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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-001498
Lower Court Case No. 2015-CP-42-0996

JAMES BENJAMIN IRBY, #352507,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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)	IN THE COMMON PLEAS COURT
COUNTY OF SPARTANBURG)	
James Benjamin Irby,)	
)	TRANSCRIPT OF RECORD
Applicant,)	2015-CP-42-0996
)	
-vs-)	
)	November 16 and 17, 2017
The State.)	Spartanburg, South Carolina

B E F O R E:

HONORABLE G. THOMAS COOPER, JUDGE

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

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(Letter dated May 5, 2008, marked Applicant's Exhibit No. 1 for Identification; letter dated January 4, 2011, marked Applicant's Exhibit No. 2 for Identification; defendant's list of potential witnesses marked Applicant's Exhibit No. 3 for Identification; email dated September 11, 2008, marked Applicant's Exhibit No. 4 for Identification; email dated October 21, 2010, marked Applicant's Exhibit No. 5 for Identification; email dated December 31, 2010, marked Applicant's Exhibit No. 6 for Identification; email dated November 13, 2008, marked Applicant's Exhibit No. 7 for Identification; letter dated December 2, 2008, and copy of agreement marked Applicant's Exhibit No. 8 for Identification; billing statement dated May 22, 2009, marked Applicant's Exhibit No. 9 for Identification; motion and consent order for continuance dated February 10, 2009, marked Applicant's Exhibit No. 10 for Identification; jury instruction marked Applicant's Exhibit No. 11 for Identification; handwritten statement of Lillian Dannette Collins marked Applicant's Exhibit No. 12 for Identification; article from American Academy of Pediatrics marked Applicant's Exhibit No. 13 for Identification; transcript of polygraph interview marked Applicant's Exhibit No. 14 for Identification; curriculum vitae of Dr. Richard A. Leo, PH.D, J.D., marked Applicant's Exhibit No. 15 for

Identification; report dated August 1, 2017, marked Applicant's Exhibit No. 16 for Identification; pre-interrogation waiver form dated November 14, 2007, marked State's Exhibit No. 1.)

THE COURT: All right. Madam Attorney General.

MS. GIOVANOLI: Thank you, Your Honor.

This is the case of James Benjamin Irby vs. the State of South Carolina, Docket No. 2015-CP-42-0996.

We're before the Court on an application for post conviction relief that was filed on March 25th of 2015.

Applicant was indicted in 2008 for criminal sexual conduct with a minor in the second degree.

Christopher Brough represented applicant.

On January 29th of 2011 an extensive hearing was held on applicant's motion to suppress multiple statements, and Judge Cole found statements were voluntarily given and denied applicant's motion.

On November 18th through 19th of 2012 applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found applicant guilty as indicted. Judge Cole sentenced applicant to imprisonment for a term of 18 years.

Applicant filed a timely notice of appeal, and Robert M. Dedek, Chief Appellate Defender for South Carolina, represented him on appeal.

The issues briefed and argued on appeal were the voluntariness of his statements. That -- the Court of Appeals affirmed applicant's conviction on January 14th of 2015.

Applicant thereafter filed an application for post conviction relief alleging various -- making various allegations of ineffective assistance of trial counsel, and he also alleged prosecutorial misconduct and a Rule 5 Brady violation.

An amendment was also filed by counsel for applicant, Ms. Patricia Blanchette. That was on or about October 16th of this year.

The state is present and ready to proceed. Applicant is also present and represented by Ms. Patricia Blanchette to whom I will hand it over at this point.

THE COURT: All right. Just -- before Ms. Blanchette starts, you say there was -- what's the date of the amended application? Is that October 16th?

MS. GIOVANOLI: It's dated October, yes, Your Honor.

THE COURT: Is that the complete application as far as you're concerned?

MS. GIOVANOLI: Well, that and his allegations that he made in his pro se application.

THE COURT: In his pro se. Okay.

MS. GIOVANOLI: Yes, Your Honor.

THE COURT: I'm with you.

MS. GIOVANOLI: And those are summarized in our return.

THE COURT: All right. Ms. Blanchette.

MS. BLANCHETTE: Thank you, Your Honor. May it please the Court. Patricia Blanchette here on behalf of James Irby.

Just to clarify, today we intend to go forward on the seven allegations set forth in the October 16th of 2017 amendment. And the eighth allegation there is just some mention of Rule 15(b), so that's not a specific allegation.

THE COURT: All right.

MS. BLANCHETTE: Your Honor, today, as I already mentioned when you're off the record, I do intend to call an expert from California. He's going to be coming to us hopefully via skype.

Back in 2016 I filed a motion for discovery and a motion regarding the taking of the testimony of Dr. Leo, and at that time the state agreed to allowing him to come in via the internet or phone.

THE COURT: What's his name?

MS. BLANCHETTE: Dr. Richard Leo.

THE COURT: Leo?

MS. BLANCHETTE: Uh-huh.

THE COURT: Okay.

MS. BLANCHETTE: And he -- he will be joining us that -- that way later today. So I just wanted to make the Court aware of that.

I also have another expert, Gaye Allen-Cook, that I'll be calling this morning, as well as my client, his former attorney, Mr. Brough, and then a fact witness, Bernadette Smith.

THE COURT: Cook person -- is that --

MS. BLANCHETTE: Ms. Gaye Allen-Cook. She's here in the courtroom with us.

THE COURT: Ms. --

MS. BLANCHETTE: Uh-huh.

THE COURT: Not a doctor.

MS. BLANCHETTE: She doesn't hold a doctorate, no, Your Honor.

THE COURT: All right. Why don't you give me an overview of your application?

MS. BLANCHETTE: Your Honor, I think one of the most fundamental things to understand -- and I think at this time I could go ahead. Well, it's the state's exhibit actually, Your Honor. But we have stipulated to the admission of the statements that were introduced at trial. A lot of these allegations deal with his statements.

THE COURT: His statement?

MS. GIOVANOLI: His statements, yes.

And just by way of background with that, Your Honor, beginning on page 74 Ms. Azzara from DSS testifies.

THE COURT: Seventy-four of the trial transcript?

MS. BLANCHETTE: Yes. And she testifies there about a voluntary statement that my client, Mr. Irby, gives after being read his rights by a Detective Aldredge.

THE COURT: That's Exhibit 1?

MS. BLANCHETTE: It's been marked as State's Exhibit 1, Your Honor.

THE COURT: I'm looking at page 74.

MS. BLANCHETTE: Yes.

THE COURT: Show you what's been marked as State's Exhibit 1.

MS. BLANCHETTE: Yes, which we --

THE COURT: That's where we are?

MS. BLANCHETTE: Yes, which we have here in court today, the trial State's Exhibit 1, which has been remarked as State's Exhibit 1 for P.C.R. purposes.

THE COURT: Okay.

MS. BLANCHETTE: Then Detective Aldredge is called to the stand on page 82 through 83. She recounts the interview on November 14th of 2007. She also recounts on page 85 a second interview.

THE COURT: This is -- give me an overview of this case.

What happened? I mean, who did what to who?

MS. BLANCHETTE: Oh, I'll be happy to do that, Your Honor.

THE COURT: Sure.

MS. BLANCHETTE: It's alleged that Mr. Irby committed criminal sexual conduct against what would be his step-daughter.

He had remarried. There were three children living in the home. The daughter, the teenage daughter, called her aunt, made some allegations. Law enforcement showed up and left. Then later Mr. Irby was charged with criminal sexual conduct.

That's where the interaction with DSS starts with Ms. Azzara as she goes over and interviews him, and that's where he gives the first statement denying anything.

THE COURT: This is not -- this is not a minor.

MS. BLANCHETTE: Yes, with a minor. I'm sorry, Your Honor.

THE COURT: Is this a forensic interview or -- is that where we are and it's one of those or --

MS. BLANCHETTE: As far as Ms. Azzara, is she a forensic interview? No. She was just the DSS worker that went -- went to interview him with Detective Aldredge.

THE COURT: Interviewed him, not the alleged victim.

MS. BLANCHETTE: Correct.

THE COURT: All right. Go ahead.

MS. BLANCHETTE: Then Detective Aldredge -- just going through the statements to kind of give you a chronological history of the statements. She testifies, like I said, to the interview on November the 14th of 2007 with Ms. Azzara from DSS present.

She also testifies on page 85 that there was a second interview, but she's lost the rights form. And a statement was produced, which was introduced on page 88 of the transcript. And 88 is where she recounts that statement.

THE COURT: And was it admitted at that time?

MS. BLANCHETTE: Your Honor, it was all admitted as State's Exhibit 1, all of the statements in one packet.

THE COURT: Okay.

MS. GIOVANOLI: Just to clarify for the record, those were the written statements. There are also some oral statements, but those were all admitted and they've also been premarked for this hearing.

THE COURT: Okay. Those are his statements?

MS. BLANCHETTE: Yes, Your Honor.

And then the major issue that is addressed in applicant's allegation No. 1 is Mr. Irby was then brought in, interviewed, polygraphed and interviewed again by Detective Morgan. That resulted in approximately a six-to-seven-hour recorded interview.

Your Honor, at this time I have a copy that I received as part of discovery to provide to Your Honor that we would ask that you review on your own. I did not intend to play the entire video here today.

It was admitted in the pretrial, and it's my understanding Your Honor has a copy of the pretrial transcript.

THE COURT: I do. Let me make --

MS. BLANCHETTE: It was --

THE COURT: Let me make sure. That is January 29th of 2011.

MS. BLANCHETTE: Just doublecheck, Your Honor. Yes, it is.

THE COURT: I have that.

MS. BLANCHETTE: In there State's 1 was introduced, as well as State's 2 and 3, which were the -- they had two separate D.V.D.s.

We would ask that State's 2 and 3 from pretrial be made part of the record for this case for any appellate purposes, but those would be found in the general sessions file.

THE COURT: What are you asking me to review?

MS. BLANCHETTE: I'm asking you to review a copy that I received as part of discovery. But, for the record, we plan to incorporate State's 2 and 3, which are two videos

that were introduced at the pretrial hearing.

MS. GIOVANOLI: Your Honor, the state would stipulate to that request.

THE COURT: All right.

MS. BLANCHETTE: Do you wish for me to approach, Your Honor?

THE COURT: You don't want me to do it now?

MS. BLANCHETTE: No, Your Honor, unless you would like to.

THE COURT: I don't have any equipment.

This is -- this is the interview between Mr. Irby and who?

MS. BLANCHETTE: Detective Morgan, Your Honor.

THE COURT: Morgan. Okay.

MS. BLANCHETTE: And, Your Honor, the state has requested that I introduce this at this time as well. I premarked it as Applicant's Exhibit No. 14.

(Transcript of polygraph interview marked State's Exhibit No. 14.)

MS. BLANCHETTE: When Dr. Leo was retained in this case he asked that I provide him with just an informal transcript of the video due to its length.

At that time I had a law clerk, Jacquelyn Venisia. I always say her name wrong. She spent days upon days making an informal transcript. It's not an official transcript.

It's just a work product that was turned over to Dr. Leo to use as a reference. He does reference it in his report.

So it's my understanding the state has agreed that we introduce that, and I've premarked it as Applicant's Exhibit No. 14.

MS. GIOVANOLI: And, for the record, we do stipulate to that being admitted subject to -- there are a few minor typos and errors, maybe some portions that say inaudible. So it isn't a certified copy.

I have reviewed the D.V.D. in conjunction with the transcript, but it's more or less accurate. So I do think it would be useful for Your Honor to make reference to certain statements given rather than having to play the video.

THE COURT: All right.

MS. BLANCHETTE: Would you like a single-sided copy or a double-sided copy?

THE COURT: All right. Is this double-sided?

MS. BLANCHETTE: Yes.

THE COURT: This is double-sided.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one second.

(Pause.)

MS. BLANCHETTE: Your Honor, I will need to substitute the copy given to the clerk. It appears that only every

other page got copied. And Your Honor can keep this, and I'll just provide a substitute copy to the clerk's office.

THE COURT: All right. Whatever.

MS. BLANCHETTE: Or we can figure it out at a break and keep moving, Your Honor.

Your Honor, would you like me to summarize the allegations now with that background information?

THE COURT: Yes.

MS. BLANCHETTE: Okay. The first allegation is that counsel rendered ineffective assistance regarding the admission -- applicant's interrogation of the statements --

THE COURT REPORTER: Excuse me?

MS. BLANCHETTE: -- including but not limited to -- and I will just summarize these.

THE COURT: Well, do you have another copy of your amendment?

MS. BLANCHETTE: I do, Your Honor.

THE COURT: Hand them to the court reporter.

MS. BLANCHETTE: I'll be happy to.

(Pause.)

MS. BLANCHETTE: And from here I'll summarize and try not to read.

Failure to utilize Dr. Leo. And to explain that allegation to Your Honor, Dr. Leo had been engaged and retained by Mr. Brough prior to trial.

There was a motion for a continuance and a consent order to continue to a date certain stating that he was a necessary witness for the defense. But he was not utilized at the trial.

So today we will be going into why he was not utilized, and I intend to call Dr. Leo to offer the opinions and testimony he would have been prepared to provide at the original trial.

We'll also be going into matters related to how the applicant should have been better utilized both in pretrial and at trial and how the video should have been utilized both pretrial and at trial.

The second allegation deals with the qualifications of Lynn McMillan who was called as an expert. She conducted the forensic interview in this case. We will be going into her qualifications, as well as the testimony that was elicited from her.

THE COURT: She interviewed the victim.

MS. BLANCHETTE: Yes, Your Honor.

THE COURT: Go ahead.

MS. BLANCHETTE: The next allegation deals with the medical doctor that was called in this case, Dr. Nancy Henderson. We will be addressing counsel's failure to further cross-examine her.

The fourth allegation, we will touch briefly on some

areas in which my client alleges the attorney should have further cross-examined the victim when she was on the stand.

The fifth --

THE COURT: The victim --

MS. BLANCHETTE: Yes, sir.

THE COURT: -- took the stand.

MS. BLANCHETTE: Yes, she did, Your Honor.

THE COURT: Okay.

MS. BLANCHETTE: The fifth allegation deals with counsel's decision to utilize Lillian Collins as a witness for the defense.

She was married to Mr. Irby at the time of these allegations. She's the mother of the victim in this case. She was called as a witness for the defense to testify to an alleged recantation by the victim that took place when she was in a therapy session with Gina Odom.

We will be addressing the advice that Mr. Brough gave to Mr. Irby in deciding to call Ms. Collins and then how it was found on pages 185 through 189 or 191 of the trial transcript that defense counsel opened the door then to otherwise inadmissible testimony of Gina Odom regarding the consistency of the victim's reports. And that shows up on pages 185 through 191 where that testimony was allowed in.

The sixth allegation deals with trial counsel's

failure to utilize an expert in the area of sexual abuse to assist in trial preparation and to assist in trial or be used as an expert. And that's where I intend to call Gaye Allen-Cook, Your Honor.

And then the seventh allegation is failure to utilize available evidence and witnesses.

Your Honor, that simply boils down to a very short witness by the name of Bernadette Smith.

Your Honor, at this time I'm prepared to call Gaye Allen-Cook unless there's any other information I could provide to the Court.

THE COURT: Call your first witness.

MS. BLANCHETTE: Your Honor, I'd call Gaye Allen-Cook to the stand.

GAY ALLEN COOK, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. BLANCHETTE

Q Can you please state your name for the record?

A Gaye Allen-Cook.

Q And, Gaye, what is your current occupation?

A I am a child and family therapist specializing in trauma and abuse. I practice in a private practice in Florence, South Carolina.

Q And do you have any certifications?

A I do.

Q Okay. As far as the Court is concerned. I'm sorry.
A Well, I have a license to practice in this state. I have been qualified in numerous aspects of the Court as an expert in various domains. I am currently -- just received national certification in trauma interviews.
Q And are you a certified family court mediator?
A I am.
Q And are you a certified guardian ad litem?
A I am.
Q Okay. Let's go through a little bit of your education if you could walk me through that.
A I have an undergrad degree from Francis Marion University. I have a master's degree in clinical counseling. I have postgraduate studies in the areas of trauma and abuse.

I have to keep up my license. I think it's 40 hours every two years. I usually go over that. And at this point I'm about six -- no -- 18 hours away from completing my Ph.D.
Q Okay. And you shared with us some of your licenses and certification. What has been your employment history?
A I started my career in a mental health center in Charlotte, North Carolina.

From there I got invited to go into a private practice in Charlotte, North Carolina.

Then I wanted to move back home because I was going to get married. And so home is Florence, South Carolina. So I moved back there. I joined the staff of the Durant Children's Center, which is one of the Child Advocacy Centers in Florence.

From there I went into private practice. I think that was in 2008 that I did that. And I've remained in private practice since that time.

Q And while you've been in private practice, or even prior to that, were you qualified as an expert in the state courts of South Carolina?

A Yes.

Q How many times approximately would you say you've been qualified as an expert?

A Are you talking about in all of the courts together or in specific parts?

Q In family and circuit court.

A In the State of South Carolina and North Carolina I've probably been qualified at least 200 times, give or take. That's a very rough estimate.

Q And have you specifically been qualified in the circuit courts of South Carolina?

A I have.

Q Okay. And have you been qualified to testify in a post conviction relief proceeding in the circuit courts in

South Carolina?
A I have.
Q And as part of your private practice now do you do consultations with attorneys?
A I do.
Q Okay. In what type of cases?
A In family court cases involving, you know, various aspects of family dynamics, disclosures of children, how divorce impacts children. Oftentimes that will spin off into allegations of maltreatment of children.

I've also provided consultation in criminal matters for both actually prosecution and defense in the State of South Carolina.

I've actually been called upon in other states to render opinions. I've done cases in Georgia; I've done some down in Florida; North Carolina; and Kansas. I can't think of anything else off the top of my head, but there may be a few other states that I've done expert consultation in.
Q Okay. And during your time where you worked for the state did you do any training or do any type of training for other individuals that worked in state agencies?
A Well, I've never worked for the state but --
Q I'm sorry. I missed it.
A That's okay.

Q When you worked in Florence for the Advocacy Center there.
A Oh, oh, yes, ma'am. I did -- actually continued to do trainings in all parts of the state and other states on the dynamics of abuse, how that impacts a family, the area of recantation, you know, I guess what the dynamics are when children have been abused, the dynamics of false allegations and how those impact children.

Currently I've been traveling and teaching a lot in our protocol that we use, a trauma focused cognitive behavioral therapy, which is the best accepted protocol for children whenever they have been for some type of maltreatment. And so I'm one of the supervisors in the state for that and actually travel around and teach and provide supervision in that model.
Q And you mentioned recantation. Have you ever offered consultation and/or testified in the area of recantation?
A I have.
Q Okay. Do you know approximately how many times you've testified regarding recantation?
A I've provided lots of consultation on it. Sometimes I decide that I don't want to be a part of the testimony or a part of that trial regarding that.

As far as testimony in that area, I'm going to ballpark it to say maybe 30 times that I've testified in my

career specifically targeted to recantation.

MS. BLANCHETTE: Your Honor, her C.V. is more extensive than I've gone over, but at this time I would offer Ms. Gaye Allen-Cook as an expert as a clinical child and family therapist specializing in trauma and abuse.

THE COURT: Any voir dire or objection?

MS. GIOVANOLI: Just a couple of questions if I may.

THE COURT: All right. Go ahead.

VOIR DIRE EXAMINATION

BY MS. GIOVANOLI

Q When did you give Ms. Blanchette your current C.V. résumé?

A She's -- she's had my résumé for, my C.V. for, a couple of years in cases that we've done together. I actually handed her an updated fresh-off-the-press copy this morning.

Q Okay. So that's what we have here in this proceeding?

A That's the one I handed her this morning. I'm assuming that's that one she gave you.

Q When were you contacted to be involved in this case?

A I was contacted in January of this year.

Q And did you decide at that point to assist in this case?

A No. What -- what I typically do with attorneys when they call me is we'll talk about kind of the brief overview

of what's going on, and then I will ask them to prepare a packet for me and send it to me and let me review it. And then I'll decide if I feel like there's anything that I may be able to assist in. Sometimes there is and sometimes there isn't.

Q And when did you review that packet?

A I received it in January, and so I've -- I've reviewed it off and on multiple times since then. I can't give you exact dates.

Q Okay. When were you retained?

A I think it was in March. That -- that's a rough estimate though. I'm sorry.

Q Okay.

MS. GIOVANOLI: I have no further questions. The state takes no position as to the qualification.

THE WITNESS: Could I ask the Court for some water?

(Pause.)

THE COURT: All right. I grant your motion. I'll admit her as an expert in the fields as stated on the record.

MS. BLANCHETTE: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MS. BLANCHETTE

Q Now, Ms. Cook, in May of 2016 a motion for discovery was filed, and then subsequent to that in August of 2016 an

order was issued for discovery that you had requested to properly review this case.

Do you recall requesting that I obtain discovery so that you could review the case?

A I do.

Q Okay. And then subsequent to that when it was provided to me pursuant to the discovery order was that, in turn, given to you?

A Yes, ma'am.

Q And also pursuant to that discovery order did you sign stating that you would not disclose any of that information and be keeping compliance with an administrative order that was in place in Spartanburg County?

A I did.

Q Okay. And, if you could, just go through generally what you reviewed once that discovery was provided to you.

A I can't remember all of it. It's in -- it's in my bag. But there were interviews. There was a D.V.D. of the child's forensic interviews. There were several of -- interviews that were on that D.V.D.

There was information from the department of social services; there was information from the trial; there was some information in there from the guardian ad litem and various other documents that were a part of the file.

Q And did you also recently have the opportunity to go

and meet with Mr. Irby at Broad River Correctional Institution?

A I did on October the 17th.

Q Okay. Now, you said in your qualifications that you regularly consult with attorneys either in family court cases or in criminal cases, is that correct?

A I do.

Q Okay. If Mr. Brough had contacted you as a defense attorney looking to have you review a file, is that something you would have been willing to do for him?

A Yes.

Q Okay. And is that essentially what you did with materials that you were provided?

A Yes, ma'am.

Q Okay. Now, if you could, just take me through the steps of what you would have done if there's anything different if Mr. Brough would have contacted you or criminal defense attorney contacted you.

A Well, typically when I am contacted by a criminal defense attorney they are preparing for trial. They are preparing, you know, for the trial which will decide whether this alleged person is innocent or guilty. And so that happens quite often for me.

I'll get phone calls from various attorneys. And typically I will listen to a very short rendition, I guess,

of what they say is going on, and then I'll ask them to go ahead and send me a packet. And usually they know what I'm talking about. But I'll specifically say are there interviews of the child or the child's siblings or if there are multiple victims. Or I'll want those forensic interviews.

I want to be able to sit down and watch them. Typically, I watch them multiple times. The first time I'll watch them for the language of the interviewer to see if there are questions maybe that are outside of the scope of what he or she should have asked.

I'm going to see if they followed protocol, because I'm also trained in the area of forensic interviewing. So I'll be looking for that.

And then I will watch those a couple more times to listen to the child's statements. I'm watching for the child's verbal and nonverbal reactions to questions.

And typically I will turn all of the sound off of the D.V.D. and I'll just watch it for the nonverbals of the child.

From there I'll go and read the transcript that is usually attached with the forensic interviews. Sometimes there are multiple interviews; sometimes there are interviews of siblings.

And then I will look for, if DSS has been involved or

if there are therapy records, if there are school records.

Sometimes I have to call the attorney back and say I don't see any academic records or I don't see any therapeutic records. And so we have to get those things because all of those things are very important to me as I'm doing kind of a preview of -- of this case, because I'm deciding if there's things in there that I feel that I can come along and assist with.

Sometimes I'll review those and I just say there's really nothing that I can do to help. Other times there will be things. And so it's very case dependent. It's also case dependent as far as what I feel I may or may not be able to offer in the area of expertise.

Q And in this case upon review of that what was your determination as to whether or not you would be able to assist in this case?

A I said that I would.

Q Okay. And I want to talk with you about those specific areas that you found in your review of this case.

First I'd like to talk about the alleged recantation. In your review of the discovery file that was provided to us pursuant to a court order did you see evidence of a recantation by the victim?

A No.

Q Do you care to explain?

A I -- I didn't see. I've been told that there was one. I didn't see one.
Q Okay. And in this case the victim's mother was called at trial to address a purported recantation that took place during a session with Gina Odom, a joint session.
A Yes, ma'am.
Q Would -- what would you tell an attorney that you were consulting with about using a layperson, or specifically here the mother of a victim, to discuss a recantation and the issues of recantation?
A Well, I will tell you this. Any time I hear the word recantation my antenna will go up because from someone who has practiced as long as I have that is a very delicate subject to deal with, be it with a child who's made a recantation, be it with a parent who says a child's made a recantation.

And especially it's a very delicate subject when you are in a criminal trial with a jury listening. You have to be knowledgeable in what that word means. You have to be knowledgeable, in my opinion, the family dynamics that are going on that could have led to a recantation or possibly led to a non-recantation.

It's certainly not something that just, as they like to say, the average Joe can come in and discuss with anyone -- not with an attorney, not with a judge and

certainly not with a jury who is charged with deciding whether someone is innocent or guilty.

Even in my own work with colleagues of mine when I'm providing supervision for people who have just maybe entered into the field or you're asking me for supervision, that is an issue that we take very seriously. And we have to make sure that we're handling it appropriately.

Q What would your advice have been to defense counsel or your consultation regarding using a lay person to testify regarding recantation? Would you have recommended that?

A Definitely not.

Q And what would your findings have been to him or consultation as far as whether there was any evidence to support recantation from the file that you reviewed?

A I would say that I didn't see any.

Q Okay. If counsel still had chosen to go down that road would you have been willing to be present at the trial and potentially be used as a witness to explain recantation and testify regarding recantation?

A Yes. And oftentimes what happens is when I'm providing a consultation for an attorney that isn't always just a -- a 1-shot deal.

It can go in the beginning of the case as we prepare the case. It can go down to the week of trial. And oftentimes there are cases where an attorney will say to me

I don't know if I will necessarily need you to testify, can I have you on standby because if these issues arise I'll need to call you or if you, you know, these issues don't arise then there's no reason for you to have to sit there and wait.

But if an issue of recantation is going to arise in a case where there are criminal sexual conduct allegations of a minor, any attorney in my opinion would be remiss to not have an expert somewhere close by to come in and address that issue.

Q And you've even assisted attorneys with drafting questions or examinations, but not testified, is that correct?

A I have. I -- I've provided consultation in various areas of -- of that.

I've actually even sat in in cases, usually for the state actually, when there's going to be an expert that's going to be called. And I'll listen to the testimony and see if there's anything that I may be able to add.

So I've done that in various, different ways. But it's a very delicate subject and it's something that even a lot of experts in my field don't -- don't like to address.

Q Now, in this case after Lillian Collins was called by the defense and went into this recanted -- purported recantation, the state then called Gina Odom to testify.

And she testified that the victim was consistent in her reports.

Did you have some concerns regarding the interactions you saw with the child in her reports?

A What I -- what I noticed upon review of this, and then from talking with Mr. Irby, is it appears that the child was -- was questioned by several people and was questioned several times. And that can be extremely concerning in cases where allegations of sexual misconduct are there.

You have to be extremely careful when you're questioning children about those allegations, and you have to be extremely careful to understand the family dynamics that are going on for this child when they're in the disclosure process, in any possible healing process.

And, you know, even in my field we have finally, I think, gotten a little more educated in even the treatment of children that have raised those allegations, because if you are not careful you can often enter things into a child's mind or enter things into a therapeutic environment that may not have existed in the way of questioning, in the way of how you give attention to a child.

THE COURT: Is this -- Ms. Blanchette, is this a delayed disclosure case?

MS. BLANCHETTE: It does involve partial undelayed disclosure, Your Honor.

THE COURT: Okay. Factually, I'm trying to piece it together.

MS. BLANCHETTE: Yes. I believe the indictment reads -- just one second, Your Honor. From October of 2005 to November of 2007. So there was a large range as well.

Q Now, again, in this case you had her school records, various records, regarding the victim, is that correct?

A Yes, ma'am.

Q And in your opinion did it appear that she was a troubled girl?

A It did.

Q And how could that factor into the interactions that she was having with the people that were interviewing her and providing her therapy?

A Generally speaking, whenever you have a child that has behavioral issues or a child who maybe has made allegations of other people, you have to be extremely careful because children enjoy attention. They enjoy attention, whether it be negative or whether it be positive.

And so oftentimes when you have a child who has made a disclosure of sexual abuse if this child is gaining attention from other people for this, that can often take the allegation and cause it to continue, cause it to exasperate, cause it to become bigger than it could have been.

And so whenever children have behavioral issues you have to be extremely careful in interviewing them and providing therapy for them.

And that is one of the first things that I ask an attorney whenever they call me about they want me to consult on a case. I want to see those records; I want to see the grades; I want to see the behaviors; I want to see any possible prior allegations so I can kind of maybe size up a little bit what could or could not be going on.

Q Okay. And in this case there was also a rape shield motion addressed pretrial where they addressed prior sexual abuse the victim had suffered. Would that also factor into your analysis of this case?

A Yes, ma'am.

Q Okay. Now, again, you had the opportunity to review the statements contributed here to Mr. Irby where he spoke with the DSS worker and denied and continued to deny, and in the statement that he ultimately made to Detective Morgan, as well as all of the reports given by the victim. Did you see any inconsistencies in those?

A I did.

Q And could you explain that, please?

A Well, it seemed that there was -- I guess we could say disclosures by him and then retractions of those disclosures.

And, typically, if I am called upon to review that in the beginning as something that's going to trial, that's not necessarily my issue when we begin -- my strengths, I would say, when we begin to talk about, you know, people who are making confessions, or lack thereof.

Typically, what I'll say to an attorney is that's not really my area of expertise, we may need to find someone who can help us with that. And typically attorneys will ask me if I know of anybody, and I'll usually just suggest the list serve that I know you guys use to find various experts.

Q But did it raise a red flag for you regarding the statements that you reviewed that are attributed to Mr. Irby, as well as the disclosures made by the victim and how those did or didn't match up?

A Yes.

Q Did that raise a red flag to you?

A Yes, it did.

Q Gaye, as the state pointed out, you worked on this case for a long time. I was able to finally provide you the discovery in January of this year.

You met with Mr. Irby. Is there anything else that you would have offered to Mr. Brough or a defense attorney if they would have consulted with you pretrial or that you think you could have offered in the trial of this case?

A Well, everything that we've just gone over now. But the biggest thing for me would have been the recantation issue and just offering some advice and expertise and, I guess, guidance to the attorney about that issue and about how to handle that issue.

MS. BLANCHETTE: Your Honor, I have no further questions of this witness.

CROSS-EXAMINATION

BY MS. GIOVANOLI

Q Good afternoon, Ms. Cooke -- or Allen-Cook?

A Allen-Cook.

Q Allen-Cook.

A Thank you.

Q And is your primary business child counseling?

A I do quite a bit of child counseling, but I also do a lot of adult work too. I have a lot of adults who come in for various issues. And I do a lot of family work also.

Q Okay. What portion of your business is children?

A I'd say it used to be -- used to be a hundred percent. Since I've become a mom I've tried to diversify some. I would say right now currently children probably compose -- these are rough estimates -- right now probably about 40 percent of my business.

Q Do you have a promotional video on line for child counseling?

A I -- I do. I actually was chosen by Project Best that I just referenced a little bit ago to -- to be a, I guess a, spokesperson. And they actually have, I guess, congratulated and awarded me in my work with children, which is where that came from.
Q Okay. Well, I'm going to quote a little bit from that video.
A Okay.
Q It was you speaking on the video, correct?
A And I think that video was in 2013, I think. I can't remember exactly.
Q Okay. Has anything changed from your statements in that video to now?
A I -- I would say that I don't do as much child work as I -- as I did back then.
Q But the child work you do is the same as what you discussed in the video?
A Back in the video time I did predominantly victim -- victim work. I don't do as much child victim work as I did then.
Q Okay. You stated in that video, "I'm passionate about helping children and families recover from traumatic events." And you use the trauma focus cognitive behavioral therapy. Are you still using that?
A Yes.

