERS: Your Honor, I mean, there's really not
2 a lot I can say at this point. I mean, they served him
3 with notice of life without parole. And that seems to be
4 the only sentence the Court can hand down at this point.

5 THE COURT: Mr. Thompson, anything you'd like to say,
6 sir?

7 DEFENDANT THOMPSON: I didn't do it.

8 SENTENCE

9 THE COURT: The sentence is you be committed to the
10 Department of Corrections for life. That's on case
11 number --

12 (WHEREUPON, the Defendant walked away from the
13 podium.)

14 THE COURT: Excuse me. One second, sir.

15 THE COURTROOM DEPUTY: Hang on.

16 THE COURT: That's on the -- case 2013-GS-23-00700.

17 On case 2010-GS-23-08831, the sentence is you be
18 committed --

19 What is the maximum sentence on that?

20 MS. SUSTAKOVITCH: I believe up to five years, Your
21 Honor.

22 THE COURT: You be committed to the Department of
23 Corrections for five years consecutive.

24 Good luck, sir.

25 *****END OF TRANSCRIPT OF RECORD*****

CERTIFICATE OF REPORTER

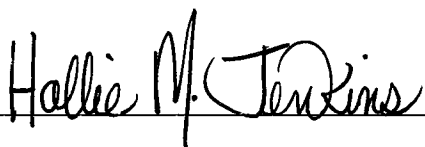
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 13th, 14th, and 15th days of January, 2014.

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

March 10, 2014

A handwritten signature in cursive script, reading "Hollie M. Jenkins", is written over a horizontal line.

Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

FORM 5

STATE OF SOUTH CAROLINA)

County of Greenville)Gary Reece Thompson JR 218312)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2017-CP-23- 06516

APPLICATION FOR

POST-CONVICTION RELIEF

FILED-CLERK OF COURT
PAUL B. WILSON
2017 OCT 13 PM 3:48**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 SCDC McCormick CI
2. Name and location of Court which imposed sentence Greenville
3. Name(s) of co-defendant(s) (if any) Jessica Thompson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) _____
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) _____
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirm Conviction
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Lawyer said he had know objection when he should have
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Did not have my case heard at Direct Appeal, because lawyer
- (b) Didn't Object
- (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? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (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. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____
(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?
NA

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. Randy Chambers
ii. Kathrine H. Hudgins
iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial
ii. Trial
iii. Trial

19. State clearly the relief you seek in filing this application:

Vacate, Set aside ~~or~~ what ever the
Court deems nessary.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Gary Thompson, 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.

Gary Thompson

SWORN to and subscribed before me this 13
 day of September, 2017.

JC Franklin (L.S.)
 Notary Public

My Commission Expires: 12-16-2019

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Gary Thompson, 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.

Gary Thompson
Applicant

SWORN or affirmed to and subscribed before me this

13 day of September 2017

J. Frankel
Notary Public

My Commission Expires: 12-16-2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
	)	
Gary R. Thompson, 218312	)	
	)	2017-CP-23-6516
Applicant,	)	
	)	
v.	)	
	)	RETURN AND MOTION FOR A
State of South Carolina,	)	MORE DEFINITE STATEMENT
	)	
Respondent.	)	
	)	
	)	
	)	
	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on October 13, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In November of 2013, the Greenville County Grand Jury indicted Applicant for disseminating obscenity to a minor (2013-GS-23-8831) and criminal sexual conduct with a minor first degree (2013-GS-23-700A). Randall L. Chambers, Esquire, represented Applicant. Applicant proceeded to trial on January 13, 2014, before the Honorable D. Garrison Hill and a jury. On January 15, 2014 the jury found Applicant guilty as indicted to both charges. Judge Hill sentenced Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for first-degree criminal sexual conduct with a minor along with a consecutive term of imprisonment of five years for disseminating obscene material to a minor.

Applicant filed a timely notice of appeal. Katherine H. Hudgins, Esquire of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals issued an unpublished opinion in which it unanimously affirmed Applicant's convictions. State v.

Thompson. Op. No. 2015-UP-524 (S.C. Ct. App. filed Nov. 18, 2015). Thereafter, Applicant petitioned the Court of Appeals for rehearing, and the petition was denied. Applicant then filed a petition for a writ of certiorari in the Supreme Court. The petition for writ of certiorari was denied on November 9, 2016.

Attached to this Return are the records of the Greenville County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Lawyer said he had know objection when he should have."
 - a. Did not have my case heard at direct appeal, because lawyer didn't object.

III.

Respondent construes Applicant's lone allegation as ineffective assistance of counsel. Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the proceeding "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent

upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR 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), SCRPC. 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, SCRPC. Pro se filings will not be considered at the PCR 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), SCRPC.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII.

WHEREFORE, having made its Return, Respondent requests Applicant provide a more definite statement of his claims, and an evidentiary hearing be held on any claims so requiring one.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

January 17, 2018

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2017-CP-23-6516

GARY R. THOMPSON, 218312)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

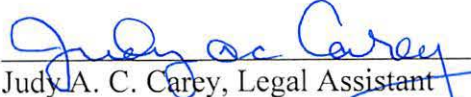
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Susannah C. Ross, Esquire
Ross & Enderlin, PA
330 East Coffee Street
Greenville SC 29601

DATED this 17th day of January, 2018.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
GARY R. THOMPSON,	)	SUPPLEMENTAL APPLICATION
APPLICANT.	)	
v.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	CASE # 2017-CP-23-6516
RESPONDENT.	)	

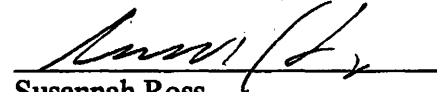
This matter comes before the Court by way of application of post conviction relief filed October 13, 2017, alleging ineffective assistance of trial counsel. A Return and Motion for a More Definite Statement was made on January 17, 2018. This application is intended to incorporate Mr. Thompson's application and add allegations of Fifth, Sixth, Eighth and Fourteenth Amendment violations of the Constitution of the United States & Art. I Sec. 3, 10, & 14 of the South Carolina Constitution due to ineffective assistance of plea counsel for:

- (1) failing to move for a severance of CSC with minor and disseminating pornography,
- (2) failing to make a contemporaneous objection to stipulation of prior CSC with a minor and registry requirement;
- (3) failing to request to bifurcate the trial avoid the fundamental unfairness of the jury's knowledge of the Applicant's prior CSC with a minor and registry requirement;
- (4) failing to investigate issue of pornography being purchased after child had been removed from the home;
- (5) failing to object to unfounded prejudicial expert testimony;
- (6) failing to object to hearsay testimony by clinical social worker expert;
- (7) failing to object in State's closing to a misstatement of the burden of proof and improperly appealing to emotions of the jury; and

(8) failing to take exception to jury instruction that the prior record should be considered only for the limited purpose of proving the elements of the indicted charge.

The Applicant also alleges a Due Process violation based on his failure to get a fair trial by an impartial jury.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
330 E. Coffee St,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina

This 27 day of March, 2018

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

GARY R. THOMPSON,)

Applicant,)

vs.)

THE STATE OF SOUTH CAROLINA,)

Respondent.)

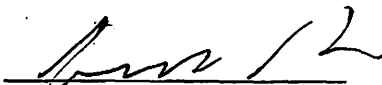
IN THE COURT OF COMMON PLEAS

2017-CP-23-6516

AFFIDAVIT OF SERVICE
BY MAIL

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Supplemental Application** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Attorney General
Alan Wilson
P.O. Box 11549
Columbia, SC 29211
Attn: DeShawn Mitchell


 Attorney for Defendant

This 27 day of March, 2018

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INDEX OF WITNESSES

GARY THOMPSON

Direct By Ms. Ross 8
Cross By Mr. Mitchell 15

RANDY CHAMBERS

Direct By Mr. Mitchell 20
Cross By Ms. Ross 31

There were no exhibits.

» > o < «

Certificate of Reporter 54

1 THE COURT: Good morning, sir.

2 MR. THOMPSON: Good morning.

3 THE COURT: All right, ready to go?

4 MR. MITCHELL: Yes, Your Honor.

5 THE COURT: All right, thank you.

6 MR. MITCHELL: This is 2017-CP-23-6516, Gary
7 Thompson vs. The State of South Carolina. The
8 applicant is presently confined in the South Carolina
9 Department of Corrections pursuant to orders of
10 commitment from the Greenville County Clerk of Court.
11 In November of 2013 the grand jury indicted The
12 Applicant for disseminating obscenity to a minor and
13 criminal sexual conduct with a minor first degree.
14 Mr. Randall Chambers represented The Applicant.

15 The Applicant proceeded to trial on January 13,
16 2014 before the Honorable D. Garrison Hill and a
17 jury. On January 15, 2014, the jury found Applicant
18 guilty as indicted to both charges. Judge Hill
19 sentenced Applicant to life without parole for first
20 degree criminal sexual conduct with a minor, along
21 with a consecutive term of imprisonment for
22 disseminating obscenity to a minor.

23 The Applicant filed a timely notice of appeal.
24 The South Carolina Court of Appeals issued an
25 unpublished opinion that unanimously affirmed

1 Applicant's conviction. He's present in the
2 courtroom today Your Honor and represented by
3 Ms. Ross.

4 MS. ROSS: Thank you, Your Honor. Did you
5 receive the supplemental application?

6 THE COURT: I have it right here. It was right
7 on top of the file, thank you.

8 MS. ROSS: Just to kind of expand on that a
9 little bit, I would just argue before that the
10 failing to move for a severance on the CSC, the first
11 issue is on Page 40 on the record.

12 THE COURT: Thank you.

13 MS. ROSS: The failure to preserve the argument
14 regarding the stipulation, that argument was on Page
15 12 through 25. And Page 165, Line 25 is where there
16 was no objection to the stipulation coming in. We
17 would argue also that these matters should have
18 specifically been argued regarding that stipulation.
19 Though there was some strong argument that wasn't
20 preserved. The attorney didn't argue that the
21 Section 16-3-655 was not -- was Constitutionally
22 overbroad, it was not narrowly construed to promote
23 on legitimate state interest.

24 And we'd note that's it been reversed as to the
25 death penalty aspect in Kennedy v. Louisiana. Also,

1 he didn't argue specifically that the prior can't be
2 wiped from the minds of the jury. He didn't offer to
3 stipulate to being on the registry, specifically,
4 verses the actual CSC with a minor, which is arguably
5 the worst of the registry crimes coming in, the most
6 prejudicial. And then moving on, he failed to
7 request to bifurcate the trial in attempts to correct
8 the problem with prejudice. Fail to investigate the
9 issue of pornography. And The Applicant will extend
10 on that being in the home. Failed to attack
11 unscientific prejudicial expert testimony on Page
12 227. That's where that is.

13 On number six--

14 THE COURT: Who was that testimony by, I'm
15 sorry?

16 MS. ROSS: It was by the doctor.

17 THE COURT: Okay.

18 MS. ROSS: Dr. Henderson.

19 She said, 90 percent of examinations are normal
20 after allegations are made. And that's normal.

21 THE COURT: That's Page 227, okay.

22 MS. ROSS: I say failed to object to hearsay
23 testimony, I meant and bolstering by the social
24 worker. And there's -- that will come out later.
25 But that was on Page 294 and 296 where bolstering

1 testimony came in without objection. And, in fact,
2 the attorney had attempt in pre-trial to object and
3 he specifically did not.

4 We'd argue on Page 324 is where there's comments
5 in The State's closing asking -- appealing for a
6 verdict that speaks the truth. And I comes down to
7 whether you believe the child. And we would argue
8 that that's improper argument. And it was failing to
9 take exception to the jury instruction. And that was
10 on Page 365 and 372. And we'd argue that the
11 curative charge could not possibly cure the damage so
12 there should have been an exception to that made by
13 The State. We'd also argue the trial was unfair and
14 that the statute itself result in a unfair trial.
15 And that would be a due process violation as well.

16 So, at this point we'd call Mr. Thompson to the
17 stand.

18 THE COURT: Okay, come forward, Mr. Thompson.

19 MS. ROSS: If I may, I got two cases and a
20 statute for you to review.

21 THE COURT: Please.

22 THE CLERK: Mr. Thompson, place your left hand
23 on the Bible, raise your right hand.

24 Gary Thompson{,}after being duly
sworn{,}testified as follows:{F}

25 THE CLERK: Thank you, you may be seated.

GARY THOMPSON-DIRECT BY MS. ROSS

1 Please state your full name for the record.

2 THE WITNESS: Gary Reece Thompson, Jr.

3 DIRECT EXAMINATION

4 BY MS. ROSS:

5 Q Okay, Mr. Thompson, why have you alleged
6 ineffective assistance of counsel in this case?

7 A He didn't carry over on my issue that I had in
8 the direct appeal.

9 Q What was that issue?

10 A When I was in trial he had started objecting to
11 it but later on during the trial he told The Judge that he
12 had no objection to it. And that made it where I didn't
13 even get my case heard on direct appeal. Is what I was
14 told by my direct appeal lawyer.

15 Q All right. And that was Cat Hudgins; is that
16 correct?

17 A Yes, ma'am.

18 Q And as far as that issue, do you feel like it
19 was a strong issue?

20 A Yes, ma'am.

21 Q Why?

22 A Because I didn't do that. And they were sitting
23 there trying to say that I did and I didn't. And I mean.

24 . .

25 Q What did you think happened to the jurors when

GARY THOMPSON-DIRECT BY MS. ROSS

1 they heard about your prior?

2 A They automatically thought I was guilty.

3 Q All right. Were you guilty?

4 A No, ma'am.

5 Q Now, as far as the disseminating pornography
6 charge, that was tried -- did you want that charge tried
7 with your CSC?

8 A No, ma'am. I didn't have no porn until after
9 they removed the children from the home.

10 Q All right. Could your lawyer have investigated
11 that for you?

12 A Yes, I told him where he could have went, where
13 I bought it from.

14 Q Okay. And why would that be relevant?

15 A Because they're trying to say I had porn in the
16 house with them and there was no porn when the children
17 lived there. That would have showed that there wun't
18 [verbatim] none. That would have showed that it come
19 afterwards.

20 Q So, my review of the transcript, I believe the
21 children were removed from the home in May; does that
22 sound about right?

23 A Yes, ma'am. It was real hectic when they done
24 that. My wife flipped out and I did too. We were going
25 to try to get somebody to give us some gas money to go

GARY THOMPSON-DIRECT BY MS. ROSS

1 find a lawyer. They come when we left to take the kids.
2 We come back home and they was gone. It's just tore her
3 up.

4 Q All right. And that's not when any pornography
5 was found in the house?

6 A No.

7 Q So none was there then?

8 A No, ma'am.

9 Q And then in December your house was searched
10 again. Does that sound about right, the timing?

11 A I was locked up all that time. So, I don't
12 know, you know.

13 Q Okay. When had you gotten the pornography that
14 was entered as evidence in your case?

15 A That was actually bought and I never actually
16 looked at the video. That was actually bought after they
17 had removed them from the home.

18 Q Now how could your attorney have done anything
19 to prove that?

20 A He could have went to the store right up the
21 road where I bought it from.

22 Q And did you tell him about that?

23 A Yes, ma'am.

24 Q Did you ask him to go look?

25 A Yeah, I told him that he could go there and that

GARY THOMPSON-DIRECT BY MS. ROSS

1 would prove that the porn was bought afterwards.