Q Okay. And then you also said something there's something very powerful in taking a child whose life has been turned upside down and teaching them how to put it back together again, is that correct?
A Correct.
Q Okay. Do you know anything about the little-girl victim in this case?
A Just what I've read in the file. And let me say that and then I interviewed Mr. Irby.
Q Okay. Are you aware that her life was turned upside down after these -- the disclosure of the sexual abuse?
A I don't know specifically, but I would imagine that. Usually when children do make allegations of abuse their life is turned upside down.
Q Okay. Are you aware that she was actually removed from her own home, from her mom, her siblings, after she alleged that the -- the applicant in this case had committed sexual abuse against her?
A I have been told that, yes, ma'am.
Q Okay. And did you know her mom sided with him and stood by him and didn't believe her own daughter? Did you know that?
A Mr. Irby shared that with me when I interviewed him.
Q So she hadn't -- were you -- were you not aware that she had everything to lose if she remained consistent in

her allegations throughout this, the course of this trial?
A I wouldn't say I was -- I was aware of that. Just from interviewing Mr. Irby, I was aware of the -- the family dynamics that surrounded this case.
Q Okay. How much money is the applicant paying you to assist him in this case?
A There was, I believe -- usually I do an initial consult fee of $1,500, or thereabouts, to review, and then of course my time to be at trial.
Q Okay. Had the victim paid you that much would you be counseling her instead of testifying here today?
A I would be counseling her if she had been referred to me as my client, but she wasn't.
Q So she's not paying you. The applicant's paying you in this case.
A Of course. That's correct.
Q Do you have a different promotional video for this part of your business, testifying on behalf of --
A I don't actually, no, ma'am.
Q Are you aware of the ratings on the internet sites for your services to your clients?
A I don't -- I don't look as those things because I am very aware that in the world that I live in regard -- depending on how a case turns out depends on who likes me and who doesn't. And so I don't -- I don't pay any

attention to that stuff to be honest.
Q Okay. So you're not aware of the negative ratings on line for your services.
MS. BLANCHETTE: Your Honor, I would object as hearsay at this point. She's referencing information that's on line without any even disclosure of the source.
THE COURT: All right. I sustain the objection.
Q Okay. So the material that you reviewed in preparation for this case, you testified that it was the interview -- I mean, let me get this right. Interviews, the D.V.D. of the child advocacy interviews, the information from DSS, information from trial. I'm assuming that was the trial transcript.
A Correct.
Q And information from the guardian ad litem. So you never met with the victim.
A No, ma'am.
Q Okay. You never interviewed her.
A No, ma'am.
Q You didn't counsel her.
A No, ma'am.
Q You didn't talk to her about the abuse she sustained at the hands of this man.
A No, ma'am.
Q And you don't know anything about her.

A I know what I read in the file and I know what Mr. Irby has said. But, no, I have not provided services for her, which is not a typical when I do a consultation.
Q Right. But you said during -- when you -- when you consulted with counsel you reviewed the packet to determine whether or not you want to be a part of the case.
A Correct.
Q Is that correct? So knowing anything about the victim outside of what's in the file, is that not considered in your analysis of whether or not to sign on to a case?
A I would never ask a child to come in and be interviewed yet again by me.

I am very, very much of the mind-set that the least amount of people that interview a child, the least amount of people that provide therapy for a child, the better for that child. So I would not want to be a part of that at this juncture.

Q Okay. So you could not consider any information about the victim in agreeing to assist the applicant in this case.
A I'm sorry. I don't understand what you're asking me.
Q Well, because you never spoke to the victim, she was never a consideration in your agreement to sign up to assist in this case.
A Correct. I -- I would -- I would never interview that

child based on the number of times she's already been interviewed.

Q Okay. So you wouldn't even call the mother maybe to discuss anything about the --

A No, ma'am, no, ma'am.

MS. GIOVANOLI: Beg the Court's indulgence.

(Pause.)

Q Okay. So you testified that you charge fifteen hundred for a consult.

A Well, not -- not for consult. To -- to review the file, the initial review of the file.

Q Okay. And you've done that in this case. But you're also here testifying. You said you also charge for preparation for trial or testimony and then your time to testify, is that correct?

A Correct.

Q And how much did you ultimately -- how -- how many hours have you put in in this case?

A I'd say today will probably be about around eight with travel.

Q Okay.

A And then there have been -- I charged the fifteen hundred, which was for the initial review. I've -- I've put in more than that which I -- which I haven't charged for. So eight today and then the fifteen hundred.

Q Okay. And how much do you charge hourly?
A Two fifty.
Q You testified that you thought that -- well, let me -- let me just clarify.
How many Child Advocacy interviews do you think were proper in this case?
A Typically, the standard of care is -- is one interview.
Q And what is that standard based on?
A It's based on the fact that when a child comes for a forensic interview a Child Advocacy Center is considered what they call a one-stop-shop.
The child comes in. They have their forensic interview. They have their medical if it's needed. Sometimes it's not. And the child tells their story. It's video taped, obviously, with D.V.D., whatever word you want to use these days. And so the child doesn't have to continuously be questioned by other people.
Q Okay. But the purpose, you know -- you understand the purpose of a forensic interview, right?
A Oh, yes, ma'am. I've done plenty of them myself.
Q So they're actually conducted by people certified like yourself.
A They're -- they're -- they're conducted by someone who's just a certified forensic interview, yes, ma'am.

Q Okay. And with -- with certification and education and experience, correct?
A With -- with the certification, yes, ma'am.
Q So they don't need any education or experience in order to --
A They don't necessarily have to have any experience because sometimes when you've got to have your first, so, sometimes when you do one it may be your first, second or third. You didn't have tons of experience in it.
Q Was this -- was this Lynn's first time?
A I don't know anything about her. I'm sorry.
Q So you would agree that children often don't open up to strangers in their first meeting, especially about traumatic events. Is that true generally?
A I -- I would say that there are various schools of thought on that. I mean -- I mean, typically by the time a child goes to a forensic interview, I mean, the incident, the alleged incident, has already occurred. And so typically they're coming to tell their story. And sometimes they've already told their story to other people.
Q Are they not sometimes hesitant to tell their story to other people?
A I mean, I think it's -- it's child dependent. I mean, I -- I've done many interviews where children were not hesitant. I've done some where they -- where they were

hesitant. But, typically, when you are doing an interview you are trying to get everything you can for that one interview so you don't have to continue to reinterview.

Q Okay. So would you concede that there are certain cases that require more than one interview?

A I would say that I'm sure there are. I wouldn't say that I would find that necessarily appropriate.

Q Okay. So you ever feel that way in your counseling sessions, that one session isn't sufficient to get a complete disclosure?

A Counseling is extremely different than a forensic interview. They are two separate protocols.

Q Right.

A And -- and two separate things. I don't even think you can talk about them in the same arena.

An interview is designed for a child to be asked very specific, pointed, non-leading questions to see if there is anything that this child can tell you about what could or could not have happened to them.

Therapy is way, way different than that. In therapy you're beginning the healing process. You're not necessarily doing the questions about what happened, where were you, those kinds of things like an interview is.

Q In order to counsel and give therapy to someone don't you need to know what the allegations are and don't you

need for the victim to disclose to you the allegations?
A When -- when a child comes for therapy usually -- I'd say way more times than not -- the allegation has already been addressed.

And so what happens is that child goes into the forensic interview. They're asked the questions. They either disclose or don't disclose. And then they come to therapy.

And so the way I provide therapy with children, which is consistent with the trauma-focused cognitive behavioral therapy model, is you're not coming in and asking this child, you know, 500 questions about what happened. You're beginning the healing process, and so they're two different things.
Q Okay. So you don't need to know. You don't need to establish whether or not the -- your victim counseled -- if you're counseling the victim, you don't need to establish whether or not she's telling the truth to help you with your therapy?
A In the -- in the beginning you're not doing a are-you-telling-me-the-truth-or-are-you-telling-me-a-lie. That would be extremely offensive to a child who's coming in for therapy.

When a child is referred to my office the interview's already been done, you know, and there's in my mind a peace

that's happening outside of that therapy process with solicitors and police officers and all of these people doing their work. That child is entering into therapy with me to begin to work through what may or may not be going on.

Q How many advocacy interviews were there in this case?

A There were -- there were multiple on the D.V.D. that I -- that I reviewed.

Q Okay. Multiple as in how many?

A I think there were three, but I'm not a hundred percent sure without looking at it.

Q Did you review that in order to testify here today?

A Of course I did.

Q So you don't know exactly how many?

A I think there were three.

Q Okay. You talked briefly about recantation. Are you aware that the applicant actually never recanted to his trial attorney even in confidence? He maintained the same story that he told Detective Morgan to his trial attorney. Were you aware of that?

A When we were talking about recantation I was talking about a child, not about Mr. Irby.

Q Okay. I understand, and I'll address that too.

A Okay.

Q But with regard to the recantation, that's part of

this case, right?
A Well, when I was using the word recantation I was not factoring in Mr. Irby and his statements. I was talking specifically about a child.
Q Okay. So talking about the child, there was really no testimony from Lillian -- I believe her name was. It was the exwife at the time of the applicant. Do you remember that testimony from the trial?
A Yes. I've read it.
Q She didn't actually testify that he recanted. She didn't use that word. I mean, he -- she recanted -- excuse me -- the victim. Did she?
A I wouldn't say she specifically used that word, but I would say that she went into information that opened up that door.
Q Sure. And her testimony was actually that her daughter told her nothing happened.
A Exactly.
Q And your testimony today is that you would advise -- you would have advised a lawyer not to elicit the testimony that the victim told her mother nothing happened. That would have been your advice.
A My -- my advice would be that whenever you're going to discuss recantation you need to have someone who knows what they're doing. You need to have an expert, not a lay

person or not a parent, to address those issues. It's a very delicate subject.

Q The victim didn't recant to an expert, did she?

A Not that I'm aware of. But what I'm saying is you're talking about the mother's testimony. And so what I'm saying to you is when that occurred an expert should have been brought in to address that issue.

Q Okay. And there was also some testimony from Gina Odom that was -- the state offered Gina Odom in response as a rebuttal witness to Lillian's testimony that the victim had told her nothing had ever happened. Do you recall that part in the trial transcript?

A I do.

Q Okay. And there's a difference between -- because I was a little bit confused at your original testimony. Gina Odom was actually kind of what you are, a counselor, correct?

A That's my understanding, yes, ma'am.

Q Okay. And then Lynn MacMillan was the forensic interviewer.

A That's my understanding, yes, ma'am.

Q Okay. So these are two totally different sort of D.V.D.s that you watched -- counseling sessions and inter -- and child advocacy interviews.

A I -- I never watched any counsel -- counseling

sessions are not to be recorded.
Q Okay.
A They're not D.V.D. recorded, no, ma'am.
Q And that's what I thought. I think that you were addressing the Gina Odom issue and the Lynn McMillan issue. So just for clarity for the record, you watched the forensic interviews made by Lynn McMillan.
A Correct.
Q Okay.
MS. GIOVANOLI: Beg the Court's indulgence for one moment.
(Pause.)
Q You testified earlier in direct that there was no evidence in what you reviewed, the record, that you had full discovery, that the victim never recanted. Is that correct?
A Not from what I read, no, ma'am.
Q Okay. So you weren't aware of the affidavit that was actually in Mr. Brough's file from Lillian stating that the victim told her nothing happened.
A Yes. I have that affidavit.
Q So isn't that evidence that she recanted?
A In -- in that affidavit, but we -- I was trying to say that a layperson would not be a person that could talk about that and, I guess, be credible, for lack of a better

word, when discussing the issue of recantation.
Q But wouldn't he have to put her on the stand in order to get the evidence out that she recanted? He couldn't just call you to the stand and talk about recantation without tying some relevance to it.
A But if -- if -- if she was going to come in and discuss that my opinion would be that you would need to have an expert to come in and clean up the recantation issue.
Q Okay. So you're saying that Brough needed to consult with an expert to find out that he needed an expert to present recantation testimony.
A My opinion would be that if you're going to address the issue of recantation you would need to have an expert involved.
Q No further questions. Thank you.
A Thank you.
THE COURT: Any redirect?
MS. BLANCHETTE: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. BLANCHETTE

Q Gaye, in this case I have received a discovery order, and in that discovery order we were supposed to receive a complete copy of Mr. Brough's file.
And then number two goes into a very detailed list

which included the complete Children's Advocacy Center of Spartanburg's file and any discoverable counseling records from Middle Tyger Community Center, which is where Gina Odom was out of.

Do you recall that we then after you had reviewed everything, you asked me to further check to see if there were any records? A subpoena was issued and nothing further could be provided from Middle Tyger regarding Gina Odom.

A That's correct.

Q Okay. And so you have reviewed everything that the state provided us pursuant to a discovery order in this case.

A That's correct.

Q Okay. And I wanted just to address the testimony and the affidavit that was referenced in your cross-examination.

MS. BLANCHETTE: Your Honor, may I approach the witness?

Q I have premarked this as Applicant's Exhibit 12. Do you recognize that document?

A I do.

Q And what does that appear to be?

A It's a handwritten statement by Lillian Collins.

Q And did you review that as part of the file that was

provided to you?
A I did.
Q Okay. And was it your understanding this came from the attorney's file in this case?
A I'm not sure. I just know that it was included in the information you gave me to review.
Q That's perfectly fine.
MS. BLANCHETTE: Your Honor, at this time I would move Applicant's No. 12 into the record, the handwritten statement of Lillian Dannette Collins.
MS. GIOVANOLI: No objection.
THE COURT: Without objection.
(Handwritten statement of Lillian Dannette Collins marked Applicant's Exhibit No. 12.)
MS. BLANCHETTE: Your Honor, would you like a copy?
THE COURT: Sure.
Q Now, having reviewed all of the files that were turned over pursuant to the discovery order, having reviewed that statement, having reviewed the testimony of Lillian Collins on pages 165 through 167, primarily, about a joint session with Gina Odom where she says twice her daughter said that nothing had happened, would you consider all of that to be testimony and information regarding recantation? Is that what you would call all of that, is recantation testimony?
A Yes, yes, ma'am.

Q Okay. And having reviewed the full file and that handwritten statement, because you obviously wouldn't have had the testimony yet, what would you have told defense counsel as to whether or not in your expert opinion you found there to be evidence of a recantation in this case?
A Well, I would have wanted to see the therapist's file to see what she documented about this session, because when we are writing notes in therapy we would obviously make a note of something as important as recantation. I would have wanted to see that. And if that therapist would have been willing to talk with me I would have wanted to -- to talk with her.

Sometimes that can be a little difficult because of HIPAA and confidentiality and things like that. But I would have wanted to know what occurred in that session and what the dynamics were.
Q And would you have felt confident based upon the records that were provided to you, including that handwritten statement -- would you have been confident to get on the stand and say there was evidence of a recantation in this case?
A Yes.
Q So you would have testified that it appeared that the victim had recanted?
A Oh, no, ma'am, not at all.

Q Okay. But if the attorney still chose to go down that road you would have been able to testify about recantation in general.
A Correct.
Q But you did not identify a recantation in this case based upon your review of the file.
A No, ma'am.
MS. BLANCHETTE: Your Honor, I have no further questions.
MS. GIOVANOLI: I just have one followup question, Your Honor.
THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MS. GIOVANOLI

Q So would you concede that you and trial counsel were not entitled to the counselor's files or notes?
A I don't have the -- the therapist's record.
Q Right. But you're not entitled to them. They're -- they're protected.
A There are times when I provide consultation that I do have the records.
Q That's not my question.
I'm asking you that you would concede that you're not entitled to this therapist's notes or records pursuant to HIPAA and confidentiality laws.

A And -- and the way I'm answering that is there are oftentimes when I get called upon as a consultant in a case that I am provided that file.
Q And I understand that. But my question is do you concede that you're not entitled to it. It's yes or no.
A No. I'm not necessarily entitled to it, but it does help me to be able to review that to be able to help someone prepare for a trial.
Q Okay.
MS. GIOVANOLI: Thank you. No further questions.
THE COURT: You may come down.
THE WITNESS: Thank you.
THE COURT: Witness be excused or anybody --
MS. GIOVANOLI: No objection.
THE COURT: Without objection. You're free to go, ma'am. Thank you very much.
(Whereupon, the witness was excused.)
MS. BLANCHETTE: Your Honor, I would call Bernadette Smith to the stand.
THE COURT: Bernadette Smith?
MS. BLANCHETTE: Yes, Your Honor.
BERNADETTE MELISSA SMITH, having been first duly sworn, testified as follows:
THE COURT: State your name for the record.
THE WITNESS: My name is Bernadette Melissa Smith.

DIRECT EXAMINATION BY MR. BLANCHETTE

Q And, Ms. Smith, in what city and state do you currently reside?

A In live in Clinton.

Q Okay. And you're here under subpoena today?

A Yes, ma'am.

Q Okay. And, Ms. Smith, how is it that you know James Irby?

A I actually was on the phone calling someone, and I called the wrong number, and that's how I ended up talking to him on the phone.

Q Okay. And how many years have you known Mr. Irby for?

A Fifteen years.

Q Okay. And have you guys at times been involved in a romantic relationship?

A Yes, ma'am.

Q Okay. And at the time of these allegations -- they stem from 2005 to 2007 -- he was married to the victim's mother at that time. What was the nature of your relationship at that time with Mr. Irby?

A At that time we were just friends. We -- he lived in Spartanburg and at that -- at one point in time I was in Clinton. Then I moved to Newberry.

Q Okay.

MS. BLANCHETTE: Your Honor, may I approach the

witness?

THE COURT: Sure.

Q Ms. Smith, I'm going to show you what's been premarked as Applicant's No. 1.

A Okay.

Q Can you please identify that for the record?

A This is a letter that I wrote.

Q Okay. What's the date on that letter?

A May the 5th of 2008.

MS. BLANCHETTE: Your Honor, at this time I would move to admit the letter dated May 5th of 2008, typed signature by Bernadette Smith, as Applicant's No. 1.

MS. GIOVANOLI: I would just object based on the authenticity of this document.

THE COURT: She's identified it.

MS. GIOVANOLI: Okay.

THE COURT: That's it? That's the only objection?

MS. GIOVANOLI: Yes, Your Honor.

THE COURT: All right.

MS. BLANCHETTE: Your Honor, would you like a copy?

THE COURT: I thought there was a signature on it. Is it not?

MS. BLANCHETTE: It's a -- it's a typed signature. Do you want me to have her further identify it?

THE COURT: Yes.

Q Okay. Ms. Smith, in looking at this letter here do you recall typing this?
A I did.
Q Okay. And do you recall typing your signature on that?
A I did.
Q Okay. And you can verify today that that is an authentic document that you created.
A Yes, ma'am.
Q And what was the reason that you created it?
A I got this information so I can give to Brough to let him know what type of relationship that me and James had.
THE COURT: I couldn't hear what she said.
THE WITNESS: I got this information and I gave it to Brouth so Brouth would know what type of relationship --
THE COURT: Brouth?
THE WITNESS: Brouth. I guess I'm pronouncing his name right.
THE COURT: Oh, the lawyer.
Q Did you provide it to James' defense attorney?
A I did.
Q Okay.
MS. BLANCHETTE: Your Honor, I -- has it not been admitted? I would move to admit Applicant's No. 1.
THE COURT: Without objection. Well, over the state's

objection, it's admitted.

(Letter dated May 5, 2008, marked Applicant's Exhibit No. 1.)

Q And, Ms. Smith, did you have any communication or the opportunity to meet with Mr. Irby's defense attorney, Mr. Brough?

A I took Mr. Brough some phone records to his office. His office was like right behind this courthouse right here at one time. And I took some phone records over to him.

Q Why did you take him phone records?

A Because me and James, we stayed on the phone all of the time, all day, all night.

Q Okay. And what did you discuss with his defense attorney regarding those phone records?

A I told him that the night that this happened that me and James was on the phone, this particular night.

Q Okay. And I'll ask you more about that, but let me get this back from you so we don't lose it.

Do you recall his response to you? Did he indicate to you that you'd be a witness or how that information you were giving him may be utilized at trial?

A The only thing that he ever did was gave me a couple of subpoenas to come to court. But he never gave, you know -- called me to the stand for anything. I was present in court every single time that James had to be present.

Q So did he ever prepare you to take the stand and testify?
A No, ma'am.
Q Okay. Did you explain to him beyond the information contained in this letter -- did you explain to him that you felt that you had information that would be important to James' defense?
A Yes, ma'am.
Q Okay. And you said that you brought him phone records because you guys had been on the phone. During those phone calls was there any information that you ascertained that you thought was important to his defense, any information you received?
A Say -- ask me that again.
Q Okay. I'll be happy to.
When you were on the phone with James --
A Uh-huh.
Q Let me rephrase that. I apologize.
Did you tell Mr. Brough, his defense attorney, any information that you felt like you knew was helpful to the case besides those phone records?
A Yes, ma'am. When I took him the phone records that day we sat at a long table in the back, and I was letting him know what had happened at that time.
Q Okay. And what were specific things that you told

him? Were there certain concerns that you had?
A No. I was telling him about the night that we were on the phone and how the night progressed, what happened into that night.
Q Okay. Well, you can tell us. It's not hearsay for us -- for you to tell us what you told him. Do you remember specifically what you told his attorney?
A I pretty much told him that I was on the phone with James. And it started with Dannette wanting a T.V.
A T.V. needed to be -- was moved out of her room. And I think her son's name is [illegible]. He wanted the -- she wanted the T.V. to be put back in the room, and James was like [illegible] took the T.V. out, he can put the T.V. back in.
Dannette at that time -- I call her Dannette. I don't know her real -- what her real name -- Lillian. She took the cell phone from James. And when she took the cell phone from James, James got on the phone, on the house phone. And while he was on the house phone she completely pulled the wire out of the phone.
How he was able to get his cell phone back and get me back on the phone, I don't know, but he -- any time anything went on James would either call me or his mom to have somebody on the phone as a witness to what was being happening in the home.
Q So he used you as a witness to the family dynamic and

what was going on in the home.
A Uh-huh.
Q Were you aware of where he would typically sleep in the home?
A A lot of times it would be on the chair.
Q Okay. And so is that how you were able to have conversations with him? He wasn't actually in the bed with his wife at night?
A Yes, ma'am.
Q Okay. Did you ever tell him any concerns you had about Lillian's daughter that ultimately became the victim in this case?
A I was on the phone with -- I call him Jay. Y'all call him James. I was on the phone with James, and VICTIM came in and she said, "James --"
MS. GIOVANOLI: Objection to hearsay.
THE COURT: Sustained.
A She --
Q You can't answer. I'm sorry.
A She -- she --
Q You can't continue to answer.
A Okay.
Q The judge sustained her objection. Let me ask you another question. Okay?
A Okay.

Q Did you tell James worries or concerns you had for him in that home? And what did you tell James?
A I told James that he needed to leave once I heard VICTIM say --
MS. GIOVANOLI: Objection to hearsay.
THE WITNESS: Excuse me.
THE COURT: Sustained.
A I told him he needed to leave the home. I told him that he did.
Q Okay. And was that in response to things that you were hearing being said by the daughter who ultimately became the victim in this case?
A Yes, ma'am.
Q Okay. And why did you think he needed to leave? What was your worry for him?
A That something bad was going to happen there. He couldn't get his wife to understand some of the things that were going on and that he addressed. So my biggest concern was him to leave.
MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.
(Pause.)
Q Ms. Smith, was it ever explained to you why you were not called as a witness at James' trial?
A No, ma'am.

Q And you would have been willing to testify.
A Yes, ma'am.
Q Okay.
MS. BLANCHETTE: Beg the Court's indulgence one moment.
(Pause.)
MS. BLANCHETTE: Your Honor, I have no further questions.

CROSS-EXAMINATION

BY MS. GIOVANOLI

Q Good afternoon.
A Hey.
Q So you were Irby's girlfriend.
A At one time, yes.
Q Okay. And that was prior to him being married to Dannette, is that correct?
A It was before, that's correct.
Q Okay. But you testified today that you were on the phone with him all day and all night.
A That's correct.
Q And your testimony today is that you're on the phone with him all day and all night between October 29th of 2005 and November the 9th of 2007 when he was alleged to have committed sexual abuse against the victim.
A Pretty much, yes, ma'am.

Q Okay. Do you think that maybe that could have possibly been a reason Dannette and Mr. Irby were fighting?
A No. It wasn't about me.
Q So you've testified that you guys talked on the phone all day and all night. But that particular night you called the wrong number and you just happened to call his number?
A I don't know what you're talking about. I didn't call the wrong.

When I first met him I dialed the wrong number. That's how I met him. When I first -- when I first -- I was calling someone else, and his sister and him were living in a home that this same house was -- the same phone was still present. I guess the phone was still on in the house at the same number or whatever. But when I dialed he told me that I had the wrong number, but we kept pursuing talking on the phone.

Q Okay. And this letter that you -- we've admitted into the Court that you've allegedly written, this was actually used at his bond hearing, wasn't it?
A I don't know.
Q Were you at his bond hearing?
A I was at everything, yes, ma'am.
Q So you did provide this to Mr. Brough.
A I did.

Q And isn't it true that in 2003 you were arrested for a fraudulent check?
A Yes. I -- I wasn't arrested. I was fingerprinted and my picture was taken. I wasn't actually arrested but --
Q You weren't actually convicted, but you were arrested, isn't that correct?
A Yeah. It was.
Q And that was in Greenville County.
A No. It was in Laurens County. It was expunged through Greenwood.
Q That's right. You weren't convicted of it.
A That's correct.
MS. GIOVANOLI: Nothing further. Thank you.
MS. BLANCHETTE: I have nothing further, Your Honor.
THE WITNESS: I'm sorry.
THE COURT: That's all right. I thought she wanted to ask you another question. You can have a seat, ma'am. Thank you very much.
MS. BLANCHETTE: And is there any objection to her being released from her subpoena so she can return to work?
THE COURT: You can -- you're free to go without objection.
(Whereupon, the witness was excused.)
MS. GIOVANOLI: Your Honor, I would call Christopher Brough to the stand. And I apologize to him saying his

name incorrectly.

THE COURT: Let me -- approach the bench, Counsel.

(Bench conference held off the record.)

THE COURT: Let's stand at ease until 1:30.

(Whereupon, a recess was taken.)

THE COURT: Let's proceed.

MS. BLANCHETTE: Your Honor, one housekeeping matter. During the break I actually emailed you a copy of the 144-page unofficial transcript because I felt you may prefer to have it that way versus on paper. And I didn't know if you'd mind at the end of the hearing if they could be marked -- the copy that you have that's complete as the court's exhibit and marked as an exhibit at the end of the hearing today.

THE COURT: This document?

MS. BLANCHETTE: Yes. That is the complete copy if I could mark --

THE COURT: Wait a minute.

MS. BLANCHETTE: -- that as Applicant's No. 14.

THE COURT: You sent the transcript of this?

MS. BLANCHETTE: I did. I sent a link from an on-line file that I have that has this transcript connected to it. But if you want to use that during the hearing, then I'll just make sure it gets back with the exhibits at the end.

THE COURT: Do you want this now?

MS. BLANCHETTE: I can. Would you like me to remove the sticker?

Your Honor, at this time I call Christopher Brough to the stand.

CHRISTOPHER BROUGH, having been first duly sworn, testified as follows:

THE COURT: State your full name for the record.

THE WITNESS: My name is Christopher Brough. That's B-R-O-U-G-H, Your Honor.

DIRECT EXAMINATION BY MR. BLANCHETTE

Q And, Mr. Brough, how are you currently employed?

A I own the Brough Law Firm where I've been in private practice since 2005.

Q And since 2005 what type of cases have you been handling at your law firm?

A We handle a variety of cases, but our focus has always been primarily in criminal defense work. And prior to being in private practice I spent two years in the Spartanburg County Public Defender's Office.

Q Okay. And do you remember representing Mr. Irby?

A Yes, ma'am.

Q Do you recall how it was that it came to be that you represented him?

A I believe they made contact with my office sometime in 2008. At that time we agreed to represent Mr. Irby on the

criminal case, as well as on the department of social service allegations relating out of the same facts.

Q Okay. And do you recall that you provided your complete file to my office pursuant to a court order and subpoena?

A Yes. I -- I believe that I did. I had provided it previously to Mr. Irby on a number of occasions, absent the C.S.C. interviews where there was the standing administrative order that we dealt with before I provided it to you.

Q Okay. And at this time, Mr. Brough, I'm going to ask you some questions about the last witness that testified, which would be allegation No. 7 on Mr. Irby's amendment -- Ms. Bernadette Smith.

A Okay.

Q Do you recall meeting with her?

A Yes, ma'am.

Q Okay. What do you recall from that meeting?

A Well, Ms. Smith, as she had testified, had had prior romantic interests with Mr. Irby.

She was wanting to introduce phone records showing the amount of phone contact that she had with Mr. Irby. Of course she wasn't on the phone with him literally 24 hours a day. And the indictment and the allegations spanned over a significant time period. And there was no way she could

have said that she was on the phone with him the entire time or knew everything that occurred at that house.

Q Now, but you would agree that the victim testified and that you were able to narrow down to some specific times such as right before she went on a field trip to the Biltmore, is that correct?

A There was one allegation that occurred approximately at that time, but there were also other things that were referenced in some of Mr. Irby's statements. I believe they've previously been admitted into evidence.

Q Okay. And let me show you.

MS. BLANCHETTE: Your Honor, do you mind if I approach? And do I need to continue to request to approach the witness?

THE COURT: No.

Q Do you recall the document that's marked as Applicant's No. 1, a letter from Bernadette Smith?

A Yes, I sure do.

Q Okay. And that was in your file?

A It most certainly was. That was given to me, and I believe we used that at a bond hearing to make sure that he was able to secure bond. Most of that document, if you actually read it, is essentially a character reference.

Q Okay. And did you plan to utilize her as a witness in this case?

A No.
Q Okay. I'm going to show you what's been marked as Applicant's No. 2. Could you identify that for the record?
A Yes. This is a letter indicating that she was under subpoena and she was going to be placed on the phone standby.
Q Okay. And --
A This is to Ms. Smith.

Now, when we answered the question, I didn't intend to use her. I didn't intend to use her after a number of meetings that occurred after some of those meetings.

And you asked me at trial if I intended to use her. Initially, it was my intent that she might be able to provide some helpful testimony. But in light of her relationship with Mr. Irby and the statement, key statement, that was given by his wife, Lillian, indicating that the victim on the case had potentially recanted her testimony and the problems and troubled relationship that James had with Lillian, it was my opinion that Ms. Smith would do nothing to essentially help the case but could infuriate a key witness in the case and potentially influence her testimony.

MS. BLANCHETTE: Your Honor, at this time I would move Applicant's No. 2, a letter from the Brough Law Firm dated January 4th of 2011, into evidence.

MS. GIOVANOLI: No objection.

THE COURT: Without objection.

(Letter dated January 4, 2011 marked Applicant's Exhibit No. 2.)

Q But you would agree that as late as January of 2011 you were putting her under subpoena for trial and providing a letter to her work along with a subpoena.

A As of 2011. I think we tried the case almost a year later.

Q And can you identify what's been premarked as Applicant's No. 3 for the record?

A This is a list of potential witnesses.

Q And do you recognize that as being part of your file in this case?

A It was. I'm not sure if this was the one that was submitted during the trial of this case or not or if it was one that was done previously to preparing on a different date and occasion.

And of course this doesn't indicate that we're going to call a witness. It indicates that we may call a witness. And of course you have to identify every witness that might be subject to being called.

MS. BLANCHETTE: Your Honor, at this time I'd move the defendant's list of potential witnesses in as Applicant's No. 3.

MS. GIOVANOLI: No objection.

THE COURT: Without objection.

(Defendant's list of potential witnesses marked Applicant's Exhibit No. 3.)

Q And, Mr. Brough, you would agree that Ms. Bernadette Smith is listed on that witness list.

A She is.

Q Okay. Now, I'm going to jump back a little bit and ask you about plea negotiations in this case.

A Okay.

Q I apologize. I have a nerve that does not work in my hand. Sometimes it chooses not to work, so I'm fumbling a little bit here with the paper.

I'm going to show you an email dated 9/11/2008. Can you identify that for the record?

A Yes. This is an email that I received from Susan Reese who was the lead prosecutor in the case. It was dated September the 11th of 2008.

It's indicating she reviewed the file on Mr. Irby and under the circumstances she would be unable to make an offer on the case and that I have every item with the exception of the C.S.C. tapes in discovery and that we have requested those be sent to us.

MS. BLANCHETTE: Your Honor, at this time I'd move the email dated September the 11th of 2008 in as Applicant's

No. 4.

MS. GIOVANOLI: I'm sorry. No objection.

THE COURT: Without objection.

(Email dated September 11, 2008 marked Applicant's Exhibit No. 4.)

Q I'm going to show you what's been premarked as Applicant's No. 5. Can you identify this for the record?

A Sure. This is an email exchange between myself and Susan Reese, initial email that she sent me on October the 21st of 2010 at 11:42 and I responded to on October the 21st at 1:46 p.m.

Just an indication that the victim was ready to go to trial, doesn't think the child is a problem to testify, that she's never heard back from me as to whether exploring an offer was a possibility. I told there that Mr. Irby had always taken the position with me he didn't do it and was coerced into a statement and being said if he was willing to reduce the charges I would talk to him about it.

MS. BLANCHETTE: Your Honor, I would move the email from December -- or sorry -- October 21st of 2010 in as Applicant's No. 5.

MS. GIOVANOLI: No objection.

THE COURT: Without objection.

(Email dated October 21, 2010 marked Applicant's Exhibit No. 5.)

Q I'm going to show you one final email.
A Okay.
Q If you could, identify what's been premarked as Applicant's No. 6 for the record, please.
A There are actually two documents here. One is an email from Susan Reese to me on December the 31st of 2010 at 9:00 a.m. and the other attached to it is an email from me to Ms. Reese on the same date at 4:52.

Essentially, this was an email from Susan offering -- there are a number of things in here, but she was going to try to get to me -- to an offer, a cap of ten years. Then she sent back an email. I'm sorry. It was an email from her to me on the -- at 4:52, indicates she's been given the okay to offer a cap of ten years in criminal sexual conduct second degree with a minor.

There's a handwritten note here on my file that I discussed it with Mr. Irby on January the 4th of 2011. He indicated no.

We had some discussions about the issues with the wife's credibility in light of the fact that after she had given the affidavit previously being admitted into evidence Mr. Irby was convicted of domestic violence against her, after that, and that we felt that that would have some problems, that she might have some incentive to not be helpful to us.

Q And do you identify that handwriting as your handwriting on the second page?
A It sure is, yes, ma'am.
MS. BLANCHETTE: Your Honor, at this time I would move the email dated 12/31/2010 -- it's two emails between Mr. Brough and the solicitor -- in as Applicant's No. 6.
MS. GIOVANOLI: No objection.
THE COURT: Without objection.
(Email dated December 31, 2010 marked Applicant's Exhibit No. 6.)
Q Now, Mr. Brough, I want to ask you about two issues that come up in these emails.
First, it appears from the emails there was no offer on the table, and then you got a cap of ten. Could you take us through that progression?
A Sure. And it's going to be a somewhat long answer, so please bear with me.
But when we were going through the case initially Ms. Reese took the position this was a horrible case and there was no way they were going to offer anything. The victim was very adamant about testifying.
At the same time that the criminal charges were made, or approximately thereof, there was also a DSS investigation that took place -- it was filed in family -- court based on James' role as essentially acting as a

parental figure to VICTIM, so it would be a subject to -- and they were making allegations of sexual abuse, child abuse based on that nature.

We held a contested family court DSS hearing where we called a number of witnesses, including Detective Aldredge spoke, as well as a number of other individuals.

At that time the discovery that I had in my file is not what you have in yours right now. There was additional evidence that we were able to learn and obtain during that hearing that we then tried to use in order to better his case.

One of the things that we found out about was is the fact that the -- and I know we'll get into this at some point -- but that the interview with Detective Morgan had been videotaped.

I know that the sheriff's office typically does video those interviews on a laptop in their interrogation room there. And we were able to obtain testimony from Detective Aldredge that that video existed, that it hadn't been destroyed and essentially that it hadn't been disclosed to the solicitor's office at that point. So we were able to obtain that.

In preparing for that case we also spoke to Lillian on a brief basis. I didn't really have an extended conversation with her. I didn't want her to ever feel like

I was representing her or was acting in any capacity that would be, you know, inappropriate.

But she did come to my office. She was seated in our lobby. She was handed a legal pad and told that, you know, essentially we can't give you any legal advice, if you have absolutely any concerns that it should -- you know, could depend on things, you should consult with an attorney. However, if you want to give us a statement on James' case, more than welcome to do so.

She then handwrote out a statement of which I believe there's been a copy introduced into evidence there from the victim, her daughter, VICTIM, indicating that while at a therapy session after the forensic interviews with Gina Odom that VICTIM recanted her version of events and indicated that nothing had happened, that Gina Odom had been very combative to her at that point and had essentially terminated any future contact, you know, with her going forward. And, you know, there was never another interview that was rescheduled. And that was all referenced in there.

We provided that document to the solicitor's office in order to try to do a couple of things. Number one was to help -- help James' case. And, number two, I thought it was a good thing to make sure that, you know, I mean, we have to have proper disclosure. But also I thought it

protected him at some level in the event she were to change her testimony or change her version of events because the reality was -- and Ms. Reese and I had some conversations about this -- is that Lillian was playing both sides. And we had talked about that a good bit. And, quite frankly, neither one of us knew whose side she would ultimately be on on the day of trial given all of the back and forth.

I think a lot of that went into her opinion of the case and the fact that she had a written statement indicating that the victim had recanted. I think that went into her making an offer.

From our standpoint, you know -- and I talked to James a good bit about the offer -- you know, I had recommended him to consider taking a plea in this case. And part of the reason I recommended that, well, was for a number of reasons.

Number one is, is that in conversations with him and in going over the evidence -- and keep in mind that I represented him for over three years. So we'd had numerous conversations. And there were numerous statements he gave to law enforcement and DSS.

He always vehemently denied that he had sex with VICTIM. Always. But he also maintained his story that -- and there was a time when he was asleep in a state of undress and he woke up to the victim performing oral sex on

him.

Now, he always maintained that that was her doing something and he never engaged in any action. But he also indicated in a couple of those sessions, is that he let it go on for it a minute or two before he stopped it.

Now, my concern in the case was, is that, you know, obviously, that's a violation of the C.S.C. statute. And so we had a number of problems. So my advice to him was to consider taking a plea.

We talked about it on a number of occasions. I told them that, you know, it was a big mistake to rely on Lillian, you know, to make the case for him.

After she gave that statement he got charged with a domestic violence charge against her and convicted of that, as to Lillian, which was also not helpful.

And, you know, he had already moved on with someone else, and she was aware of that too. And she had lost her kids at this point through the DSS hearing and as a result of standing by him. And, essentially, she didn't have the kids and she didn't have him. So there was a good chance that she was going to throw him under the bus, as we would say.

Q And so in one of your emails there you say that your client, Mr. Irby, stands by the position that the statement was coerced.

A Uh-huh.
Q Was that his position; was that your position? Please explain that to me.
A That was his position. In looking at things I felt like Detective Morgan's questions could be construed as being coercive.

However, those weren't the only statements he gave. You know, there was actually probably about close to five statements that were given in this case.

The first was a statement given to the DSS caseworker with Detective Aldredge present in November where he denied everything, and nature, that he informed the caseworker that, you know, he was always very careful around the child to dot his I's, essentially cross his T's and that, you know, you could never be too careful.

There was another statement that he gave to the DSS caseworker -- that's Ms. Azzara, I believe -- three days later where he went through and indicated that had he had sex with her that he was not of average size and she would be bleeding and things of this nature.

Then on the date that he was taken into the sheriff's office there were actually three statements that were taken.

The first statement was by Detective Tonya Aldredge. And in that statement -- that was the first reference that

James had made to victim coming on to him or wanting him to so-called smell her cookies.

I didn't have any information that Detective Aldredge had ever acted inappropriately in getting any of those interviews or anything of that nature. In fact, my understanding was, it was a very brief interview.

After that he was given a lie detector test by Detective Danny Morgan. He was told that he did not pass that test.

Subsequent to that test the other statements were taken and recorded, and all of that was recorded on video. But the reason that was video-recorded was because it was given as a lie detector test, and that's how we were able to get that out at the DSS hearing, that that evidence would exist from Detective Aldredge.

Q Now, I want to talk with you a little bit about the statements that you just discussed.

A Okay.

Q You would agree there was a pretrial suppression hearing in this case?

A Yes, a rather lengthy one, I believe, where I did absolutely, I think, everything I could possibly do in my power to try to get those statements suppressed.

Q And when you were talking about the pleas -- and correct me if I'm wrong -- it seems to me that you were

saying the video was favorable evidence for the defense and helped you in negotiating the plea, is that correct?

A In terms of the fact that you could argue that the statements to Morgan were potentially coercive.

Now, having said that, I didn't have any actual knowledge from James that all of those statements were, in fact, false. And that was the problem. You know, he always maintained with me that, yes, he never came on to her, yes, he never did that, that she came on to him, but, you know, when you look at it from that standpoint, you know, in going through those statements, you know, I had a number of concerns about putting him on the stand.

I'm sure that you've read in the transcript that I didn't keep him on the stand long, and that was intentionally done because he took the stand against my advice.

I was concerned that he was going to say in front of the jury what he had referenced in my office, which was about the fact that he allowed it to go on for a little bit after he realized what was happening. And in light of that it was my advice to him not to take the stand.

Q And now I'd actually like to ask you about the pretrial hearing --

A Okay.

Q -- where you did put him on the stand. And you

referenced the video in the pretrial hearing.

And when Mr. Irby was on the stand, specifically, in pretrial, page 82, he said he had not reviewed the video prior to taking the stand that day. Did you review the video with Mr. Irby?

A Sure did.

Q And do you know when you did that?

A I can't give you an exact date off the top of my head, but I make it a point to go through all of the evidence with every single one of my clients.

Q But you do have a specific recollection of going through the video with him.

A Yes, I do.

Q Okay. So you would disagree with what he said under oath that he hadn't reviewed the video.

A Yes, ma'am.

Q Okay. And then at the end of the pretrial Judge Cole was asking you some questions about how much of the video you wanted reviewed.

Pages 90 through 91 of the pretrial appear to come to the conclusion that he doesn't need to review the entire video. Do you know why you reached that decision that you did not want him to watch the lengthy interrogation?

A Other than the fact that the video was rather lengthy, most of the coercive statements were specifically gone

into.

I mean, we played those portions of the tape in the courtroom about the throwing to the wolves, about a number of the other things.

And other than the length of time in questioning and the manner of questioning, the most relevant questions, you know, I believe were listed in there.

Q And you did make an argument regarding Miranda. You made an argument that they failed to re-Mirandize and there was a break.

Do you think the video would have been helpful to support your argument that there was this lengthy interrogation and Miranda wasn't properly given?

A Well, certainly I think that the video, and parts of the video, were very helpful, which is why we introduced parts of the video and played them for the Court.

In fact, I think if you read the transcript of that hearing you'll find that Detective Morgan was not initially a very cooperative witness. He seemed to not remember anything that occurred during that interview.

Specifically, he didn't remember any of the statements that he made that seemed to be threatening or forceful or coercive. But upon cross-examination, I think, by about the second or third time I asked him about something, he just looked at me. And he said, you know, I'm not sure if

I said it or not but I'm sure you have it cued up on video, why don't you just play it.

So, I mean, I don't know how much more I could have done other than what I did at that hearing.

Q Now, you testified about the video and how it was utilized at the pretrial. And today we put in the record we're going to include the pretrial video exhibit. Why was that video not introduced at the trial for the jury to review?

A Again, I think the key points were to highlight the coerciveness of the statements.

I think if you put in the video the whole video comes in. And the bad thing about the whole video coming in too is there are parts in the video where if you look at the written statement you can see that the detective had Mr. Irby actually go through and after each paragraph -- and I can't remember if he initialed or signed it -- but I'm sure you have them up there -- and basically verifying that what he said was correct.

So despite those key points I felt that the overall character of the video would not necessarily be helpful when he's verifying those things are true, you know, in which case I think you would be up here telling me that I shouldn't have introduced that because I'm introducing a lengthy evidence of my client's confession, so.

Q So you also didn't elicit any testimony from Mr. Irby regarding his confession on direct. It only came up through the cross-examination by the state. Would you agree with that? And I can show you the transcript if you need to review it.

A No. I know what it says. And the answer is, yes, I didn't go into his statement in detail. And there's a reason for it.

I was trying to walk a very fine line between him basically indicating that he never acted or engaged in anything inappropriate versus him allowing something inappropriate to happen. And he indicated he wanted to testify, and I felt that the longer he was on the stand the more damage would potentially be done to his case.

Q But you didn't feel it was necessary to even address his statement and explain to the jury because they could give weight to it, to choose to give weight to it or not, that it was coerced or involuntary. You chose not to ask him a single question about his statement.

A Well, and certainly I don't think I needed to do that after I went after Detective Morgan about the types of questions that he was asked in front of the jury that indicate that, you know, if he didn't do what he was supposed to do and confess he'd be thrown to the wolves.

I think there was a clear record there that we got out

that it was given in a coercive type atmosphere and, as such, I felt like that was the best course rather than to leave my client up there for an extended period of time on cross-examination with someone who I knew to be a pretty decent prosecutor that I felt like ultimately James would crack, he would start spilling his information just like he did to Detective Morgan and we would have problems.

Q But the solicitor then on cross-examination spent pages 179 through 182 asking him about his statement. So his statement was really only addressed by the state in the questions that were asked.

A His statement -- the only thing that it has to do with his statement is the fact that, arguably, it's a confession. That's the only thing that his statement essentially achieved for the state.

So if I asked him if the allegations -- and those allegations being that he had sex -- and, of course, he admitted to other conduct which would constitute a criminal sexual conduct -- were false, there was a reason it was asked that way, and it wasn't because we weren't trying to do what we needed to do for James. It was because that's what needed to happen, because the longer he got left up there, if he told them what he told me in the office, he was done. That's why I advised him not to take the stand. Ultimately, that's not my decision, you know.

Q After he was asked several pages of questions by the state about his statement, you simply asked him on page 182 if he could have written his own statement. And if it's for the same reasoning, that's fine. But is there any reason why you didn't try to address his statement with him then on redirect?
A I felt the longer we got into his statement the more potential there was for bad things to happen in that case.
Q Okay. Now, I've been trying to wrap my mind around the statement, and we actually had some discussions at some points regarding this.
Would you agree that the statement doesn't match the allegations made by the victim in this case?
A I would agree with that.
Q Why did you not ask him about that or point that out to the jury?
A Well, I think that it was pretty clear that it didn't match the allegations. I don't know that I didn't point it out.
Q Do you think a video would have helped the jury understand how Mr. Irby would have gotten to the point that he made a purported confession that didn't even match the allegations in this case?
A No, I don't, because I think when they looked at it, as much as I felt like it was coercive, them being an

untrained eye, is going to look at that video, and they're going to look at him initialing each paragraph on video on that written statement, and we're going to have problems.

Q And I'm glad you said untrained eye. I want to ask you about Dr. Richard Leo.

A Sure.

Q Did you retain the services of Dr. Richard Leo in this case?

A I initially retained his services to do a consultation.

I believe he charged a $2,500 fee to look at the case or review the evidence. And he and I had some discussions, and his opinion, I believe, was as follows: I can't tell you whether or not James' statement is true or false. No one can who is a false-confession expert. All we can tell you is whether or not the elements present in a false confession are present in this case. And in looking at it he had concerns that some of those elements were present.

Now, from a trial standpoint and trial -- strategy standpoint we had a number of issues.

Number one was a monetary issue with his family being unwilling to pay for the services which now they seem to have apparently come up with even at a reduced when they told me that he would do it for a reduced rate because Mary Ann, who is his mother, talked to him. And he said he

would do it for a reduced rate. I asked them if they had the money at the reduced rate, and they said no.

Then you had the issue with he still had to be able to say that the confession was false, which to me meant calling James to say that the confession was, in fact, false. That's what you would want if you're going to try a false-confession case. You have to have the expert testimony, but you also have to have the person come and say it's false.

And for the reasons previously articulated about the manner of the statements and what was stated and what was in his statement, you're correct, did not match what the victim's allegation was. But it was an oral-sex type allegation. And him indicating in my office that he did not stop it, I didn't feel like it would be fruitful to do that.

So we put our best foot forward at the Jackson vs. Denno hearing. The trial strategy was going to be to try to keep that out. If it came in, to make sure it was preserved for appeal, which I believe I did, and, hopefully, to keep him off the stand and try to shed enough doubt on the victim's credibility by calling people like her mom who said it didn't happen to try to win the day.

Now, ultimately, it didn't go down that way. And I had concerns with him before trial going into it about his

mom's or the mother's credibility and her playing both sides and the problems we could have. And I think if you look you'll see that that occurred in this case if you actually read the transcript and you read what she said on cross-examination on page -- give me one second. I will find it for you.

(Pause.)

Q If you're speaking about the recantation testimony it's on --

A Here you go. On page 168, line -- beginning on line 21. This was the question from her after she had indicated that [redacted] had previously recanted.

"Q Did you at any time come out from your room about 2:00 or 3:00 or 4:00 in the morning and find the defendant standing in the hallway naked?

"A I did.

A So what practically happened is we had one witness that might be able to help us other than potentially him, but I didn't feel like he could really help himself.

That was the mother. She had reason to basically throw him under the bus. When she said that in the courtroom, as I looked at the jury I saw every single person in that jury shift. The case was over when she said that. And that was the reality of it.

Q Now, let me go back to Dr. Leo that I was asking you about.

I'm going to show you some exhibits, and then I'll ask you questions about them.

Can you identify what's been premarked as Applicant's No. 7 for the record, please?

A Okay. This looks like an email from my paralegal going through a number of things with Mr. Leo. Looks like this was initially back in 2008, back and forth, and then 2009 some additional things, which basically indicates his prices and things of that nature, what the total estimate for trial would have been, which would have been $10,750, he thinks.

MS. BLANCHETTE: Your Honor, at this time I would move Applicant's No. 7, a series of emails between Mr. Brough's office and Dr. Richard Leo, in as -- into evidence.

MS. GIOVANOLI: No objection.

(Email dated November 13, 2008 marked Applicant's Exhibit No. 7.)

Q Mr. Brough, I'm going to hand you what's been premarked as Applicant's No. 8. Can you identify this for the record, please?

A This is a copy of the initial-consultation retainer agreement with Dr. Leo and my office indicating that he was paid a fee of $2,500 to do a consult. That was back in

December 2nd of 2008.

MS. BLANCHETTE: Your Honor, at this time I would move the letter and retainer in as Applicant's No. 8.

MS. GIOVANOLI: I just request to see it. I think you actually handed me seven again. Yes. No objection.

(Letter dated December 2, 2008, and copy of agreement marked Applicant's Exhibit No. 8.)

Q I'm going to hand you what's been previously marked as Applicant's No. 9. Can you identify that document for the record?

A This looks like an additional billing document for time he had spent on the case back in 2008, reviewing it into 2009, indicating that the total due was $2,800, minus the $2,500 already paid up front. We owed him $300, I believe.

MS. BLANCHETTE: Your Honor, at this time I would move the billing statement in as Applicant's No. 9.

MS. GIOVANOLI: No objection.

(Billing statement dated May 22, 2009 marked Applicant's Exhibit No. 9.)

Q And finally can you identify what's been premarked as Applicant's No. 10 for the record?

A Yes. This is a motion for continuance that I had filed, along with an attached copy of a consent order for continuance where at that time we had intended to call Dr.

Leo in the case. However that was also prior to a number of other developments in the case. But that's fine.

MS. BLANCHETTE: Your Honor, at this time I would move the motion and consent order for continuance in as Applicant's No. 10.

MS. GIOVANOLI: No objection.

(Motion and consent order for continuance dated February 10, 2009 marked Applicant's Exhibit No. 10.)

Q I appreciate you helping me get through those documents. I want to ask you now some questions about them.

A Okay.

Q First about the e-mails, Applicant's No. 7. You indicated these are emails going back and forth between your office and Dr. Leo.

If you need to look through it more clearly, would you agree that you're actually getting what his fee would be and trying to find a date for him to be able to come and testify at the trial?

A Yes. I would also indicate that this was 2009, which was very early in our representation.

Q And I'd like to direct your attention to the motion for continuance and consent order for continuance.

In the motion for continuance would you agree it says, "The defendant plans on calling an out-of-state expert

witness to testify in the area of false confessions. The witness' name is Richard Leo, and his C.V. is attached to this motion. The defendant believes that Mr. Leo's testimony is critical in order for the defendant to have a fair trial."

Would you agree that's how it reads?

A Yes, I would agree.

Q And then a consent order was entered and the case was continued and set for a date certain on June 1st of 2009 so that your witness, expert witness, could be present to testify.

Can you please explain to me what happened from the time you were making this motion on him a necessary witness to what you just explained where you determined he wasn't a necessary witness based upon his findings, I believe? And if I mischaracterized that, I apologize.

A Certainly. What had occurred was, is that James had finally admitted in the office as we prepping for some of his cases for trial -- and, as you can see, these date-certains did not happen for a number of reasons. But he ended up. He and I talked in depth about his case repeatedly, and he ended up admitting to me in session that, you know, listen, you know, I didn't stop it right away.

Now, that to me was a huge red flag, because for a

number of reasons. Number one, if I'm going to call a false-confession expert to say that his confession is false, and his confession is, is that I woke up, she was performing oral sex on me, you know, and that's his statement and he's maintaining that statement, I don't have any business calling a false-confession expert just to call one.

Q Did he maintain that statement when you utilized Mr. Irby as your essentially sole witness to explain the statements at the pretrial hearing without a jury?

A In terms of -- I don't believe he was ever -- I think we didn't ask him as much about the content of the statements, just about the questioning process.

Q Just let me know, if you're taking time to respond, when you're finished.

(Pause.)

A And really the Jackson vs. Denno went to the characterization of how he felt like he was treated. I mean --

Q And isn't Dr. Leo -- he's -- you're saying false-confession expert --

A Uh-huh.

Q -- but did he explain to you indicators he saw of coercive police tactics? So isn't he, in fact, a coercion expert?

A I mean, I don't know that he was qualified as that when we gave -- I'd have to look at his C.V.
Q I'm sorry. I didn't attach it to the exhibit. It is already in the record though --
A Okay.
Q -- as it's rather lengthy.
A I remember him being a false-confession expert. I couldn't tell you whether or not he was an expert in any other area. You'd have to tell me.
Q Correct me I'm wrong, but he couldn't come in. No expert could come in and tell the jury this is a false confession.
A True.
Q He could testify regarding indicators from the interview that showed coercive tactics that could lead to a false confession.
MS. GIOVANOLI: Objection to leading at this point.
THE COURT: I'm going to allow it.
Go ahead.
Q That was my question.
A I'm sorry. Can you repeat it?
Q I will. It probably won't be the same.
A Okay.
Q Would you agree, which I think you just did, that he could not testify in front of the jury that it was a false

confession?
A Agree.
Q But he could testify regarding indicators from the interview that showed either coercive police tactics or coercion.
So why did you not use him to go into that at the Jackson vs. Denno hearing? Why did you only use Mr. Irby?
A Well, for a couple of reasons. Number one is -- and we'd numerous discussions about this -- Mr. Irby and his family, number one, refused to pay for the expert. They did not make any efforts to make that happen despite repeated conversations with them about it.
Number two, while it wasn't perfect -- and no case ever is -- I don't know how much he could have potentially swayed the Court on the voluntariness.
We did what we could with the video evidence we had literally dissecting six hours of video to hit every single key point, get their investigator to admit that there was a problem.
In terms of other than that, you know, that was the way that we handled him when we made a determination that that was not going to be a resource that was available to us.
Q So you dissected the video with Detective Morgan who was the interrogator in the video, not with an expert that

may, I believe you said, gave you favorable findings.
A He did give us some favorable findings, but, ultimately, I don't know that that would have swayed a court one way or another on things.

And when I say a favorable finding, this is just an indication that there are certain indicators of reliability there. But that only went to Morgan's statements. It did not go to anyone besides his. So that didn't go to the statements regarding the DSS caseworker, Ms. Azzara; it didn't go to statements from Aldredge where there started to be some admission of the sexual inappropriateness.

And the problem is, is that James gave a lot of inconsistent testimony in a number of these statements.

I mean, you went from a situation where he's talking to the DSS caseworker about how he has to be careful because that girl's in the house and that she's underage and everything else, to testimony where he's like, yeah, you know, I was sleeping naked out in the living room and, you know, I was sleeping naked with my wife and I always sleep naked and the door's open.

And, I mean, you know, you have all of those issues, and then you have that, and then you have her coming on to him. And that's not in any of Morgan's stuff. So Morgan gets into, yes, there's the oral sex that happens, yes, there's these other issues that happen.

But then, I mean, you've even got his wife talking about, you know, going through, you know, the fact that she sees him naked in the hallway. And she's the person who the child supposedly recants to.

So, I mean, if you're going to sit here and, you know, go through with this, my recommendation was to him that he needed to cut a deal. We went back and forth on it. I begged him to let me cut a deal for him. We went back and forth repeatedly. I talked to his mom about it. We had problems with the case.

Now, us calling a high price and spending $10,000 to bring in a false-confession expert when the confession is not necessarily false, I don't know that that ultimately wins the day for him. I don't think it does.

Q And I want to ask you a little bit about the financial aspect of this.

You indicated that his family did not have the $10,000 for Dr. Leo to come and testify.

A It's my understanding at that time. Apparently, that's changed.

Q I'm just asking you about that time.

A Okay.

Q Did you make a motion similar to, I did in this P.C.R. proceedings, to see if there would be any other avenues such as phone or internet testimony that you could do with

Dr. Leo so you wouldn't have to pay for all of the travel? I think it's four days to get from California to here and for his time.

A Well, number one, I would submit to you that witnesses are always better received in person. So if you're going to have an expert it's always been my opinion you'd be better if they're in person. And-but to answer your question, no, I did not make such a motion.

However, when I was told that there would be zero additional dollars forthcoming, whether I made that motion or not seemed pretty irrelevant.

Q Do you know if you communicated that to Dr. Leo and asked him if he could take a reduced fee?

A Well, after -- I don't know that I communicated that to him. After -- I know I leaned on his mom pretty hard about it after she came to me and said that she had a conversation herself with Dr. Leo and that he agreed to do it for a reduced fee, I specifically asked her if she had the reduced fee to pay him, and she said no.

Q I'm going to show you what's been premarked as Applicant's No. 11. Can you identify this for the record?

A It's proposed jury instruction. Actually, it's not a proposed jury instruction. It's missing a couple of pages.

Q I might have gave you the wrong one.

Let me just ask you this from the record. Did you

request that the jury be charged about a voluntary confession and about the confession in this case?
A Yes, I did based on the statements that Morgan made that we were able to cross-examine him about. I sure did.
Q Okay. And do you recall in your closing argument arguing that -- arguing regarding the statements? I can reference you to page 198 through 199.
A Yes. I sure did.
Q And do you see on page 199 where you specifically start talking about false confessions and the fact they exist?
A Yes. And I believe I also elicited that testimony from the state's witness, Detective Morgan, on cross-examination.
Q So you're arguing to the jury in your closing argument this is a false confession.
A Well, you know, when you're backed against the wall you've got to do with what you've got. So that's what we did.
Q Okay. I'll move on.
I'd like to ask you about Lynn McMillan on page 101 of the trial transcript.
A Yeah.
Q She is called by the state, and she is qualified as an expert in the field of child abuse assessments.

A Okay.
Q I understand the case law has continuously been evolving in this area, but do you have any reason you did not object to her qualification as an expert?
A Other than the fact that, you know, she had been previously qualified in general sessions about 45 or 50 times. I believe we limited her testimony.
THE COURT: Believe what?
THE WITNESS: We limited her testimony.
A She was allowed to go into time and place. I think that was about it. I believe that was my understanding of the case law at the time. You're allowed to go into time and place in the disclosure, but that's about it.
Q On page 100 prior to her being qualified, lines 18 through 22, she talks about the rules for children regarding truth-telling and forensic interviews. Is there any reason you didn't object to that information being given to the jury?
A Well, since -- the question didn't go to whether or not victim was telling the truth, just merely as to the way in which interviews are conducted. I didn't feel like it was proper to object to.
Q And on page 104 she talks about the disclosure that was made by the victim and her demeanor. Is there any reason you didn't object when she addressed or gave

testimony regarding the victim's demeanor?
A Well, I don't know that it was an objectionable question, but I don't think it called for anything other than a lay observation, which she would be allowed to make even as a lay witness.
Q The next witness was Dr. Nancy Henderson.
A Okay.
Q On page 113 she's referencing a specific article about it's normal to be normal. Had you reviewed that article or had any understanding of that article before she was testifying to it?
A I had not reviewed that article. I don't believe it was disclosed to me.
I do know that her testimony in every single case is essentially that being normal and having your hymen intact isn't consistent with sexual abuse. But she also admits on cross-examination it's also completely consistent with nothing happening. My personal opinion of her aside, she's been qualified as an expert a million times.
Q Now I'd like to turn to the testimony of Lillian Dannette Collins, and we've discussed -- you discussed her quite a bit already from the stand.
A Okay.
Q In your opening you tell the jury on page 49, line nine, that they will hear testimony that the victim

recanted in a counseling session with her mom present.
A Okay.
Q Then on pages 62 through 63 on cross-examination you asked the victim about it.
A Yes, I did.
Q And she says they had one joint session with her mom and she never said nothing happened.
A Okay.
Q Okay. Then the choice is made by the defense to call Ms. Collins.
A Yes.
Q Take me through -- and if you've already addressed it, you know, just briefly -- the decision-making process at that point to put Ms. Collins on the stand and to open up with the recantation in your opening argument.
A Well, we needed to get the jury to hopefully starting to side with Mr. Irby, and so we wanted to make sure that they had some reasonable expectation that this potentially didn't happen or that there was some doubt that this happened.

I think if the child tells her mother who's supposed to be her protector and guardian that something didn't happen, that's a pretty powerful evidence that it, in fact, did not happen.

The reason we asked VICTIM is because, as I'm sure

you're aware, hearsay is not admissible in court. However, if we were to ask the victim if she made a specific statement with other people present, then certainly we -- and she denies it -- then certainly we can call that other person as a prior inconsistent statement as an exception to the hearsay rule, which is exactly what I did.

Now, in terms of my concerns with her, yes, I had concerns with her. I also did have a written affidavit from her.

And since James had turned down any offer at that point, my concerns with her, you know, just more things that had to be dealt with.

There's no way I could try a case like this and not call a witness to whom the victim had potentially recanted to. I would submit to you that if I failed to call her I would have been ineffective.

Q And you indicated that you limited -- sorry -- Lynn McMillan's testimony to time and place --

A Uh-huh.

Q -- based upon the case law at that time. But as a result of Ms. Collins' testimony the state then called Gina Odom.

A Okay.

Q And on page 185, line 20, she says the victim always remained consistent --

A Yes.
Q -- in her disclosures. Thereafter you objected. And I will just summarize and then ask you a question.
You argued McCurley which was a more recent case at that time and said it was a seasoned prosecutor and they had essentially done prosecutorial misconduct by eliciting that testimony in front of the jury.
In response on page 189 the state argued that it was on the heels of your witness saying the victim recanted. And ultimately on page 190, line 25, through 191, line six, Judge Cole finds that the testimony is admissible simply because was on the heels of your witness.
A Okay.
Q Did you go into trial anticipating that Lillian Collins' testimony would open the door to otherwise inadmissible testimony?
A Even if it did it didn't matter because I could not, not in good faith, introduce evidence that the victim said it didn't happen.
There was no forensic evidence. It was the victim's word. If the victim said it didn't happen and I didn't put that evidence in, even if it opened the door to other evidence coming in, because there was a big dispute about, you know, what Lillian thought about the counselor and the fact that a counselor refused to schedule additional joint

sessions -- even if it did open the door I would do it again a million times, because it was evidence that it didn't happen.

I don't think I would have been effective representing my client if I didn't put in evidence of a recantation in a sexual misconduct case. And I would submit to you that I would not have been a good lawyer had I not put it in.

Q On page 208, lines 13 through 16, the state argues in their closing argument the victim is consistent as a result of Gina Odom being able to testify, as a result of Lillian Collins being able to testify. Understanding your answer, but did you anticipate going into trial that you were going to open that door and give the state that argument?

A I thought there was a chance we could keep it out. I thought there was a chance they could just get into whether or not that happened and not prior additional consistencies after that, which was the basis of my motion for mistrial that I made based on prosecutorial misconduct. And whether I agree with the judge's decision or not, you know, I felt like we did what we needed to do in the case.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.

THE COURT: Certainly.

(Pause.)

Q So if I understand your testimony correctly, at trial

you had to call Ms. Collins, or it was your belief you had to call Ms. Collins, to refute the allegations made by the victim.

A Uh-huh.

Q But yet you still have this statement out there. If you would have been able to suppress that statement do you think you would have needed to call Ms. Collins?

A If I would have been able to suppress whose statement -- James?

Q James' statement.

A I think I still would have needed to call her, because even if James' statement doesn't come in the fact that the victim admitted it potentially didn't happen is huge for the defense regardless of anything else, because whether or not the state's going to argue that the victim is consistent at some level, the jury's heard evidence that she wasn't. And so, I mean, you have to call her.

Q And did you advise James -- because you said you anticipated that it could open the door to the inconsistent testimony -- did you advise James of that when you were discussing whether or not Lillian Collins should be called?

A I don't know that he and I had that specific conversation.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.