2 Q All right. Now, did you review discovery? Did
3 you have a copy of the discovery?

4 A I did have one.

5 Q Okay. Did you feel your lawyer met with you as
6 many times as you needed?

7 A No, not really.

8 Q How many times would you say?

9 A I mean, he come told me what we was going to do
10 and that it. It wouldn't like he'd come -- maybe twice, I
11 seen him I think.

12 Q All right. And as far as testifying in your own
13 defense, you didn't testify?

14 A He told me that he didn't want me to testify
15 because I have a tendency to keep talking. And that he
16 thought it wouldn't be good for me. I did want to testify
17 because I wanted to tell me side.

18 Q Okay. You think that would have helped?

19 A Yes, ma'am. I mean, they was up there telling
20 lies on me, I wanted to get up there and tell the truth.

21 Q Now, as far as that helping, had DSS been
22 closely observing you and your family?

23 A DSS has been involved in my life the whole time
24 we was together. They took them kids all the time to the
25 doctors and everything. There was numerous times they had

GARY THOMPSON-DIRECT BY MS. ROSS

1 them checked by the family doctor, by the hospital system.
2 North Greenville had checked them I think the last time it
3 was done.

4 Q So, how many years of that?

5 A The whole time we was together. I mean,
6 Greenville County use to come out to the house all the
7 time. And they come out and seen it was us, they be like,
8 oh, I'm sorry for bothering y'all. We wish we knew who
9 was calling anonymously, we'd have them locked up. Then
10 they would leave.

11 Q All right. But then they would investigate each
12 time?

13 A I mean, they would come you out and see it was
14 us and then they would leave. People was calling all kind
15 of ridiculous things and stuff.

16 Q Were there doctors visits as well and
17 examinations?

18 A They had -- I had to take them to the doctor.
19 Then she took them back to the doctor had to examine them
20 to specifically looking for if somebody had messed with
21 them or whatever. Recently at one time they had said she
22 was burning and hurting. And they said oh that's a sign
23 of molestation. They had us take her to North Greenville
24 Hospital. The doctor there talked to her and seen her
25 said that she had a UTI and that's why she was itching and

GARY THOMPSON-DIRECT BY MS. ROSS

1 burning. That there was no signs of no molestation.

2 Q And they would ask and talk to her about
3 molestation --

4 A Yes, that was told by the DSS--

5 MR. MITCHELL: Objection Your Honor, hearsay.

6 THE COURT: Noting your objection for the
7 record.

8 MS. ROSS: All right.

9 BY MS. ROSS:

10 Q Do you think that that testimony was may have
11 helped their case?

12 A Yes, ma'am.

13 Q Was that information brought out through DSS
14 records or any other--

15 A They said -- they told me at the family court
16 thing that no contest or something like that and none of
17 that would come up in my trial. I thought it would help
18 in my trial that I needed all that to come up where they
19 had taken them to the doctors and stuff. But none of it
20 come up.

21 Q And did you think that would support theory what
22 that examined -- looked at you very closely a number of
23 times there's been no evidence?

24 A That's what it would have showed?

25 Q Okay. And it might have shown that they were

GARY THOMPSON-DIRECT BY MS. ROSS

1 gunning for you from the beginning?

2 A Yes, ma'am.

3 MR. MITCHELL: Objection, Your Honor, calls for
4 speculation.

5 MS. ROSS: Okay.

6 BY MS. ROSS:

7 Q Is there anything else you want to let the Judge
8 know in this case?

9 A I mean, I'm just -- I done lost a lot of my life
10 and my family members behind all this. And I'm just ready
11 for this to be over with. I really want my freedom. You
12 know, I really. . .

13 Q Let's me let you answer this just specifically.
14 You said originally, I guess, you're the child's paternal
15 grandmother was making allegations against you, correct?

16 A Yes. The real father's mother had actually
17 called her, supposedly, and convinced her to call and have
18 them taken to the rape crisis center and check. And she
19 did take them over, I dropped them off, they had me leave.

20 Q Okay. And that was after allegations were made
21 against her son?

22 A No, that was actually before they was made
23 against him. They made again because Greenville County
24 come back out and talked to the child by themselves in the
25 police car. And the mother was there too when they were

GARY THOMPSON-CROSS BY MR. MITCHELL

1 talking to them then.

2 MS. ROSS: Okay. No further questions.

3 THE COURT: Yes, sir.

4 MR. MITCHELL: Thank you, Your Honor, may it
5 please the Court?

6 THE COURT: Yes, sir.

7 CROSS-EXAMINATION

8 BY MR. MITCHELL:

9 Q Good morning, Mr. Thompson, how are you?

10 A Fine. You?

11 Q Doing well. Ask you a couple of questions. How
12 many times did you meet with Mr. Chambers prior to going
13 to trial?

14 A I think like twice. I've had three different
15 lawyers, supposedly two different solicitors in this case.

16 Q So, you had all of your discovery before you
17 went to trial, right?

18 A Yeah, after I had talk to Randy Chambers.

19 Q Okay. And did Mr. Chambers ever present to you
20 any plea offers on behalf of The State at all?

21 A He said they offered 20 years.

22 Q And you declined?

23 A Yes, sir. I ain't taking something for
24 something I didn't do.

25 Q Okay. Let me ask you this, you -- so you went

GARY THOMPSON-CROSS BY MR. MITCHELL

1 to trial and the solicitor's office served you with a
2 notice of life, correct?

3 A Some investigator come and seen me, said he had
4 another charge for me. And I told them I didn't want that
5 up in my room where I was at, that he needed to take that
6 and give it to my lawyer, that he would handle all of that
7 because he's my lawyer.

8 Q But you knew prior to going to trial?

9 A They said something about life. Randy had come
10 and told me about it before we come into the courtroom
11 that that was supposedly off the bill, that there wun't
12 going to be no life.

13 Q Okay. Let me ask you this, prior to being
14 charged with these crimes, you had been convicted and
15 found guilty of a previous criminal sexual conduct?

16 A Over 20 years ago for something I didn't do then
17 either.

18 Q Okay. But you were found guilty, though, right?
19 You served time for it?

20 A I pled because my father wanted me to.

21 Q Okay, very good. Did you talk to Mr. Chambers
22 about any defenses in this case at all?

23 A Sir?

24 Q Did you talk with Mr. Chambers about any
25 possible defenses at all in this case?

GARY THOMPSON-CROSS BY MR. MITCHELL

1 A Everything he had asked me about. I mean, I
2 went over it with him in the case. I told him about the
3 disseminating porn. I told him about the previous charge
4 and everything.

5 Q Okay. You said that you wanted to testify but
6 Mr. Chambers told you that --

7 A Yeah, he told me that he didn't want me to
8 testify because I had a tendency to keep talking.

9 Q Okay. Do you remember The Judge talking to you
10 about your right to testify if you wanted to and telling
11 him that you didn't want to, right?

12 A When was this?

13 Q During the trial? Do you recall during the
14 trial if The Judge ever asked you--

15 A I mean, he had something about it to the jury.
16 He said something about. . .

17 THE COURT: Did the trial Judge go through your
18 Constitutional rights? Typically you do it when the
19 jury is out. And it's after The State usually rests
20 their case, the trial Judge would ask you to stand up
21 and swear you in and say, sir, this is the time where
22 you are permitted to put up your defense if you would
23 like to. You have the right to testify or not
24 testify in your behalf, that is completely up to you.
25 Then he goes through and questions you. The Judge

GARY THOMPSON-CROSS BY MR. MITCHELL

1 asking you whether or not you wish to testify and
2 explains to you your Fifth Amendment rights. Do you
3 recall that? It would be in the transcript.

4 MR. THOMPSON: I don't remember standing up, you
5 know, raising my hand or nothing.

6 THE COURT: Okay.

7 MR. THOMPSON: I do think he had talked to me.
8 He had me stand up over there and talked to me one
9 time.

10 THE COURT: Right. Because they would ask you
11 that. And the reason why they do that is because
12 whether or not you testify is a personal right. Your
13 lawyer can you tell you and talk with you but it's a
14 right that either you invoke or you don't invoke.

15 So did he or didn't he testify? He did not,
16 correct?

17 MR. MITCHELL: He did not, Your Honor.

18 THE COURT: Okay.

19 MR. MITCHELL: And I would just not for the
20 record on Page 273 that The Court goes--

21 THE COURT: Thank you, I assume. Okay.

22 BY MR. MITCHELL:

23 Q Mr. Thompson, let me ask you this, did you have
24 discussions with Mr. Chambers about separating the two
25 charges prior to going to trial?

GARY THOMPSON-CROSS BY MR. MITCHELL

1 A He never had talked to me about that. I told
2 him I didn't think that I should have the two charges
3 because it was actually three or four different charges in
4 the beginning when I got locked up. They had to reamend
5 but they wouldn't reamend the indictments because they
6 was -- one of them was -- a couple of them was a year off,
7 one of them was two years off and the judge said they
8 wun't going to do but they were going to reindict me.

9	Q	Okay.

10 Judge, those are all the questions I have
11 for this witness.

12 THE COURT: Okay.

13 Ms. Ross, anything?

14 MS. ROSS: No redirect, Your Honor.

15 THE COURT: Okay, you may step down, sir.

16	Anything further?

17 MS. ROSS: No further testimony.

18 THE COURT: All right, from The State?

19 MR. MITCHELL: Your Honor, The State calls
20 Mr. Chambers to the stand.

21 THE COURT: Come on board, Mr. Chambers.

22 THE CLERK: Place your left hand on the Bible,
23 raise your right hand.

24 Randy Chambers{,}after being duly
sworn{,}testified as follows:{F}

25 THE CLERK: Thank you, you may be seated.

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 Please state your name for the record.

2 THE WITNESS: My name is Randall Lee Chambers.

3 DIRECT EXAMINATION

4 BY MR. MITCHELL:

5 Q Good morning, Mr. Chambers, how are you?

6 A I'm okay. How are you?

7 Q I'm doing well today. Let me start by asking
8 you, I ask most lawyers, how long have you practiced law
9 here in South Carolina?

10 A Since 1992.

11 Q How much of that time has been devoted or
12 dedicated to criminal law?

13 A All of it.

14 Q All of it. Okay. I know you probably can't
15 count but could you give me a ballpark estimate of how
16 many trials you've done since you've been practicing?

17 A I mean it's well into the hundreds. But I
18 honestly don't know how many.

19 Q Fair enough. And let me ask you about this
20 case, were you appointed or retained to represent
21 Mr. Thompson?

22 A This was an appointed case.

23 Q Okay. Do you recall how the charges arose in
24 this case or the allegations against Mr. Thompson?

25 A I believe that they initially arose from the

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 maternal grandmother. And went through the Spartanburg
2 whatever they call the crisis center over there, it's
3 there version of the Julie Valentine Center that we have
4 here. Then it was referred to the sheriff's office. And
5 they picked it up from there. But I believe that it
6 originated with the grandmother. I will tell you that I'm
7 at a little bit of disadvantage. I had requested months
8 ago the -- my file in this case. But they keep the closed
9 files in a storage facility that's not here in the
10 courthouse. And as recently as last week they -- the
11 folks down at the public defender's office indicated to me
12 that they had not been able the retrieve Mr. Thompson's
13 file. I don't know if it's been lost. So, I wasn't able
14 to go through and look at my case notes or trial notes or
15 any of the stuff that I prepared for trial. Really I've
16 only been able to look at the transcript in this case.
17 So, what I'm telling you is from the very best of my
18 memory.

19 MR. MITCHELL: Judge, I would just note for the
20 record that if anything comes up and I need to
21 supplement the record, that would be okay with
22 Ms. Ross.

23 THE COURT: Okay.

24 MR. MITCHELL: You okay with that?

25 MS. ROSS: No objection.

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 THE COURT: Thank you, Ms. Ross.

2 BY MR. MITCHELL:

3 Q Let me ask you, based on your memory, do you
4 recall meeting with Mr. Thompson a number of times?

5 A I do recall. I honestly don't remember the
6 number of times. I do recall, as I think he alluded to,
7 that he had a couple of different lawyers before me. I
8 think just because there had been lawyers that had had the
9 case that weren't doing appointed work or weren't in the
10 public defender's office or anything anymore and it
11 eventually found its way to me. But I'm sure I met with
12 him several times. I think -- I would think it was more
13 than twice.

14 Q Okay. And is it your routine practice during
15 these meetings to go over the charges and sentences that
16 they carry and his Constitutional rights and things like
17 that?

18 A Yeah. I mean, we would cover the discovery, if
19 he wanted a copy of it, I would give him a copy. And, of
20 course, caution him to be careful with it over in the
21 jail. I think at one point -- obviously, go over all of
22 his rights. At one point, again, as he alluded to, there
23 was an offer of 20 years on the table, which he declined.
24 Because he maintained his innocence throughout the
25 process.

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 Q And let me ask you this because I want to go
2 ahead and jump into the allegations and talk about some of
3 the investigation here in a minute. But concerning his
4 allegation regarding the CSC first, then the dissemination
5 of pornography. Do you recall if there was ever any
6 discussion about trying to severe those two charges at
7 all?

8 A No. I mean, maybe that would have been a good
9 idea. I honestly never thought about bifurcating the
10 trial in away or severing the charges. So no, we didn't
11 have any discussion about that.

12 Q Okay. Was there ever any discussion about him
13 buying porn after he had been arrested or finding any porn
14 in the house?

15 A I don't recall that and I think I would have
16 investigated it had that been the case. What I recall and
17 I looked in the transcript is that the child had indicated
18 that Mr. Thompson had watched some pornography -- that
19 they watched pornography together and apparently gave some
20 sort of description of the pornography. And then the
21 police apparently executed the search warrant at some
22 point, found some DVD's and it matched up they said with
23 what the child was saying happened. But I don't ever
24 remember any discussion, and again, I don't have my notes
25 or anything but I think I would have pursued it had he

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 said it to me. That he bought the porn afterward or
2 anything like that. I mean, the child indicated there was
3 porn there and that was the reason they were looking for
4 it.

5 Q Okay. I want to ask you about The Applicant's
6 former conviction for a criminal sexual conduct charge.
7 And throughout the -- or I guess at the beginning of the
8 trial, the solicitor has charged him with CSC first, the
9 second portion of the statute; is that correct?

10 A That's correct.

11 Q And under that portion of the statute, if the
12 victim is under 16 and also another element of it, and
13 correct me if I'm wrong, is that The Defendant has been
14 convicted of a former crime; is that correct?

15 A That's correct.

16 Q Okay. And during the trial the solicitor sought
17 to introduce evidence of that actual crime; correct?

18 A That's correct.

19 Q Okay. And so, during the trial there was a
20 stipulation that, essentially, was introduced or read to
21 the jury by The Judge?

22 A There was. I mean, that was a stipulation that
23 was, essentially, forced on me, you know.

24 Q Well, let me ask you this, did you try to argue
25 that The Defendant should be prosecuted under the first

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 portion of the statute as opposed to the second one, do
2 you recall at all?