(Pause.)
Q Mr. Brough, were you aware and do you recall having a statement from Ms. Collins in your file indicating she did not want to prosecute on the C.D.V. charge?
A I don't --
MS. GIOVANOLI: Objection as to relevance.
THE COURT: What's the relevance?
MS. BLANCHETTE: He testified regarding the C.D.V. charge and how that had changed some of his trial preparation. That was towards the beginning of his testimony. But he multiple times, as I recall, referenced the C.D.V. charge between Mr. Irby and Lillian Collins.
THE COURT: Go ahead and answer if you can.
THE WITNESS: Okay.
A I haven't done an in-depth review looking for that statement prior to today, but, I mean, I can try to find it if you want to give me about 30 minutes.
MS. BLANCHETTE: Your Honor, may I approach the witness and save us all 30 minutes?
Q Do you recognize this document?
(Pause.)
A I do. My understanding is, is this is her asking for a lesser charge. I don't know that it says that she doesn't want anything to happen to him.
Q Are you familiar with that document?

A In reading it now, I do believe that I might have had this, yes.
Q Okay.
A But, you know, my understanding from this document is, is that she read that the Court can suspend the imposition or execution of all or part of a sentence conditioned upon the offender completing a program designed to treat batterers. And she is consenting and requesting a lesser charge.

MS. BLANCHETTE: Your Honor, I have no further questions.

MS. GIOVANOLI: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. GIOVANOLI

Q Thank you for being here, Mr. Brough.

I'm going to go back. You said that you represented the applicant in a DSS case as well.
A Yes, ma'am.
Q Okay. What exactly was the basis for that DSS case?
A It was the same set of factual allegations, that there was sexual abuse committed against the minor in the home where he was acting as a parental figure.
Q Okay. And did you also represent him on the DSS child support case?
A No.

Q I wanted to go to -- there was some testimony on page 77. I believe it was the -- yes -- pretrial Jackson vs. Denno hearing.

And on direct review you disagreed with his testimony -- I'm sorry. It's not page 77. It was from Irby. I'm not sure what page. But he testified that he hadn't reviewed the video, the interrogation video. Do you recall that? And you testified that you had reviewed the video with him. You disagree with that testimony that he -- he gave during that hearing.

A What page is that on?

Q Well, I was going to ask you a question about page 77 but --

A Okay. You can. You can ask.

Q Okay. So during the pretrial hearing he testified that he hadn't seen the video. And on direct examination you testified you disagree with that testimony.

A Yes, ma'am.

Q Did you also disagree with his testimony on page 77, lines 17 through 20, where he says, "Well, I mean, in the video, I mean, he told me about, you know, if I told him something he would give me five years, but if I didn't tell him something he would give me 20 years"? That was Mr. Irby's testimony.

Did he actually -- was that -- did that ever happen on

the -- the D.V.D. of Detective Morgan's interview with the applicant?

A What Morgan did is he didn't -- he referenced other cases so he --

Q Did you tell him what the -- the applicant testified to? "He told me if I gave him something he would give me five years, but if I didn't tell him something he would give me 20."

A I don't recall that specifically. I recall the throwing-to-the-wolves specifically. I recall the how-do-you-want-to-portrayed specifically as someone who is remorseful or not in front of the jury. There are a number of things I remember. I don't remember that one specifically.

Q Okay. Would you agree that that wasn't in the D.V.D. of Detective Morgan's interview?

A I'd have to rereview the -- and I haven't but --

Q All right. And I'm just touching on a little bit of your direct testimony before I get into some other questions.

At the time of trial what -- what year was this?

A In terms -- in what, the Jackson vs. Denno or the trial?

Q The trial was January of 2012, is that correct?

A That was November of 2012. November 18th and 19th of

2012 was the trial. And then January 29th of 2011 was the Jackson vs. Denno.

Q So you're in trial in November of 2012.

A Yes.

Q Okay. And were you familiar with the State vs. Douglas case in 2009 that actually said forensic interviewer's explanation of the importance of telling the truth in interview was not improper bolstering?

A Yes.

Q Do you recall that?

A Yes.

Q So that was the proper state of the law at the time of this trial, correct?

A Correct. And, again, I think that I tried to indicate that that questioning didn't go to specifically --

Q Sure.

A -- in trial whether or not the victim was telling the truth.

Q Well, were you also aware that Douglas was abrogated in 2015 by State vs. Anderson?

A Okay.

Q This is after the trial, correct?

A Yes, ma'am.

Q So the authority at that time was State vs. Douglas, is that correct?

A Yes.
Q Okay. So you did not play the entire 6-hour D.V.D. of the interview of the applicant by Detective Morgan in the pretrial hearing, is that correct?
A That is true.
Q And you testified that you only played the relevant portions in order to make your arguments to the Court for a suppression, is that correct?
A Yes.
Q Okay. So, and you were talking a little bit about your cross-examination of Detective Morgan. And it's all in the record. But each time he didn't recall something you actually played that specific portion of the D.V.D. where you found his -- his statements to the applicant were coercive, is that correct?
A That is correct.
Q So the Court heard all of the coercive statements, or arguably coercive statements, by Detective Morgan, is that correct?
A Yes. And on a couple of occasions after he somehow did not remember them and then all of a sudden he did.
Q Going to, let's say, false-confession expert, slash, coercion expert, are you aware of any case law in South Carolina in this jurisdiction that supports the admissibility of such expert testimony?

A I'm not aware of any, but I -- I haven't researched it again prior to today, so.
Q Okay. Do you know of any other cases where an expert of that type has testified in this jurisdiction?
A No. I'll -- I have to go hunting to find that.
Q Have you ever used a false-confession expert in another case where you had a confession?
A No, ma'am.
Q Do you know of any other colleagues, lawyers, friends that use one?
A Not anyone locally. My understanding is there was another gentleman out of Massachusetts as well. But he was actually more expensive, I believe, than Dr. Leo was.
Q So this isn't a common practice in criminal law when there's a confession to call a false-confession, slash, coercion expert.
A No, ma'am.
Q But you investigated calling this expert, didn't you?
A Yes. I -- I found him.
Q What gave you that idea?
A In reviewing the video I had some concerns about the manner in which Detective Morgan was asking questions and the length of time, which was all brought up.
Q So is it safe to say that the theory of coercion was more of a theory that you came about with and not actually

Mr. Irby?
A Yes. That was -- we tried to go ahead and do that. We had talks with him about the fact that he confessed, and -- you know, and we talked about that and, you know, he'd indicated he just had to tell him something, whatever that was.
Q And you keep saying confess, and I've been using the word confession. But isn't it true that there's actually a legal distinction in South Carolina between a statement from which you can infer guilt, a statement of facts from which you can infer guilt, versus a confession?
A If you say so. I don't know.
Q I'm asking if you're aware.
A I'm not aware.
Q Okay. Then I'll move on.
A Okay.
Q Did you have a discussion with opposing counsel regarding Dr. Leo, Professor Leo, not recalling your conversations with him because he didn't have records?
A I did.
MS. BLANCHETTE: Your Honor, I object. Opposing counsel is not a witness in this case. I think under Rule 3.7, the State vs. Ciera, that's an improper question.
THE COURT: All right. I sustain the objection.
Q Are you aware if Dr. Leo kept records based on your

conversations with him?
A My understanding is, is that he had no recollection of ever reviewing this case for a period of time afterwards.
Q Okay. And I apologize. I'm looking over my notes. Your testimony is very thorough.
(Pause.)
Q Okay. And with regard to the allegation that you didn't effectively cross-examine Dr. Nancy Henderson, is it fair to summarize her testimony as the victim had a normal physical exam but that can be still consistent with abuse, sexual abuse? Is that the extent of her testimony?
A Yeah. That's pretty much what she said. I mean, I hate to say she says it in every case, but she does.
Q Okay. And so on cross-examination you hammered on the fact that the victim's physical exam was normal -- no tears, no scars, no -- that her hymen was intact. But you also elicited testimony that that could be consistent with no abuse.
A Correct.
Q Okay. And you saw no other better avenue of cross-examination of Dr. Henderson?
A No, ma'am.
Q Have you cross-examined her on previous cases?
A I sure have.
Q Okay. There was some allegations of -- I'm going to

withdraw that question. I believe that allegation has been withdrawn.

It was your testimony you advised the defendant not to testify, is that correct?

A That's correct.

Q How did the defendant -- applicant in this case -- feel about calling Lillian Collins? Did he have a say in that?

A Well, I think he felt initially like she would have been helpful. I mean, my understanding is, is that, you know, I mean, during the pendency of the DSS case, I mean, they -- she was still living with him for a while and the child was out of the home.

Q Well, let's talk about at the time of trial, because I understand that there was a tumultuous relationship, ups and downs, leading up to the trial. The day of trial was the decision to call Lillian Collins only yours or did Irby also, Mr. Irby also --

A The week before we had a conversation, and he thought that she would still be helpful to him. He thought that everyone was going to help out his case. He thought she was going to be helpful. He thought this Bernadette Smith woman would be helpful, although I didn't see any actual added value to her testimony. I think she testified here today. I don't think that would have swayed anything one

way or the other. I had concerns about Lillian because I knew she was playing both sides of the fence.

Q But despite those risks, you felt compelled to call her as a witness.

A That's why -- if you notice on the -- on the witness list we also listed a Kirby Lanford. She was the notary that took the statement in case Lillian backed up on it.

Q So the allegation has been made that by calling Lillian you opened the door to otherwise inadmissible testimony. You understand that.

A Uh-huh.

Q And you were asked if you anticipated that. Is it fair to say that you did anticipate it because you argued against that testimony? You actually moved for a mistrial under McCurley as that being inadmissible testimony.

A I think that there was a good chance that they could try to go there, but I felt like we had a decent argument that they could only get into the fact as to what happened in that situation, you know, to rebut that.

I don't feel like them admitting additional testimony from other instances was relevant or appropriate. That's why I made the motion I made.

MS. GIOVANOLI: I have nothing further.

Q Thank you very much.

MS. BLANCHETTE: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. BLANCHETTE

Q The state asked you questions about Dr. Leo and it being somewhat of a novel idea for you to utilize a false-confession expert and if you're aware of any cases where a false-confession expert had been used.

At the time of this trial were you aware of State vs. Myers which was a Supreme Court opinion issued in 2004 that addresses a Dr. Kassin used as a false confession expert? And I'm sorry. He was an expert in social psychology dealing with confessions and false or coerced confessions.

A I don't recall specifically this case, but I think he was a gentleman in Massachusetts I might have been referring to. I can't remember.

MS. BLANCHETTE: Would Your Honor like a copy of the case?

THE COURT: If you want me to read it.

Q And in this case it's not contested whether or not a false-confession expert can be utilized in South Carolina, but here the issue on appeal was whether or not he could compare specific cases to the other cases.

So the state was not contesting here whether or not a false-confession expert would be utilized. So it wouldn't have been the first time a false-confession expert was utilized if you would have called Dr. Leo. Would you agree

if that's what the case reflects?
A I mean, I haven't read it, but I'll go along.
Q I can show you the section.
A I mean, if it's in there, then I can't argue. And it's not the --
Q It'd be on --
A -- first case. Whether I was aware if it's the first case, I couldn't tell you that.
Q It'd be on page four of five, says Dr. Kassin under point No. 4.
A Seems like part of this testimony was in with something that was kept out.
Q Okay.
A I mean, that's -- I mean, that's a cursory reading of it but...
Q And were you aware of State vs. Cope which was actually finally decided on August 28th of 23rd [sic] or 2013? But the Court of Appeals had been issued in a 2009 addressing the utilization of a false-confession expert.
A Which opinion is that?
Q State vs. Cope.
A Do you have the appellate court opinion?
Q I do not have the Court of Appeals opinion. This is the Supreme Court opinion.
A I don't know how that would be relevant since it was

decided after.
Q But do you remember researching State vs. Cope?
A Not specifically, no.
Q And you filed a motion that we've discussed for a continuance stating that the witness' name is Richard Leo. His testimony is critical to a fair trial and he'll testify in the area of false confessions. Then a consent order was entered for a date certain for Dr. Leo to testify.
At any time did the state file a motion under Daubert to exclude his testimony?
A I don't believe that they did, but I don't believe that we had given them any kind of written reports or anything at that point either.
Q And would you agree that a Daubert motion would have to be made and then both parties would have time to respond and a hearing would be held as to whether or not his testimony could be excluded?
A That would be a procedure.
Q Do you recall that procedure ever being initiated in this case?
A Again, as we had not done and followed through with the payment of this expert -- and we had concerns about presenting this case as a straight-up false-confession case, or I did -- no, that was not done.
MS. BLANCHETTE: Your Honor, I have no further

questions.

MS. GIOVANOLI: I would just follow up with two questions.

RECROSS-EXAMINATION

BY MS. GIOVANOLI

Q In your cursory review of Cope and Myers you're aware that the issue of actual admissibility of this type of expert testimony was not addressed in those opinions.

A I saw -- and understand I looked at it for about 30 seconds -- but I did see a reference in there that it was left in the sound discretion of the trial judge as to what to allow in.

Q Okay. But that wasn't the issue taken up on appeal, actual admissibility of that expert testimony.

A Again, I -- you gave it to me for like 30 seconds, so I'll be happy to review if you want.

Q With regard to the Daubert motion --

A Yeah.

Q -- the state never made, you filed this motion for a continuance, and you basically alleged that you were going to call a false-confession expert. That was early in the stages of the trial preparation, is that correct?

A It was.

Q And so there was nothing solidified that you were actually going to call him. You didn't get any reports.

You didn't provide those to the state.

A This initially started off as a case that they were really pushing hard and that they weren't going to offer anything and that there was no deal and the state was going to push it through pretty quickly.

It turned into a lot more than that after we gathered a number of other evidence. And some of that other evidence changed my opinion as to who I would call and how I would handle things.

Q Okay. No further questions. Thank you, Mr. Brough.

THE COURT: Thank you very much. You may come down.

MS. BLANCHETTE: Your Honor, at this time I need just a moment to prepare to call Dr. Richard Leo from California over the internet, and I could use a moment at the restroom.

THE COURT: Take ten minutes.

MS. BLANCHETTE: Thank you, Your Honor.

MS. GIOVANOLI: And just to briefly address, Mr. Brough I believe needs to be somewhere.

I am okay with having him excused, but, at the same time, if something comes out and the state -- in the rest of the applicant's case, I would request that I could supplement the record with an affidavit from Mr. Brough at least defending the allegations made against him.

THE COURT: Any objection?

MS. BLANCHETTE: Never been asked that before, Your Honor.

I would like to be able to cross-examine him on any information contained in that affidavit. So I think in the interest of my client's rights I need to object to that.

THE COURT: Well, let's don't anticipate things that might not happen.

MS. BLANCHETTE: Okay.

THE COURT: Mr. Brough, you are excused. You may be subject to recall.

THE WITNESS: Yes, sir.

(Whereupon, the witness was excused.)

MS. BLANCHETTE: Thank you, Your Honor.

(Whereupon, a recess was taken.)

MS. BLANCHETTE: Your Honor, at this time I would call Dr. Richard Leo to the stand.

(The following testimony is submitted per a skype connection.)

DR. RICHARD LEO, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. BLANCHETTE

THE COURT: Ms. Giovanoli, do you need to move over here?

MS. GIOVANOLI: No. I can hear perfectly fine, but when I question him I'll move.

DIRECT EXAMINATION BY MS. BLANCHETTE

Q And, Dr. Leo, right now the frame is cutting your head off a little bit. We can't see above your glasses.

(Pause.)

Q That works perfectly.

A I can adjust it a little bit. Thank you.

MS. BLANCHETTE: Your Honor, at this time it's my understanding that the state stipulates to the admissibility and the information contained in Dr. Richard A. Leo's 56-page curriculum vitae.

MS. GIOVANOLI: Yes, Your Honor. I'm stipulating to that but not necessarily qualifying him as an expert.

THE COURT: All right. Stipulation is accepted.

MS. BLANCHETTE: And that will be Applicant's No. 15, I believe.

(Curriculum vitae of Dr. Richard A. Leo, PH.D, J.D., marked Applicant's Exhibit No. 15.)

MS. BLANCHETTE: Your Honor, since the C.V. is in the record, I will rely upon that and not ask questions regarding it. But what I will ask Dr. Leo's is other questions regarding his qualifications.

Q Dr. Leo, can you hear me okay?

A I can, yes.

Q Okay. Dr. Leo, have you been qualified as an expert in courts in the United States before?

A I have, yes, many times.
Q And what is the typical qualification that you receive? What is the title?
A Well, typically as an expert in social psychology and criminology with a specialization in police interrogations, psychological coercion and false or unreliable confessions.
Q Do you know approximately how many times you have been qualified in the United States?
A Approximately 340 times going back to 1997.
Q Have you ever been qualified in the state court of South Carolina?
A I have at least on one occasions, yes.
Q Okay. And we have stipulated to and entered your curriculum vitae, which is 56 pages in length, that sets out your positions, your articles, your publications, just a number of different things. But approximately how many articles have you written in the area in which you have been qualified as an expert?
A Approximately a hundred or so articles going back to 1992.
Q And when you have been utilized as an expert in this area do you always testify or sometimes do you just merely consult with the attorneys?
A No. Oftentimes I merely consult. In fact, the vast majority of times I merely consult.

Q Do you have any idea of the number of cases you have consulted on?
A Yeah. At this point over 1,900 cases.
Q Okay. And do you also work on cases outside of the United States?
A I have worked on some outside the United States, yes.
Q Okay. And do you offer training in classes in the area of your expertise?
A I have, yes, both to police and to university students.
Q Okay. And those would be detailed in your curriculum vitae, is that correct?
A Correct, yes.
Q Okay. And do you recall how many times you have not been qualified as an expert and not been able to testify?
A Yeah. My -- my testimony has not been permitted about 12 or so times. Sometimes I -- I'm not sure it's always been because I haven't been qualified. It might be that I'm qualified in the nonlegal sense but there's a reason that the judge does not allow the testimony which has nothing to do with my qualifications.
Q Okay.
MS. BLANCHETTE: Your Honor, at this time I have not received any type of formal objection from the state or written notice as to objections that they have to Dr. Leo.

It's my understanding they do have objections. I'd ask that I be able to further question him after I hear their objections to his qualifications so I'm not just shooting in the dark.

THE COURT: Okay. I'll hear from the state.

MS. GIOVANOLI: Yes, Your Honor. May I engage in voir dire?

THE COURT: Sure.

VOIR DIRE EXAMINATION

BY MS. GIOVANOLI

Q Hi, Professor Leo. I'm going to be standing right to the side of the computer. But let me know if you cannot hear me.

A Okay. Great.

Q Okay. So you testified that you had had, let me see, testified as an expert 340 times in the past, is that correct?

A Correct, yes.

Q But not all of it has been with regard to police coercion and false confession, is that correct?

A Well, most of it has been, yeah --

Q Okay.

A -- with regard to police interrogation and/or psychological coercion and/or false confessions, yes.

Q And are you aware of how many of those times that you

were allowed to testify that that testimony was actually found inadmissible in a higher court and overruled?

A Well, the -- all of the times that I've been permitted to testify the testimony has been admissible. It's never been overruled. The dozen or so times where I was not allowed to testify, I never did testify.

Q Right.

A So there was -- there -- the -- the higher courts don't invalidate the testimony when it's admitted.

Q Okay. So you've testified at the trial-court level, correct?

A Yes, mostly at the trial-court level, occasionally in some post-conviction hearings like this one as well.

Q Okay. But you're aware that some of those -- in some of those cases they've been appealed to appellate courts, and the appellate courts have found that your testimony was improperly admitted, is that correct?

A No. I -- I don't think so. There was one case in Kansas where the appellate court said they would not have admitted the -- the testimony but the -- the -- there was -- there had been a Daubert hearing.

The trial court said it was fine. The defendant got convicted. That's the only one I'm -- I'm aware of where an appellate court has said that second -- second-guessed the trial court.

There have been some case where the appellate courts have reversed a conviction because I've been excluded. But in terms of second-guessing the admissibility decision, just that one case in Kansas. The defendant's name is Artice Cobb. That's the only one I'm aware of.

Q Yeah. And that's State vs. Cobb, 30 Kansas, Appellate Reporter, 2d, 544, is that correct?

A Yes, yes. That's the only case I'm aware of where there was -- where a court opined that they would not have admitted me -- appellate court -- even though the trial court did. And I think that court -- that case is now almost 20 years old.

Q Yeah. That was actually in 2002.

Did you also testify in People vs. Kowalski, a Michigan case?

A Well, I didn't -- no, no. I didn't testify because the testimony was not allowed. That's exactly what I -- that's exactly what I was getting at when I said there's a dozen or so cases where a court has not allowed my testimony.

Q Okay. And that testimony was actually proffered in Kowalski, right?

A Well, it may have been proffered, but it was never accepted.

Q Right, that -- because the appellate court said that

your testimony flunked any sort of scientific test, is that correct?

A I don't recall. They published their decision. I don't recall what -- what their reasoning was, but I do recall that they -- that they said the testimony was not admissible.

Q And that was in 2012. Then what --

MS. BLANCHETTE: Your Honor, I have an objection.

THE COURT: What's the objection?

MS. BLANCHETTE: Your Honor, I'm concerned that we're getting into a Daubert hearing here by her asking about the scientific value of his testimony.

THE COURT: We haven't gotten there yet.

MS. BLANCHETTE: And there has been nothing filed. I've received no written notice. I'm not prepared to --

THE COURT: This is voir dire. Overruled.

MS. BLANCHETTE: Thank you, Your Honor.

MS. GIOVANOLI: Thank you, Your Honor.

Q Okay. And then in Vent vs. State -- that was an Alaskan case -- that Court of Appeals found that your conclusions were unquantifiable and unhelpful to a jury. And that was in 2003, correct?

A It was actually in 1998. The published opinion may be 2003. Again, I -- I know that they did not permit the testimony but I -- I don't recall what they wrote, although

it is published.
Q Okay. And then in United States vs. Deuman, that was a United States District Court in Michigan, said that your research and theory is not sufficiently reliable and testimony was more prejudicial than probative, minimal probative value with significant potential for unfair prejudice. And that was in 2012. Do you recall that one?
A Yeah, I -- I do recall that -- that -- that case, yes.
Q And did you read that that -- oh, excuse me. Let me skip on to the next. State vs. Wooden. There was an Ohio Court of Appeals case in 2008. They found that your testimony was not scientifically reliable, is that correct?
A Yeah. They were affirming the exclusion of a trial court. I don't -- again, I don't recall the basis for it.
Q Okay. And then People vs. Linton was a Supreme Court of California, which you're actually located in California. This was 2013. They found your testimony was highly speculative, is that correct?
A I -- I don't recall. I -- I testified at the trial level in that case, or I was going to in 1999. But I didn't testify. And I think you're -- you're quoting from a 2013 opinion that came out many, many years later.
Q Okay. And then also Jimerson vs. State. That was an Indiana Court of Appeals in 2016, so pretty recently. "Experts may not comment about the specific interrogation

in controversy in a way that may be interpreted by the jury as the expert's opinion that the confession in that particular case was coerced or false as this would invade the province of the jury."

And this was actually your testimony. They limited that to false -- the phenomenon of false confessions and the problematic practices generally. But they didn't allow you to testify with regard to the specifics in that case. Do you -- is that correct?

A I -- I think that's right. So -- so they permitted my testimony, as most courts do, but -- but of course I didn't testify to the ultimate issue. And I think that's what that is getting at, your quote.

Q But you -- but you were only allowed to testify with regard to the general phenomenon of false confessions in that case, is that correct?

A I'm not sure. I -- what I heard -- first of all, I don't remember what specifically I did and didn't testify to. But what I thought I heard you say was that I couldn't opine about whether the confession was false.

Oftentimes I testify about techniques in an interrogation, and their known effects, which is case specific testimony. But I don't opine about the ultimate issue. So I don't recall if my testimony in Jimerson was purely general or if there was some case specific analysis

short of the ultimate issue.
Q Okay. But are you familiar with the Indiana Court of Appeals' opinion in that case?
A I have not recently read it, no.
Q Okay. So you're not aware that they found that you were only -- you should have only been allowed to testify with regard to the general phenomenon of false confessions.
A If -- if that's what they said, correct. I don't recall what I testified to, but they did allow me to testify.
Q Okay. And then Walker vs. State. This was an Alabama Court of Appeals' case. The P.C.R. judge actually there -- his decision to exclude your testimony regarding false confessions was affirmed because it would not assist the trier of fact, is that correct?
A If you have a published opinion, then that is correct. That one I don't recall. But if -- if it's a published opinion, then -- then, yes, of course that's correct.
Q Well, did you have any involvement in Walker's P.C.R.?
A I believe I did, yes. But I didn't recall being excluded in that case.
Q Okay. Well, that -- that's an Alabama Court of Appeals, 2015, case.
And then Commonworth vs. -- Commonwealth vs. Alicia. That was actually in Pennsylvania Supreme Court. The trial

court admitted general testimony, again, about the general phenomenon of false confessions.

The Pennsylvania Supreme Court said it was inadmissible because it's an impermissible invasion of the jury's sole role as exclusive arbiter of credibility. That was in 2014. Do you remember that one?

A I don't remember the year, but, yeah, I'm aware of that case, yeah.

Q And then State vs. Rafay. Were you involved in that case? That was a Washington case.

A Yes.

Q And the Court of Appeals found that your testimony was inadmissible in that case as well because of unreliability on your theories and methodology. That was 2012. Is that correct?

A Yeah. Well, I don't -- if -- if -- I have not read that case recently, but I believe my testimony's proffered around 2003 in that case, or 2006, something like that. So many years ago. So whatever the court says, the court said. Obviously, we can all read it. But I do remember not being permitted to testify in that case.

Q Okay. And just --

MS. BLANCHETTE: Your Honor, I would object again. I feel this is going towards legal argument if she wants to argue these cases to Your Honor, but I don't see that

there's any -- not sure questions being asked of Dr. Leo.

THE COURT: I do.

MS. BLANCHETTE: Thank you, Your Honor.

THE COURT: Overruled.

Q Okay. And then there's only three more cases I wanted to mention where you were actually the subject of the expert testimony.

It's State vs. Davis. You were involved in that Missouri case, correct?

A Yeah, in 1997, 20 years ago, was -- was when the trial court there did not permit me to testify.

Q Okay. And then the Missouri Court of Appeals in 2000 found that it was inadmissible because of credibility testimony that encroaches upon the jury's duty to determine reliability of a defendant's statement. They found that your testimony encroached on that. Do you recall that opinion?

A No, no. I -- I recall the appellate court upholding it. But, again, I haven't read that opinion in many, many years. So I don't recall the specifics.

Q Okay. And then People vs. Ramos. That was also a California Court of Appeals, Second District, case. Were you involved with that one?

A Actually, I was not involved with that one, no. The defense attorney was dishonest and represented that I would

work on that case. And so I was not involved in that case. I had not been retrained in that case. I'm aware of the published opinion. It's based on erroneous statements, misleading statements, to the Court from the defense attorney.

Q Okay. Well, in that actual opinion they actually found your testimony inadmissible because the jury could understand and evaluate all of the evidence presented without the assistance of an expert on police interrogation. So that's not your recollection of that case?

A No, no, no. There is a published opinion. I -- I don't recall the specifics, but if you're reading from it, I'm sure you're reading accurately.

What I'm saying -- you -- you'd asked me a prior question was I involved in that case, and I was not involved in that case. I'm not disputing what you're reading from, the published opinion.

I'm merely telling you that I never worked on that case. And the defense attorney misled the trial court, which is what led to the trial court's exclusion of my testimony, even though I wasn't working on the case, which was then upheld by the appellate court, which is the opinion from which you are reading.

Q Okay. Thank you for that background.

And then cases that didn't specifically involve you but your colleagues, there's New Jersey, New York, a Tenth Circuit Court of Appeals case for the federal circuits.

THE COURT: I sustain the objection.

MS. GIOVANOLI: Okay. Thank you, Your Honor.

Q Okay. So now going to kind of the science, you've been studying false confessions since the 80s, is that correct?

A Since the 90s, not the 80s.

Q Okay. So almost 30 years. And you and your colleagues can still not adduce with any certainty how often false confessions occur.

A Yeah. We -- we don't know the precise rate at which false confessions occur because the government does not keep track of all of the interrogations from which we could do a random sample to find out.

We know that they're far more common than anybody believed, and we've documented hundreds and hundreds of cases. But whether they occurred one percent, ten percent, twenty percent, no. We don't know the precise frequency of false confessions given to police in interrogation. That's correct.

Q Okay. On a smaller scale would the interrogation --

MS. BLANCHETTE: Your Honor, I object. At this point we're going into a Daubert hearing. I've received no

motion. The state hasn't moved to exclude his testimony under Daubert.

THE COURT: Explain. Where are you going with this?

MS. GIOVANOLI: Well, I believe any expert testimony is required to be found to be reliable and --

THE COURT: I understand. But I don't understand that this man is about to testify as to any confession in this case.

MS. GIOVANOLI: That's what he's being admitted -- his report that's been relayed to me as addressing this case specifically.

THE COURT: Okay. Do you have any report?

MS. BLANCHETTE: Yes, Your Honor. I have his -- I have not gotten to that yet, Your Honor. I have provided his report to the state back in August.

THE COURT: But he wasn't used, correct?

MS. BLANCHETTE: Correct. He was retained and not utilized at trial so therefore we've picked up -- he has now done a report and is prepared to testify.

THE COURT: Now?

MS. BLANCHETTE: Yes. He has rereviewed the interrogation, along with all of the materials, and has issued a report.

THE COURT: Posttrial.

MS. BLANCHETTE: Posttrial, yes, Your Honor.

THE COURT: He's going to offer what kind of opinion, that he knows something about -- he reviewed? Picture is coming a little clearer.

MS. BLANCHETTE: Yes, Your Honor.

THE COURT: I had no idea that he was going to testify about this case in hindsight.

MS. BLANCHETTE: Yes, Your Honor. What I intend to do is first ask him about his interactions with Mr. Brough when he was originally involved in the case.

THE COURT: I expected that.

MS. BLANCHETTE: Then I intend to ask him about rereviewing everything that he recalls reviewing. And he actually issued a report at the state's request, even though we don't have to do reports. I had him --

THE COURT: The state's request?

MS. GIOVANOLI: I did not request a report.

MS. BLANCHETTE: I'm sorry, Your Honor. That may have been a discussion with a different assistant attorney general. I agreed to generate a report because of the nature of -- you know, he was going to have very lengthy findings.

I provided that report back in August. And why I'm objecting to this Daubert type question at this point is --

THE COURT: I understand that if we --

MS. BLANCHETTE: -- once that's provided they should

have made a motion.

THE COURT: I understand that.

MS. BLANCHETTE: Also, Your Honor, I previously provided Myers and Cope. In both of those cases doctors were admitted -- Dr. Kassin that he's worked with and is familiar with -- as false-confession experts.

The only issue on appeal was whether they could testify and compare the instant case, the Cope case, to other cases they had handled.

Our courts in both instances found that was too far for them to go. I'd say we're past all of that at this point, the false-confession expert's accepted area of expertise.

I understand the trial court has discretion under 702 to make a different ruling at any time, but I think the state would have had to move under Daubert, if that's what they're attempting to do now, to exclude this type of social science.

I did receive a list of cases from Westlaw, and we did have some discussions about cases she was looking at, of Dr. Leo's, but I've received nothing as far as a Daubert motion or any motion to exclude his testimony on the basis of Daubert or that it's not a reliable science, Your Honor.

THE COURT: What's the state's position?

MS. GIOVANOLI: I believe that the Daubert hearing

would have been necessary at the trial, but essentially Dr., Mr., Professor Leo was not called at trial, and that's ultimately the crux of this case, is that counsel was ineffective for not calling Dr. Leo for trial.

At this case we're arguing effectively that had Mr. Brough offered Dr. Leo as an expert at trial he would -- his testimony would not have been admissible.

THE COURT: Not have been admitted.

MS. GIOVANOLI: And although there is case law in Myers and Cope, she has stated it correctly. They didn't address the issue of the admissibility of this type of testimony as other courts have.

THE COURT: Or this witness?

MS. GIOVANOLI: Or this witness, right.

MS. BLANCHETTE: Your Honor, it was the exact same expertise I intend to qualify him on.

MS. GIOVANOLI: But the issue had to be before the Court for them to order -- effectively rule whether it was admissible or not, and it wasn't before the appellate courts.

MS. BLANCHETTE: Furthermore, Your Honor, back in 2016, in the spring of 2016, March -- I'm sorry -- May of 2016 I filed a motion with Dr. Leo's C.V. attached asking how we could address the taking of his testimony.

At that time the state agreed, and an order was issued

on August 26th of 2016 stating that his testimony could have been taken via the internet.

Since that time my client has been spending money on Dr. Leo as an expert. We generated a report.

I think this is too late for the state to be saying his testimony should be excluded. That should have been raised when I filed the motion in May of 2016 addressing how we could take his testimony.

MS. GIOVANOLI: There would be no rule requiring us to, I guess, put forth our objection prior to the hearing. I had no clue whether or not this expert was actually going to testify.

Did the state consent to testimony via skype? Yes. And that's what we're doing right here today. I did not -- the state never consented to his testimony as an expert in the criminal case regarding false confessions and police interrogations.

THE COURT: Four years later.

MS. GIOVANOLI: Correct.

THE COURT: All right. Well, just -- I'm going to suspend this proceeding right now. I'm going to take this -- I want you to brief this issue.

I mean, all of a sudden we're -- we're going -- we're rehashing the trial and what a lawyer should have done five years later when the lawyer has already said based on his

judgment in the case that this testimony was not necessary and he chose not to do it.

Now, I mean, you've hit me with this thing cold. I had no idea that that's where you were going. I thought you were going to have this witness just recount the facts that he would think that his testimony would have been helpful. But you've gone much further than that.

MS. BLANCHETTE: Well, to do that, Your Honor -- and Mr. Brough testified to it -- that he gave him findings. So I asked him to put those findings into a report, and I intend to question him about those findings today.

Mr. Brough has made this relevant. He said that he gave him findings when he was on the stand. So I think in order to show --

THE COURT: I understand.

MS. BLANCHETTE: -- prejudice --

THE COURT: On what stand?

MS. BLANCHETTE: When he was on the stand today. He said he had a discussion with Dr. Leo and he did give him findings.

THE COURT: But they're not these findings.

MS. BLANCHETTE: I would submit that they are these findings since Dr. Leo has --

THE COURT: How do you know that?

MS. BLANCHETTE: He will testify to that, that these

would have been the same findings that he would have made at that time when he reviewed this same exact evidence.

So I think in order to show prejudice I would be allowed to go into his findings. I think I'd have to go into his findings.

Now, this whole issue of Daubert and whether this is an accepted science, I think that was on the state to produce some type of pleading prior to today, because they have been on notice since May 13th of 2016 that I intended to call Dr. Leo. I put it in the motion. We had a hearing on it.

THE COURT: That's not -- is that correct?

MS. GIOVANOLI: I know of no -- as far as us knowing that she intended to call him or that she was investigating calling him, yes, certainly, absolutely.

We didn't absolutely know that he was going to be called, nor is there any rule or procedure or law or statute requiring the state to make a Daubert motion for that --

THE COURT: Did you know what he was going to testify to if he was allowed to testify by skype?

MS. GIOVANOLI: I was provided a report and I have that report in my possession here.

THE COURT: All right. Now you're challenging his --

MS. GIOVANOLI: Essentially his --

THE COURT: You are making a Daubert motion at this time.

MS. GIOVANOLI: Well, essentially because she's alleging ineffective assistance of counsel for Mr. Brough failing to call him at trial, I am now arguing that his testimony would not have been admissible at trial. Therefore counsel could not have been ineffective, notwithstanding all of the strategic decisions and testimony that Mr. Brough provided to the Court today with regard to the reason why he didn't call him.

I think it's also pretty important that, because our courts have not ruled on the admissibility of this type of evidence and because multiple states have ruled it inadmissible --

THE COURT: I thought Ms. Blanchette said the courts have ruled.

MS. BLANCHETTE: Your Honor, just to clarify -- oh, I'm sorry.

MS. GIOVANOLI: I believe Myers and Cope if you'll read them, they have not ruled on the admissibility of this type of testimony as expert testimony in a criminal trial.

THE COURT: All right.

MS. BLANCHETTE: Your Honor, they ruled in both of those cases on an expert witness' exact expertise.

The issue raised on appeal was whether or not they

could go into the specifics of the case at the end. So, for instance, the Cohan [sic] case versus cases that that expert had handled.

I would say the Daubert issue is moot because experts have been qualified. We don't have case law for when every time he testifies and it's accepted. We don't have case law for every time a false-confession expert has been accepted in the State of South Carolina, but we do have two cases where one was accepted under the rule. And the only issue was how far they could go with their testimony.

So I would say at this point Daubert is moot. This isn't like a polygraph where we're still trying to get it in for the first time.

THE COURT: Well, Daubert is not moot if this gentleman's not qualified as an expert in this field. Daubert is very much alive.

MS. BLANCHETTE: I believe his --

THE COURT: I mean, you handed me 50 pages of C.V.

MS. BLANCHETTE: Which I'll be happy to go through, Your Honor.

I also have several cases such as Harris vs. City of Chicago where the issue of his qualifications was raised and he was found to be duly qualified and capable of going into this testimony.

I know the state has referenced 10 or 11 cases where

his testimony was not admitted, and then that went up on appeal. But like I already said, we don't have all of the cases where he has been qualified and allowed to testify because that would not go up on appeal.

We only have the cases where he has not been allowed to testify or his testimony has been limited. But I do have Harris vs. City of Chicago. I have a copy for Your Honor where they go into all of the Daubert factors and they address his testimony. And if this is going to be --

THE COURT: As to -- wait a minute. As to the issues that you have proposed that he would testify to today.

MS. BLANCHETTE: And the exact expertise in which I plan to qualify him under today are those facts of the case --

THE COURT: Let's -- let's limit --

MS. BLANCHETTE: Go ahead. I'm sorry.

THE COURT: Let's limit that to what you're seeking to qualify him to testify to today.

MS. BLANCHETTE: I plan to qualify him in the exact same way Dr. Kassin was -- was qualified in the appellate decisions that we have, Your Honor.

THE COURT: Tell me on the record. What's he qualified to testify about?

MS. BLANCHETTE: As far as his title or as far as the contents, Your Honor?

THE COURT: Contents of what you want him to testify to that you claim he's expert in. Is what?

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment because I don't want to misstate those.

THE COURT: Well, I mean, I don't want the whole panoply of criminal investigations.

MS. BLANCHETTE: No, Your Honor. And could I ask my expert just so that we're clear on this?

THE COURT: Fine with me.

MS. BLANCHETTE: Okay.

VOIR DIRE EXAMINATION

BY MS. BLANCHETTE

Q Dr. Leo, what is the area of expertise in which you are typically qualified in which you were assisting in this case?

THE COURT: No.

MS. BLANCHETTE: No?

THE COURT: Specifically, as to this case.

Q Dr. Leo, what is the title for the area of expertise in which you have offered in this case?

A The -- the -- the disciplines of social psychology and criminology with a specialized focus on the study of police interrogation, psychological coercion and false and unreliable statements, admissions and confessions.

THE COURT: And this report deals with all of those psychological issues, is that correct?

THE WITNESS: Yes.

MS. BLANCHETTE: Your Honor, if it would be of service to the Court I do have copies of his report.

THE COURT: Well, I mean, you just say things like criminology. I'm sure we could be here a week listening to you tell us about criminology.

I'm trying to focus -- narrow your focus as to why you are here -- why you're being called to testify today and what qualifies you to testify as to that specific discipline, shall we say.

MS. BLANCHETTE: Your Honor, I can answer that question by referring to his report, or if Your Honor would like for him to respond.

THE COURT: I think he ought to have to respond.

BY MS. BLANCHETTE

Q So the Court would like for you to answer, Dr. Leo.

A Okay.

THE COURT: Do you follow me? Do you follow my question? I mean --

THE WITNESS: I think so, yes.

THE COURT: We're not --

THE WITNESS: For -- for 25 years I've been researching and writing on police interrogation and false

confessions. I'm one of many, many scholars who've written, studied, published peer review articles on this subject. That is the basis for my expertise. The testimony would be very specifically about police interrogation and false confessions.

THE COURT: In this case.

THE WITNESS: Though -- in this case as laid out in the report, though I would not offer any ultimate opinions. And I promise I would not be here a week.

THE COURT: Well, I'm exaggerating, but it just -- this was sprung on me ten minutes ago, so I'm trying to focus on where we're going with it.

The state objects to your testimony, and I assume that's the reason for Ms. Giovanoli's voir dire.

Let me -- let me just sort of flesh this out a little bit more.

Ms. Giovanoli --

MS. GIOVANOLI: Yes, Your Honor.

THE COURT: -- what -- what is your objection?

MS. GIOVANOLI: Well, I have a couple --

THE COURT: I mean, even though you're not finished with your --

MS. GIOVANOLI: Sure.

THE COURT: Didn't mean to interrupt you, but I'm trying to get a handle on where we're going.

MS. GIOVANOLI: Okay. So the first objection to the testimony would be that it does not assist the trier of fact. And that's required under Rule 702.

And it, in fact, encroaches on the jury's -- on the province of the jury to determine credibility. Now, that's --

THE COURT: We're behind the jury.

MS. GIOVANOLI: Right. And -- and/but he would have -- the allegation is through ineffective assistance of counsel for failing to call him at trial. So effectively it's the jury, and you in this hearing, essentially the same thing.

So I don't believe that he could have assisted the trier of fact, number one, because the general phenomenon of false confessions is widely known.

There are N.B.C., Dateline, all kinds of prime time features with regard to the phenomenon that false confessions exist. There's even a Netflex series, "Making a Murderer". Everybody knows that they exist, so I don't think that it would assist the trier of fact in that regard.

Then if he goes a step further to address the particulars of this -- this defendant's case, then he's encroaching on the province of the jury to determine credibility.

Numerous other courts have ruled that this type of testimony evades -- evades the province of the jury to assess credibility, especially in this case, the defendant's statements. So those are two bases.

And then the other one is that the science is just not reliable. And with further voir dire I believe I would have been able to elicit that Dr. Leo could not predict when a false confession is -- when a confession is false, nor can he opine that coercive interrogation tactics are more likely to be false versus true confessions.

They do not know the rate at which false confessions occur over true confessions. He cannot offer an opinion on which interrogation techniques lead to false confessions more often than true confessions, and he has no information about --

THE COURT: Okay. I am going to allow. All right. Continue your voir dire.

MS. GIOVANOLI: Yes. Okay.

VOIR DIRE EXAMINATION

BY MS. GIOVANOLI

Q I'm not quite sure where I was, but I'm going to try to pick up where I think I was so --

THE COURT: Over the objection of the applicant.

MS. GIOVANOLI: Thank you, Your Honor.

Q Okay. So on a smaller scale with the interrogation

techniques you criticized do you know the rate at which those techniques increase the likelihood of eliciting a false confession versus a true confession?

A In laboratory studies we can determine those rates, but not in the real world.

Q Okay. So IN laboratory studies. Are you referring to the keystroke study and the student cheating study?

A Yes. I mean, there are many such studies, but yes.

Q Okay. But these don't accurately represent the kind of false confessions you testify about in criminal cases, do they?

A Well, they're not -- they're not false confessions to murders and rapes if that's what you're asking, because for ethical reasons we can't induce that in the laboratory, but the -- but it's the same underlying phenomenon.

Q But there's no real --

A It's -- it's confessions.

Q Oh, I'm sorry.

A Confessions to rule breaking that has consequences, and so it's just -- it's just one method for studying this phenomenon.

We also study real-world cases, and we use other methods as in other sciences. But there's some phenomenon you can't one hundred percent replicate in the laboratory of course.

Q Right, because ethically you're prohibited from submitting people to the riggers and the stresses and pressures of an actual criminal investigation, is that correct?
A Yes.
Q Okay. So in those studies there's no real consequences, real life consequences, is that correct?
A No. I -- I would disagree. In -- in a whole line of studies involving student cheating the consequences are possibly that the student would get expelled. That's what they're led to believe.

So there are real consequences, but they're not the same consequences as -- as confessing in a murder or rape case of course for ethical reasons, again.
Q Okay. So in that -- just to elaborate a little bit on that student-cheating study, that essentially was a study where you guys put a student in a room with another student and they were advised that they -- there were certain questions on a test where they couldn't help the other student.

And then they were left alone and the -- the -- the subject was asked by the other student, hey, will you help me, even though it was a question where they weren't allowed help. And the subject actually would, sometimes would, help; sometimes wouldn't. Is that correct?

A Yeah, barebones, yes.
Q Yeah. Okay. So what were essentially the findings of that study?
A Well, then some people broke the rules, and others didn't. And then they were interrogated. And some gave true confessions and some gave false confessions. And they were interrogated using standard-read American interrogation methods.

And then there was an analysis of how the techniques that elicited false confessions compared to how the techniques that elicited true confessions.

Again, this is just one line of research. There are many other lines of research that don't involve experiments. And this is a very common phenomenon in science and social science where you take a phenomenon -- you take -- you take something from the real world and you model it as closely as you can in the laboratory to study the underlying processes.
Q Sure. But in that study those students were admitting to actually helping another student, which is very different than someone admitting to, say, having oral sex performed on them by a 13-year-old step-daughter, is that correct?
A Yeah. We've already established that, yes.
Q Okay. So going back to the rates, we don't know the

rate at which false confessions occur, do we?
A Outside of the laboratory studies, no. Again, you've asked this question and I've answered it. Because the government doesn't have a database from which we can sample and make that determination, we don't know if it's one percent, five percent, ten percent.

But there -- there are many phenomenon where this is -- where this is true. We do know that this occurs troublingly often. We've documented hundreds of cases, but we don't know the precise rate at which it occurs.
Q Okay. And -- and/but false confessions are pretty rare, wouldn't you agree?
A We don't know how rare they are. We -- we -- we all think that true confessions are far more common, and thus false confessions are the exception. But nobody knows the real rate. So whether -- you know, if -- if it was one percent, would that be rare; would five percent be rare; would ten percent be rare? It depends on what we mean by rare.

But we -- we do not think they are the typical outcome. They're an atypical outcome of interrogation. But, again, we've documented hundreds of cases, and the belief is these are the tip of a larger iceberg even though the -- the typical outcome of interrogation is a reliable or true confession. That is -- that's the conventional

wisdom.

Q Okay. How many proven false confessions are you personally aware of? And by proven I'm referring to you've categorized them as proven, highly probable and probable. So how many proven ones are you personally aware of?

A About 500 proven ones. And I just want to be really clear what we mean by this.

If you could show that -- that the crime did not occur or if you could show that it was physically impossible for a confessor to have committed the crime or if you have dispositive scientific evidence that establishes the confessor did not commit the crime or if you have dispositive evidence showing who the true perpetrator is who did commit the crime, it's very difficult to prove the negative.

These are the four conditions under which we can prove a confession was false to near or absolute certainly. So these are a minority of the false-confession cases. And -- and really they're -- whether -- somebody's ability to prove a confession false really is a matter of luck.

Two people can be equally innocent and one of them just happens to be able to prove it false because they can show that the crime didn't occur or was physically impossible or there was dispositive, exculpatory scientific evidence or the true perpetrator was caught.

Somebody can be completely innocent and have -- and made a false confession and have none of those four conditions present. So we have approximately 500 proven false confessions documented, which is the response -- which is the answer to your question.

Q Okay. And so five -- approximately 500. That's out of millions of confessions, is that correct?

A Well, we don't know how many confessions that's out of --

Q We don't know exactly. We don't know exactly how many, but approximately in the millions. Wouldn't you consider that to be pretty accurate?

A I -- I can't -- the government doesn't keep track of the number of interrogations but your -- your question was a little --

Q The government's fault. So is it true --

MS. BLANCHETTE: Your Honor, I ask that he be able to finish his answer.

THE COURT: Yeah. Go ahead.

MS. GIOVANOLI: I believe he's not answering my question.

THE COURT: Restate the question, but don't talk over him.

MS. GIOVANOLI: Okay.

Q So isn't it true that another expert on the other side

of the false-confession spectrum estimated there were some 23 million confessions? Is that true?

A Not to my knowledge. You're going to have to -- I mean, your question's completely vague.

If you're thinking of a specific individual, you're going to have to tell me who that individual is and what the basis is based on.

But as you've asked the question, I'm not aware of any responsible social science expert who's made such an estimate. But if you can tell me the source of that, I can answer your question.

Q Did you -- I can't tell you the exact name. I'm sorry. I don't have that on my notes. But I figured that you would know.

You did a study analyzing 60 alleged false confessions, is that correct?

A In 1998, yes, 20 years ago. That's one of many studies.

Q Okay. And you concede that that's not a statistically adequate sample, right?

A Well, it's not a sample because, again, there's no -- there's no database that the government or any private organization has put together from which we can do a random sample. That doesn't mean it's scientifically meaningless. This is an area where we have to go out and find the data.

So it's not -- it's not a sample. The sample -- the sample is the wrong term for collecting that data. It's more a cohort of data.

Q But you would concede it's not statistically adequate.

A I guess I'd want to know what was meant by the term statistically adequate.

Q Have you conceded that before in other hearings?

A I -- I may have. I -- but I -- I -- I -- you'd have to refresh my recollection about the context. I -- I don't know what you mean by statistically adequate.

You need random samples to make certain statistical inferences. So a cohort that is not a random sample can -- you cannot make certain statistical inferences from. If that's what you mean, then, yes. But you can still make other statistical descriptions and analyses. So I'd have to know more.

Q Okay. With regard to that study isn't it true that only 29 of those confessions resulted in a trial or a conviction?

A I -- I don't know the number that resulted in a trial, but, yes, my recollection is 29 resulted in a conviction. Some of the false confessions were recognized by the police or the prosecutors or the courts and thus never went to trial.

Q So you'd agree that that -- that's evidence that the

criminal justice system, the ability to weed out the bad confessions and the good with the procedures that we have in place, is without the assistance of experts like yourself, is that correct? Do you agree to that?

A No. I would disagree with that. It -- a large -- a large percentage of those individuals were wrongly convicted even though they had evidence their confessions were false.

So no. I think it -- it reflects the exact opposite of the criminal justice system, that the error rates were unacceptably high.

In those cases experts were -- were not used because most of those cases were from the 1980s before experts were typically used in these cases. If you wanted to ask the question are experts helpful, you have to -- you have to study cases where experts were used.

Q But I was asking you with regard to the 29 that did not result in a trial or a conviction. Doesn't that -- evidence that the criminal justice system and the protections that we have in place work?

A No. I would disagree.

Q Okay. Going back to your study of the 60 alleged false confessions, isn't it true that 20 of those weren't undisputed false confessions?

A No. I -- I don't know what number were not

undisputed, but far more than 20 of them were -- I mean, it depends on who you mean by disputed. Many of these individuals were exonerated by D.N.A. But of course it was disputed by prosecutors up the chain or by police.

So I -- I don't know -- when you say disputed, you're going to have to tell me. Disputed by who? There's no -- the 20 -- the 20 doesn't make -- the number 20 to me doesn't make sense.

Q Well, you met one critic, and I do not have his name written down here. But he's written -- he opposes your testimony and your philosophies and your theories. And he claimed that you were 45 percent wrong on those 20 disputed false confessions. Do you know who I'm taking about there?

A Yes, but he's not an expert in my field. He's a -- he's a former prosecutor who's now a law professor. And his statements are factually false. He's not a trained social scientist; he's not a recognized expert in the science, psychological science, of interrogation and confessions. And the 45 percent number is -- is basically a lie.

Q Okay. Can you describe your methodology for proving or concluding that a false confession is false or likely false?

A Well, I've already described the -- how we determine whether or not a confession is a proven false confession

where we're studying confessions in the real world. I gave the four categories to determine whether or not a confession can be proven to near or absolute certainty.

Q I don't want to interrupt you, but you just mentioned the four categories. Those are objective pieces of evidence to point to a defendant's innocence, correct?

A Well, it's that the confession is false in a proven false-confession case, yes.

Q Okay. So you sort of -- your -- you do more of anecdotal research where you take something where you know someone's been exonerated and then you examine their confession and kinda work backwards to see why -- what produced the false confession. Is that kind of an accurate description?

A No. I think that's inaccurate. I think it's inaccurate for several reasons. So anecdotal refers to just telling stories.

We collect cohorts of cases and code and analyze the cases and then look for patterns across the cases. So that's one reason I would disagree with the statement you just made.

And, secondly, there are multiple lines of research or methods -- survey research, observational research, analysis of case materials and documents, experimental research. So there's multiple lines. You're talking about

one particular line of research where we study real world cases.

Q And how --

A So I wouldn't describe it as anecdotal.

Q How do you collect those cohorts of cases?

A Well, you -- we have to -- we have to search through Lexis and Westlaw and other media and legal databases to find the cases. We have to try to acquire as many documents as we can, which in some cases is very easy, and other cases isn't.

And then we have to sift through and analyze the cases to see whether they fall into one of the four proven false-confession categories. And that's essentially assembling a database. And many of -- many of the cases don't.

Even if there's strong evidence that the confession is false, in order to be classified as a proven false confession they'd have to fall into one of the four categories that I mentioned earlier.

Q Well, you have no known rate of errors. So if you were to conclude something was false, you have really no ability to assess the reliability of that conclusion, correct?

A Well, I -- I -- I think you're using error -- error -- rate of error in a different way than I would use it.

The point of these studies is not to -- is not to come up with a rate of true or false confessions. It's to analyze patterns across cases.

When we classify a case as a proven false confession it's an objective determination. No one -- no -- no researcher in my field has ever criticized me. We stated our criteria and the basis for the classification.

But -- but the point is not to say false confessions occur. The point is to analyze a number of research questions about how and why they occur and -- and how we can better understand them to better prevent them.

Q Do you think that the fact that false convictions -- false confessions do occur is kinda common knowledge amongst lay people?

A Well, no. We've done studies where it's not common knowledge -- survey studies, systematic, peer reviewed survey studies where most people are very sceptical that it occurs and -- and -- and how have no clue why it occurs.

And that's the deeper question. Why would somebody counterintuitively falsely confess to a crime they didn't commit, especially a serious crime, to police?

So no. We have good survey evidence that shows people are not generally aware of the phenomena. It's outside of common knowledge, and they don't understand why it occurs, and they have a misconception that they would never falsely

confess, and thus most people would never falsely confess.
Q But in your book "The Problem of False Confessions in America" -- I think it's on page 31 -- you actually reported that nearly 70 percent of jurors believe false confessions occur but rarely. Isn't that a fairly accurate belief to hold?
A Well, first of all, my -- my -- I don't have a book called "The Problem of False Confessions." I think you're referring to an article. And -- and secondly --
Q I apologize.
A -- I don't recognize the pagination. It didn't -- this is not an article that began on page one. So, you know, I'd have to -- I'd have to know specifically what you're referring to to be able to respond to that. Maybe -- maybe -- maybe what you're referring to is one of the many survey studies. I don't know. But -- but --
Q You -- you reported it. You reported in that article that 70 percent of jurors believe false confessions occur but rarely.
A Okay. But if I was there you would show me what I was referring to and then I could explain that to you. Is there some way you can project what it is you're referring to so I can see it?
Q Well, that was in your book, but I will refer you to a Washington, D.C., study in which 68 percent of their

potential jurors they surveyed -- well, they surveyed potential jurors. And 68 percent of them believe suspects falsely confessed, quote, "not very often or almost never," but not -- they didn't answer never. But they just said not very often and almost never. Are you aware of that study? And that was a Washington, D.C., study.

A Yes. But -- but I -- I -- many -- that's many, many years ago old, but yes. But when you referred as part of your response to -- to me that in my book, you're referring to an article, not a book. But yes to your second question. I -- I -- I -- many years ago I did read that survey study you're referring to now.

Q So --

A And I think it supports my point that people are very sceptical that false confessions exist and have very little knowledge about the phenomena of false confessions. And there are other survey studies that show they have no clue how or why false confessions occur. And they assume that when somebody confesses it's a truthful confession and it has consequences.

Q Sure. So this survey that was actually many years old, would you agree that now with the advent of the internet, prime time T.V., YouTube, that now even more jurors may be aware of the phenomenon of false confessions?

A Yes. More jurors, potential jurors, may be, but that

doesn't mean that they understand how and why it occurs or what the research shows about the counterintuitive phenomenon of false confession.

We have lots of studies that show jurors are ignorant. This is outside common knowledge and it highly biases their judgments.

Q Okay. So let's go to -- you actually offered the defendant a discounted rate to testify in this case, didn't you?

A Well, I believe I offered -- the rate that I offered was the same rate that I was paid in 2009 or so when I was retained by trial counsel. So, yes, that's discounted on today's rate.

Q Okay. Are you offering discounted rates now because, number one, jurors are pretty familiar with the phenomenon of false confessions due to the sensationalism in media, and, number two, because more and more states are finding that your expert testimony is inadmissible?

A No. I don't think more and more states are finding the testimony is inadmissible. But the reason for the reduced expert rate is just a matter of fairness, that what I charged the defendant's family in 2009, I just thought that's what I should charge them in 2017. So it had nothing to do with the two bases for your question.

Q How much do you charge to consult or testify in cases,

criminal cases like this, I mean?

MS. BLANCHETTE: Your Honor, I think he's answered what he charged in this case. I don't see how this is relevant.

MS. GIOVANOLI: No.

Q I believed you tested --

THE COURT: Let him answer.

Q You charged $2,500.

THE COURT: Let him answer.

Q $2,500 consultation fee. Is that all you've charged in this case?

A I -- I don't recall what I charged in this case. I may have charged that in this case. I'd have to look at my records.

I thought I was charging an hourly rate of $250 an hour, which is what I charged back then when I was initially retained. And that hourly rate has gone up since then. But I'm not charging the current hourly rate.

Q And we have evidence already in the record that you were -- you quoted Mr. Brough who was trial counsel a $250 per hour rate, is that correct?

A That's my recollection from 2009, yes.

Q How often do you consult or testify in these criminal type proceedings? Never mind. Let me withdraw that question. I'm sorry. You already answered it.

Typically, how much of your time do you devote to this part of your business, testifying on behalf of criminal defendants or once they've already been convicted?
A Well, I -- I wouldn't call this a business but I -- I -- well, I -- I -- a very small percentage of my time is actually spent testifying.
The work that I do on cases is mostly consulting with attorneys, reviewing documents and then -- and then sometimes testifying in cases, you know, once or twice a month on average, so 12 to 18 times a year. But the actual in-court testimony time's a small percentage of the larger time reviewing documents and consulting with attorneys.
Q Well, you've testified in 340 cases, criminal cases.
A Correct, going back to 1997 -- 20 years. And actually not all of them have been criminal cases. Some of them have been civil cases.
Q Okay. But with regard to false confessions, correct?
A Well, no, not always. Because about a third of those have been pretrial suppression hearings or motions in limine to exclude the confession. And the issue has not been the reliability of the confession but rather the techniques that you -- were used.
Q Okay.
A So they're not always about false confessions. This case would have been about that because it would have been

trial testimony, not pretrial testimony.
Q Okay. And the judge is waving to me to sum it up. So how much do you make as a professor?
A My -- my professor professorial salary right now is a little bit over two hundred thousand a year.
Q And on average how much in a year do you make based on these, these cases, testifying as an expert?
A Okay. So in these cases it's the entire range of the work, not just the testifying work.
Q Sure.
THE COURT: That's not relevant here.
A I've made as little as twenty-five thousand; I've made as much as two hundred and forty thousand.
MS. BLANCHETTE: I really don't think the financial is relevant to his --
THE COURT: Well, it's true in every case.
Q Okay. Nothing further. Thank you.
MS. GIOVANOLI: If you'd like argument on the qualification --
MS. BLANCHETTE: How would you like me to proceed, Your Honor?
I can further question him and go through much more detail as far as the social science and his qualifications that the state has asked questions about. I can make argument. But I do -- I mean, he is much more qualified

and has handled many more cases and there's much more to the social science than what the state has asked.

THE COURT: What's the state's position?

MS. GIOVANOLI: Your Honor, the first, like I said, the first basis is it doesn't assist the trier of fact, you or a jury.

I think everyone's pretty familiar with the phenomenon of false condition -- convict -- confessions. And I also believe that at trial it would have encroached on the jury's province, and their sole province, to determine issues of credibility.

THE COURT: And the only way I can tell that is to hear his testimony, so I'm going to allow it.

MS. BLANCHETTE: And, Your Honor, if I may just in response to the state's argument -- Dr. Leo has provided me a brief that was submitted by the psychological association in support of this type of science being used.

THE COURT: Would you ask your witness the first question, please?

MS. BLANCHETTE: Yes, Your Honor.

Doctor, I'm going to allow you to testify.

THE WITNESS: Okay. Thank you.

CONTINUED DIRECT EXAMINATION

BY MS. BLANCHETTE

Q Dr. Leo, do you recall being involved in this case of

James Irby back in 2008?
A I do, yes.
Q And did an attorney by the name of Christopher Brough contact you?
A He did, yes.
Q Do you recall reviewing the case?
A I do, yes, although that was now almost a decade ago.
Q And to just expedite the matter and make sure we have a clear record, did you produce a report on August 1st of 2017 with the name of myself, Tricia Blanchette, at the top in the case of the State of South Carolina vs. James Irby?
A I did, yes.
MS. BLANCHETTE: Your Honor, at this time I would move the report as Applicant's No. 16. I think it'll help us make a more complete record, and I intend to just question him solely off this report.
THE COURT: Over the state's objection.
MS. BLANCHETTE: Your Honor, would you like a copy?
THE COURT: If you want me to read it.
(Report dated August 1, 2017 marked Applicant's Exhibit No. 16.)
Q Dr. Leo, as stated in this report do you recall reviewing the materials and providing your opinions to Mr. Brough?
A I do, yes.

Q Do you recall informing him that your expertise could be helpful to Mr. Irby?
A Yes.
Q Do you recall telling him that you'd be willing to testify at trial, which you've already mentioned, and you could have been utilized potentially pretrial in a suppression hearing?
A I -- I recall telling him I could testify at trial. I do not recall whether I said I could also testify pretrial.
Q Okay. And do you have a recollection -- you summarize it in your report -- as to why you were not called to testify in Mr. Irby's trial?
A I never heard back from -- from Mr. -- Mr. Brough. I think I -- I -- I later learned that the family -- or he said the family didn't have enough money to retain me. I think that's -- I think that's what he told me at some point.
Q Okay. And do you think that information was ascertained from Mr. Brough or could have potentially been ascertained from Mr. Irby and his family?
A It's more likely that it was ascertained from Mr. Irby and his family because I -- I recall just not hearing back from Mr. Brough after we had discussions about my coming out and testifying.
Q Okay. And if he would have contacted you and let you

know that the family could not have afforded your fee, a fee that had been quoted for four days of being in South Carolina, and travel, would you have been willing to potentially work with them on that fee?

A Yes. I -- I think there would have been at least two ways I could have worked with them on that fee. One would be just to have a cap and lower the fee. Another would have been to provide video taped or video conference, rather, testimony like this, which is what I believe I did the -- the -- the -- the last time I had testified in South -- in a South Carolina case.

Q And, as you just stated, you had previously -- you don't always testify in person, is that correct?

A Correct. Well, most of the time the cases I work on I don't testify. But in those cases where I do testify, on at least half a dozen occasions over the course of my career, they've been video conference, which of course was prior to skype and facetime. But, yes, so it's not always physically in person.

Q And is that something you would have been willing to discuss with him?

A Of course, yes.

Q And do you recall him discussing that with you at any time?

A I do not, no.

Q Okay. And just because of the nature of the state's questioning, I want to ask when you say in a lot of the cases you don't ultimately testify, that's not because your testimony is excluded. It's because you're used in other capacities?

A Well, it's actually two reasons. So when I say I've testified in approximately 1,900 cases, many times I give opinions to the attorneys that they don't want to hear and -- and so it just ends with a consultation. And then many times their cases resolve before they go to trial or even pretrial hearings.

So it's not because I'm excluded. Like I think I said earlier, I'm excluded in very few cases -- only 12 cases out of 340 is like, you know, five percent or less. It's because my opinions are not helpful or the case doesn't go to the point where I could helpfully testify if my opinions were helpful.

Q And when you do testify, and if you had testified in this case, would you have addressed the scientific study of police interrogations and false confessions?

A Yes.

Q And is that the kind of a foundation that you begin laying before you go into your case-specific findings?

A Yes.

Q Okay. Would you take us through that, please?

A Well, this kind of testimony is general and sometimes also case specific.

The general testimony would have to do with the social scientific study of the practice of police interrogation, what -- how they are trained to interrogate to get confessions, what the specific techniques are, how they are designed to move somebody from denial to admission.

And then the social science research that shows how these techniques work individually, as well as collectively, to effectively get both true and sometimes false or unreliable confessions.

And so that's what the testimony, the general testimony, would have walked through, the social science research on the phenomena of police interrogation, the psychology of police interrogation, how and why it works to get true confessions, how and why it sometimes works to get false or unreliable confessions, what we know about the process that can lead to false and unreliable confessions, the techniques that are known, risk factors and why, what the research is based on, and -- and other aspects of the research that might be relevant in a general sense.