3 A I don't recall.

4 Q Okay. Well, let me ask you this, the first
5 portion of the statute is that if the victim is 11 years
6 or older and that's simply it; correct? There's no--

7 A Well no, I wouldn't have argued it. Because
8 there was no question of the child's age, the child was
9 nine.

10 Q Okay. But the stipulation came in over any
11 arguments that you may have made?

12 A Yeah, we litigated that, as you probably saw in
13 motion in limine. And Judge Hill ruled against me and the
14 stipulation was basically what he came up with.

15 Q Do you recall if The Judge gave limited
16 instructions to the jury?

17 A He did.

18 Q Okay. And I guess let me ask you this, in
19 regards to that stipulation, do you recall if when it was
20 read to the jury if you objected to it at all or?

21 A You know, I did not make a contemporaneous
22 objection and I probably should have. I felt -- I thought
23 that we preserved it for the record and that was all that
24 was necessary, you know. I was already worried about it.
25 I believe I even said when we were arguing the motion in

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 limine, if The Judge allowed them to get the evidence of
2 the prior conviction in, that we were basically wasting
3 our time. I didn't see any way that my client could get a
4 fair trial if the jury found out that he had a prior sex
5 crime on his record. And I, frankly, didn't want to call
6 anymore attention to it than I already had by standing up
7 and objecting to it. But in retrospect, I probably should
8 have done that. And if that's the reason that his appeal
9 was sent back, then I think he certainly deserves a new
10 trial over that issue.

11 Q Let me ask you this, but there's no question
12 that you tried to limit the former conviction from coming
13 in?

14 A Absolutely. I tried to keep it out and then he
15 offered to do like you typically do in other cases. DUI
16 for example. I mean, you always stipulate to the
17 enhancement. So, that the jury can't hear about it,
18 that's just routine. And I tried to get Judge Hill to do
19 that but his reading of the statute was such that he felt
20 like that he was an element that had to be proved by The
21 State and he had to allow that evidence in.

22 Q Okay. Let me ask you this, there's another
23 allegation that The Defendant wanted you to bifurcate the
24 trial, essentially?

25 A He never brought that up. And I wouldn't have

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 expected him to. I mean, that's a legal argument. I
2 didn't think I had an argument to make about bifurcation
3 or severance because it seemed to me, based on what the
4 evidence was, that those charges, you know, were related
5 enough that they could be tried together. But -- but, you
6 know, maybe I was wrong about that. Maybe I should have
7 done that.

8 Q And Ms. Ross may have asked you this so I may
9 come back and ask you later on and I don't know
10 specifically what she needs with that allegation so I may
11 came back and ask you--

12 A Okay.

13 THE COURT: So, you didn't even raise that to
14 the trial judge, though?

15 THE WITNESS: No, ma'am.

16 THE COURT: Okay.

17 BY MR. MITCHELL:

18 Q Let me ask you about expert testimony by the
19 doctor in this particular case, Dr. Henderson who,
20 essentially, examined The Victim in this particular case.
21 Did you have any concerns or issues with her testimony at
22 all?

23 A I mean, I did from the standpoint that -- not
24 from his disability or her not being able to do it. But I
25 had experience with her, she testifies in all these kinds

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 of cases and I've tried a bunch of them. And basically,
2 she's going to take the stand and testify however she
3 needs to to support the allegations, the charges against
4 The Defendant. And that's what she did in this case. And
5 basically, anything -- anything that happened in that
6 case, she's going to say is perfectly normal and
7 consistent with somebody that's undergone abuse. And
8 that's what she did in this case.

9 Because as you recall from looking through
10 the transcript, you know, there was -- this is a nine year
11 old child who supposedly had vaginal intercourse with a
12 grown man. And there was absolutely no physical evidence
13 to support that. And that's where she makes the statement
14 at some point that, well, the literature says that
15 90 percent of these cases you don't make any physical
16 findings. And so, that's perfectly consist with somebody
17 having been abused.

18 Then we went into a little further and
19 that's when she -- I said, Well, the information that you
20 have is coming from her?

21 She said, Well, that's the history.

22 And I -- basically I think pushed her, the
23 history is what she gets from the child. You know, it's
24 basically what the child told her. So I went into that
25 with her on cross-examination.

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 Q And no question that you did a lengthier -- or,
2 I guess I should say extraneous cross-examination?

3 A Well, I mean, I was trying to be as effective in
4 my cross-examination as possible and make the point that
5 she didn't have any real evidence to offer. That's what I
6 was trying to do.

7 MR. MITCHELL: Judge, I would just note for the
8 record some 20 pages of cross-examination per the
9 trial transcript.

10 BY MR. MITCHELL:

11 Q Let me ask you this, if you recall, about a
12 social worker that testified at the actual hearing?

13 A Yeah.

14 Q Do you recall the testimony from the social
15 worker and what the social worker provided? Testimony?

16 A Just what's in the record. And I'd probably
17 have to look at it again if you're going to ask me
18 something specific about it.

19 Q I would just reference Page 184 through 196.

20 A Okay.

21 Q And while you're looking, let me ask you this
22 question. Do you recall or do you -- did you find any
23 issue with any of the testimony by the social worker at
24 all?

25 A Well, I mean--

RANDY CHAMBERS-DIRECT BY MR. MITCHELL

1 Q Direct starts on 148.

2 A Yeah, I'm looking at it.

3 Q And cross starts on 196.

4 A I don't recall having a real issue with it. I
5 mean, again, it's much like the doctor, I didn't think
6 that -- I mean, I think she was going to find that
7 whatever happened in this case was going to be consistent
8 with the allegation of abuse. Which is typical in all
9 these cases.

10 MR. MITCHELL: I just note for the record,
11 Judge, that all of these folks were qualified as
12 experts to testify at this trial.

13 BY MR. MITCHELL:

14 Q Let me ask you this, in regards to closing
15 arguments or burden shifting closing arguments by The
16 State, at any point did you ever feel as though The State
17 shifted the burden to your client?

18 A I did not.

19 Q Okay. And if you would have, would you have
20 objected to it or made a motion for a mistrial or
21 something to that effect?

22 A I would have.

23 Q Okay. And let me ask you, were there any issues
24 with The Judges jury instruction in your mind to the jury?

25 A No.

RANDY CHAMBERS-CROSS BY MS. ROSS

1 Q Okay.

2 MR. MITCHELL: Judge, that's all the questions I
3 have right now. I may have some additional questions
4 on redirect.

5 THE COURT: Ms. Ross.

6 MS. ROSS: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MS. ROSS:

9 Q Now, I'll start backwards. As far as the jury
10 instructions, once the jury hears all about someone being
11 a child molester, do you think a curative instruction is
12 going to help?

13 A No.

14 Q And yet you didn't take exception to his
15 curative instruction after he gave the instructions to the
16 jury or do you recall?

17 A I didn't think it would help but I really didn't
18 think it would hurt.

19 Q Okay. But after the instruction was given -- so
20 everything was kind of hashed out pretrial. And The Judge
21 decided he would give a curative instruction, at that
22 point, did you still feel that the jury would still be
23 prejudiced by knowing The Defendant was a child molester
24 or had a prior?

25 A Yeah. I mean, I really firmly believed that --

RANDY CHAMBERS-CROSS BY MS. ROSS

1 I mean, not that I was going to lay down on the job but I
2 really felt like we were not going to be successful. I
3 didn't know any way in the world that we were going to be
4 able to overcome that. I mean, I don't believe you can
5 have 12 people here that a person's on trial for something
6 they've already been convicted of before and expect that
7 they're not going to find him guilty.

8 Q Right. And would you agree that that might have
9 been better preserved if you would just put on the record
10 after the curative instruction, Judge, by the way, I don't
11 think that instruction can cure this problem?

12 A In retrospect, that is clear that I probably
13 should have done that, yes.

14 Q Okay. And then I have a question, do you
15 recall, was this -- was notice of life without parole
16 served in this case?

17 A It was.

18 Q I believe it was. Okay, I got confused about
19 that before. On Page 317, it looks like you did not ask
20 for a lesser included of ABHAN to be instructed to the
21 jury.

22 THE COURT: While you're looking at that, can I
23 back up for a second?

24 MS. ROSS: Sure.

25 THE COURT: Ms. Ross, was that an issue on

RANDY CHAMBERS-CROSS BY MS. ROSS

1 appeal, The Judge's ruling on charging the second
2 portion of where they talked about a previous
3 conviction for sexual assault, was that appealed?

4 MS. ROSS: Yes.

5 THE COURT: And did they find that it was
6 preserved for appeal?

7 MS. ROSS: No.

8 THE COURT: Okay. And that -- I'm sorry, it
9 kind of begs the question, I assumed that but from
10 what I'm hearing, I just wanted to make absolutely
11 sure, they said it wasn't preserved?

12 MS. ROSS: Correct. And it was requested and
13 they still said it wasn't preserved.

14 THE COURT: Just so I understand, what that the
15 Court of Appeals or was that the Supreme Court?

16 MR. MITCHELL: It was first Court of Appeals,
17 then the Supreme Court took it up on cert.

18 THE COURT: On cert?

19 MS. ROSS: Uh-huh.

20 MR. MITCHELL: There should be--

21 THE COURT: I've got it all, I just haven't read
22 through it all. I got it this morning so I may need
23 to look at it. I just wanted to know, okay.

24 MS. ROSS: Okay.

25 THE COURT: Okay.

RANDY CHAMBERS-CROSS BY MS. ROSS

1 BY MS. ROSS:

2 Q Now, just going back, there's stuff on the
3 record that says for strategic reasons you didn't request
4 ABHAN. You didn't request it and The Judge says, Is that
5 for strategic reasons?

6 Is that because at that time you knew that
7 ABHAN was a serious -- would still be a strike under LWOP?

8 A Yes, that's part of it.

9 Q Okay. And what was the other part?

10 A Well, the other part is, you know, I don't
11 remember. You know, I don't remember. I mean, it was
12 purely strategic but.

13 Q Okay.

14 A Maybe it had something to do with--

15 THE COURT: How would you have gotten an ABHAN
16 charge from a CSC?

17 THE WITNESS: Well, I don't even know that we
18 could have.

19 THE COURT: I don't see the facts fitting that
20 in any way in this case.

21 So, go ahead.

22 MS. ROSS: Okay, I just wanted to clarify that
23 issue.

24 BY MS. ROSS:

25 Q Going back as far as on Page 324, The verdict

RANDY CHAMBERS-CROSS BY MS. ROSS

1 that speaks the truth, it comes down do you believe the
2 child's telling the truth?

3 You didn't object to that did you? I mean,
4 if it's not in the record?

5 A I mean, I don't know that it's objectionable.

6 Q Okay.

7 A You know, I tend not to -- I try not to object
8 during somebody's closing arguments just unless it's
9 something that's really objectionable. That's certainly
10 not -- and I don't know, that doesn't seem objectionable
11 to me.

12 Q All right. Well, it's The State's burden of
13 proof to prove the truth or to prove beyond a reasonable
14 doubt?

15 A Well, they have to prove beyond a reasonable
16 doubt.

17 Q All right. And is that what the closing -- is
18 that what she said?

19 A You know, there's also law that says that you
20 can -- that you can -- you don't have to. But you can
21 base a conviction on the testimony of the victim in crimes
22 like that.

23 THE COURT: And that's it.

24 THE WITNESS: Yeah.

25 THE COURT: Yeah.

RANDY CHAMBERS-CROSS BY MS. ROSS

1 BY MS. ROSS:

2 Q True. However, the standard is not a verdict
3 that speaks the truth. The jury has to be convinced
4 beyond a reasonable doubt--

5 A No, I mean, you know that lawyers have made that
6 argument forever about that veredicto and. . .

7 Q I understand. And I'm trying to preserve the
8 record so we can see what happens with this. And also,
9 would you agree that it comes down to whether you believe
10 the child not, wouldn't you agree that that's sort of
11 appealing to the emotions of the jury to say are you going
12 to call this child a liar?

13 A It is but here's the thing, I mean, our whole
14 defense was not necessarily that she was a liar but she
15 had been coached to say what she said. So, I wasn't
16 overly concerned about that statement by the solicitor for
17 that very reason. I mean, we were offering up through
18 cross-examination all the reasons, and you can see that in
19 my closing argument, why this little girl was put in a
20 position to say something that wasn't true.

21 Q Okay. And going into that, you brought out that
22 another person was initially charged with molestation and
23 that's why this case kind of came into being. All the
24 questioning was about A and then it came down to B in the
25 middle of--

RANDY CHAMBERS-CROSS BY MS. ROSS

1 A Yeah --

2 Q -- the interviews.

3 A -- we believed that she had probably been abused
4 but it wasn't by Mr. Thompson.

5 Q Now, just going to that, on Page 294, the
6 forensic interview, you questioned her about her testimony
7 that was in the interview, in the video that, I want you
8 to know that Gary should not have been doing those things
9 to you. And then she goes on to talk about rich detail.

10 You did not attempt to keep that bolstering
11 testimony out of the trial, did you?

12 A No. Because I actually thought that that would
13 help us more than it would hurt us.

14 Q Now, if that was the theory, did you not -- why
15 didn't you go into the history of DSS investigating Gary
16 over and over again in the past and find him being --
17 having allegations against him in the past and them all
18 being unfounded?

19 A I don't know that I knew anything about.

20 Q Okay. Hadn't the child been examined -- did you
21 know anything about -- did you get the DSS records, do you
22 recall?

23 A No.

24 Q Okay.

25 THE COURT: Can I ask a question? I saw that

RANDY CHAMBERS-CROSS BY MS. ROSS

1 somewhere it says the mother was a co-defendant. Was
2 she charged as well?

3 THE WITNESS: I don't recall.

4 THE COURT: It looks like it was one of his
5 applications and he referred to Ms. Thompson's--

6 MS. ROSS: A different charge.

7 THE COURT: What was that charge, do you know?

8 MR. MITCHELL: She was. The child had disclosed
9 to her that The Applicant had sexually assaulted her
10 and she did nothing about it. So they also charged
11 her. I can't remember the exact charge but they
12 charged her as well.

13 THE COURT: Okay. Okay.

14 BY MS. ROSS:

15 Q And as far as that, I believe -- did you bring
16 out that her testimony was that she didn't believe the
17 child when she was told that, the mother?

18 A I don't remember.

19 Q The reason she didn't. Okay. I just wanted
20 to -- the severance issue was one thing with the
21 bifurcating issue, I'm talking about like a death penalty
22 case where you have one trial for guilt and one trial for
23 sentencing.

24 A Oh, okay.

25 Q And you didn't throw that out as an option for

RANDY CHAMBERS-CROSS BY MS. ROSS

1 The Judge to consider?

2 A I didn't. I mean, it never dawned on me. I
3 would have never thought of bifurcating the proceedings
4 like that.

5 Q Okay. And then, you didn't specifically, you
6 gave some compelling argument as to the prejudicial nature
7 of the jury being told of a prior CSC, but you didn't
8 actually request that the jury only be told that it was a
9 registry crime. That The Defendant had been convicted of?

10 A No, I did not.

11 THE COURT: Let me ask you this, why couldn't it
12 have just gone under Subsection A(1)?

13 MS. ROSS: They reindicted A(2) specifically to
14 get in the priors.

15 THE COURT: Okay.

16 MS. ROSS: Because of the lack of, I would
17 argue, the other evidence, compelling other evidence
18 in this case. So they reindicted saying, no not
19 under 11, we're going to go forward on the priors.