That would have been -- I know I'm painting with very broad brushes, but that would have been the general foundational testimony. Had I testified specifically I would have offered opinions like the ones that are offered

in the report.

They would have been opinions about techniques that were present or practices that were present in the recorded interrogation and what the social science research shows about the risks that some of those techniques or practices create and why.

But of course I would not have opined about the credibility of the confession or the reliability of the confession. It would have been, first, general, educational testimony, and, secondly, case-specific testimony about some of the techniques and risks of those techniques based on the science -- social scientific research.

Q And you would have been capable or are capable now of providing such testimony in a pretrial suppression hearing and/or in front of the jury, is that correct?

A Correct, yes. And -- and it's really -- it's really outlined in the report. So the -- what -- what I say in the specific section of the report after the general discussion of the scientific field and development would have been --

MS. GIOVANOLI: Your Honor, I would object to this testimony --

A -- the opinions that I would have offered --

THE COURT: Go ahead.

A -- at a suppression hearing or at a trial and --
Q Dr. Leo, if you could just stop for a second -- I'm so sorry. You can't see when objections are made. I'm sorry. If you could, just hold for one second.
MS. GIOVANOLI: I just need --
A I'm sorry.
MS. GIOVANOLI: -- to state my objection for the record. Thank you.
THE COURT: Which is to what?
MS. GIOVANOLI: Which is to his testimony, this testimony, on the basis that I argued earlier.
THE COURT: Oh, okay. Overruled.
MS. BLANCHETTE: And, Your Honor, just to expedite matters, the report has been admitted into the record.
Q Dr. Leo, do pages four through approximately ten of your report go over the social science and the more general testimony you would have provided?
A Yes.
Q Okay. And then on the remaining pages do you go into the interrogation and the confession specifically of Mr. James Irby?
A I do, yes.
Q As well as at the beginning you summarize your findings, is that correct?
A Yes. In the beginning there's an overview of the

findings, yes.

Q Since this report is in the record I'd ask that you just now address the specific findings you have regarding the interrogation and confession statement of James Irby.

A Okay. Well, I believe there were five specific findings. Let me -- let me just grab my report for just a second. Just a second. There may have been four; there may have been six. Give me just a moment.

Okay. So there were actually five points that I made. I think four of them are findings and one of them is just a discussion of what I would have testified to. So I will be very brief since these are written about in the report. And -- and you can ask more questions if you like.

One was that Detective Aldredge's and Detective Morgan's pre-polygraph and post-polygraph interrogation of James Irby was guilt presumptive, accusatory and more theory driven than evidence driven. And that is explained further in the report.

Two is that Detective Morgan used interrogation techniques and practices that are known to increase the risk of eliciting false and unreliable statements, admissions or confessions.

These included lengthy interrogation, what we call false evidence ploys, which are lies about evidence, minimization, which is a practice of minimizing

consequences of blameworthiness to get a suspect to confess, implied promises of leniency and implied threats of harsher punishment. That was the second one.

The third was that in my professional opinion Detective Morgan's interrogation of James Irby was psychologically coercive and that the -- these interrogation techniques moved Mr. Irby from denial to admission and thus increased the risk of eliciting what is called a coerced-compliant false confession in the research literature. That was the fourth specific point.

And then the fifth was just saying if I had testified at trial here are the general and specific areas I would have testified to.

Q Okay. And can you give me those specific areas you would have testified to where you reference the actual interrogation itself?

A Okay. I would have testified specifically about interrogation and techniques and practices present in Mr. Irby's interrogation, why they're significant in light of the social science research and how and why they may increase the risk of eliciting false and unreliable statements during interrogation. That's really the first four opinions that I just went through, more specifically.

MS. GIOVANOLI: Your Honor, I don't want to continue to object, but I would like my standing objection to all of

this testimony to preserve the issue for appeal.

THE COURT: Yes.

Go ahead.

Note your -- objection is noted.

MS. GIOVANOLI: Thank you.

Q Dr. Irby, if I could just direct your attention to page 11 of the report -- do you have it there in front of you?

A Page 11, yes.

Q Okay. And there it first addresses the presumption of guilt, presumption of guilty knowledge and investigative bias.

A Correct.

Q You go into specifics of how you see that present in the instant case. Could you address that?

A Yes. So what I was saying here is that this was not a neutral interview. It was an interrogation, in my opinion, both the polygraph, pre-polygraph, polygraph, post-polygraph. And then the post-polygraph interrogation were based on a presumption of guilt, that both individuals, detectives Aldredge and Morgan, presumed that Mr. Irby had committed a crime. And their goal was to get from him a confession, not to evenhandedly or objectively evaluate whether or not the accusations or allegations were supported or not supported by the evidence.

And so that's why I say there was a presumption of guilt and that led to, in my opinion, an investigative bias. And there's been a lot of research about guilt-presumptive interrogation that are driven by investigative biases and how and why that can increase the risk of what's called tunnel vision and ultimately getting false or unreliable confession.

Q Now, under point two on page 12 you talk about the lengthy interrogation, fatigue and exhaustion. Can you address specifically how you see that present in this case?

A Yes. And -- and -- and I want to say that with all these factors I'm not concluding this is a false confession. I'm -- I'm merely describing the research on the risks. It's obviously for or would have been for a jury to make its own independent evaluation about what -- what -- whether this was reliable or not in this case.

So the second opinion on page, now page, 12 is about the lengthy interrogation, fatigue and exhaustion. And I describe, or I opine rather, that Mr. Irby was interrogated for six hours and in the context of -- of what we know about -- actually I say it's closer to seven and a half hours when you count the gaps of time between the sessions. But what we know about in -- in our field of research about the length of interrogation and interrogation during custodial detention, this is a very long period of time.

And for a variety of reasons it raises the risk that you will elicit a false or unreliable confession. People tend to be fatigued, exhausted. Interrogators use more techniques. People's decision-making capacity is worn down.

There's a lot more that can be said here, but I just flag it as the second issue that increases the risk that -- that somebody in this situation could have given a false or unreliable confession.

THE COURT: Is this going to be --

MS. BLANCHETTE: Yes, Your Honor.

THE COURT: Ask him how he comes to this conclusion that it was seven and a half hours. I mean, I -- is that -- I missed from the transcript? How did he find that out?

MS. BLANCHETTE: There's two separate videos. They're on the disc for Your Honor. They were introduced as two separate videos. It's a full-day interrogation.

THE COURT: Okay.

MS. BLANCHETTE: Does that answer Your Honor's question or would you like me to ask him?

THE COURT: I hope so. I hope it does.

Q Mr. Irby -- or I'm sorry -- Dr. Leo, just to be clear, you have reviewed the videos from the confession or from the interrogation in this case, is that correct?

A Correct, yes.
Q Okay. And that's where you get the timing here in your report.
A Correct.
Q It's from watching the videos, not from just merely reviewing the work product transcript that was produced by my office.
A Correct.
Q Okay. And I'm sorry. This has been a little bit different than usual, so I'm going to jump back to something.

What did you review in this case before preparing this report?
A So a video and audio of the polygraph interview/interrogation of James Irby, a transcript of the polygraph interview/interrogation of James Irby, the video and audio of the post-polygraph interrogation of James Irby, a transcript of the post-polygraph interrogation of James Irby, policy reports, Spartanburg County vs. Lillian Collins, the transcript of record dated July 30th of 2008, State vs. James Irby, transcript record, January 29th of 2011, and the trial transcript of State vs. James Irby dated November 18th to 19th, 2012.
Q And in police reports, that would include the written statements of Mr. Irby, is that correct?

A Correct.
Q Okay. Now, I'm sorry, Dr. Leo, for jumping around on you, but I wanted to make sure we had that in the record.
If you could go back, please, to page 12, were you done offering the testimony you wanted to give summarizing your finding under No. 2, lengthy interrogation, fatigue and exhaustion?
A Yes.
Q Let's turn then to No. 3, false evidence ploys. What was the specific findings you had regarding false evidence ploys in this case?
A Well, a false evidence ploy is a term in the field that means when police lie to suspects or suggest there is evidence that doesn't really exist. So, and this is a technique that's been well studied and correlated with a higher rate of false confessions.
And what I say here is that detectives Aldredge and Morgan told Mr. Irby that he failed the polygraph exam, that it supposedly proved his guilt to a scientific certainty.
But the problem is that a polygraph exam can never prove somebody's guilt to a scientific certainty. All it measures is somebody's emotional arousal in response to different questions. And of course it has a high error rate. But the point is that they were representing that it

established his guilt to a scientific certainty, and that was an inaccurate statement.

And -- and so I went through and described why false and inaccurate statements like this referred to often as false evidence ploys in interrogation have been shown in a variety of studies to increase the risk or rate of eliciting a false or unreliable confession.

Q Next you talk about the common interrogation strategy in minimization --

A Correct.

Q -- under No. 4. Where did you see that present in the instant case?

A Well, there were a number of places where the detectives minimized Mr. Irby's culpability or blameworthiness or implied that the consequences would be minimized either as moral or legal blameworthiness if he stopped denying and started mitting -- started admitting to the accusations.

In the report there's one reference here on page 70 where Mr. Irby is told that the contact between him and VICTIM could be something fairly minor, it could be something that she, not he, initiated, that he wasn't a bad person, that he did not initiate these things.

So the -- the detectives here are downplaying, again, a recognized technique, downplaying Mr. Irby's

blameworthiness and culpability or suggesting that it can be downplayed if he stops denying and starts confessing.

Q Okay. And then you speak about, I believe, threats and promises, would be the next section. It's also numbered No. 4. But that would be No. 5 on page 15.

A Correct. So what -- I give an example here of Detective Morgan saying I can help you understand what's going to happen or what is likely to happen if you go this way, what's likely to happen if you go that way.

And he continues to suggest that if Mr. Irby denies he will be thrown to the wolves and so the -- the -- the -- the implication there -- and there's some other -- there's some other examples that I give on page 16 in the report -- a number of other examples.

But the implications are that there will be worse consequences if you continue to deny and better consequences if you stop denying and start agreeing and admitting to the allegations.

They're often communicated implicitly in context, and so these -- what -- what's important from a research point of view is whether somebody understands what's being said as a threat or a promise. And these implied threats and promises have been, again, correlated with false confessions shown to increase the risk of false confession.

Q And, finally, you have a No. 5 appearing at the bottom

of page 18 that talks about psychological coercion and risk of false confessions. Could you summarize that point for us, please?

A Well, sure. I -- I just say on the prior point there's a lot of examples --

Q Okay.

A -- in the report that I didn't testify to.

But on the point of psychological coercion, what we mean by psychological coercion are certain techniques that are inherently coercive or are so powerful they could be inherently coercive like threats and promises or cumulatively that the interrogation techniques could or did cause a suspect to perceive that he had no meaningful choice but to stop denying and agree with the interrogators' accusations.

And I -- I opined in this report, as I just mentioned, that there were certain of these psychologically coercive interrogation techniques, the implied promises, implied threats that are described and illustrated on pages 15 to 17 of the report, or 15 to 18, and then also that these techniques caused Mr. Irby to perceive he had no meaningful choice but to cooperate and comply with Detective Morgan's demands if he wished to terminate the interrogation.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment. I was having serious issues

with my copiers yesterday, and I want to make sure that I'm not missing.

As he just referenced, there's a couple of pages of the report. I apologize due to the lateness of the hour, but I just kept having consistent problems with the copier yesterday. And I want to make sure that this is the complete report.

THE COURT: Are you asking me?

MS. BLANCHETTE: If I could just have a moment's indulgence to check back to my original copy, Your Honor.

THE COURT: All right.

(Pause.)

MS. BLANCHETTE: Your Honor, does your copy have pages 15, 16, 17 and 18? Your Honor, here's a proper copy. I apologize. I thought I had squared away all of those issues.

(Pause.)

MS. BLANCHETTE: Your Honor, I can make sure that everybody has complete copies. I won't prolong the Court's time.

Q Dr. Leo, at this point the Court has indicated to me that we are close to needing to conclude for the day.

MS. BLANCHETTE: Your Honor, at this time can we go off the record and ask regarding his availability, or did you want me to suspend my questioning at this point?

THE COURT: You're going to ask him now?

MS. BLANCHETTE: I can. I just didn't know if you want it on the record when he's available tomorrow.

THE COURT: No. We will stop the record.

(Off the record.)

END OF PROCEEDINGS NOVEMBER 16, 2017

(Proceedings November 17, 2017)

THE COURT: How do you wish to proceed?

MS. BLANCHETTE: Your Honor, I'm prepared to call Mr. Irby.

It's my understanding that the state would also like to call the assistant solicitor before we broke for this case for the morning.

I did get a text from Dr. Leo at 2:00 a.m. his time that his nanny that takes his daughters to school is not available.

So he won't be available until noon our time today versus 11:00. So we can resume his testimony at noon today if that's okay with the Court.

THE COURT: All right. That's fine.

MS. GIOVANOLI: And I was just requesting to call a witness a little bit out of line because we're taking up Dr. Leo's testimony later.

The assistant solicitor has to leave at 11:30 to take her grandmother to.a doctor's appointment. So I would just -- I only have three or four questions for her, so it should be a very brief witness.

THE COURT: All right. Thank you.

All right. Ms. Blanchette, you may proceed.

MS. BLANCHETTE: Yes, Your Honor. I would call James Irby to the stand.

JAMES BENJAMIN IRBY, having been first duly sworn, testified as follows:

THE COURT: State your full name for the record.

THE WITNESS: My full name is James Benjamin Irby, III.

DIRECT EXAMINATION BY MS. BLANCHETTE

Q And, Mr. Irby, you filed the P.C.R. application that we're here on today that was docketed at 2015-CP-42-996, filed on March 9th of 2015, is that correct?

A Yes, ma'am.

Q And after you retained my services I assisted you in filing a -- an amendment in October of 2017, is that correct?

A Yes, ma'am.

Q And those are the allegations that you're asking the Court to consider today, is that correct?

A Yes.

Q Okay. I want to ask a little bit of background information. Then after I do that we're just going to go through each of the allegations and you can provide testimony on those. Okay?

A Okay.

Q Okay. And I understand that you had to stay in the county jail last night and you're suffering from a little bit of a headache today, is that right?

A I have a headache and really didn't get that much sleep.
Q Okay.
A I was tired. I was -- I didn't get that much rest yesterday either.
Q And I know you've prepared today. You prepared amply for today. So let me know if I'm going to quickly or if you don't understand any questions that I'm asking. Okay?
A Yes.
Q Okay. Do you recall when Mr. Brough who testified yesterday was retained to assist you with your case?
A My mother retained Mr. Brough in two thousand -- sometime in 2007.
Q Do you know how long after you had been arrested on these charges he was retained?
A Maybe about three months. Three or four months.
Q So it was early on into being charged with these crimes that you retained Mr. Brough, is that correct?
A Yes. It was real early.
Q Okay. And prior to your trial did you spend any time in the detention center?
A I stayed in the detention center -- detention center eight months.
Q Okay. And what were you in the detention center for? Was it on this charge or another charge?

A I was in the detention center for child support.
Q And then after that was satisfied were you out on bond on these charges?
A Yes. My mother bonded me out.
Q Okay. How many times do you recall meeting with Mr. Brough from the time that you were charged up until the time you went to trial in 2012?
A I would say maybe three, but/and that was real brief.
Q And that's what I was going to ask.

During those meetings what transpired? Did you guys sit down and go over the discovery? Did you review the video? What happened during those meetings?

A I never seen the discovery until I got to -- until I received my discovery at -- at Broad River. But he just came and asked me about the statements. And, you know, that's when I told him that I felt threatened at the time of the interrogation and, you know -- and Danny Morgan was leading me in the statements. And, you know, I told him, you know, how I felt threatened. I told him Danny Morgan was, you know, invading my body space. He was -- he was implying threats.
Q And we'll talk a little bit more about that interrogation and your statements in a moment, but I want to ask you a little bit about the video.

On page 82 of the pretrial transcript when you're

testifying after Danny Morgan you make references to the video. But you -- I'm sorry. But on page 82 you say you didn't review the video.

Prior to the pretrial hearing, the suppression hearing, had you sat down and gone over the approximately 7-hour video with Mr. Brough?

A No. I never watched the video until I got -- until my mother sent it to me at Broad River because I couldn't stand to relive what happened in that interrogation. That was -- to me that was traumatic.

Q And I just need to clarify. You said you didn't want to watch it.

So did Mr. Brough ever say to you, "James, we need to sit down and go over this," or, "I need you to sit down and take notes," and did you respond, "No. I can't handle that," or did he just not ever propose it?

A He didn't ever propose it. Every time I met with Mr. Brough it was real brief.

Q Okay. Now I want to turn a little bit to the interrogation but more specifically to Dr. Richard Leo that began his testimony yesterday.

Did you ever see the retainer agreement that was introduced yesterday as Applicant's No. 8 that was ex -- that was signed by Mr. Brough?

A I never seen the retainer until I received my

discovery at --
Q Okay.
A -- Broad River.
Q Okay. But you were aware that you and your family had paid $2,800 for the services of Dr. Leo.
A Yes, I'm aware that my mother paid. I didn't know how much, but I know she paid.
Q Okay. How did the name Dr. Leo come up? Did Mr. Brough tell you about him? How did you first learn about him?
A I believe Mr. Brough had to do some -- had to do some research.

When I -- Mr. Brough told me he found the expert witness, but when I received my discovery at Broad River, that's when I realized that he really didn't know anything about those type of expert witnesses.

So he was -- he was trying to research. And also in the email that he received from one of his colleagues they -- they recommended Dr. Leo to Brough.
Q And he recommended to you that you utilize the services of Dr. Richard Leo, is that correct?
A Yes, ma'am.
Q And as a result we have records of some $2,800 that was paid to Dr. Leo.
A Yes, ma'am.

Q Did Mr. Brough ever tell you that his understanding, that Dr. Leo had made favorable findings in your case?
A Yes. He didn't -- he didn't say -- he didn't use those words. He just came to me. He said, "Yes. Dr. Leo said you was coerced."
Q Okay. And was it your understanding he was getting continuances so that Dr. Leo could come and testify in your case?
A Yes. That was my understanding.
Q Now, yesterday the state asked, I think, questions for nearly an hour of Dr. Leo during voir dire. And I want to ask you about some of those topics that were discussed.
Did Mr. Brough ever come to you and say, "James, we can't use this guy. His science is just kooky. I think he's a quack. I'm sorry you paid him this money." Was that ever discussed with you?
A No. He never discussed that with me.
Q Did he ever come to you and say, "James, I've been researching him and it looks like he did a study years back and his sample size might have been too small. I don't think we should use this guy."
A No. Brough never indicated to me he did any kind of research. He was leaving all of the research up to Dr. Leo.
Q Did he ever say to you, "James, the state has filed a

motion to exclude his testimony. So I think at this point it would be best that we don't go further with Dr. Leo and pay him any more funds?" Did Mr. Brough ever say that to you?

A No, he never said that to me.

Q Did he ever show you any concern about utilizing Dr. Leo either in the suppression hearing or at trial?

A Repeat that.

Q Did he ever show you any concern, say, "James, I don't think we should use this guy" --

A No.

Q -- at a suppression hearing or at trial"?

A No. He never show -- he never told me about any kind of concerns that he had.

Q Okay. And, finally, did he ever say this may be something that -- just answer if you heard him say this. Did he ever say, "James, I don't think we can use Dr. Leo because he may go into what the jury's supposed to decide. He may kind of push into what's the province of the jury. So I don't think we can use this guy." Did he ever say that to you?

A No, he never said that.

Q What did he tell you about Dr. Leo? Did he talk to you about money?

A Well, after he told me that Dr. Leo said that I was

coerced he told me that it would be $10,000 for Dr. Leo to fly in in June.

Q And what was your response to that?

A Well, after he told me that I thought of ways that I could come up with the $10,000, and there was no way that I could.

So I think late April or early May I told -- I phoned Brough on the phone and told him that I couldn't, I wasn't going to be able to afford that.

Q In response to that do you recall him saying let me call Dr. Leo, he's a law professor and he has a very good business, let's see if we can potentially get a discounted rate since he's already into this case with us?

A No. We never -- we never had that conversation.

Q Okay. Did he ever talk with you about motioning the Court to see if he could possibly take his testimony over the phone or internet so you wouldn't have to pay for multiple days of travel to and from California?

A No. He -- he never brought up any kind of alternative.

Q Okay. And, finally, did he ever talk about motioning the Court to say that you were indigent and needed state funding for the expert to be able to continue to move forward with the allegations?

MS. GIOVANOLI: Objection. Your Honor --

A No, he never. He never brought that -- he never brought that to my attention.

MS. BLANCHETTE: Your Honor, if I may respond, we actually made the allegation under Reeves, and Reeves specifically addresses where an attorney motioned the Court on a retained case for indigent funding.

A And through --

THE COURT: Go ahead.

A And through my research that I had been doing over the -- over the years that I've been incarcerated I actually wrote the clerk of court and asked them did Mr. Brough file a motion on my behalf. But the clerk of court sent the letter back to me telling me that I needed to -- I needed to write Brough and ask him. But it was no need to ask Brough because Brough had stopped responding to any of my letters in 2013, I think.

Q Once you told Mr. Brough you didn't have $10,000 was Dr. Leo discussed again?

A No.

Q Was it then ever discussed with you what the strategy would be since you could not utilize Dr. Leo's services due to financial reasons?

A Well, he said -- from what I can recall, I would just have to testify at the suppression hearing since Dr. -- since we didn't have Dr. Leo. And he would do the best he

could.
Q What was your understanding of the likelihood of winning your case if he didn't win the suppression hearing, if the statements weren't suppressed?
A Well, I thought with all of the facts we had that I had a good chance of winning the suppression hearing, but Mr. Brough told me if we lose the suppression hearing we was going to lose at the trial. I didn't understand that.
Q In preparing you for the suppression hearing and your trial did you and Mr. Brough sit down and talk about how -- what was purportedly confessed to by you in the interrogation with Dr. -- with Detective Morgan and what the victim was alleging those facts didn't match up? Did you all ever discuss that?
A He didn't -- he didn't discuss that with -- with me. He just brought it up in court.
Q Okay. At the suppression hearing, I pointed out yesterday that Mr. Brough did not ask Judge Cole to review the entire video. Would you have wanted him to review the entire video, and why?
A Yes, I would have wanted Judge Cole to review the whole video, because by reviewing the video maybe he would have picked up on the implied threats that Morgan -- that Morgan made to me. And I can understand in the video, you know, everybody's saying that, you know, I'm not really

showing no emotion. But, you know, I consider myself a [sic] entrepreneur. And, you know, like I said, I had a lawn care service. Even when I went to those meetings if I felt under pressure I couldn't -- I couldn't display that. You know, I was just there to close the deal.

Q And when you say there to close the deal though, you're not referring to the interrogation. You're referring to your business.

A My business, yes.

Q Okay. Just wanted to be clear on that.

I want to talk with you a little bit about the testimony that was elicited from you at trial regarding your statements.

As addressed with Mr. Rough yesterday, he did not ask you any questions on direct. You were only asked about your statements on cross-examination by the solicitor on page 179 through 182.

Did you know going into trial that Mr. Brough wasn't going to ask you any questions about your statements?

A Prior to trial I didn't even meet with him. Me and Brough never had any kind of meeting.

So when I got to trial and I just figured he was going to have me to testify, and when I did testify I figured I was going to be testifying about the statements, and once Lillian testified I figured he would question me about

everything that Lillian said so the jury would -- could understand, you know, so I could make the jury understand why she was saying what she was saying and to let the jury know that none of that wasn't even true.

Q Okay. You kind of jumped to Lillian, which is fine. We'll get there in a little bit regarding what the allegation is to her. But regarding your statement --

A Okay.

Q -- did he tell you prior to trial that he wasn't going to ask you any questions about your statement and explain why he was doing that?

A No. He never -- he never said he wasn't going to ask me any -- any statements, I mean, any questions, no.

Q And I -- I'm trying not to mischaracterize his testimony. The record will properly reflect. But yesterday I took his testimony to be that one of the reasons he chose not to use a false-confession expert is because you never told him that the statement was false. Was this statement, the incriminating portions of the statement, given to Detective Morgan false?

A All of the statements was false. I always held that position with Mr. Brough, that they were -- they were false.

Q Okay. Now, I asked you about wanting the judge to see the whole video pretrial.

Did you also want the jury to see the video at your trial?
A Yes, ma'am.
Q And did you think that would be a court exhibit at -- I'm sorry -- an exhibit at your trial?
A I thought it would be.
Q And did Mr. Brough give you any explanation as to why he didn't introduce the video at trial?
A No.
Q Now, at the pretrial Mr. Brough did make an argument about Miranda, but I know that you have concerns about the argument that he made and how Miranda was administered.
Can you please testify regarding that?
A Well, at -- at the family court hearing Detective Aldredge had basically already admitted that she didn't read me Miranda.
And so at the suppression hearing when we -- when Miranda came up again, you know, he did bring up about Detective Aldredge not reading me Miranda. But when I got to Broad River and I started researching everything myself, that's when I realized. I said Danny Morgan didn't read me Miranda before he interrogated me.
Q And just explain, because the judge hasn't seen the video yet. What transpired that day? You arrived and met with Mr. or Detective Morgan for what? What was your

understanding of why you were there?
A The only reason I was at the sheriff's department is for the polygraph.
Q Okay. And what was the first thing that happened that day?
A Detective Aldredge questioned me, and I gave her two statements.
Q And in those statements did you confess anything incriminating?
A No.
Q And then what was the next thing that happened that day?
A They took me into the polygraph.
Q Okay. And then what happened after the polygraph?
A After the polygraph I had to leave the sheriff's department to go to a family court hearing.
Q Okay. And then what happened after the family court hearing?
A After the family court hearing -- well, Danny Morgan had told me I needed to come back to the sheriff's department to get the results. So after the family court hearing I went back to get the results and they -- he said, he claimed, I failed. I didn't believe it.
Q And then did he continue to question you for a number of hours?

A Yes. He said since I failed he felt that he had -- it was a need to interrogate me.
Q Okay. And as a result all of that culminated in the written statements that were introduced as State's 1 at the trial and here in your P.C.R.
A Yes.
Q That Danny Morgan wrote for you.
A Yes.
Q Okay. Now, James, I have explained to you as far as the allegations of ineffective assistance. You're alleging that Dr. Leo should have been utilized as an expert and not have had a layperson addressing the video in the interrogation tactics used in the video. But I know there are some very specific things that you wanted to point out to the judge that you did not get to testify to at trial. So I'm just going to take you through a couple of those very briefly.

Is there something from the very beginning of the video where Detective Morgan cuts you off that you wanted to point out -- or that wasn't on the video?
A Well, I believe it is on -- I believe it is in the video. Danny Morgan -- if I could have a minute to study.

(Pause.)

A Yes. I say -- I say to Danny Morgan, I say, "Yeah. I'm going to -- I'm going to start from the part with the

oral sex if that's fine."

But Morgan cuts me off, and he says, "Well, if you -- if you'd let me kind of walk you through it there because this -- I do this all the time. So I know what kind of flow you need to have with it." And then I just respond okay.

Q Okay. And you are reading from what, James?

A The -- the transcripts that had been transcribed from the -- from the interrogation D.V.D.

Q The work product transcript from my office. And what page were you on?

A Page 107.

Q Okay. And why do you think that portion was important and something you would have wanted Mr. Brough to address?

A It was something I had already testified to.

I testified at the family court hearing that Danny Morgan was leading me in the statements and one -- even if you -- if you look at, I think, it's statement one of five, I tell Danny Morgan that I can't write, that he -- he asked me if I wanted to write the statements. I told Danny Morgan that I couldn't write because I'm hardly functioning.

Danny Morgan -- he didn't write that. He -- he wrote down that I didn't feel up to writing the statements so I asked him to write it. And I feel the reason he did that,

because if he'd wrote down that I was barely -- that I was hardly functioning, it would have showed someone that something was wrong with me during that time. And what was wrong with me, I knew I was fixing to doom myself by giving some statements of something I didn't even do.

But Morgan, he was in control the whole time. I mean, he was implying threats. He overbore -- he overborne my will, I mean.

Only -- only thing I knew to do to get out to -- the only thing I knew to get out of there was to give him what he wanted, and that was those statements.

Q And there's one specific example. I know that you would love to go line by line through this transcript and explain each line to the judge, but I've advised you I don't think that's appropriate for your P.C.R. The judge has the video and he has the transcript and he's agreed to hear from our expert.

But there is one specific instance I know that you want to explain to the judge that is an example of how you felt that he was putting words or thoughts in your head and then you were using those in the statement to give him what he wanted.

Specifically, did he use terminology or explain something to you regarding erections that then you later used in the statement to try to satisfy what you thought he

was looking for you to say?
A Can you repeat all of that? I was trying to get my composure.
Q Yeah, and I'll probably do it a lot shorter.
I explained that we're not going to go through it line by line because it's in the record and we have an expert.
But is there one specific example regarding some explanation he gave you regarding erections that then you utilized in your statement because you were trying to satisfy or give him the information you thought that he wanted?
A Yes. And what I am fixing to tell you all, it's the -- it's the same thing that I tried to testify to at my family court hearing.
But that was my first time really testifying at a -- at a criminal trial at this level. So, you know, I -- I didn't know how to testify. I really wasn't prepared. Brough didn't prepare me.
But what I was trying to convey, Danny Morgan had this scientific theory of a man has more blood flow in his head and when he has that erection that blood flows to his genitals which gives him that erection. And during that time when a man has an erection, he can't think.
So I used Morgan's scientific theory in my statement, and I can't tell you exactly what statement it is. But I

put myself in the position of with victim having some kind of sexual encounter. And I basically told him the encounter happened and during that time, you know, I came to my senses, is what I used in the statement that I used in that -- or the words I used in that statement.

Q So that example is where he was giving you phraseology or maybe almost an excuse for something that happened. And then you regurgitated that back in your statement.

A Yes, ma'am. I did that -- I did that a couple of times in the statements.

Q Okay. And you weren't doing that trying to outsmart him. Were you doing that just simply trying to give him -- give him what he wanted so you could get out of that room?

A Yes.

Q Now, at trial you -- I've already pointed out your attorney asked you no questions about your statement. The state did extensive cross-examination. So you were in the position where you were having to defend on cross-examination the statements. But he did do somewhat detailed testimony with Detective Morgan.

Did he ever discuss with you the strategy that we're only going to really elicit testimony about these implied threats or coercions from the detective who did the interrogation?

A No. He never went over anything with me. I just --

when I sat in court, I just viewed what he -- the strategy that he had.

Q And would you have agreed with the strategy that we're only going to ask the detective or the interrogator about the interrogation, we're not going to really ask you about it, we're not going to ask an expert about it, we're just going to ask the detective and give him the opportunity to explain it away?

A No. I wouldn't have agreed with his strategy. And, I mean, if you really look at the Jackson vs. Denno hearing...

(Pause.)

A If you look at the Jackson vs. Denno hearing where he -- he is -- well, where Mr. Brough is cross-examining Danny Morgan and the parts where it say where, "Whereupon, the tape is played," the questions that Mr. Brough is asking before the tape played, he's not really -- the only thing he's really referencing at every point is not any threats that Morgan made to me.

The only threat that he referenced was the threat about the wolves. That's the only threat that -- that Brough really brought out. But it's -- but all through the interrogation -- it's about seven -- it's about seven different implied threats that Morgan made to me.

Q And later today I'll be going through some of that

with Dr. Leo, and we will defer to his expertise in explaining that to the Court. But I want to take you to page 149 of the trial transcript, and that is where Mr. Brough is asking him about the statement of being thrown to the wolves beginning on line one of page 149.

A Yes.

Q Then on line six through 21 he gives an explanation of what he -- he was doing. And he's asked, "It's a threat, isn't it?" On page 122. And he says, "Oh, no, sir."

So here Danny Morgan is getting to explain what thrown to the wolves was. But did your attorney on direct examination ever give you the opportunity to explain to the jury if you felt threatened or coerced during that lengthy interrogation?

A No.

Q And you never agreed to the strategy that only Danny Morgan would be allowed to explain away the comments and what you're calling treats that he made to you.

A Well, if Brough would've went over with me with -- about his strategy, then I would have told Brough that I would like to have what portions of the interview that I would like the jury to see. And those would be the portions of the implied threats, which I say is about seven of them.

Q Okay. And those weren't shown to the jury.