20 THE WITNESS: Yeah, I think they wanted to be
21 able to--

22 THE COURT: To put that in.

23 THE WITNESS: -- as much as possible.

24 THE COURT: So, what is the law currently on
25 that, Ms. Ross?

RANDY CHAMBERS-CROSS BY MS. ROSS

1 MS. ROSS: It is -- my understanding is that
2 issue is going up to appeal.

3 MR. MITCHELL: So, certainly there are Supreme
4 Court arguments about whether the section -- there
5 should be a bifurcation of it.

6 THE COURT: Right.

7 MR. MITCHELL: Currently since it's a current
8 element of the crime, our current law is that it
9 needs to be presented to the jury.

10 THE COURT: Right.

11 MR. MITCHELL: And in this case--

12 THE COURT: But there is a case that's up right
13 now?

14 MR. MITCHELL: It's my understanding Gary Lott,
15 I think was an argument that our office had.

16 THE COURT: Okay.

17 MS. ROSS: Rot or Lott?

18 MR. MITCHELL: Lott.

19 THE COURT: L-O-T-T?

20 MR. MITCHELL: Yes, ma'am.

21 THE COURT: Okay.

22 MR. MITCHELL: I'm fairly certain. I'll correct
23 myself if I'm wrong but I think that's the case going
24 up right now.

25 THE COURT: Okay.

RANDY CHAMBERS-CROSS BY MS. ROSS

1 BY MS. ROSS:

2 Q And on that, in your argument, you didn't
3 specifically attack the CSC statute itself for being
4 constitutionally overbroad or fundamentally unfair?

5 A I did not. I didn't really feel like that would
6 be a winning argument at the trial level.

7 Q And then that -- your whole argument that you
8 made wasn't preserved, as you know.

9 I don't believe I have any other questions.
10 There's more in the record that I presented before but
11 that's the extent of my questions for you, Mr. Chambers,
12 thank you.

13 MR. CHAMBERS: Thank you.

14 MR. MITCHELL: I don't have any redirect, I
15 would just reserve my arguments for closing.

16 THE COURT: Okay, that's fine, you may step
17 down, sir. Thank you.

18 MR. CHAMBERS: May I be excused?

19 THE COURT: Of course, sir. Thank you. Are you
20 in court this week?

21 MR. CHAMBERS: No, not this week.

22 THE COURT: Good.

23 MR. CHAMBERS: That's why I'm casual today.

24 THE COURT: Very good.

25 All right.

1 MR. MITCHELL: No further witnesses by The
2 State, Your Honor.

3 THE COURT: Okay. Argument? I'd like some.

4 MS. ROSS: Judge, I guess, I could start, I've
5 done a lot of research on this. It's a compelling
6 issue. I would argue certainly that despite State v.
7 Cheatham, which was bantered back and forth a lot
8 regarding the burglaries, there is simply no way that
9 with a topic like criminal sexual conduct with a
10 minor, that a jury can't be prejudiced by knowledge
11 of a prior, beyond any ability to be fair and give
12 Mr. Thompson a fair trial.

13 A lot of the Cheatham, just going back in time,
14 was based on Spencer v. Texas. Which is a Supreme
15 Court opinion, 385 U.S. 554. It's from 1967. And
16 it's basically a general case where they have a
17 number of defendants where they're saying can states
18 have recidivism laws. And they said in this case
19 that they had, those laws didn't violate due process
20 because they were reasonably designed to accomplish a
21 specific purpose.

22 Here we'd argue this statute is not reasonably
23 designed to accomplish any purpose. We know from all
24 the drug laws, trafficking laws, it's very simple to
25 achieve the purpose of addressing recidivism by

1 simply having someone writing the statute in such a
2 way that if someone is convicted of this charge and
3 has a prior, then it impacts this sentence versus the
4 first sentence. Here, the legislature failed to do
5 that. It's not narrowly construed to support what
6 they -- a valid purpose. Here, clearly the purpose
7 is to make -- to contaminate the jury, make a biased
8 jury we'd argue.

9 And I think if you go back to Spencer v. Texas
10 and then look at other laws and other famous cases
11 like the Bruton case where they go into how a bad
12 confession is going to ruin the jury to such a degree
13 that a curative, you know, a curative instruction is
14 meaningless and it's going to serve no purpose. And
15 I think that's more of the language to consider this
16 case in.

17 I'll point out that the prior was a long time
18 ago and would not have come in under the rules of
19 evidence. Clearly, that's not even -- doesn't really
20 matter since he didn't testify. But I think he
21 probably could have testified and that prior would
22 not have even come in. The fact that The State
23 changed the indictment, reindicted in such a way that
24 they could bring in those priors, when the original
25 indictment didn't have it, shows that The State

1 intent was to produce this prejudice and the outcome
2 would have been the same anyway.

3 I understand the Cheatham argument for The State
4 has the right to prove their case however they want
5 to. Here I don't think they can do it in such a way
6 that denies due process or right to a fair trial and
7 that's what happened here. We'd also argue that the
8 legislature, while they have extreme powers, they do
9 not have the powers to legislate away your right to a
10 fair trial. Your due process rights. And we'd argue
11 that's what happened here.

12 The other argument--

13 THE COURT: So, can we just back up for one
14 second? Obviously, this is a PCR so we have to put
15 it back to what is the ineffectiveness of counsel.
16 Because I understand most of your argument is
17 directed towards what The Judge did and that's been
18 appealed. And I understand that that wasn't
19 preserved for the appeal from what I'm hearing.

20 MS. ROSS: Right.

21 THE COURT: Not that I think it probably would
22 have effected it. At least in 2014. But, again,
23 what did Mr. Chambers do?

24 MS. ROSS: His argument was pretty thorough. He
25 argued, and this is on page -- it's prior to Page 23.

1 It's about ten pages prior to that. He just they're
2 basic arguments. He's not familiar with -- but he's
3 not measuring it that way. He's simply saying this
4 can't be wiped from the jury's mind. Once they hear
5 this, this guy is not going to get a fair trial. He
6 argues that they reindicted specifically to deny this
7 fair trial.

8 So, we'd argue that he lays the groundwork for
9 the argument that I just made.

10 THE COURT: Okay.

11 MS. ROSS: If it had been preserved.

12 THE COURT: Okay.

13 MS. ROSS: Also we argue that, especially in
14 light of recent case law, the failing to object to
15 the bolstering of the interviewer of the child's
16 statements cannot be strategic. We'd argue that just
17 allowing that in on top of the prior, essentially,
18 having her say on video that the jury is hearing, you
19 know, Gary was wrong to do those things to you, you
20 were hurt. And then to testify how it was just
21 protective language. That cannot -- that's not
22 something that can be strategic, that can't be
23 overcome. And that all came in as well. And that
24 was because Mr. Chambers didn't object to that.

25 And he lays a strategy. He says because I want

1 to show that's why--

2 THE COURT: She was coached. It's part of the
3 allegation that she was coached, look at her. Look
4 at what the forensic interviewer is doing.

5 MS. ROSS: But they cut a lot of the forensic
6 interview where it was coach, coach, coach
7 throughout, they cut out tons of it. And then they
8 left those two little parts. Which we would just say
9 outline, basically, bolster The Defendant without
10 effectively proving that she was coached throughout.

11 THE COURT: Okay.

12 MS. ROSS: And the other one I made, I think
13 preserved the record as far as--

14 THE COURT: Okay.

15 MS. ROSS: What those positions are.

16 THE COURT: Okay. So.

17 MS. ROSS: But with due process, I argue there's
18 a real due process issue here as well beyond
19 ineffective assistance of counsel, despite counsel
20 the state of the law of a citizen has a right to a
21 fair trial. And this statute denied him that right.

22 THE COURT: Okay.

23 MR. MITCHELL: I think the issue that Your Honor
24 is most concerned with probably is the issue in
25 regards to -- to the objections not being preserved

1 and whether the appellate courts could reach a
2 decision. So, in regards to that allegation is
3 concerned in a PCR, The Applicant can't simply say
4 that counsel didn't object to this issue, it's not
5 preserved for appellate review. He has to move to
6 the next step. Had it been preserved for appellate
7 review, would that issue had been meritorious?

8 THE COURT: Right.

9 MR. MITCHELL: In this particular case, The
10 State would submit that it would not be. This
11 particular crime, under the statute, a prior
12 conviction is a element of the actual crime itself.
13 So, if The State choose to prosecute under the second
14 section, then certainly it's well within their right.
15 I would note in the actual trial transcript, Judge
16 Hill goes through the balancing test of showing
17 whether -- or I guess assessing whether this
18 admission is more prejudicial than probative. He
19 goes through the Old Chief vs. United States Supreme
20 Court case. And ultimately comes to the conclusion
21 that because of legislative intent by the
22 legislature, that this element must be introduced to
23 the actual jury in this case. And he goes so far as
24 to give limited instructions, letting the jury know
25 that they can only use this stipulation to show that

1 it meets the elements of the actual crime and not to,
2 essentially, punish The Applicant.

3 Your Honor, I can't say what goes through a
4 jury's mind once they hear this information. But I
5 think it was well within the law for The Judge to
6 read the stipulation. And had it been preserved for
7 appellate review, I don't think that the Supreme
8 Court or the Court of Appeals, for that matter, would
9 have overturned this case because it essentially is a
10 element of the actual statute itself.

11 There's appellate material that I have included
12 in the actual materials to Your Honor which goes in
13 depth about the case law currently in South Carolina.
14 Counsel can't be clairvoyant and anticipate changes
15 in the law. He tries the case as it is during that
16 time and the law does change, then it may impact
17 cases that he's tried in the past. But certainly, he
18 can't be held to the standard that he has to
19 anticipate changes in the law regarding this
20 particular issue.

21 I would also note counsel strategy in terms of
22 cross-examining the expert in this case regarding
23 whether there's a issue of bolstering. I would
24 submit that I don't think that those statements by
25 the actual expert amount to actual bolstering. If

1 they did, counsel explained his strategy and under
2 PCR law, counsel strategy shouldn't be seconded
3 guessed in those regards.

4 So with that, if there's any other issues that
5 Your Honor would like further briefing on, further
6 comment, I'll be happy to address those.

7 THE COURT: Okay.

8 MS. ROSS: Judge, can I just make--

9 THE COURT: Please, yeah.

10 MS. ROSS: At the beginning there is discussion
11 regarding the tapes and which parts of the tape to
12 remove. On Page 91, Line 10, I think if I got my
13 notes correctly, the solicitor admits that it would
14 be bolstering to say that we know Gary did something
15 wrong or had something wrong. So, there's somewhere
16 around 90, 91 where Randy, defense counsel, says he's
17 doing it for strategic reasons --

18 THE COURT: Yeah.

19 MS. ROSS: -- but the solicitor admits that
20 these are bolstering statements.

21 MR. MITCHELL: What page?

22 MS. ROSS: It was 91, Line 10.

23 THE COURT: In the beginning he says, If the
24 interview is going to come in, then I want the parts
25 in where she is essentially telling the child, You

1 know he did something wrong and we're here to protect
2 you. Because again, I think that is a departure from
3 protocol, in my mind it casts doubt on the integrity
4 of the interview process.

5 MS. ROSS: Right. So, he says that but also the
6 solicitor --

7 THE COURT: Goes on to say, Strategically I
8 understand your position.

9 MS. ROSS: Right.

10 THE COURT: Yeah.

11 MS. ROSS: But the solicitor at some point says,
12 This is boltering.

13 So, she sort of admits to it. But then it
14 says--

15 THE COURT: Where does it say where she says,
16 This is bolstering?

17 MR. MITCHELL: That's what I was looking for.

18 THE COURT: I don't see it.

19 MS. ROSS: I may have pointed out the wrong
20 part. Maybe around 98.

21 THE COURT: Okay.

22 MS. ROSS: Judge, I think I have to go back
23 through it again. At some point I recall her saying,
24 Arguably this is bolstering testimony and we would
25 take it out.

1 But then Randy does not object to it.

2 Okay, I'm sorry, 101, line 7, 8 and 9. Okay.

3 And, Judge, Page 8 is where defense counsel is asking

4 to keep that in, The State requested to remove it.

5 That's correct. That's where -- I think that's what

6 I was referring to that The State felt that at some

7 point she referred to it potentially being

8 bolstering. So, I apologize for it being confusing

9 there.

10 THE COURT: Well, it looks like at the very end,
11 though, when she talks about --

12 The solicitor said, The State would be fine to
13 streamline this and just try to shorten it and ask
14 her on the stand, did you meet with her a third time?
15 Clarify the location the abuse took place.

16 But that's not what happened; is that correct?
17 They played the video?

18 MS. ROSS: Yes.

19 THE COURT: Okay.

20 MS. ROSS: I think. That's my understanding
21 reading the transcript that they did play the video.

22 THE COURT: Okay. I'm just looking at the
23 pretrial portion of it. Okay.

24 MS. ROSS: I think he refers to it and says it's
25 going to time and place.

1 THE COURT: Okay.

2 MS. ROSS: And then, as far as -- as far as the
3 argument you don't have to be clairvoyant about what
4 the case law will be in the future, in this case, you
5 know, it would have been Mr. Thompson's case if that
6 had been preserved. So, it's not necessarily to say
7 someone as to be clairvoyant, it's just saying the
8 outcome certainly would have been different. And
9 then that just goes to the prejudice. In this case
10 the transcript will show that there is no physical
11 evidence, no corroborating evidence, house is full of
12 people. Always -- no other -- no other evidence to
13 support the allegations except for the child's word
14 after she had already accused another person.

15 THE COURT: So, there's no allegations that
16 there was any other child was abused in this house?

17 MS. ROSS: Nothing.

18 THE COURT: Okay. How many kids were there
19 total?

20 MS. ROSS: I know there were at least two.

21 MR. MITCHELL: Four.

22 THE COURT: Four.

23 What were their ages, do you know, Ms. Ross?

24 MS. ROSS: I believe -- he'd know.

25 THE COURT: He can tell you.

1 MR. THOMPSON: I think ten, nine, seven and six.

2 THE COURT: Okay. How many girls, how boys?

3 MR. THOMPSON: All girls.

4 THE COURT: All girls.

5 MR. THOMPSON: Yes, ma'am.

6 THE COURT: Okay.

7 MS. ROSS: So, that would be our argument. And
8 the transcript's replete with that as well.

9 THE COURT: Okay. All right, anything else from
10 anyone then? We're good?

11 MR. MITCHELL: Your Honor, unless you need
12 further arguments.

13 THE COURT: No, I'm good. I want to talk to you
14 about me being able to -- I want to read the
15 transcript. So -- not you, I mean, how in the world
16 they're going to let me take this out the door.
17 Which I may need to do. So, all right, I'll let you
18 all know something, I appreciate it.

19 MS. ROSS: Thank you very much.

20 THE COURT: Thank you.

21 And we say the Lott case was argued in February,
22 is my understanding; is that correct?

23 MR. MITCHELL: That is correct, Your Honor.

24 THE COURT: Okay. Thank you.

25 MR. MITCHELL: Thank you, Your Honor.

1 MS. ROSS: Thank you.

2 THE COURT: Okay, thank you. I appreciate it.

3 (WHEREUPON, the proceedings were concluded.)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
Common Pleas for Greenville County, South Carolina, on the
17th day of April, 2018.

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

August 28, 2019



APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Gary R. Thompson, 218312,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-23-6516

ORDER OF DISMISSAL

19 JUL 31 AM 11:01
Paul Wickensimer
COC.GUL SC

This matter comes before the Court by way of an application for post-conviction relief filed on October 13, 2017 by Gary R. Thompson (Applicant). Respondent made its Return on January 17, 2018. An evidentiary hearing into the matter was convened on April 17, 2018, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel, Randall L. Chambers, Esquire, also testified. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In November of 2013, the

Greenville County Grand Jury indicted Applicant for disseminating obscenity to a minor (2013-GS-23-8831) and criminal sexual conduct with a minor first degree (2013-GS-23-700A). Randall L. Chambers, Esquire, represented Applicant. Applicant proceeded to trial on January 13, 2014, before the Honorable D. Garrison Hill and a jury. On January 15, 2014 the jury found Applicant guilty as indicted of both charges. Judge Hill sentenced Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for first-degree criminal sexual conduct with a minor along with a consecutive term of imprisonment of five years for disseminating obscene material to a minor.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals issued an unpublished opinion in which it unanimously affirmed Applicant's convictions. State v. Thompson, Op. No. 2015-UP-524 (S.C. Ct. App. filed Nov. 18, 2015). Thereafter, Applicant petitioned the Court of Appeals for rehearing, and the petition was denied. Applicant then filed a petition for a writ of certiorari in the Supreme Court. The petition for writ of certiorari was denied on November 9, 2016.

FACTUAL HISTORY

In 2010, the victim ("Victim"), who was nine years old at the time, falsely alleged at the behest of her mother, Jessica Taylor ("Mother"), her paternal uncle had sexually abused her. (Tr. p. 138; p. 245; pp. 281-282). In response, Victim was referred to the Children's Advocacy Center in Spartanburg, South Carolina, and met with Tricia Austin, a licensed professional counselor at the center, on June 15, 2010. (Tr. p. 279; pp. 281-282). During Austin's meeting with Victim, Victim admitted her paternal uncle had never sexually abused her. (Tr. p. 145; p. 307). However, Victim spontaneously disclosed she had been sexually abused many times by her stepfather, Applicant, Gary Reece Thompson, Jr. (Tr. pp. 286-288; p. 294; p. 306; p. 309).

Following Victim's disclosure, Austin reported the allegations to Lieutenant Ty Miller of the Greenville County Sheriff's Office, and he began an investigation into the reported sexual abuse. (Tr. pp. 168-170; pp. 288-289). As a result of the investigation, Applicant and Mother were arrested in September of 2010. (Tr. p. 175; p. 177). Lieutenant Miller then obtained a search warrant for Applicant's home and discovered pornography consistent with pornography Victim had described being shown to her by Applicant during the time period she was being abused. (Tr. p. 135; pp. 177-180).

Subsequently, Applicant was indicted for first-degree criminal sexual conduct with a minor and disseminating obscene material to a minor, and he proceeded to trial. (Tr. pp. 46-48; Indictments). At the outset of trial, defense counsel moved for the trial judge to preclude the solicitor from prosecuting Applicant for first-degree criminal sexual conduct with a minor pursuant to S.C. Code Ann. § 16-3-655(A)(2) because he contended there was no question Applicant could instead be prosecuted pursuant to S.C. Code Ann. § 16-3-655(A)(1) in light of the fact Victim was unquestionably under the age of the eleven at the time she was sexually abused. (Tr. pp. 7-8). In response, the solicitor indicated she was entitled to proceed forward with the prosecution under any theory supported by the evidence just as a prosecution for first-degree burglary involving prior convictions as an aggravating circumstance would be permitted to go forward even if other aggravating circumstances could also be proven aside from the existence of two or more prior qualifying convictions. (Tr. pp. 9-12).

Following the solicitor's remarks, defense counsel again urged the trial judge to force the solicitor to prosecute Applicant for a violation of S.C. Code Ann. § 16-3-655(A)(1) instead of a violation of S.C. Code Ann. § 16-3-655(A)(2). (Tr. pp. 12-14). However, in the event he would not do so, defense counsel asked the trial judge to permit him to stipulate to the existence of

Applicant's qualifying prior conviction while also precluding the solicitor from presenting that stipulation to the jury. (Tr. pp. 13-14; p. 17). In response, the solicitor asserted the South Carolina Supreme Court had previously rejected a similar argument that the State could be forced to stipulate to an element in the context of first-degree burglary. (Tr. pp. 14-15). However, the solicitor offered to stipulate to the prior conviction in Applicant's case while noting the stipulation had to be presented to the jury due to the fact the existence of a prior conviction was an element of the charged offense that necessarily had to be found by the jury. (Tr. pp. 14-15; p. 18).

After considering the arguments of counsel, the trial judge declined to preclude the solicitor from prosecuting Applicant pursuant to S.C. Code Ann. § 16-3-655(A)(2) and declined to bar the jury from hearing the stipulation to which the parties agreed in regard to the existence of Applicant's prior conviction. (Tr. pp. 23-24). In reaching that decision, the trial judge found the probative value of Applicant's prior conviction was "essential" to prove a violation of the statute and determined the situation in Applicant's case was distinguishable from the situation in Old Chief v. United States, 519 U.S. 172 (1997), due to the fact the prior conviction necessary to prove first-degree criminal sexual conduct with a minor in South Carolina had to be for a specific type of offense related to the charged offense. (Tr. pp. 23-24). However, the trial judge indicated he would provide a limiting instruction to the jury when the stipulation was introduced if one was desired. (Tr. pp. 24-25).

Subsequently, during trial, Victim testified about the abuse she suffered at the hands of Applicant. (Tr. pp. 130-135). Specifically, Victim stated Applicant was physically abusive towards her, her mother, and her three sisters, and she reported Applicant began sexually abusing her when she was six years old. (Tr. p. 130). In regard to the abuse, Victim testified Applicant

painfully inserted his penis into her vagina and anus on numerous occasions, performed oral sex on her and forced her to perform oral sex on him multiple times, and showed her "a bunch" of pornographic films depicting women engaged in sexual acts. (Tr. pp. 130-135). Furthermore, Victim stated Applicant threatened to kill her or hurt her mother if she did not engage in the sexual acts with him, and she indicated she did not reveal the abuse earlier because she was frightened of Applicant. (Tr. p. 136).

At the conclusion of Victim's testimony, the solicitor moved to admit the stipulation regarding Applicant's prior conviction and publish it to the jury. (Tr. p. 165). In response, defense counsel stated: "[T]he Defense has no objection, Your Honor." (Tr. pp. 165-166). Thereafter, the stipulation was admitted into evidence without objection, and the trial judge presented the following limiting instructions to the jury:

Now, this particular stipulation, before it is read to you, I want to instruct you on something else. And you'll, also, recall that I made what probably seemed a curious statement earlier as well.¹ And that is that you can use some evidence for one purpose and one purpose only, and not for any other purpose. And this stipulation you're about to read can only be used by you, the jury, for a very limited purpose. And that purpose is simply on the issue of whether the State has met its burden of proof as to an element of the crime of criminal sexual conduct with a minor in the first degree. And you can give this stipulation whatever weight you decide to in that regard. You may not consider this stipulation for any other purpose. Your oath forbids you, for example, from using the evidence of this stipulation as proof of whether [Applicant] committed the acts for which he's on trial here today, except on that issue of that element of the offense. So the law doesn't allow you to use the stipulation as proof of [Applicant]'s guilt for any charge that he's on trial for here today, except for deciding whether the State has met its burden of proof about a prior offense.

(Tr. pp. 166-167). Following those limiting instructions, the trial judge presented the agreed-upon stipulation to the jurors, which instructed them Applicant "[had] been convicted of criminal

¹ Regarding that "curious statement," the trial judge had earlier stated to the jurors during his preliminary instructions: "Now, some evidence can be used for limited purposes. And I'll tell you more about that later. But simply because something comes into evidence for one purpose doesn't mean you can use it for other purposes. So bear that in mind as well. And remember, too, that this is an important trial for both sides, of course." (Tr. p. 109).

sexual conduct with a minor first degree, an offense listed pursuant to South Carolina Code Section 23-3-430(C), and [was] currently on the South Carolina Sex Offender Registry.” (Tr. p. 167). The trial judge then again instructed the jurors they could only consider the stipulation that had just been presented to them for the limited purpose identified to them and not for any other purpose. (Tr. p. 167).

As the trial continued, Lieutenant Miller testified about his investigation into the reported sexual abuse, and Wiley Garrett, a therapist assigned to work with Victim after she disclosed the sexual abuse, noted Victim was exhibiting symptoms of trauma subsequent to the abuse. (Tr. pp. 170-175; p. 184; pp. 192-193). Additionally, Dr. Nancy Henderson, a board-certified child abuse pediatrician, testified about her physical examination of Victim after the abuse was revealed, indicated Victim disclosed during the examination she was sexually abused between the ages of six and nine, and stated the examination results were normal. (Tr. pp. 205-206; p. 212; pp. 215-218). However, Dr. Henderson noted normal examination results were extremely common in sexual abuse cases and did not mean no sexual abuse had occurred due to the fact injuries to the genital area heal very rapidly. (Tr. pp. 217-218; p. 229). Furthermore, Mother, who had earlier pled guilty to unlawful conduct towards a child, testified for the prosecution, indicated Applicant treated Victim very differently from her other children, noted Victim and her other children began to exhibit sexualized behavior after Applicant moved into their home, and stated she awakened one time and saw Applicant on the floor with his face at Victim’s crotch. (Tr. pp. 230-231; pp. 239-245; p. 269). Mother also candidly acknowledged she instructed Victim to falsely accuse her paternal uncle of sexually assaulting her, and she admitted Victim informed her Applicant was touching her genital area but did not do anything in response.² (Tr.

² During her testimony, Mother also indicated Applicant wanted her to wear her hair in ponytails, pretend to be a little girl, and call him “Daddy” when they engaged in sexual intercourse. (Tr. p. 244).

p. 241; p. 245). Finally, following Mother's testimony, Austin testified about her meetings with Victim and confirmed Victim disclosed she had been sexually abused by Applicant. (Tr. pp. 286-288; p. 294; p. 306; p. 309).

Thereafter, at the conclusion of the evidentiary phase of trial, the parties rested their cases and presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (Tr. pp. 319-372). As part of his jury instructions, the trial judge advised the jurors they must apply the law as he provided it to them and informed them they must follow all of his instruction. (Tr. pp. 360-361). Furthermore, in regard to the evidence of Applicant's prior conviction, the trial judge instructed the jury:

You have heard evidence that the Defendant was convicted of a crime other than the one for which is now on trial. This testimony, if you conclude it is true, may only be considered by you for the limited purpose for which I told you that it could be. And that is whether the State has met its burden of proof as to an element of the crime for criminal sexual conduct in the first degree with a minor. You may not consider it for any other reason or any other purpose. You may not and must not consider this evidence of the commission of another offense as proof of Applicant's guilt of the crime that we are charging – guilt of the crime that he is on trial for here today, other than to the extent I've told you that you could do so.

(Tr. p. 365).

Subsequently, at the conclusion of trial, the jury convicted Applicant as indicted. (Tr. p. 375).

Following the verdict, the trial judge sentenced Applicant to life imprisonment without the possibility of parole for first-degree criminal sexual conduct with a minor based on the fact Applicant had previously been convicted of that same "most serious" offense. (Tr. pp. 379-380). Additionally, the trial judge sentenced Applicant to a consecutive five-year term of imprisonment for disseminating obscene material to a minor. (Tr. p. 380).

ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Lawyer said he had know objection when he should have."
 - a. Did not have my case heard at direct appeal, because lawyer didn't object.

Applicant filed a supplemental application on March 27, 2018, further alleging Trial Counsel was ineffective for the following reasons:

1. Failing to move for a severance of CSC with minor and disseminating pornography;
2. Failing to make a contemporaneous objection to stipulation of prior CSC with a minor and registry requirement;
3. Failing to request to bifurcate the trial to avoid the fundamental unfairness of the jury's knowledge of the Applicant's prior CSC with a minor and registry requirement;
4. Failing to investigate issue of pornography being purchased after child had been removed from the home;
5. Failing to object to unfounded prejudicial expert testimony;
6. Failing to object to hearsay testimony by clinical social worker expert;
7. Failing to object in State's closing to a misstatement of the burden of proof and improperly appealing to the emotions of the jury;
8. Failing to take exception to jury instruction that the prior record should be considered only for the limited purpose of proving the elements of the indicted charge;
9. The Applicant also alleges a Due Process violation based on his failure to get a fair trial by an impartial jury.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified Trial Counsel represented him on his charges. He testified Trial Counsel initially objected to the stipulation of his prior criminal sexual conduct (CSC) conviction with a minor and registry requirement being published to the jury pretrial, but Trial Counsel failed to object during the introduction of this evidence during trial. Applicant testified he was not guilty but the jury thought he was guilty of the charges because they heard about his prior conviction for CSC. He testified Trial Counsel should have investigated his case more

thoroughly. Applicant testified he did not have any porn videos at the home he shared with victim when they all lived there and that the children were removed from the house in May before he was arrested. He testified the house was searched by police later that year in December after he had been locked up and porn videos were found. Applicant testified he did not look at any of the videos and they were purchased after the children were removed from the home in May. He testified Trial Counsel could have gone to the store where he purchased them from to investigate when the videos were brought to show the victim could not have seen them since they were purchased after the children were removed from the home. Applicant testified Trial Counsel did not meet with him enough in preparing his case and believed Trial Counsel only met with him twice. He testified he did not testify at his trial because Trial Counsel did not want him to as he had the ability to sometimes talk too much. Applicant testified he wanted to testify at trial because he wanted to tell the truth and believed his testimony would have helped his case. He testified the Department of Social Services (DSS) were involved in the children's lives the whole time he was together with the children's mother. Applicant testified someone called DSS anonymously on him and the children's mother. He testified during a visit to the doctor, the doctor examined the children to see if they had been molested. Applicant testified because of this there was a family court case involving the children as well but that the facts from that case did not come up during his trial even though he thought they should have. He testified those facts would have shown there was no evidence against him. Applicant testified because of these charges and conviction he had lost his life, family and freedom. He testified the children's paternal grandmother made the allegations against him and there were previous allegations of sexual misconduct made against the children's biological dad.

On cross-examination, Applicant testified he only met with Trial Counsel two times

during his representation. He testified while his charges were pending he had three different lawyers. Applicant testified he had received his discovery before trial and that the State had extended a plea offer of twenty years which he declined. He testified he was not going to accept the plea offer for something he did not do. Applicant testified Trial Counsel told him life without parole was off the table in terms of a potential sentence. He testified he had previously pled guilty twenty years ago to CSC and that he was not guilty of the crime then but that his father wanted him to take the plea. Applicant testified Trial Counsel did not discuss any defenses with him. He testified he told Trial Counsel about his previous charge and about when he purchased the porn. Applicant testified Trial Counsel told him he did not want him to testify at trial. He testified he did not remember the trial judge examining him about his wishes on whether to testify or not. Applicant testified Trial Counsel never talked to him about severing his charges.