A No. Only -- only -- only ones -- only -- only threat that was -- that the jury was informed about was the wolves.
Q And -- and Mr. or Detective Morgan was being allowed to explain the video, but the state hadn't called him as a foundation witness to set up the video, had they?
A Repeat that.
Q Detective Morgan wasn't used as a witness to identify the video and introduce and narrate the video, was he? If you don't know the answer to the question, that's fine.
A No. I don't know.
Q Okay. The transcript will reflect how Detective Morgan was questioned.
A But do you want me to respond to the question about how Danny Morgan responded to --
Q Yes. If you have more on page 149, please go ahead.
A Well, Mr. Brough asked Danny Morgan, say, "Do you recall telling him that, pointblank that, before he had given you any statements that you knew sexual contact had occurred and you hate to see him thrown to the wolves? Do you remember stating that to him?"
Danny Morgan says, "Yes. I did tell him that I knew at this point that I was confident that sexual contact had occurred, that he was not being honest with me. And when you do certain things over and over again as far as your

job, you develop certain habits or idiocies of ways of doing my job. And one of the comments I would often use with a person was that I hate to see you be throwed to the wolves. And that is kind of, sort of, like the statement of saying to someone I hate to see you being throwed under the bus. It doesn't mean you actually have to throw someone, somebody, under the bus or actually throw someone to the wolves, it -- it is just a way of saying I don't want you -- to see you left hanging out there without any sort of protection, covering or whatever you would say. It's -- it is just a comment that I would often make with people."

And during the whole time that's what -- that's what Danny Morgan made me feel in that interrogation room, that, you know, if I gave some kind of statement that I was going to get some kind of protection, you know.

But, like I said, at the end of the day the statements was false. I was just trying to get out of there. I gave Danny Morgan what he wanted. And by that -- by Danny Morgan's own admission -- I mean, everybody knows what -- if you throw somebody up under the bus, everybody know that mean.

Q James, let me ask you this. You pointed out this very specific instance where Mr. Brough is asking him about a portion of the video and then allowing Danny Morgan to

explain. Would you have wanted this jury to actually see the video much like he did at the suppression hearing?
A Yes.
Q Okay. But that video was never shown to the jury.
A It was never shown, no.
Q And, in fact, after your very brief testimony and the case concluded the jury came back in and asked to rehear your testimony, is that correct?
A Yes.
Q And ten minutes after they reheard your testimony they came back in with a conviction.
A Yes.
Q Now, James we've spent quite a bit of time this morning focusing on the first issue, the statement.
Is there anything else regarding the statements and the interrogation that you would like to testify to in support of your allegations before I move on to the other allegations?
MS. GIOVANOLI: I object. That calls for a narrative.
THE COURT: Perhaps.
MS. BLANCHETTE: May he answer, Your Honor?
THE COURT: Yes.
Q Okay. Please answer.
A Like I said, at the end of the day I went down there to talk to Danny Morgan voluntarily to try to cooperate,

you know. But the thing -- the thing of it is when it came to the interrogation I wasn't -- I didn't -- I didn't go down there to be interrogated. I went down there for a polygraph. And, like I say, I felt that when I came back from family court that I should have been given the opportunity to assert my rights. But no one never gave me that opportunity at the start of the interview or at the onset of Danny Morgan's interrogation.

Q It just flowed from a discussion right back into interrogation, didn't it, James?

A Yes.

Q Okay. Let's move on to issue No. 2. Would you have wanted your attorney to object to the qualifications of Lynn McMillan and object to her testimony at trial?

A Yes.

Q Okay. Would you have wanted your attorney to further cross-examine Dr. Nancy Henderson?

A Yes.

Q And, specifically, if you could look at page 112 through 113 of your transcript, could you please explain to the Court the research that you undertook and discovered in response to her testimony on pages 112 through 113?

A And we are referring to the paper, "It's Normal to be Normal"?

Q On page 113 of the transcript she's referencing an

article.
A Okay.
Q As a result of that testimony did you do some research and obtain an article?
A Yes. I -- I had asked my family to -- to look up the book, because she said it was a book. But come to find out it was a paper. So -- so when I got the paper, I read it. And through my research it -- it states this.
MS. GIOVANOLI: Your Honor, I'm going to object at this point to hearsay.
THE COURT: All right. Sustained.
Move on.
MS. BLANCHETTE: Your Honor, may I approach the witness?
THE COURT: Sure.
Q Mr. Irby, is this a copy of the article you obtained?
A Yes, that's -- that's -- that's the article I retained, yes.
Q And you found this article as a result of her referencing it in her testimony, is that correct?
A Yes. She referenced it in her testimony and -- and they asked about -- they was trying to qualify her as an expert witness. So they asked her -- I can't think of the way it was worded. But she said because she examined adolescents and through her research, through a book she --

she read, that by Joyce Myers or Joyce Adams, "It's Normal to be Normal", those are the two things she referenced to help the Court qualify her as an expert witness.

Q Okay. And you then found the article. And is there a specific section in it that you would have wanted your attorney to ask her about when she was on the stand?

MS. GIOVANOLI: Objection to hearsay.

THE COURT: Overruled.

Go ahead.

Q You can answer. Is there a specific section you would have wanted him to reference?

A Yes, there's a specific section I -- I would want him to reference, yes.

Q Okay. And what is that section in the article? You can read that to us.

A Okay.

MS. GIOVANOLI: Objection to hearsay for the record.

THE COURT: We're not going to read an article.

MS. BLANCHETTE: It's approximately three sentences, Your Honor, a point that he would have wanted his attorney to make in the cross-examination.

THE COURT: Go ahead.

MS. BLANCHETTE: Thank you, Your Honor.

THE COURT: Three sentences.

A "It should also be noted that the classification scale

used in the study is currently undergoing revision as more data -- data are reported on non-abused children as known victims of penetration -- gen -- genital injury. This classification system was developed in order to maintain some internal consistent -- con -- consistency in the review. Sensus [sic] of medical experts regarding the classification findings with respect to abuse."

Q So, Mr. Irby, you found the article referenced by her, and you would have wanted your attorney to further cross-examine her regarding the reliability of what she was giving as a reference for her qualifications and testimony, is that correct?

A Yes. I felt if Brough would have maybe pretrial interviewed her to find out, you know, maybe any kind of articles or tapes that she was going to offer that he could have read over them and, you know, maybe objected to them when she tried to -- when she tried to bring it up at court.

Q And just to be clear for the record, what is the title of the article?

A "Examination, Findings and Legal [sic] Confirm Child Sexual Abuse. It's Normal to be Normal."

Q Okay.

A By Joyce Adams.

Q All right. Let's move on to the next allegation.

You've alleged that your attorney was ineffective for failing to further cross-examine the victim.
A Yes.
Q Was there specific information regarding the sleeping arrangements in the bedroom that you would have wanted him to further question her on?
A Yes. When VICTIM testified, she testified that her sister slept on the -- the top bunk and she slept on the bottom, which that wasn't -- we -- we never allowed MINOR 1, the youngest child, to sleep on the top bunk because she had -- she had a medical issue that caused her to have to have frequent urination. And we was always afraid that she would, you know, get out of the bed late at night and fall. So she was never allowed to sleep on the top bunk.

And also the top bunk always stayed cluttered -- cluttered with clothes because we couldn't never get the children to clean up the room. And VICTIM and MINOR 1, they always slept in the bed year round together.
Q And that would have refuted the allegations that she was in that bed alone when you came in and committed these sexual acts against her, is that correct?
A Yes. It would've -- it would've refuted the allegations, because MINOR 1 was at -- at home the night of November the 7th. It was a school night.

Q But in the record the state's allowed to argue when it's submitted to the jury that, you know, that it was easy that Mr. Brough may not have been in that room and that the victim was there by herself, is that correct?
A Yes. That's how they tried to explain it away.
Q She also -- there was testimony elicited about the door being blocked. Did you take issue with that and wanted Mr. Brough to address that? And please explain.
A Yes. That was an issue because I told Mr. -- I don't think. Let me see. Did I tell Mr. Brough. Well, when that was brought up at -- at court I think I nudged Mr. Brough and I told Mr. Brough that -- or I let him know sometime during the Court hearing that if that door would've ever been blocked like that Lillian would have found it blocked like that, because the children never got up on their own. My wife always woke them up.
Q And let's turn then to the testimony of Lillian Collins. There's some specific information that you feel that Mr. Brough should have further impeached her with, is that correct?
A Yes.
Q Yesterday he pointed out her statement about finding you naked in the hallway --
A Yes.
Q -- in his testimony. Would you have wanted to have

him ask her further questions about that and allow you to address it?

A Yes, I would've.

Q And how would you have wanted it addressed?

A Well, Lillian took the stand before me and -- and she testified that -- she testified to the sleeping arrange -- arrangements. She tried to say that, you know, the children slept in separate bunks, but that -- that wasn't true.

She testified that she found me in the hallway naked, but that was just half the story. Me and her both was in the hallway naked because someone was trying to steal the air condition outta the hallway window that night. And she held the window. I mean, she held the air condition while I went to put on some clothes to go take the -- so I could go outside to the take the air condition outta the window because it was kinda -- it was kinda high.

Q But Mr. Brough said yesterday once she said that, essentially, he knew it was done for. But there is more that you're saying should have been asked about that and you should have testified about that incident.

A Yes. And it was also Lillian testified that I told her that I put my finger in her -- in her daughter, which I never told her that. And, you know, Brough had discovery, so he, you know, he could have researched that.

Q Okay. And then she testified also about T.V. timers. Is there something further you would have wanted to address regarding the T.V. timers?

A Yes. As far as the T.V. timers, Lillian told me on a visit when she came to the jail that it wasn't -- that -- that she had put timers on the T.V.s. That was -- there was never timers on the T.V.s until after I was incarcerated for child support but --

Q So that wasn't accurate testimony.

A That wasn't accurate. The only -- the only reason Lillian testified like that is -- see, I left Lillian Collins in 2009. And when I left Lillian Collins -- even they talked about the C.D.V. Lillian Collins placed on me, you know.

Basically, if Lillian Collins couldn't get what she wanted, she was going to try to make my life miserable, which she tried to do with the C.D.V. But my mother, you know, pleaded with her, and, you know, she told my mother that she would -- that if my mother would bond me out she would pay my mother back, you know, which she never did.

And as far as the -- as far as the letter that Brough referenced and he said that she was trying to get the charges reduced, yes, she was trying to get the charges reduced or either dropped, because the charges was in general sessions. And they dropped it down to -- to a --

to a lower -- to a lower court on the condition that I plead guilty to it. That's the only way they would take it out of general sessions.

But if I would have knew about that statement that Mr. Brough had in the discovery when I received it at Broad River, I wouldn't have never pled guilty to that because I would've -- I would've had something to fight with.

Q Now, you're telling me this negative information about Lillian. But she was called as a defense witness. So please explain to me how the decision was reached, if it was reached between you and Mr. Brough, or if he just reached the decision to call Ms. Collins to the stand as a defense witness.

A Well, at trial we was -- we was -- we was sitting at the table, and he asked me if I wanted to call Lillian, and I said, yes, it's important because she has the -- she -- she wrote a [sic] affidavit that her daughter recanted. And I thought that was important for the jury to hear.

Q Did he ever discuss with you that there was no evidence in any of the files of the counselors or DSS that a recantation had taken place? Did he ever tell you that?

A No, he never -- he never told me anything about discovery.

Q Did he discuss with you the ability to get an expert to review the files to determine based upon their

expertise, such as Gay Allen-Cook, if a recantation had taken place and see if she could provide testimony on it?
A No.
Q And you utilized Gaye Allen-Cook as part of the support of your allegations. Would you have wanted her utilized both pretrial and potentially at your trial?
A Yes.
Q Okay. Did Mr. Brough ever explain to you -- and this plays out at the -- after Lillian Collins' testimony -- they called Gina Odom and she begins to testify. And Mr. Brough makes the motion, claims prosecutorial misconduct because she's testifying that the victim was consistent.

Did Mr. Brough ever tell you, hey, James if we call Lillian it may open the door to this in-otherwise -- this otherwise inadmissible testimony that would help make the victim look better to the jury? Did he ever tell you that?
A No, he never told me that.
Q If he would have warned you about that would that have factored into your decision to call Lillian?
A It would have factored in -- in my decision. You know -- you know, Brough wasn't -- I thought Brough knew what he was doing.
Q Do you feel that you were properly advised regarding what could happen if Lillian Collins was put on the stand?

A No.
Q And, finally, I want to ask you about Bernadette Smith.
A Yes.
Q You were aware that she talked to Mr. Brough and was available to be a witness in your case?
A Yes.
Q Did Mr. Brough ever explain to you why she wasn't utilized as a witness in your case?
A After he met with -- with Bernadette Smith he never discussed anything with me regarding Bernadette Smith.

Only when I received my discovery and I compared the phone records, the phone-record dates, with victim's statement that I realized that they was the wrong phone records. And I couldn't understand why Brough didn't make that connection that they were the phone records from the 9th when the police came to the house, not the 7th when she claimed that this incident occurred.

Q Would you have wanted Bernadette called as a witness at your trial?
A Yes, I would have because we was on the phone all night on the 7th.
Q Okay. And you agree that she was aware of all of the things that she testified to yesterday morning?
A Yes.

Q Okay. And she had conveyed concerns to you about you remaining in that house.
A Yes.
Q Okay. James, I usually ask this question at the beginning, but I guess I was so eager to start this morning that I didn't.
You understand and I've explained to you that there's only one type of relief you can get in this case. And what is the relief you're asking the Court for?
A Asking for a new trial.
Q Okay. And do you understand, James, that means your current conviction and sentence would be set aside and you'd face your original charges with no guarantee of less time? Knowing that, you still want a new trial from the Court?
A Yes, ma'am.
Q Okay. Now, James I'm not asking for a narrative here, but I know that you have filed this application some, my goodness, over two and a half years ago now.
Is there anything that I have failed to ask you that you'd like to testify to in support of your allegations?
A No, no.
MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.
(Pause.)

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Cross-examination.

MS. GIOVANOLI: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. GIOVANOLI

Q Good morning, Mr. Irby.

A Good morning.

Q Let's talk about VICTIM. She was your, at the time of these allegations she was your, 12-year-old step-daughter, is that correct?

A Yes.

Q Okay. And she alleged that you came into her room and raped her, is that correct?

A Yes. That's what she alleged.

Q Right. That's what she alleged, but that's not true. Was it?

A No, that's not true.

Q She was actually coming on to you for a while, right?

A Well, I mean, she made -- she made two comments that I thought was in a sexual nature.

Q Didn't you say that she was coming around you with no panties, following you into the bathroom with no top? She asked you if you wanted to smell her cookies. And she also told you she smelled your underwear, is that correct?

A Yes.
Q Okay. And you told Detective Aldredge that.
A Yeah. I think I told -- I told her, yes, about the two statements, yes.
Q Okay. And you also told Detective Morgan that too, right?
A Yes.
Q Okay. And then there was another statement that you made to Detective Aldredge, and I believe it was in the home, that if you had physically or sexually abused VICTIM that she'd be tore up because you're not a man of average size, is that correct?
A I didn't tell Detective Aldredge that. I told Brenda Sparks.
Q Okay. So you told Brenda Sparks that. She's from DSS, correct?
A Yes.
Q And at that time she was talking to in your house, right?
A Yes.
Q And then you voluntarily stated that you voluntarily went and met with Detective Morgan to take a polygraph test, is that correct?
A Yes.
Q And then you were read your rights before you were

given the polygraph exam, is that correct?
A I was read my rights at the onset of the polygraph, yes.
Q Okay. And you actually signed a waiver of your rights that day right?
A Yes, for the polygraph.
MS. GIOVANOLI: And, for the record, those have been admitted in as part of these proceedings.
Q So let's go to the polygraph. During the polygraph -- that was sort of just a getting-to-know-you, getting to know some background information about you. Is that about how you would describe the beginning phase of the polygraph exam?
A Yes, ma'am.
Q And then when you got to the actual polygraph -- that was the interview phase -- the actual polygraph was just a handful of the same questions that were asked in different orders, right?
A Yes.
Q So after that you went to a family court hearing, is that correct?
A Yes.
Q And you didn't testify on direct, but you also -- they took you to McDonald's and bought you lunch too, is that correct?

A Yes.
Q What did you have at McDonald's?
A Maybe a cheeseburger, fries, Coke.
Q Okay. So then you -- you went back to Detective Morgan's -- to the sheriff's department voluntarily, right?
A No. I mean, they told me I had to come back.
Q They told you that you had to come back.
A Yes. They told me I had to come back to get the results.
Q Okay. So you -- you felt that you didn't -- you couldn't just say, hey, I don't want to go back to get the results.
A Danny Morgan was in control the whole time.
Q But Danny Morgan was at the sheriff's department. You're with Detective Aldredge in her car at McDonald's.
A Yes.
Q Did you ever tell her I don't want to go back?
A No. Detective Aldredge was -- she was in cahoots with Danny Morgan. No.
Q Okay. So then during the interrogation phase -- we'll call it -- Detective Morgan told you that he detected deception on two of the questions that he asked you during the polygraph, is that correct?
A That's what he said.
Q Okay. And you guys kind of talked about that, the

polygraph results. And then after 28 minutes of being confronted with those results you disclosed that you were sleeping naked on a living room floor and that VICTIM came and started performing oral sex on you, is that correct?

A I told Danny Morgan that. And the reason I told Danny Morgan that -- if I can reference something, you know, I can tell -- I can show you why. It's okay?

Q Let me ask you this. Did you say that because he said he didn't want to see you thrown to the wolves?

A No. I said that because I -- because Danny Morgan could make the polygraph results read what he wanted them to read.

Q Right. He's -- he's been a detective for over 20 years, right, doing polygraph exams? He told you that, didn't he?

A Yeah, he said that.

Q Okay. And so he was actually the one who tested you and read the results of the polygraph exam, correct?

A Yes.

Q So --

A But there was a reason.

Q The first disclosure was that you --

MS. BLANCHETTE: Your Honor, I ask that he be allowed to finish.

Q Go ahead. That's fine.

A But it was a -- it was reason that I made that statement to Danny Morgan about -- that led into all of the other statements if I could reference -- if I could reference.

Q Well, was it because he was threatening you?

A I can explain it to you better if I can have a minute to study.

Q Sure.

(Pause.)

A Yes. Danny -- Danny Morgan -- he tells me...

Q If you could reference the page so the judge knows where you're referring.

A It's page 12.

Q Okay.

A Danny Morgan says, "If it's -- if it gets to the point where I have to warn somebody three times to stop doing something, then by that point it's pretty obvious to figure out what category that person falls into. So at that point I usually just go ahead and terminate the test and wrap up as a failure due to lack of cooperation."

So if Danny Morgan can just stop a test five minutes in and write it up as a failure, he can do what he want to do. He can -- he can -- he can report what he want to report.

Q And you were reading from actually the first portion

of the -- not the interrogation but the interview, the pre-polygraph interview. He was explaining to you the procedures, right?

A To me he was explaining to me what he was capable of doing.

Q Okay. That was during the interview that happened. This was probably the ten minutes into your first interview that morning, right?

A I don't know if it was ten minutes in, an hour in. I don't -- I don't know.

Q Okay. Let's go back to the interrogation portion.

So after you disclosed the first incidents of sexual contact, then the second incidents that you disclosed was that you were, once again, asleep on the floor in the living room naked and that VICTIM had come over to you and straddled you and put her vagina on your penis, is that correct?

A VICTIM --

Q That's the statement that you gave. I'm not asking you if it was a true or false statement. But that's the statement that you gave.

A No. That corresponds with him telling me what he could do. Then I started to tell him that. But later on, that's when it got put in a statement. It didn't get put in a statement right then.

Q Okay. That's right. And you actually testified that you were just saying whatever you could so that you could get out of that room, is that correct? That's not your testimony, right?
A Yes. I just wanted the interrogation to end.
Q So weren't the victim's allegations that you went into her room and raped her?
A That's what she -- that's what she said.
Q Okay. So you felt that by telling a totally different story that Detective Morgan was going to let you leave the room.
A What I felt is Morgan had his own story in his head of what he thought, you know, so and I didn't know what that -- what -- Morgan had his own truth, you know, and I don't know what his truth was, but I assumed with how he was conducting the interview his truth, that I was guilty. So I gave him some statements.
Q But at no time did you say I want -- I don't want to talk to you any more, I want to end this interview, I want to go back to my jail cell. You never tried that, did you?
A No, I never tried that because I thought that the interview had to go on.
Q Why did you think that? You were advised of your rights that you didn't have to be there, that you had a right to an attorney, that you didn't have to talk to them,

you could cease the interview at any time.
A He didn't advise me of my rights at the onset of the interview. And you got to understand something. It was a lot going on that day.
I had just went back to family court for a second hearing, because when they put me in jail I had a job. But they locked me up anyway. And my wife called the newspaper, so the judge gave me a second hearing. And at that second hearing, you know, they -- they -- they said the hearing wasn't going to go on because I was being charged with something. And I'm like how I am being charged with something.
So in my mind Danny Morgan some kind of way done already got me charged with this crime. So when I went back to the -- went back to the jail and got the results, Danny Morgan never read me Miranda.
Q Okay. But he reminded you at the start of the interrogation that you were still under Miranda.
A No. He didn't even remind me.
Q Okay. You were actually advised multiple times of your Miranda rights, isn't that correct, over the course of this whole case?
A No. I was only advised of Miranda at DSS and the -- the interview, the -- the polygraph interview.
Q But it is true that you used to sleep in the living

room floor naked, is that correct?
A I never slept in -- I never slept in the living room floor naked. I slept in the living room with clothes on.
Q All right. Let's talk about MINOR 2 .
After you had talked about what happened with the victim in this case -- VICTIM -- Detective Morgan asked you about another little girl who made similar allegations against you, right?
A Yes.
Q And you -- and this was after you gave the two disclosures about VICTIM, right?
A Yes.
Q Okay. You vehemently denied any allegations with regard to MINOR 2 , is that correct?
A Yes.
Q So at that point you felt you were back in control of the interview, and you were still able to make denials despite those same coercive tactics being used on you.
A I was never in control of the interview. Morgan asked me some questions about what happened, and I told him it didn't happen.
Q Okay. And the denial of the MINOR 2 allegations, this occurred five and a half hours into the whole interrogation and interview process, correct?
A Repeat that question.

Q When he started questioning you about MINOR 2 's allegations --
A Yes.
Q -- that was about five and a half hours into the total interview and interrogation process, right?
A Yes.
Q I mean, it was well into the interrogation.
A Yes. But like -- like I say, if anybody would have done a proper -- proper investigation they would have found out the truth in behind that, but nobody did a proffer -- a proper in --
Q I understand.
So not only did you vehemently deny the MINOR 2 allegations, but you also denied inserting your finger into VICTIM 's vagina, is that correct?
A Yes.
Q Okay. And, in fact, about an hour and 15 minutes into it, the afternoon session, you denied the finger allegation five times when it was first brought up. And that's on page 102 of this transcript that we have Ms. Blanchette's created.
A Okay. The interrogation, 105?
Q Yes. 102 was about an hour and 15 minutes into your afternoon session. You denied putting your finger in VICTIM's vagina five times at that point.

Well, let me just ask you this. Do you recall that part of the interrogation talking about the digital penetration?
A I recall telling Danny Morgan that didn't happen.
Q That's right. And then about an hour and 30 minutes in Detective Morgan came back to begin writing your statement about the other two disclosures. And you immediately and unsolicited brought up the digital-penetration allegation again and, once again, denied that, is that correct? And that's on page 108 if you want to reference it.
A I always denied. I always denied that.
Q That's right. You did. And then somewhere around the 2-hour mark you again bring up the digital-penetration allegation, and you denied it again. And that's on page 120.
A I never brought it up. Danny Morgan brought it up.
Q Okay. This time at that 2-hour mark he actually didn't bring it up. You brought it up. And the transcript will reflect that. You, once again, denied it, correct?
A Okay.
Q Did you deny it?
A I denied it.
Q Okay. And then still maintaining your innocence on the issue, you mention it again around two hours and 30

minutes into the afternoon session. And that's on page 125. You denied it again, is that correct?

A Yes, I denied it.

Q Okay. And you were so unwavering with regard to that allegation that you -- I'm sorry. Let me rephrase that. So you felt so coerced that you had to admit to VICTIM coming to you while you were sleeping and performing oral sex on you and attempting to have sex with you, but you didn't feel coerced to admit that you digitally penetrated VICTIM.

A I can't remember Danny Morgan questioning me. I don't -- I don't know. I don't know the answer to that question.

Q Okay. I'll move on.

Mr. Brough also represented you on the DSS intervention case against you, correct?

A Yes.

Q Okay. And during the DSS hearing you testified under oath.

A Yes.

Q You claimed the same thing there, that you felt pressured and threatened during that interrogation, right?

A Yes.

Q So under oath in a court of law you told law enforcement specifically threatened you by saying they'd

give you four years if you confessed to something. Do you remember testifying to that effect?

A I remember saying that.

Q Okay. And I'll -- and I'll read briefly from that testimony.

"Q "And is it fair to say, Mr. Irby, that Detective Morgan accurately identified the process by which he took your statements, isn't that correct?"

Your answer was no.

"Q And how was he incorrect about that?

"A I felt I was pressured.

"Q You felt you were pressured?

"A Pressured and basically threatened.

"Q How did he threaten you?

"A He said if I didn't tell him anything, if I didn't tell them then, you know, they was going to give me time, but if I told them something they would give me four years.

"Q So that's going to be on the video tape.

"A Yes. It should state that we will see about getting you four years or if -- if you tell us something."

Q Now, you've seen that video since then, correct?

A No. I didn't see the video until I got to Broad River.
Q Okay.
A And you got to understand something. I was in jail eight months, and when I stayed in jail eight months nobody -- how can anybody reasonably say I could've -- I couldn't remember everything that transpired on that -- on that D.V.D. after or in that interrogation after eight months.
Q But you testified that they threatened you.
A I was just trying to tell -- you know, I was just trying to convey what happened to me during -- at the interrogation based on the memory that I had.
Q Okay. But you've since seen the D.V.D.s that we have. They're part of the record in this case.
A I seen, yes. I seen the D.V.D.
Q Did Detective Morgan ever tell you he was going to give you four years if you told him something?
A No, he didn't. He didn't say that. But now that I reviewed, you know, everything -- and what I was referencing is what he told -- he told me a story about a man if he cooperated and if he didn't cooperate and what happened to him versus when he cooperated --
Q So you --
A -- and what happened.
Q I'm sorry. So you lied under oath at the DSS hearing.

A No. I didn't lie -- lie -- no, no. I didn't lie. What I was trying to do, I was trying to convey to the courts the best way I could of what happened. But, like I say, I never reviewed the D.V.D. If I -- if I did, then I could have better testified to exactly what happened.
Q So had you reviewed the D.V.D. you wouldn't have lied in court.
A I didn't lie in court. I -- what I did based off of what I could -- what I could remember or what I thought I could remember, I conveyed that the best way I could to the courts.
Q Okay. And then you -- you lied in the Jackson vs. Denno hearing, didn't you?
A No.
Q Okay. I'm going to refer you to page 77 of that hearing, and I'll just briefly read. You're talking about feeling threatened. And I'll start at line 15.

"Q When you say you felt threatened, tell me what you thought might happen since you felt threatened."

And your response on line 17.

"A Well, I mean, in the video, I mean, he told me about, you know, if I told him something he would give me five years, but if I didn't tell him something he would give me 20

years."
Q So that -- that testimony was under oath, wasn't it?
A It was under oath.
Q And did Detective Morgan -- on this D.V.D. did Detective Morgan ever tell you he was going to give you five years this time and 20 years if you didn't tell him something?
A Like I said, that goes back to me trying to convey to the courts the best way I could about exactly what happened.

But if I would have had effective attorney, I had already testified at the family court hearing. And with that respect and as him being a professional lawyer, seems like he would've took me as the client and said, well, James this is actually what happened. And then, you know, we could have rectified that testimony.

So, no, it wasn't like it was a blatant lie. To me it was the truth during that time.
Q Okay. And you also testified that on the D.V.D. -- well, it is on the D.V.D. You testified that you didn't write your own statement because you told Detective Morgan you couldn't function.
A Yes.
Q And that's on the D.V.D. that was presented to the Court at the Jackson vs. Denno hearing, correct?

A Yes. I can reference the page in the transcripts if you want me to.
Q Okay. Well, I -- I'm agreeing with you that that's in there. And so whenever he -- he asked you if you wanted to write your statement, and you declined because you felt not in control. Or what was the word?
A I was hardly functioning.
Q Hardly functioning. But you complained during direct testimony that he didn't write that, the statement. But the statement that he did write, is it true that you reviewed each and every paragraph as he wrote it and had you initial beside it? Is that true?
A Yes. He did that.
Q And you, in fact, initialed by the paragraph that he said the reason why he was writing it.
A I -- I initialed and -- and signed the statements, yes, I did.
Q Okay. Do you remember being offered a 10-year sentence to plead guilty in this -- in this case?
A Yes.
Q Do you now wish you would have accepted that guilty plea?
A No.
Q Okay. You complained during your direct testimony that your counsel didn't play the entire video of the

interrogation for the Court during the Jackson vs. Denno hearing. Is that a correct assessment of your testimony?
A He didn't play the portion -- he didn't play the entire video and he didn't play the portions that, you know, that would have been -- that I felt would have been important to the judge which would have showed each implied threat that Danny Morgan, you know, said to me.
Q Okay. And you testified today that one of those implied threats was being thrown to the wolves, correct?
A Yes.
Q And didn't Mr. Brough play that portion during the Jackson vs. Denno hearing?
A That one portion.
Q And he also played another portion where he gave you -- gave him an example of another case where a guy didn't cooperate and got the maximum sentence. Didn't he play that for the Court?
A Yes, he played that for the courts. That's what we just got through talking about.
Q So isn't it true that he played all of the relevant portions that you allege were coercive portions of the interrogation?
A Repeat the question.
Q Isn't it true then that he played all of the relevant, coercion portions of the interrogation?

A No. He didn't.
Q Okay. Well, we do have the record. We have --
A There's -- there's -- there's seven --
Q -- the transcript as part --
A There's seven --
Q -- of the record.
A There's seven real important implied -- implied threats that Danny Morgan made to me. And that was -- that was -- that was just important or more important to make the judge understand or/and the jury at the trial or Jackson vs. Denno about what exactly happened to me in that interrogation.
Q Okay. You earlier read from an article that's called "It's Normal to be Normal".
A Yes, ma'am.
Q Do you remember that?
A Yes, ma'am.
Q And Dr. Henderson who was qualified in as an expert testified that her opinion was that a normal physical exam is consistent with sexual abuse, is that correct?
A That's -- she testified that's -- that it's consistent and that with no findings that it also could be consistent to nothing happening too. And also if you read that article it referenced -- it references that in that -- in that article. So she was taking that information, what she

testified to, from that article.
Q Yeah. But it wasn't just that article. She actually had education, training, peer review literature that she had read, isn't that correct?
A Well, I mean.
Q I mean, it's in the transcript.
A Yes. I mean, she had -- she had education. But, I mean, as an expert witness her reading this article that -- that we're talking about now she -- her as an expert witness, she should have knowed that, you know, that shouldn't have never been used in my trial.
Q All right. Thank you very much for answering my questions.
A Okay. Thank you.
MS. BLANCHETTE: Briefly Your Honor.
THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. BLANCHETTE

Q Mr. Irby, I'm going to show you the front page of the transcript that I believe the state was referencing from the DSS hearing. What was the date of that hearing?
A It was five days after -- after I got out of the county jail.
Q But what's the date listed there on the transcript?
A July 30th of 2008.

Q And who represented you at that hearing?
A Christopher Brough.
Q And prior to that hearing did Mr. Brough review the video with you, or were you just testifying from your memory of the interrogation itself?
A I was just testifying from what I could remember.
Q And then some three years later Mr. Brough represented you at the motion-to-suppress hearing regarding the statement, is that correct?
A Yes, ma'am.
Q And did he review the video with your prior to that hearing?
A No, ma'am.
Q And you state specifically on page 82 that you had not reviewed the video, is that correct?
A Yes, ma'am.
Q So you were merely testifying from your memory at that point.
A At that point. Well, when he asked me about if I reviewed -- if I had reviewed the tape, I wasn't testifying -- I was testifying -- it was a fact. I hadn't reviewed it.
Q I'm sorry. The portions that the state asked you about where you stated number of years that Danny Morgan could -- would give you or could help you get. Was that

from memory?
A That was from memory, yes.
Q Okay. That wasn't from reviewing the video.
A No.
Q Okay. And who were you relying upon to make that you were prepared for all of your hearings in this case?
A It was Mr. Brough.
Q And just to be clear, did Detective Morgan convince you that you could get less time or he could help you out if you told him something that day?
A Yes.

MS. BLANCHETTE: Your Honor, I have no further questions.