Trial Counsel's Testimony

Trial Counsel testified he had practiced law since 1992 and all of that time had been devoted to criminal law. He testified he had taken numerous cases to trial. Trial Counsel testified he was appointed to represent Applicant and that the charges arose from an allegation from the maternal grandmother of the victim. He testified the allegations were referred to the Sheriff's office from the Rape Crisis Center. Trial Counsel testified he did not remember the number of times he met with Applicant but that he certainly met with Applicant more than two times. He testified prior to being appointed to represent Applicant, Applicant had two previous attorneys. Trial Counsel testified it was his routine to review discovery in cases and also provide a copy to his clients. He testified Applicant maintained his innocence during his representation and Applicant rejected a twenty year plea offer from the State. Trial Counsel testified he did not have a discussion about severing Applicant's two charges. He testified he did not think about

severance or asking to bifurcate Applicant's trial. Trial Counsel testified he would have investigated Applicant's porn purchase as the victim indicated Applicant had watched it with her and gave a description of it. He testified a search warrant was executed and porn DVDs were found that matched the description the victim gave to authorities. Trial Counsel testified he did not recall Applicant telling him he bought the porn videos after the allegations had been made.

He testified Applicant had a prior conviction for CSC and the State sought to introduce evidence of the conviction. Trial Counsel testified the stipulation of the conviction was forced on him because Applicant could have been prosecuted under a different section of the statute considering the victim was nine at the time of the charge. He testified this would have stopped the jury from hearing about Applicant's prior conviction. Trial Counsel testified the trial judge ruled that the stipulation could come in but that the trial judge would give limiting instructions to the jury on what to consider when hearing about Applicant's prior conviction. He testified he did not object to the stipulation during trial but should have and that based on his arguments he thought the issue may have been preserved anyway. Trial Counsel testified there was no way Applicant could get a fair trial if the jury knew about his prior conviction. He testified his strategy was to keep out any mention of Applicant's prior conviction by stipulating to the jury that Applicant met the statutory requirement without mentioning the prior conviction. Trial Counsel testified the trial judge felt as though he was required by law to let the jury know about Applicant's prior conviction as it was an element of the crime he was charged with. He testified Applicant did not bring up bifurcating or severing his charges when they met. Trial Counsel testified he did not think he had an argument for trying to bifurcate or sever Applicant's charges anyway because they were closely related. He testified he did not have any concerns about Dr. Henderson's testimony, as there was no physical evidence to support the allegations so her

testimony was not as damaging to Applicant. Trial Counsel testified he thought he covered important points on his cross-examination of Dr. Henderson. He testified he did not recall having any issues with the testimony of the social worker who testified for the State. Trial Counsel testified that just like the testimony of Dr. Henderson, the social worker's testimony was essentially the information the victim testified to. He testified he did not think the closing argument by the State was burden shifting and had he thought so he would have objected and moved for a mistrial. Trial Counsel testified he did not have any issues with the jury instructions.

On cross-examination, Trial Counsel testified regarding the jury instructions. He testified he did not think the trial judge's instructions to the jury about how they could only consider Applicant's prior conviction in relation to his current charges was going to help Applicant because the jury knew Applicant already had a prior CSC. Trial Counsel testified he thought it was prejudicial to Applicant that the jury heard he had a prior conviction for CSC after it was decided during pre-trial that the stipulation would be read to the jury. He testified in retrospect Applicant's issue concerning the stipulation would have been better preserved had he made a contemporaneous objection during trial. Trial Counsel testified Applicant was served with a Life Without Parole Notice (LWOP). He testified he did not request a lesser included charge of assault and battery of a high and aggravated nature (ABHAN) during jury charges for strategic reasons. Trial Counsel testified he did not object to the State's closing argument when they made a statement about the child speaking the truth. He testified he tries not to object during closing arguments unless he believes the comments are totally objectionable and he did not believe that comment to be objectionable. Trial Counsel testified part of his defense was to show that the victim had been coached and that prior to his client being charged, the victim had made allegations against someone else that turned out to be false. He testified he believed the victim

had been abused just not by Applicant. Trial Counsel testified he did not keep out the forensic interviews because he thought they were more helpful to Applicant's case than hurtful. He testified he did not recall having any information or records from the DSS case involving the children. Trial Counsel testified the victim's mother was charged as well and that he did not bring out that the victim's mother did not believe the victim's allegations. He testified he did not think about requesting to bifurcate Applicant's trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

Ineffective Assistance of Counsel

Failure to Move for Severance of Charges

Applicant alleges Trial Counsel was ineffective in failing to move for a severance of his CSC with a minor charge and disseminating pornography charge. This court finds Trial Counsel was not ineffective in this regard. A motion for severance is addressed to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (internal citations omitted). Generally, when offenses charged in separate indictments are of the same

general nature involving connected transactions closely related in kind, place, and character, the trial judge has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced. State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005); State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974). Criminal charges may be consolidated where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced. State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). "Offenses are considered to be of the same general nature where they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App.1996). Here, this court notes Trial Counsel testified Applicant did not bring up bifurcating or severing his charges when they met. This court would further note Trial Counsel testified he did not think he had an argument for trying to bifurcate or sever Applicant's charges because they were so closely related. Upon review of the record, this court agrees with Trial Counsel's assessment of Applicant's charges and finds that Applicant would not have been successful on a motion to sever his charges. This court finds Applicant's charges were interconnected and Trial Counsel was not ineffective for failing to move to have them severed. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test -- that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Trial Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland -- that he was prejudiced by Trial Counsel's performance. This Court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed with

prejudice.

Failure to Make a Contemporaneous Objection

Applicant alleges Trial Counsel was ineffective in failing to make a contemporaneous objection to the stipulation of Applicant's prior CSC with a minor and registry requirement being published to the jury. Applicant argues Trial Counsel failed to argue that the statute he was charged with was constitutionally overbroad. This Court finds that Applicant cannot show that he was prejudiced by Counsel's failure to make a contemporaneous objection.

To establish trial counsel was ineffective for failing to preserve an issue for appellate review, Applicant must establish both deficiency and prejudice. Milledge v. State, 422 S.C. 366, 374, 811 S.E.2d 796, 800-01 (2018). Therefore, the inquiry does not end, and relief is not automatically granted, simply because an applicant establishes his counsel did not contemporaneously object and the issue was not preserved for appellate review, as an applicant must also establish prejudice.

The appropriate inquiry for determine whether an applicant was prejudiced by counsel's failure to contemporaneously object to the introduction of evidence is not merely whether the issue would have been preserved for appellate review, but rather, whether the appellate court would have reversed Applicant's convictions based on trial court error and granted him a new trial. Id. In Milledge, the South Carolina Supreme Court articulated the proper standard for determining whether an applicant established prejudice from counsel's failure to contemporaneously object to the admission of evidence following the denial of a pre-trial motion to suppress based on Fourth Amendment grounds, finding "the appropriate inquiry is whether the search conducted by the deputies was lawful under the Fourth Amendment, as that issue would have controlled the outcome on direct appeal. We further agree with the State that the search was

supported by the deputies' reasonable, articulable suspicion, and thus Milledge was not prejudiced by counsel's failure to contemporaneously object." Id. at 375, 811 S.E.2d at 801. "In determining whether a PCR applicant has established prejudice, the PCR court does not act as a finder of fact and substitute its judgment for that of the trial court. Rather, in instances like the case before us, the PCR court must view the trial court's ruling through the same lens that would be applied on appeal, which here requires giving appropriate deference to the trial court's findings." Id., at 366, 380, 811 S.E.2d at 804 (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002) (explaining that on appeal from a Fourth Amendment motion to suppress, an appellate court will only reverse the trial court if there is clear error, and will affirm if there is any evidence to support the ruling)). "[T]he proper inquiry for determining prejudice in this case is whether there is evidence in the record to support the trial court's finding the officer had reasonable suspicion. If so, an appellate court would necessarily have affirmed the trial court's denial of the motion to suppress." Milledge, 422 S.C. at 380, 811 S.E.2d at 804.

Here, this court finds the publication of the stipulation to the jury was properly charged and carefully considered by Trial Judge Hill, and Trial Counsel was not ineffective for failing to make a contemporaneous objection to it because the stipulation was relevant evidence required to prove an element of the offense charged whose probative value was not substantially outweighed by the danger of unfair prejudice.

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.").

“Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); 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.”).

However, even if relevant, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence’s tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev’d on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly though, unfair prejudice does not mean damage to a defendant’s case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State

in a criminal trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

Trial judges have “particularly wide discretion” in ruling on the comparative probative value and potential prejudicial effect of evidence. Collins, 398 S.C. at 209, 727 S.E.2d at 757. A trial judge’s ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, “[a] trial judge’s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” Id. at 358, 543 S.E.2d at 594.

In the case at bar, Applicant was charged with committing first-degree criminal sexual conduct with a minor in violation of S.C. Code Ann. § 16-3-655(A)(2). Pursuant to that statutory section, an individual is guilty of first-degree criminal sexual conduct with a minor if he or she “engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).”³ S.C. Code Ann. § 16-3-655(A)(2). Notably, in

³ Significantly, Section 23-3-430(C) outlines a list of different offenses involving criminal conduct of a sexual nature that require offenders to register as sex offenders in South Carolina upon conviction. See S.C. Code 23-3-430(C) (requiring sex offender registration for anyone convicted of twenty-two delineated South Carolina offenses, including first-degree criminal sexual conduct with a minor, or “any other offense specified in” the federal Sex Offender Registration and Notification Act). Likewise, Section 23-3-430(D) provides a trial judge with discretion to place any offender convicted of an offense not listed in Section 23-3-430(C) on the South Carolina sex offender registry if good cause is shown. See S.C. Code Ann. § 23-3-430(D) (“Upon conviction, adjudication of

delineating the elements of the offense, the legislature chose not only to make the age of the victim and the commission of a sexual battery elements of the offense but, in order to deter recidivist sex offenders, also elected to make the fact the offender had previously committed an offense that required him or her to be placed on the sex offender registry an element of the offense. Id.; cf. Benton, 338 S.C. at 154, 526 S.E.2d at 230 ("To deter repeat offenders, the General Assembly chose to include two or more prior burglary and/or housebreaking convictions as an element of first degree burglary."). Thus, in order to prove Applicant's guilt for the charged offense, the solicitor was required to prove Applicant committed a sexual battery with a victim under the age of sixteen and was on the sex offender registry by virtue of a conviction for a delineated offense -- such as first-degree criminal sexual conduct with a minor -- or by virtue of a sentencing judge making a determination there was good cause for him to register as a sex offender.

In order to prove the element of first-degree criminal sexual conduct with a minor that required a showing Applicant was a recidivist sex offender who either had been placed on the registry following a conviction for an offense specified in Section 23-3-430(C) or had been placed on the sex offender registry for good cause, the solicitor in Applicant's case introduced into evidence a stipulation agreed upon and signed by defense counsel. That stipulation, which was admitted without objection, proved Applicant's status as a recidivist sex offender by instructing the jury he "ha[d] been convicted of Criminal Sexual Conduct with a Minor First Degree, an offense listed pursuant to S.C. Code 23-3-430 (C) and is currently on the South Carolina Sex Offender Registry." (Tr. pp. 165-167; State's Ex. # 7). As a result, the stipulation had immense probative value in Applicant's case as it established an element of the offense that

delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.").

necessarily had to be proven, and, since the stipulation – or comparable evidence – was necessary to prove the charged offense, the probative value of the stipulation was not substantially outweighed by a danger of unfair prejudice, which was particularly true in light of the limiting instructions the trial judge presented to the jury in regard to that stipulation on multiple occasions both before and after the stipulation was introduced. See United States v. Gaudin, 515 U.S. 506, 510 (1995) (“[The Fifth Amendment and Sixth Amendment to the United States Constitution] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”); In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); see also State v. Cheatham, 349 S.C. 101, 109-110, 561 S.E.2d 618, 623 (Ct. App. 2002) (“It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first-degree burglary does not constitute undue prejudice. Thus, the admission of Cheatham's prior burglary and housebreaking convictions as an element of first-degree burglary does not constitute unfair prejudice in this case. Further, the trial judge specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first-degree burglary was proven. We find no error in the admission of the convictions because the trial court took every precaution to prevent the improper consideration of Cheatham's convictions and to guard against undue prejudice.”); see generally Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“A jury is presumed to follow instructions.”).

Significantly, any limitation to the stipulation would defeat the clear legislative purpose behind the inclusion of the statutory element requiring proof of a prior conviction for an offense of a sexual nature because it would remove all context from the prior conviction in the eyes of the jurors and would leave them simply speculating in regard to what Applicant's prior conviction was for, what the significance of the statutory provision referenced in the stipulation was, and why the general statement regarding the prior conviction was even presented to them at all, which could potentially result in significant prejudice to the prosecution. Old Chief v. United States, 519 U.S. 172, 189 (1997). ("If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, 'never mind what's behind the door,' and the jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way."). In light of the fact the stipulation in Applicant's case was highly probative and essential to proving Applicant's guilt for first-degree criminal sexual conduct with a minor and was not unduly or overly prejudicial in light of the trial judge's multiple limiting instructions, the trial judge did not abuse his broad discretion in permitting the solicitor to introduce the stipulation admitted in Applicant's case. See Hamilton, 344 S.C. at 358, 543 S.E.2d at 593-594 ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."); cf. State v. Simmons, 352 S.C. 342, 359, 573 S.E.2d 856, 865 (Ct. App. 2002) ("[T]he trial court properly allowed the State to present evidence of Simmons' prior burglary/housebreaking convictions as an element to support first degree burglary."). As there is evidence to support this rulings, the trial court properly denied Applicant's attempt to not have

the stipulation entered into evidence. Accordingly, Applicant cannot establish prejudice as to counsel's failure to contemporaneously object to the stipulation of Applicant's prior CSC with a minor and registry requirement being published to the jury. This allegation must be denied and dismissed with prejudice.

Failure to Request to Bifurcate

Applicant alleges Trial Counsel was ineffective for failing to request to bifurcate the trial to avoid the fundamental unfairness of the jury's knowledge of Applicant's prior CSC with a minor and registry requirement. Here, this court finds Trial Counsel was not ineffective as Applicant was not entitled to bifurcate his trial. This court can think of no authority authorizing bifurcation of criminal charges in this context and would note Applicant has not identified any further authority that would specifically authorize a trial judge in South Carolina to bifurcate a criminal trial to prevent the jury from considering all the elements of a single offense at the same time during a unitary trial.

Further, this court finds a bifurcated trial was not necessary for Applicant. This court would note just as our appellate courts have instructed should be done in first-degree burglary cases when evidence of two or prior burglary or housebreaking convictions is introduced, the trial judge issued two separate limiting instructions to prevent the jury from considering Applicant's prior conviction for any purpose other than as evidence of the element expressly requiring proof of that prior conviction.⁴ See Benton, 338 S.C. at 156, 526 S.E.2d at 230-231. ("To ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit evidence to the prior burglary

⁴ Significantly, the trial judge's issuance of a limiting instruction instead of bifurcating the trial was entirely consistent with the method to be followed when evidence of limited admissibility is introduced during trial as outlined by the South Carolina Rules of Evidence. See Rule 105, SCRE ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

and/or housebreaking convictions, as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered.”); State v. Simmons, 352 S.C. 342, 357, 573 S.E.2d 856, 864 (Ct. App. 2002) (explaining a trial judge should limit evidence of prior convictions offered to prove an element of first-degree burglary by excluding particular information about the details of the prior convictions and by issuing a limiting instruction to the jury upon request); State v. Hamilton, 327 S.C. 440, 447, 486 S.E.2d 512, 516 (Ct. App. 1998) (“When evidence of other crimes is admitted for a specific purpose, the trial judge should instruct the jury to limit its consideration of this evidence to the particular purpose for which it is offered.”); see also Gilliam, 994 F.2d at 100 (“[W]here the district court issues a proper curative instruction, we must presume that a conscientious jury will only use the proof of the prior conviction to satisfy the element of the crime.”); see generally Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367 (1963) (“This limiting instruction is clear. It must be presumed that the jury conscientiously observed it.”). Based on those curative measures, a bifurcated trial was not necessary in order to ensure Applicant received a fair trial under the circumstances. Accordingly, this court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Failure to Investigate

Applicant alleges Trial Counsel was ineffective in failing to investigate the issue of pornography being purchased after the victim had been removed from the home. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d

768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). 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 v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant has failed to show what beneficial information could have been discovered had Trial Counsel done more investigation. Even so, Trial Counsel testified he would have investigated Applicant's porn purchase as the victim indicted Applicant had watched it with her and gave a description of it to authorities. Trial Counsel testified a search warrant was executed and porn DVDs were found that matched the description the victim gave to authorities. Trial Counsel testified he did not recall Applicant telling him he bought the porn videos after the allegations had been made. Furthermore, this court finds Applicant presented no evidence at the evidentiary hearing that would show he purchased pornographic videos after the charges against him were filed. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Failure to Object

Applicant alleges Trial Counsel was ineffective for failing to object at different intervals during trial. First, Applicant alleges Trial Counsel was ineffective for failing to object to unfounded prejudicial expert testimony. During trial Dr. Nancy Henderson, a board-certified child abuse pediatrician, testified about her physical examination of Victim after the abuse was revealed, indicated Victim disclosed during the examination she was sexually abused between the ages of six and nine, and stated the examination results were normal. (Tr. pp. 205-206; p. 212; pp. 215-218). However, Dr. Henderson noted normal examination results were extremely common in sexual abuse cases and did not mean no sexual abuse had occurred due to the fact injuries to the genital area heal very rapidly. (Tr. pp. 217-218; p. 229). Applicant argues that Trial Counsel was ineffective for failing to object to Dr. Henderson's testimony that normal examinations were common. This court finds Trial Counsel was not ineffective for failing to object to this testimony. Trial Counsel testified he did not have any concerns about Dr. Henderson's testimony as there was no physical evidence to support the allegations so her testimony was not that damaging to Applicant. Trial Counsel testified he thought he covered important points on his cross-examination of Dr. Henderson. This court finds an objection to this testimony would likely have been overruled as the doctor was giving her medical opinion about an issue she had seen numerous times. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Secondly, Applicant alleges Trial Counsel was ineffective for failing to object to hearsay testimony by the clinical social worker expert. This court finds Trial Counsel was not ineffective for failing to object as Applicant cannot demonstrate sufficient prejudice. Applicant contends the social worker's testimony about his sessions with the victim contained hearsay. This court finds the testimony in this instance (Tr.p.184-196) to not be prejudicial because there was substantial evidence of this matter already in the record as the victim had already testified to this information (Tr.p.127-141) and any failure to object was harmless. Accordingly, this court finds this allegation is without merit. This allegation is denied and dismissed with prejudice.

Lastly, Applicant alleges Trial Counsel was ineffective for failing to object in the State's closing to a misstatement of the burden of proof and improperly appealing to the emotions of the jury. This court finds Trial Counsel was not ineffective for failing to object to the State's closing arguments. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853 (1975)). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices; and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not

receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. Here, Applicant argues the State’s remarks shifted the burden of proof and when the State said to the jury “your recall of all the evidence that you saw to guide you to the verdict that speaks the truth about this case. It all boils down to, do you believe the child is telling the truth” appealed to the emotions of the jury. (Tr.p.324). Trial Counsel testified he did not think the closing argument by the State was burden shifting and had he thought so he would have objected and moved for a mistrial. This court agrees and finds that during the trial judge’s introductory remarks to the jury panel and during its charge to them at the conclusion of trial, the trial judge informed the jury that the burden of proof was entirely on the State. (Tr.p.110-112)(Tr.p.364-366). Moreover, this court also finds Trial Counsel was not ineffective for failing to object to the State’s comments about “a verdict that speaks the truth”. This Court declines to grant relief as there exists no authority supportive of a limitation on the State’s ability to utilize this language in its closing argument. Cf. State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), reh’g denied (May 25, 2018) (preliminary remarks to the jury that its role was to “search for the truth,” determine “true facts,” and render a “just verdict,” was found improper but not prejudicial); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (instructing trial court “to remove any suggestion from his general sessions charges that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties); State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (instructing trial courts to omit “speak the truth” language from its opening and closing jury charges). Nor have our appellate courts assigned a finding of prejudice to the inclusion of such language in a jury instruction where the instructions otherwise properly instructed the jury regarding the burden of

proof and circumstantial evidence. *Id.* This Court finds the State's closing argument not objectionable upon the basis alleged such that no Strickland error and prejudice flows from trial counsel's failure to object to this isolated portion of the argument. See State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) ("We must review the [closing] argument in the context of the entire record."); see also Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (prejudice prong may be met if "the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process"); State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (discussing tailoring of State's closing argument so as not to appeal to personal bias or to arouse passion or prejudice). And, the court's final jury instructions were free of any reference to the verdict speaking the truth. (Tr.p.360-372). Accordingly, this court finds this allegation to be without merit. This allegation is denied and dismissed with prejudice.

Failure to Take Exception to Jury Instruction

Applicant alleges Trial Counsel was ineffective in failing to take exception to jury instructions that Applicant's prior record should be considered only for the limited purpose of proving the elements of the indicted charge. This Court finds this allegation is without merit. "In reviewing jury charges for error, the charge must be taken as a whole in light of the evidence presented at trial. State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). Moreover, a jury charge is correct if, when it is read as a whole, it contains the correct definition and adequately covers the law." *Id.* at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, "the substance of the law is what must be charged to the jury, *not* any particular verbiage." Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464 (emphasis

added). This court finds Trial Counsel was not ineffective for objecting to this jury charge. This court finds this jury charge was correctly given by the trial judge and can think of no reason Trial Counsel should have objected as the trial judge was once again informing the jury they could only consider Applicant's prior record for the limited purpose of proving the elements of the indicted charge. Accordingly, this court finds this allegation to be without merit. This allegation is denied and dismissed with prejudice.

Due Process violation

Applicant alleges Trial Counsel committed a Due process violation based on his failure to get a fair trial by an impartial jury. Applicant presented testimony in a cursory fashion concerning a due process violation. However, Applicant failed to set forth with specificity the grounds upon which these constitutional violations were based or present any evidence of a specific violation. After a review of the record, this Court finds this allegation is without merit. Accordingly, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court, after careful and deliberate consideration, finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453

(1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 24 day of July, 2018.


CARMEN T. MULLEN
Presiding Judge
Thirteenth Judicial Circuit

Beaufort, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	
GARY R. THOMPSON,	)	CASE NO. 2017-CP-23-6516
APPLICANT,	)	
	)	MOTION TO ALTER OR AMEND
	)	THE JUDGMENT
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	
_____	)	

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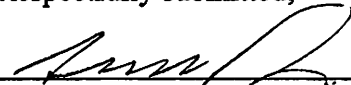
COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on July 31, 2019. The Applicant argues each allegation set fourth was ineffective resulting in undue prejudice. He further argues that even if each allegation did not amount to ineffective assistance of counsel standing alone, there was cumulative error which prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989).

The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case particularly in light of the Court's recent ruling in State v. Cross, State v. Cross, Appellate Case No. 2016-001939, Opinion No. 27903, Filed July 24, 2019. Like Cross, Mr. Thompson was indicted in 2013 and his January 2014 was three months after Cross'. Unlike Cross, Mr. Thompson's appeal was affirmed and his identical appellate issue was found to be waived due to trial counsel's statement that he had "no objection" to the introduction of the stipulation to the Applicant's prior criminal sexual conduct with a minor conviction. See State v. Thompson, Op. No. 2015-UP-524 (S.C. Ct. App. filed Nov. 18, 2015).

The Order addresses the Applicant's arguments of ineffective assistance of counsel for failing to make a contemporaneous objection to stipulation of prior CSC with a minor and registry requirement and failing to request to bifurcate the trial to thereby avoid the fundamental unfairness of the jury's knowledge of the Applicant's prior CSC on pages sixteen through twenty-four. The reasoning therein fails to address that a limiting instruction does not cure the overwhelming danger of unfair prejudice arising from the introduction of his prior criminal sexual conduct conviction. *See State v. Cross*, Appellate Case No. 2016-001939 (Op. No. 27903, filed July 24, 2019). The Rule 403 evidentiary analysis and the limiting instruction given in the Applicant's case is substantially similar to that in Cross' case. (Tr. pp. 23-25 & p. 365, l. 8.) However, Applicant's trial counsel's failed to request that the trial be bifurcated or make a contemporaneous objection when the stipulation was entered into evidence and again failed to object to the court's limiting instruction. This amounted to clear error that prejudiced the Applicant.

For the foregoing reasons, the Applicant requests this Court to alter its Order of Dismissal and grant Applicant relief.

Respectfully submitted,



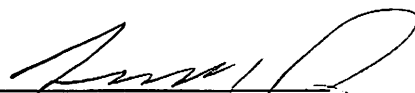
Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

This 8 day of August, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	CASE NO. 2017-CP-23-6516
GARY R. THOMPSON,	)	
	)	
Applicant,	)	
	)	
vs.	)	AFFIDAVIT OF SERVICE
	)	BY MAIL
THE STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the Motion to Alter or Amend on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

**Office of the Attorney General
PCR Division
P.O. Box 11549
Columbia, SC 29211**



Attorney for Defendant

This 8 day of August, 2019

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

**Gary R. Thompson, #218312,
Applicant,**

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No. 2017-CP-23-6516

RETURN TO MOTION TO AMEND THE JUDGMENT

The State (Respondent), by and through undersigned counsel, making its Return to Applicant's Motion to Amend the Judgment, would respectfully show unto this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In November of 2013, the Greenville County Grand Jury indicted Applicant for disseminating obscenity to a minor (2013-GS-23-8831) and criminal sexual conduct with a minor first degree (2013-GS-23-700A). Randall L. Chambers, Esquire, (Counsel) represented Applicant. Applicant proceeded to trial on January 13, 2014, before the Honorable D. Garrison Hill and a jury. On January 15, 2014 the jury found Applicant guilty as indicted to both charges. Judge Hill sentenced Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for first-degree criminal sexual conduct with a minor along with a consecutive term of imprisonment of five years for disseminating obscene material to a minor.

Applicant filed a timely notice of appeal. Katherine H. Hudgins, Esquire of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals issued an

unpublished opinion in which it unanimously affirmed Applicant's convictions. State v. Thompson. Op. No. 2015-UP-524 (S.C. Ct. App. filed Nov. 18, 2015). Thereafter, Applicant petitioned the Court of Appeals for rehearing, and the petition was denied. Applicant then filed a petition for a writ of certiorari in the Supreme Court. The petition for writ of certiorari was denied on November 9, 2016.

Applicant filed his Applicant for Post-Conviction Relief on October 13, 2017. Respondent made its Return on January 17, 2018. An evidentiary hearing was held in this matter before this Court on April 17, 2018, at the Greenville County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by Assistant Attorney General DeShawn H. Mitchell of the South Carolina Attorney General's Office. This Court issues its Order of Dismissal on July 24, 2019¹. Applicant's Motion to Alter or Amend the Judgement was filed on August 8, 2019.

Applicant's Motion requests that the Court alter or amend its judgment because (1) each allegation of Applicant was shown to be instances of ineffective assistance of counsel, (2) the cumulative effect of the alleged errors of Counsel constituted the ineffective assistance of counsel, (3) the Court failed to consider State v. Cross, Op. No. 27903 (S.C. filed July 24, 2019) (Shearhouse Adv. Sh. No. 30), when finding that Counsel was not ineffective for failing to contemporaneously object to the stipulation of Applicant's prior conviction of criminal sexual conduct with a minor, and (4) the Court failed to consider Cross when it found that Counsel was

¹ Although the signature on the final page of the Court's Order of Dismissal indicates that it was issued on July 24, 2018, Respondent interprets this as a typographical error in light of the email from the Court's law clerk to the undersigned and Applicant's PCR counsel on July 24, 2019, which indicated that the Court has issued the Order, and in light of the Applicant's filing of the Motion to Alter or Amend the Judgement within ten days thereafter.

not ineffective for failing to request to bifurcate the trial to avoid the fundamental unfairness of the jury's knowledge of Applicant's prior CSC with a minor conviction.

II.

As to the first ground provided in Applicant's Motion to Alter or Amend the Judgement, Respondent submits that, with the exception of his citation to Cross when arguing the third and fourth grounds, Applicant has not provided any new authority or argument as to why the Court's findings of fact and conclusions of law as to the specific allegations of ineffective assistance of counsel raised at Applicant's PCR hearing should be altered or amended. As such, Applicant's Motion to Alter or Amend the Judgement on this ground should be denied.

As to the second ground provided in Applicant's Motion to Alter or Amend the Judgement, Respondent submits that Applicant's argument that Counsel was ineffective for committing cumulative errors is without merit. Applicant did not raise the issue of cumulative ineffective assistance of counsel at the PCR hearing, and should not be allowed to raise it for the first time now in his Motion. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (noting that "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Nevertheless, claims of ineffective assistance of counsel are to be reviewed by the PCR court individually. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998). Applicant has also failed to demonstrate that Counsel committed multiple errors. See Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (holding that it is unsettled whether individual errors that may not be prejudicial when considered independently may be prejudicial when considered cumulatively, but recognizing that a PCR

applicant would have to first show, as a threshold matter, that counsel committed errors). As such, Applicant's Motion to Alter or Amend the Judgment on this ground should be denied.

III.

As to the third ground provided in Applicant's Motion to Alter or Amend the Judgment, Respondent submits that, although the Court did not cite Cross in its Order of Dismissal, the Court's finding that Applicant cannot establish prejudice due to Counsel's failure to contemporaneously object to the publishing to the jury of the stipulation of Applicant's prior conviction for criminal sexual conduct with a minor and registry requirement should not be disturbed. In Cross, the Supreme Court held that:

[E]vidence of [Cross's] conviction for a specific offense under section 23-3-430(C) was admissible to prove the prior-conviction element of first-degree CSC with a minor. Therefore, the State must be allowed to introduce the conviction.

Op. No. 27903 (S.C. filed July 24, 2019) (Shearhouse Adv. Sh. No. 30 at 48).

Similarly, the Court noted that it was required that the solicitor prove that Applicant had committed a defense under section 23-3-430(C) in order to prove Applicant's guilt for the charged offense. Cross specifically provided that the evidence **must** be admitted so that the State may prove the elements of the charged offense, but concerned "when that evidence should be admitted." Id. at 42. Applicant's Motion improperly relies on Cross in an attempt to establish ineffective assistance of counsel for Counsel's failure to contemporaneously to object to the admission and publishing of the stipulation of Applicant's prior conviction; however, Applicant has failed to show that the Court's analysis on this allegation was incorrect or that Cross requires the Court to reach a different conclusion. Counsel cannot be ineffective for failing to contemporaneously object to something that the Supreme Court says that "must" be admitted. As such, Applicant's Motion to Alter or Amend the Judgment on this ground should be denied.

As to the fourth ground provided in Applicant's Motion to Alter or Amend the Judgement, Respondent submits that Counsel could not have been ineffective for failing to request that the trial court bifurcate Applicant's trial because it would be inappropriate to hold Counsel to the standard of a clairvoyant. Applicant's trial was held on January of 2014. The Supreme Court filed its opinion in Cross in July of 2019. In his Motion, Applicant points to the similarity to the trial courts' analyses of the admissibility of the prior conviction and the limiting instructions during the trials of Applicant and Cross. The Supreme Court acknowledged in Cross that Cross's trial court had followed precedent in its handling of the admission of Cross's prior conviction. Id. at 43 (citing State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)). The Cross Court also acknowledged the bifurcated cases had not previously been required or commonly seen in state or federal proceedings. Id. at 43. This Court's analysis, findings, and conclusions as to Counsel's failure to request bifurcation are in line with the law as it existed at the time of Applicant's trial, and it would be inappropriate to find Counsel ineffective for failing to take an action not required by the case law at the time of the trial, especially when Cross provides that Cross's trial court was acting in accordance with precedent at the time. As the Supreme Court has explained, "[t]his Court has never required an attorney to participate or discover changes in the law, or facts which did not exist, at the time of trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993). Applicant has failed to show that the new bifurcation procedure established in Cross should be the basis for a finding that Counsel was ineffective for failing to request that procedure in Applicant's trial five-and-a-half years earlier. As such, Applicant's Motion to Alter or Amend the Judgement on the fourth ground should be denied.

IV.

Applicant's Motion to Alter or Amend the Judgement is based on four grounds. Applicant provides no support for his first ground. As to his second ground, Applicant should not be allowed to raise an allegation of cumulative errors for the first time in his Motion, but fails on the merits because he has not shown cumulative errors. As to his third ground, Counsel was not ineffective because the evidence of Applicant's prior conviction was admissible as a mandatory matter under the very authority Applicant cites for support. For these reasons stated herein, Applicant's motion should be denied. As to his fourth ground, Counsel should not be held to the standard of a clairvoyant by finding that he was ineffective for not requesting that Applicant's trial be bifurcated when the authority cited by Applicant, which institutes a novel procedure for bifurcation in these circumstances, was decided years after Applicant's trial.

WHEREFORE, having made its Return to the Motion to Alter or Amend the Judgement, Respondent respectfully requests that the Court deny the Motion and the relief requested by Applicant therein.

Respectfully submitted,

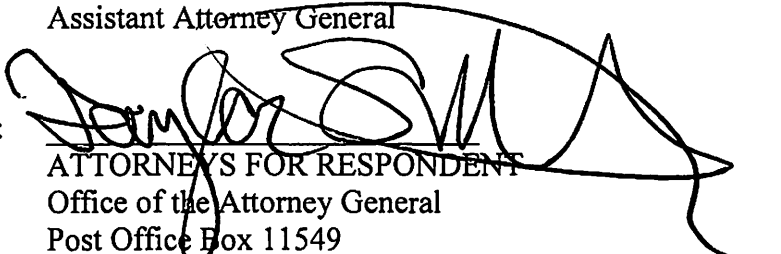
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

September 9, 2019

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2017-CP-23-6516

GARY R THOMPSON, 218312)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

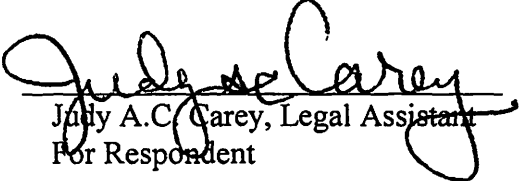
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Motion to Amend the Judgment** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Susannah C. Ross, Esquire
 Ross & Enderlin, PA
 330 East Coffee Street
 Greenville, SC 29601**

DATED this 10th day of September, 2019.


 Judy A.C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Gary R. Thompson, #218312,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT
)

) Case No. 2017-CP-23-6516
)

) **ORDER DENYING APPLICANT'S**
) **MOTION TO ALTER OR AMEND**
) **THE JUDGMENT IN PART AND**
) **GRANTING IN PART**
)

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This matter comes before this Court by way of an application for post-conviction relief filed on October 13, 2017, by Gary R. Thompson (Applicant). The State (Respondent) filed its return on January 24, 2018. On May 9, 2019. An evidentiary hearing in the matter was held before the undersigned on April 17, 2018, at the Greenville County Courthouse. Applicant was present at represented by Susannah C. Ross, Esquire, and Respondent was represented by Assistant Attorney General DeShawn H. Mitchell of the South Carolina Attorney General's Office. After reviewing the record, this Court found Applicant failed to establish any constitutional deprivations that entitle him to the grant of post-conviction relief and denied his application in an Order of Dismissal issued on July 24, 2019.¹ Applicant then filed on August 8, 2019, a motion to alter or amend the judgment, pursuant to Rule 59(e), SCRCP. Respondent filed a return to the motion to alter or amend on September 20, 2019. After reviewing the record, including the records from the Greenville County Clerk of Court regarding Applicant's convictions, the transcript from Applicant's trial, the application for post-conviction relief, Respondent's return to the application for post-conviction relief, the records from the South Carolina Department of Corrections, the records from Applicant's direct appeal, Applicant's

¹ The undersigned's signature on the final page of the Order of Dismissal indicates that the order was issued on July 24, 2018; however, this was a typographical error.

motion to alter or amend the judgment, Respondent's return to the motion to alter or amend the judgment, and the transcript from Applicant's PCR hearing, this Court finds Applicant's motion to alter or amend the judgment, pursuant to Rule 59(e), SCRCP, is granted in that this Court has altered its analysis of Applicant's claims in light of State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), and finds that the motion is denied in that this Court's finding that Applicant has failed to demonstrate that he is entitled to post-conviction relief is reaffirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his motion to alter or amend the judgment, Applicant argues this Court should alter or amend its Order of Dismissal because (1) each of Applicant's allegations that trial counsel was constitutionally ineffective was shown to be an actual instance of the ineffective assistance of counsel, (2) the cumulative effect of trial counsel's alleged errors constituted the ineffective assistance of counsel, (3) this Court failed to consider State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), while finding trial counsel was not constitutionally ineffective for failing to contemporaneously object to the stipulation that Applicant previously had been convicted of criminal sexual conduct with a minor, and (4) this Court failed to consider Cross while finding trial counsel was not constitutionally ineffective for failing to request to bifurcate Applicant's trial so as to avoid the jury's knowing of Applicant's prior conviction of criminal sexual conduct with a minor.

Each of Applicant's allegations that trial counsel was constitutionally ineffective was shown to be an actual instance of the ineffective assistance of counsel.

Applicant argues that this Court erred in finding he had failed to demonstrate that trial counsel was constitutionally ineffective with regarding to the specific instances he put before this Court at the PCR hearing. With the exception of his present appeals to the theory of cumulative errors and Cross, Applicant has not provided any new authority or argument as to why the

findings of facts and conclusions of law articulated by this Court in the Order of Dismissal regarding the specific allegations of the ineffective assistance of trial counsel raised by Applicant should be altered or amended. This Court made detailed findings of fact and conclusions of law in its Order of Dismissal with respect to the allegations raised by Applicant, and Applicant has not shown any reason for this Court to depart from them.

The cumulative effect of trial counsel's errors caused Applicant to suffer prejudice.

Applicant argues instances of deficient performance on the part of trial counsel that were not prejudicial in and of themselves had a cumulative effect that was sufficiently prejudicial to warrant a grant of post-conviction relief to Applicant.

A motion to alter or amend the judgment under Rule 59(e), SCRCP, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (citations omitted). Applicant did not argue at the PCR hearing that he was entitled to post-conviction relief based upon the cumulative effect of errors committed by trial counsel, and this Court finds he is barred from raising the issue now in his motion to alter or amend the judgment.

Notwithstanding Applicant's failure to properly raise the issue during or before his PCR hearing, Applicant is not entitled to relief in reliance upon the theory of cumulative errors. "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. "Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. Id.; see also Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (holding that it is unsettled whether individual errors that may not be prejudicial when considered independently may be

prejudicial when considered cumulative, but recognizing that an applicant for post-conviction relief would have to show, as a threshold matter, that counsel committed errors). Claims that a defendant was afforded the ineffective assistance of counsel should be reviewed by post-conviction relief courts individually, not cumulatively. Smalls, at 194, 810 S.E.2d at 846 ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (in upholding the trial court's denial of habeas relief, explicitly holding that the claims are not to be reviewed collectively). Applicant has failed to demonstrate any reason that the theory of cumulative errors should be recognized in his case and that trial counsel committed errors that, when considered collectively, support a finding that there is a reasonable likelihood that the outcome of Applicant's trial would have been different had the alleged errors not been committed. This Court finds Applicant has failed to show that this Court should alter or amend its Order of Dismissal with regard to his argument that he is entitled to post-conviction relief based upon the theory of cumulative errors.

This Court failed to consider State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019); while finding trial counsel was not constitutionally ineffective for failing to contemporaneously object to the stipulation that Applicant previously had been convicted of criminal sexual conduct with a minor.

Applicant argued at the PCR hearing that trial counsel was constitutionally ineffective for failing to preserve for appellate review his objection to the stipulation that Applicant previously had been convicted of first-degree criminal sexual conduct with a minor and was registered as a sex offender and to the publishing of the stipulation to the jury.

In Cross, the South Carolina Supreme Court considered whether the trial court erred in denying Cross's request that his trial be bifurcated when he was being tried for committing first-degree criminal sexual conduct with a minor in violation of South Carolina Code Section 16-3-

655(A)(2) and he previously had been convicted of first-degree criminal sexual conduct with a minor. Pursuant to Section 16-3-655(A)(2), a defendant is guilty of first-degree criminal sexual conduct with a minor if he "engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)." Cross moved to have his trial bifurcated because he argued he would be unfairly prejudiced if evidence of his prior conviction of CSC with a minor and his being on the sex offender registry were introduced to prove the relevant element of Section 16-3-655(A)(2). Cross, at 470, 832 S.E.2d at 283-84. The trial court denied Cross's motion to bifurcate, allowed the State to introduce into evidence the indictment and sentencing sheet from Cross's prior conviction, and gave the jury a limiting instruction that it would not consider his prior conviction as evidence of Cross's guilt of the offense for which he was being tried. Id. at 472, 832 S.E.2d at 285. The Supreme Court held that:

Evidence of [Cross's] conviction for a specific offense under section 23-3-430(C) was admissible to prove the prior-conviction element of first-degree CSC with a minor. Therefore, the State must be allowed to introduce the conviction.

Id. at 484, 832 S.E.2d at 291.

The Supreme Court specifically noted that the evidence of Cross's prior conviction had to be admitted at trial in order for the State to prove the elements of the offense codified at Section 23-3-430(C). Id. Since an element of the offense for which Cross was being tried was whether Cross had a qualifying prior conviction, the evidence of Cross's prior conviction "had significant probative value." Id. at 474, 832 S.E.2d at 286. The Court later referred to the "insurmountable probative value in [the State's] proving the prior conviction element of first-degree CSC with a minor." Id. at 477, 832 S.E.2d 287. Instead, the proper question was not whether the evidence should have been admitted, but whether the **timing and method** of the admission of the evidence

was proper. Id. at 484, 832 S.E.2d at 291 (emphasis added). According to the Court, this was due to the fact that evidence of Cross's prior conviction was not probative evidence of whether Applicant had sexually abused the minor victim making the allegations underpinning his trial for violating Section 16-3-655(A)(2), and because the danger of unfair prejudice from the admission of his prior conviction at a phase of his trial concerning his guilt in abusing the present victim was "exceedingly high" Id. at 477-78, 832 S.E.2d 287-88 (emphasis added).

Like Cross, Applicant was convicted of committing first-degree criminal sexual conduct with a minor in violation of Section 16-3-655(A)(2). Applicant's trial counsel requested that the parties be required to stipulate that Applicant had a prior, qualifying conviction, in order to prevent the State from offering evidence of the prior offense to the jury. Trial Tran. 13-14. The State agreed to stipulate that Applicant had a prior conviction for first-degree criminal sexual conduct with a minor and was listed on the South Carolina Sex Offender Registry, and the trial court offered to give a limiting instruction to the jury at trial counsel's request. Trial Tran. 24-25. Trial counsel read, approved, and signed the stipulation. Trial Tran. 45. When the State offered to admit the stipulation and publish it to the jury, trial counsel affirmed that he did not have an objection, and the stipulation was admitted. Trial Tran. 165-66. The trial court instructed the jury that it was prohibited from considering the stipulation was proof of Applicant's guilt for the offense for which he was being tried. Trial Tran. 167, 361.

Applicant argued during his PCR hearing that trial counsel was constitutionally ineffective for failing to object contemporaneously to the stipulation so as to preserve the issue for appellate review; in his motion to alter or amend, he argues that Cross supports his position and that the Court should have taken the case into consideration when analyzing his argument on this issue. Applicant's criminal trial and PCR hearing predated the Supreme Court's decision in

Cross, and this Court issued its Order of Dismissal on the same day on which the Supreme Court published Cross. The question this Court must answer now is whether its finding that Applicant failed to establish that he was prejudiced by trial counsel's failure to object contemporaneously to the stipulation should be altered or amended in light of Cross. This Court finds that the Supreme Court's decision in Cross does not require it to depart from its finding that Applicant failed to demonstrate prejudice. As is provided in the Order of Dismissal, evidence of Applicant's prior conviction was admissible, due to its being relevant and probative to the jury's determination of Applicant's guilt in violating Section 16-3-655(A)(2), as a qualifying prior conviction is an element of the offense. This Court noted that the substance of the stipulation "had immense probative value in Applicant's case", a note that tracks closely with the Supreme Court's language emphasizing the admissibility of evidence of qualifying prior convictions in Cross. This Court found that "any limitation to the stipulation would defeat the clear legislative purpose behind the inclusion of the statutory element requiring proof of a prior conviction for an offense of a sexual nature", and Cross does not challenge that finding. Nothing in Cross limits the substance of the evidence the State may offer at trial, whether offered through testimony, sentencing sheets, or a mutually acceptable stipulation, to prove a defendant was previously convicted of a qualifying prior conviction. The record indicates trial counsel believed it preferable that he enter into the stipulation rather than have the State offer testimonial or documentary evidence of Applicant's prior conviction. Applicant has failed to show that, even if trial counsel had objected contemporaneously, the issue would have been resolved in his favor on appeal, as Cross does not stand to prevent the admission of the evidence of a prior conviction; instead, it regulates the timing and method of the admission. This Court finds that Applicant has failed to show that Cross requires this Court to depart from its finding that Applicant failed to