MS. GIOVANOLI: Just one brief followup.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MS. GIOVANOLI

Q You testified that -- you testified based off your memory at the DSS hearing, and that was July 30th of 2008, is that correct?
A Yeah, the best I could remember. Like I -- like I just stated to my attorney, I had only been out of jail five days. I got outta the -- I got out of the county jail July 23rd. And if -- if you really kind of read the family court transcript -- not the family court transcript -- but

Brough didn't even have the D.V.D. during that -- during that time --
Q That's right.
A -- of the family court hearing. He didn't -- Brough did not get the D.V.D. until December of 2008. Brough wasn't even prepared, you know, for the family court hearing about any kind of statements.
Q But the interrogation occurred on December 5th of 2017, correct?
A Yes, ma'am.
Q So you were testifying with regard to your memory of the interrogation only seven months later.
A Yes. It was actually, yes, seven, eight.
Q And now we're here in November of 2017 and you're still testifying based on your memory, correct?
A I'm testifying based off of everything I done reviewed as far as the D.V.D. being transcribed, as far as the -- me watching the D.V.D. at Broad River, yeah.
Q What about the things that are not in the file? You testified to things that are not in -- in discovery.
A As?
Q You're testifying based on your memory today, right?
A As in what?
Q As in everything else that you've testified to today here -- discussions with Mr. Brough, discussions about

Lillian taking the stand. You're testifying based on your memory, is that correct or not?

A It's in the record.

Q No. Discussions with your attorney are not in the record.

A No. That's not, but things about Lillian Collins, things about Mr. Brough, yes, that's memory.

Q Okay. No further questions. Thank you.

THE COURT: All right. You may come down. Thank you. Get your papers together there.

THE WITNESS: Yes, sir.

MS. BLANCHETTE: Your Honor, the applicant has no further witnesses. As you know, we're in the middle of one, but it's my understanding the state has a witness they need to call.

MS. GIOVANOLI: Yes, sir. We would just briefly call Jennifer Jordan from the Seventh Circuit Solicitor's office.

JENNIFER A.J. JORDAN, having been first duly sworn, testified as follows:

THE COURT: Full name for the record.

THE WITNESS: Jennifer Ann Judy Jordan.

DIRECT EXAMINATION BY MS. GIOVANOLI

Q Thank you, Ms. Jordan, for being here.

Okay. So I'm just going to ask you a few brief

questions.

You were on notice that Mr. Brough had intended to call Professor Leo as an exert witness in this case?

A Yes.

Q Okay. Had you -- if he had called Professor Leo would you have called a rebuttal expert witness?

A We'd have planned to, yes.

Q And are you aware that your office referred Mr. Mike Prodan to me as a rebuttal expert witness?

A That's what you told me, yes.

Q Okay. And have you -- has your office worked with Mr. Prodan before?

A Yes, sir -- yes, ma'am.

Q How long have you been a solicitor?

A Since 2002.

Q Okay. So you've done a number of criminal trials, is that correct?

A Yes, ma'am.

Q Is it common in your practice for defense counsel to call a false-confession expert in cases where there's a confession?

A I don't recall ever having one called in a case.

Q Do you recall any of your colleagues in the time that you've been in the Seventh Circuit Solicitor's Office having a false-confession expert?

A I've been here in Spartanburg since 2004, and I don't recall any either. But that's just going off memory.
Q Okay. Well, you deal with a lot of cases with confessions, is that correct?
A Yes, ma'am.
Q And is it pretty common for defense counsel to pursue a Jackson vs. Denno hearing to have those statements suppressed?
A Yes.
Q I have nothing further. Thank you for answering my questions. Answer any that counsel may have.

MS. BLANCHETTE: I have no questions of this witness, Your Honor.

THE COURT: Thank you very much. You may come down.

MS. GIOVANOLI: That was just my case briefly. I will hand it back over to counsel.

THE COURT: All right. Thank you.

MS. BLANCHETTE: Your Honor, it's my understanding we can resume with Dr. Leo at noon today.

THE COURT: You said you'd have other witnesses.

MS. BLANCHETTE: I do not, Your Honor.

THE COURT: Oh, I'm sorry.

MS. BLANCHETTE: Dr. Leo is my only remaining witness to just conclude his testimony.

THE COURT: All right. I misunderstood you. I

thought you said you had another witness.

MS. BLANCHETTE: No. I'm sorry. I was referencing the state's witness that needed to go this morning.

THE COURT: All right. Ms. Giovanoli, where do we stand?

MS. GIOVANOLI: I believe we can conclude and reconvene on this matter after 12:00.

THE COURT: We can be in recess until noon of this case.

(Whereupon, a recess was taken.)

THE COURT: Let's continue.

MS. BLANCHETTE: Yes, Your Honor.

Before I continue with Dr. Leo's testimony I just wanted to make sure that the record was clear that yesterday when you told me to begin questioning him you had qualified him as an expert.

THE COURT: Yes, I did.

MS. BLANCHETTE: Thank you, Your Honor.

THE COURT: I'm sorry I didn't make that clear.

DR. RICHARD LEO, having been previously duly sworn, testified as follows:

REDIRECT EXAMINATION BY MS. BLANCHETTE

Q Dr. Leo, this is Tricia Blanchette. We're going to continue with your direct examination.

A Great.

Q Okay. And if you could scoot or change your screen just a little bit, we're mostly seeing your beard and below your glasses.

(Pause.)

A Is that any better?

Q It's actually lower. Now we're just seeing your tie.

(Pause.)

Q That is much better. Thank you.

A Okay. Sorry about that.

Q Dr. Leo, I'd like to pick up on what's been marked as page 15 of your report. And I apologize. I did not mark the exact point that we were at. So let's pick up on what has been marked as point No. 4, threats and promises.

A Okay.

Q If you could explain your finding there and then the bases that you go through and explain, I believe, through page 18 of the report.

A Well, my -- my -- my opinion here is that there were numerous implicit promises or threats. And in these pages I -- I document the examples of those.

So the logic is that the detective, Detective Morgan, focuses Mr. Irby on his future and what's going to happen or likely to happen to him if he confesses versus if he continues to deny Detective Morgan's accusations.

And so as I listed in this report, there are a number

of places where he suggests he can help Mr. Irby -- that is Detective Morgan -- or he implies that Mr. Irby -- if he confesses Mr. -- or that Mr. Irby will receive significantly harsher treatment or punishment if he continues to deny.

At one point I think Detective Morgan talks about another case in which somebody -- and somebody denied the accusations and did not confess, and as a result they were charged with more counts, convicted of higher crimes and received a longer sentence versus what would have happened if they -- if the person had confessed.

And -- and so the clear implication was that if Mr. Irby confessed he would be treated better, he would receive some kind of leniency, maybe counseling or therapy as opposed to the possibility of going to prison for many years like this other person.

So there -- there are a lot of examples that I write about on pages 15 to 18 of the report that support this point that, obviously, I would have testified about at the trial had I been called.

Q Just one moment, Dr. Leo.

THE COURT: I want to ask a question.

MS. BLANCHETTE: Okay.

THE COURT: Doctor, can you see or hear -- and hear me?

THE WITNESS: Yes. Thank you.
THE COURT: Remind me again from your testimony yesterday, I guess. What did you send or when did you -- and when did you send these findings to Mr. Brough?
THE WITNESS: So I did not write a report for Mr. Brough. These findings would have been communicated to him orally --
THE COURT: Orally.
THE WITNESS: -- in two thousand -- I'd have to look at my billing records. I think it was 2009. It may have been 2008. But it's -- it's documented on the billing records which -- which Ms. Blanchette has the conversations that I had with him and the time that I spent on the case.
THE COURT: Did he have any documentation alluding to the findings in your report? Did he have any things in his hand, or was it just a conversation?
THE WITNESS: I believe it was just a conversation. There were some emails between us that were ultimately retrieved, but I hadn't heard from Mr. -- Mr. Brough in many years after that. And so I, unfortunately, had destroyed my file prior to being contacted by Ms. Blanchette.
THE COURT: Well, is it fair to say then -- I'm looking at a report of 20 pages that you went over this -- this entire scope of your findings. These 20 pages, you

went over that with Mr. Brough in this -- in this detail -- in this detail back in 2008 or 2009.

THE WITNESS: No. Let me -- let me answer with a little bit of a qualification though.

The -- the report discusses, as we talked about yesterday, essentially from pages one to ten, with the exception of two and three, so -- so eight pages there are really general discussion of the field of social science and study of interrogation and confessions.

I might have given Mr. Brough some articles. I might have briefly talked to him about the background of the field, but definitely those eight pages, I don't think I would have discussed with him personally in as much depth as I do in this report.

The specific opinions I would have discussed with him orally, some of them probably in as much depth but not all of them depending on -- on -- on our discussions. So that would be my qualification.

I -- I did not write a 20-page report for him and I did not discuss everything in this report in as much depth with him, or I don't think I did.

THE COURT: Would he have -- from those conversations would he have understood the psychological bases and the history of this scientific investigation?

THE WITNESS: I -- I --

THE COURT: Would he have understood the importance of that if you had not conveyed that to him?

THE WITNESS: Well, what -- what I think I told him or would have told him was whether my testimony could be helpful and why it could be helpful and the specific reasons why I thought it would be helpful and what I could testify to.

I just don't recall his background knowledge of this field. Many attorneys who contact me have read something I've written or they've gone to a C.L.E. that I presented on or they've talked to another attorney who's worked with an expert like me or they've read an appellate case that describes the testimony.

So I just don't recall what his background knowledge was. But I would have articulated what my -- what my opinions were, why I thought they could be helpful to him, what I would have testified to at trial and some background knowledge if he needed it.

Sometimes I send attorneys articles; sometimes I talk to them about it in general terms. I just don't recall specifically what depth, if any, I went into the general field of the social psychology of interrogation and confessions that forms the basis for my specific conclusions with Mr. Brough.

THE COURT: Well, to simplify, I'm just trying to

determine what he knew and when he knew it.

THE WITNESS: I wish I had detailed notes of my conversations with him, but I -- I -- I believe there was a conversation where we went over these findings, the specific findings, and we prepared for my eventual testimony. But then I never heard back from him.

So I think he knew the highlights of my opinions as articulated in this report if not in the depth sometime in -- in -- in 2008 or 2009.

There would be in the billing records a note of the consultations or conversations with him, and I suspect the longest one -- that the -- that the conversation that lists the most amount of time toward -- toward the end of the bill would be the conversation I had with him where we went over this.

THE COURT: All right. Thank you.

MS. BLANCHETTE: Your Honor may I ask just a follow-up question to your line of questioning?

THE COURT: Sure.

BY MS. BLANCHETTE

Q Dr. Leo, just to further clarify, I have introduced a series of emails where you were setting up to come and travel to South Carolina, and then I've also introduced -- I'm sorry -- I've also introduced an order where he got the case set for a date certain saying you were a necessary

witness.

Would you have consulted with him and given him your findings before urging him to get the case set for a date certain so you could testify?

A Yes. I mean, that's my standard practice. Oftentimes I don't have helpful conclusions, but it's usually after I have that conversation with the attorney that if I can be helpful they -- they -- they would do something like that.

Q So logically to you, even though you don't have specific notes, the fact that he was trying to accommodate your schedule, you were quoting a fee for your travel and he got the case set for a date certain, you would have conveyed your findings to him at that point.

A Yes, that's my belief, yes.

MS. BLANCHETTE: Your Honor, may I go back to the report at this time?

THE COURT: It's your case.

MS. BLANCHETTE: Thank you, Your Honor.

Q Dr. Leo, if you could, just beginning at the bottom of page 15, give us the specific examples you've cited of the threats and promises.

A Okay. Thank you. I didn't know how -- how long to make my last answer, which is why I didn't go through them all.

All right. Starting at the -- toward the bottom of

page 15 of my report -- I give the example on page 71 of the interrogation transcript where Detective Morgan tells Mr. Irby, quote, "I can help -- help you understand what's going to happen, or what is likely to happen if you go this way, what's likely to happen if you go that way." End of quote.

The next example, which comes from page 80 of the interrogation transcript, Detective Morgan states, "James, there has been sexual contact between you and VICTIM. You have been involved in having sex with her. The thing is, I don't want to just see you being thrown to the wolves with this." End quote. That was the next one.

The next quote that I have here looks like a paraphrase where I say in the report at the top of page 16, "It is clear that Mr. Irby understands that threat, i.e., being thrown to the wolves, when just a few pages later he says he understands he is going to get charged seemingly if he continues to deny the accusations, but Detective Morgan cuts Mr. Irby off.

And then the next quote I have from Detective Morgan on page 84 a little ways down, toward at the top of, again, page 16 of my report, "I'm going to tell you," quote, "I'm going to tell you about my experience with doing this for so long, what I have seen happen with the criminal justice system with people who make certain choices," end quote.

Shortly after that, same page, page 84, then, again, this is Detective Morgan continuing. "Then it makes you look like you've been withholding stuff, which makes you lose worse, which is kind of the situation you've got yourself in now by withholding the information about her performing oral sex on you."

I -- I continue to analyze that, but the next quote, which is now about two-thirds of the way down on page 16 of my report, from page 86, Detective Morgan states, "But I'm trying to give you the opportunity. It looks so much better on your part when you are the one who puts everything on the table, because when you put everything on the table, then it looks like you are truly remorseful."

And -- and then the final quote at the bottom of page 16 of my report, still on page 86 of the interrogation transcript, Detective Morgan states, "Some guys though are going to make me push them to put everything on the table. They'll put everything on the table once they've been backed into a corner and they have no other choice. For that individual how do you look at two guys who have both put everything on the table?" The one -- it should say guys. It says buy. That's a typo. "The one guy puts it on voluntarily and the other guy makes you drag it out. Which guy are you going to look at from the standpoint of being an outside individual? Which are you going to be

more sympathetic towards?"

And then I have another quote. I -- I don't list the page, but I think it's page 86 again. Detective Morgan states, again, toward the top of page 17 of my report. "I want to be able to help you put all" -- I'm sorry -- "put this all down on paper so that the best possible light can be shown. You are truly looking at the rest of your life here. I'm not talking about the standpoint of jail or anything like that. I'm talking about what you do right now is going to impact the rest of your life. Okay?"

And then after that I -- I discuss the example that I was alluding to initially, and this is sort of a half to two-thirds of the way down on page 17 of my report. And this is from pages 87 to 89 of the interrogation. This is what we call a third-party threat. Well, the interrogation manuals call it a third-party theme where you talk about what happened to somebody else, so they infer that that's what would happen to you if you confess versus non-confess.

So Detective Morgan states, "If you go ahead and get all of that out in the open, then everybody who has to deal with you from this point on is able to look at you in one light. They can either look at you in this light or in that light. One way they can look at you is here's a man who's admitted that he made mistakes and made bad choices. He admitted that he screwed up. He's remorseful about what

he did. Here's a person that could probably be one of the few out there who would actually benefit from counseling, who would benefit from therapy, who can overcome this, who is not likely to, with the proper amount of counseling -- therapy and counseling and whatever else is not likely to be a threat to another child in the future. This is somebody who can be rehabilitated. Okay. But the only time they're going to look at somebody and say this is the person who can probably be rehabilitated is when they believe that person has been completely upfront and honest."

And then Detective Morgan continues. "And that they are remorseful, sorry about the choices they made. Okay. When you've got somebody who gets backed into the wall, okay, this is a prime example. A case I did about two years ago, I had a guy who eventually told me everything he had done. And he had done everything. But the children in this case were six and seven years old. Okay. It took him a long time --

THE COURT: I can read it.

Q Dr. Leo -- Dr. Leo, it appears the Court wants me to move on.

MS. BLANCHETTE: Is that correct, Your Honor? You can read the report.

THE COURT: Yeah. I don't -- he doesn't have to read

the report.

MS. BLANCHETTE: Okay.

Q And, Dr. Leo, what was your ultimate finding on page 18 regarding these passages that are reflected here in the report?

A Well, that -- that -- that he would receive therapy, counseling and rehabilitation, which is, in effect, a suggestion or promise of softer treatment or leniency if he made the admission, but that if he continued to deny, like the other person who I think received a 30-year sentence, he would receive the maximum sentence or concurrent sentences, which was, in effect, a suggestion or an implied promise of harsher punishment if he continued to deny the accusations to Detective Morgan.

Q And, Dr. Leo, I believe that No. 5 is just a summary finding that you have already addressed, is that correct?

A Correct.

Q Is there anything else regarding specific findings that -- that you would like to share with the Court that you would have testified to either at the suppression hearing or trial of Mr. Irby?

A No. I think -- I think I've testified to them mostly yesterday, but also today. And of course they're enumerated in the -- in the summaries of my opinions both at the beginning and the end of the report.

Q And, Dr. Leo, the record is clear that you were originally involved in this case in 2008 and 2009. But I want to ask. You would have been willing to testify in this case at the criminal trial or suppression hearing of Mr. Irby.
A Yes.
Q Okay. And you at this time do not have an explanation for why you were not utilized.
A Correct. I think I was subsequently told there was a view there might not have been enough money, but I don't think Mr. Brough provided me that explanation.
Q Was it ever -- were you ever informed by Mr. Brough that he was concerned about getting you qualified or the state excluding your testimony?
A No.
Q Okay. And is that something you think you would specifically remember?
A I think so. And, like I mentioned yesterday, I had been qualified and testified once before in South Carolina. So this was not a jurisdiction where I -- where I had not testified or where I had been excluded from testifying.
Q And if you could, just briefly explain your position on why it is not appropriate for a layperson to testify or try to explain to the jury the issue of a false confession or indicators of a false confession. And I apologize if I

used the terminology incorrectly.
A No. Lay people typically don't know much about false confessions. They're not familiar with the research or the findings. They don't understand the relationship between police interrogation techniques and false confessions.
So I think I mentioned this yesterday. It's just something that would be outside their common knowledge. Even -- even police detectives who learn the techniques don't know the research and can't typically explain what the research says or shows about how and why sometimes police interrogation techniques can lead innocent individuals to make or agree to false or unreliable statements, admissions or confessions.
So it'd just be something outside of a layperson's expertise, even outside of some professional's expertise who are not themselves experts in the research or science that studies it.
Q And have you been called in cases and then the opposing party calls a rebuttal and reply expert?
A It rarely happens, but it has happened on a few occasions, yes.
Q In what area is that expert typically qualified in when that has happened --
A Well --
Q -- if you recall?

A -- the -- they're usually professors, either a professor of law or --

MS. GIOVANOLI: I object.

Q One moment, Dr. Leo. I'm sorry. The state objected.

MS. GIOVANOLI: Objection to relevance as far as what the other cases, expert rebuttal testimony what they testified to.

THE COURT: Overruled.

Go ahead.

Q You can continue, Dr. Leo.

A There's -- there's two people who have opposed me that I can recall.

One is a professor of law at the University of Utah. I think I mentioned him yesterday. He -- he's a former prosecutor, not a social scientist. He is sometimes called in civil cases, not in criminal cases, although it's earlier -- earlier in the process not -- not examined and called at trial.

And the other is a psychiatrist in New York who also is not an expert in the field and also has been called in civil cases to oppose me. I can't recall ever having an expert in my field oppose me in a criminal case.

Q And in preparation for this case this week I had asked you for some information, if the state had opposed your qualifications. And did you provide me an amici curiae

brief out of the State of New York explaining the social psychology science and going into detail about why such testimony such as yours is helpful to the Court?

A I did provide that document.

The significance is not that it's an amicus brief per se. It's that it was an amicus brief filed by the American Psychological Association, the primary scientific organization in psychology that has tens of thousands of members.

And so they were filing the brief to review the science in this field and explain why it was helpful and the bases for -- excuse me -- expert testimony -- the scientific basis for expert testimony in this field.

Q And the name on that brief is People -- the State of New York vs. Adrian P. Thomas, is that correct?

A Correct.

MS. BLANCHETTE: Your Honor, at this time I would ask to move this as an applicant's exhibit. I'd have to check the number. I believe we're on 16.

MS. GIOVANOLI: The state would object to this on hearsay.

THE COURT: What is it? Amicus brief in what?

MS. BLANCHETTE: It's in a New York appellate case, and it's done by the American Psychological Association in support of appellant. And it addresses the science. It

goes to all of the questions that the state raised yesterday.

MS. GIOVANOLI: I believe that's proper for argument but maybe not for evidence in this case.

THE COURT: I think I agree with the state. I don't think I would admit it as evidence. But as in any brief -- any -- you can submit it to the Court.

MS. BLANCHETTE: Yes, Your Honor. If you will just take it for your review, that would be fine.

THE COURT: That's what I'll do.

MS. BLANCHETTE: Okay. And I have a copy.

THE COURT: Not take it as evidence in the case.

MS. BLANCHETTE: That's perfectly fine, Your Honor. I was just concerned since I didn't have a specific cite such as a reporter. I do have copy for the state as well.

Q Dr. Leo, you have now worked on this case on two separate occasions. Is there anything else that you'd like to testify to in support of your expert opinions and involvement in this case?

A No. I think it's pretty well laid out in the report, but thank you.

MS. BLANCHETTE: Your Honor, I have no further questions of this witness.

THE COURT: Cross-examination.

MS. GIOVANOLI: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. GIOVANOLI

Q Good afternoon, Professor. How are you?

A Good. Thank you.

Q All right. So I understand that you can't opine as to whether or not the statements in this case were false or true. But isn't it possible that the defendant was just lying in this interview?

A Of course that's possible. That's beyond the scope of my expert opinion in this case or why I was retained. But, yeah, of course that's possible. That's always possible in any case.

Q With regard to your report, you really are only addressing the statements, the handwritten or the written statements, that were given to Detective Morgan after the interrogation, is that correct?

A I -- I don't think so. I think I was addressing the entire interrogation process, including the polygraph interview that preceded the post-polygraph interrogation. So it wasn't just the end statement but the entire process that produced that.

Q So are you aware of the other statements that were made to law enforcement officers -- oral statements that weren't written?

A You have to refresh my recollection.

Q Well, there was one statement that the defendant gave to Detective -- actually, I think it was a DSS worker -- that the victim in this case, the 12-year-old girl, asked if she could smell his cookies and told her -- told him that she had already smelled his underwear and also she would follow him around with no panties on and follow him into the bathroom with no top.

Were you aware of those statements made to law enforcement?

A Yes. It sounds like he -- he was saying what she had said to him, yes.

Q Okay. So, well, he actually testified. He actually told them that the victim was following him around into the bathroom with no top. That wasn't what she told him. Were you aware of that?

A Well, as you -- as you described it in your last question, it sounded to me like -- like you're asking me am I aware of the statements that he says she -- that he said about what she -- what he believes she said to him.

Q No. Are you aware of the statements that he gave to law enforcement? He told law enforcement and DSS that the victim in this case was coming on to him, walking around the house with no panties, following him into the bathroom with no top, asking if he wanted to smell her cookies. And the last thing was she told him that she had smelled his

underwear.

I'm just asking if you were aware of that in your review of all of the materials in this case.

A Yes.

Q Okay. And did that factor into your analysis in this case?

A No.

Q Okay. Now, do you -- you're a lawyer also, isn't that correct?

A I -- I'm a law professor. I've never practiced law but I'm -- I do teach on a law faculty.

Q Are you admitted to any state bars?

A No. I've never taken a bar exam nor practiced at law.

Q Okay. Are you aware of the legal distinction between statements from which you can infer guilt and the difference between that and a confession?

A I think so. I mean, you're talking about incriminating statements from which one can draw an inference of -- of guilt or possible guilt versus a narrative confession.

If -- if that's the distinction you're making, I -- I don't think of that as a legal distinction. If there's a legal distinction that you're making, I -- I think you'll have to tell me what specifically you're referring to.

Q Well, I think there is a real-life distinction as well

as a legal distinction. In our jurisdiction it was in State vs. Cunningham. Our -- our courts recognized the legal distinction between the two. And I guess my question to you is do you recognize the distinction between those two things.

A Well, I think so.

What -- what we talk about in this field is three types of statements.

One would be an incriminating statement, typically ambiguous, but from which one could infer guilt or possible guilt.

And then -- and then the next level up would be an admission, which essentially is somebody saying I did it.

And then the next level up would be a confession, which would be an admission I-did-it plus a narrative explaining how and why the person did it.

So those are three different types of statements from which one can infer possible guilt, although they may be unreliable as well as reliable.

Q And how did you categorize the statements in this case?

A The statements in this case I -- I would have -- I would have classified as a confession.

Q Okay. You realize that the statements that he made were that he was asleep whenever the victim came to him and

began performing oral sex on him. How is that even incriminating? That's not against the law, is it?
A Well, you're asking me for a legal conclusion. I think there was more to it than just that. But, yeah, you're right. If he was completely asleep, then -- then my understanding of criminal law is that wouldn't be against the law.
Q And that's the disclosure that he made to Detective Morgan 28 minutes into the interrogation, is it not?
A I -- I recall that as being part of the interrogation. I don't recall exactly where.
Q Okay. So, well, how about his second disclosure? The second disclosure was that he was asleep and the victim -- he woke up to the victim trying to have sex with him. I believe her vagina was on his penis when he immediately stopped it. That's also not an incriminating statement, would you agree?
A I would agree that that, yes, that that's not a crime, I think is what you're saying.
Q And, in fact, it wasn't until the very end of this interrogation. Detective Morgan was actually trying to end the interview, because I believe it was close to 7:00 o'clock. He even mentioned getting home to his family. And this was where applicant actually said, wait, I want to tell you one more thing. Do you recall that in

the interrogation, the very end?
A Not off the top of my head, but if you tell me the page number, I can go to it.
Q Okay. I'll give you the page number. It is page 133 on the work-product transcript and there's -- the total is 141 pages. So we're at the very end of the interrogation.
A Okay. Hold on just a second.
(Pause.)
A Okay. On 133.
Q I'm going to refer you to the question that's the second to last question, next to last question. And this is Detective Morgan.

"Q All right. We've been here for a long time. There's no point in us spending any more time with it. Okay. I just want you to understand where you're at. It's a decision that you're making."

Q And then he says:

"A Let me tell you one last thing. The only thing else is about the room incident. VICTIM had asked me if she could perform oral sex on me. And through all that she's been coming on to me, coming on to me, coming on to me. You know, that's what happened."

"Q When was that?

"A That was around about back during the summer.

Q And at that point he -- that's why the interview continued for a few more minutes, was because he made that last disclosure, which was actually the only incriminating disclosure in the entire interrogation. Is that -- is that your reading of it?

A No. The -- he says, "She asked if she could perform oral sex on me. She had been coming on to me."

If you just take those statements standing alone, I don't understand why they're incriminating.

Q Well, he goes on to elaborate that he actually let her perform the oral sex. I think that's what he meant by that's what happened. He let her perform oral sex.

He went into her room. The victim asked if she could perform oral sex on him, and he allowed it to happen for two -- a couple of minutes before stopping.

So that's really the only time he confessed to a crime in this whole interrogation, isn't that right?

A I -- I just don't recall if that's the only time if -- and if that's -- you know, assuming your reading of this statement.

Q Well, it's all here in the transcript. And if you need a minute to read over it to refresh your recollection, I'm sure the Court would allow you that time.

A Okay.

(Pause.)

Q Just let me know when you're done, and then I'll ask my question.

A Okay.

(Pause.)

MS. BLANCHETTE: If I could turn that down.

(Pause.)

A Okay. I -- I'm done.

Q Okay. So did the fact that he gave the only admission of guilt to a crime at the very end of the interview when Detective Morgan was trying to end the interview factor into your analysis in this case?

A No. You'd have to tell me more specifically what you mean by factor into your analysis.

Q Well, you reviewed all of the materials in this case and you agreed to assist in this case, correct?

A Yes.

Q And you did that based on what?

A Well, based on the materials I reviewed, but this doesn't -- what you've just asked me doesn't affect any of my opinions in this case. So, no, it doesn't factor into my analysis.

Q Okay. So I'll move on.

Are you aware that there was a Jackson vs. Denno

hearing in this case?
A Yes.
Q And you're aware that the entire D.V.D. of Detective Morgan's interview and interrogation was admitted during that hearing.
A Yes.
Q And although only parts were played, the ability to watch the entire video was offered to the Court and the Court of Appeals. Judge Cole found that this was not a coerced confession. Are you aware of that?
A Yes, yes, a legally -- not a legally coerced confession, correct.
Q Okay. And then three Court of Appeal judges for South Carolina agreed and affirmed that decision. Were you aware of that?
A No.
Q All right. Is it true that people who falsely confess recant their false confessions shortly thereafter?
A Sometimes.
Q Would it surprise you to learn that he, in fact, did not recant to his trial attorney in confidence?
A No, that would not surprise me.
Q So he -- he maintained the same story to his trial attorney in confidence. Were you aware of that?
A Well, I'm not aware that that's what his trial

attorney has testified to, no.
Q Okay. In your report you stated -- and I'm going to quote. This is on page 11 of your report.
"The interrogators were not instructured [sic] to find the truth but instead to intentionally incriminate Mr. Irby by pressuring and persuading him to repeat back the alleged victim's allegations, which Detective Aldredge and Morgan assumed must be true but never sought to independently verify with actual evidence."
Okay. First, are confessions not actual evidence?
A Well, obviously, they are evidence, but the question is whether or not they are corroborated. And I'm saying that there was no corroboration of the confession here.
Q Is a little girl's disclosure of sexual abuse not actual evidence?
A No.
Q How is that not actual evidence?
A Well, in -- in -- when there's an accusation that then leads to a confession, you don't take the accusation as corroborated confession. You need independent evidence from the accusation or the confession to corroborate it.
We know that accusations are often false or misleading for a number of reasons. And it's essentially a different form of testimonial evidence. So you would look for something outside the confession, not including the

accusation -- accusations are often recanted too -- that supported it.

Q Okay. So you're aware that oftentimes there's no physical evidence of abuse in these cases, aren't you?

A In some -- in some types of cases, yes.

Q So aside from the victim's allegations if there's no physical evidence, you're saying there's really no actual evidence in the case of a criminal sexual assault.

A No. I'm saying there's no -- there's no independent corroboration --

Q Okay. Independent --

A -- of the -- right -- of the confession statement.

Q All right. Going back to the statement on page 11 of your report that I read, how do you reconcile your theory that the interrogators were pressuring and persuading him to repeat back the victim's allegations with the defendant's actual statements that he made to them?

A I -- I don't understand what there is to reconcile.

Q Well, you're saying that the detectives in this case were basically coercing him into repeating back the victim's allegations. But he, in fact, never repeated the victim's allegations, did he?

A I thought he did, and I thought they were telegraphing them throughout the interrogation, telling him he was lying and what he was being accused of.

Q So are you -- so you're not aware that the victim's allegations were only that he came into her room and vaginally raped her.
A I was at the time, but no. As I sit here I don't -- I don't recall the specific allegations. But I -- I -- I think at a more general level they were pressuring him to get him to admit to something that would incriminate him for having -- for allegedly having some sexual interaction with VICTIM.
Q And they weren't really successful because he just admitted that he was asleep and she was doing things to him.
A No. They were successful because they ultimately got the incriminating statements, which was their goal.
Q Okay. You also criticized the interrogator's questioning of him for approximately six hours, an extraordinarily lengthy interrogation. And you say it was closer to seven and a half if you included the breaks and the gaps.
A Correct.
Q Why would you -- why would you include the breaks and the gaps? He went to a family court hearing and then he went to lunch at McDonald's. So why do you include that in your analysis?
A It's standard in my field to include the breaks

because they -- they're -- the person gets more fatigued and exhausted and worn down during those times.

Q And -- and you --

A So it's -- it's just a -- it's just the way -- way we count the time when somebody is interrogated over multiple sessions on the same day or days.

Q And it's your -- I think you stated in your report that it's recommended not to exceed four hours in an interrogation, is that correct?

A By -- by the leading interrogation trainers, correct.

Q Okay. So what if someone was interrogated four hours on three separate days? Under your logic, all logic, that would be 72 hours of interrogation.

A No. I don't think you would -- you would count the 24, the time they were sleeping, you know, and, obviously, there would be a significant break between each of the 4-hour sessions.

If it was just four hours, then I would just count four times -- four plus four plus four. But if one day there was four hours, and there was an hour break, then I would count that as five.

If the next day was four hours but two hours break during questioning, I would count that as six.

And the final one if it was just four straight hours, I would count that as four. So I wouldn't count it as 72.

Q Okay. I'm going leave that one alone.

See, I know you've reviewed the video tape and read the transcript in this case.

So you would agree that the first two and a half hours is just an interview, not an interrogation. A lot of instruction was given, a lot of explaining of words and the procedures, a lot of background questions, rapport building and then a short polygraph exam which consisted of a handful of the same questions asked in varying orders.

Would you agree that that was about the first two-and-a-half hours?

A I wouldn't agree with your characterization. I think it was really an interrogation from the start. And the reason I think it was an interrogation is because the calligrapher under the guise of supposedly just trying to get to truth and background information asked questions and said things that sought to elicit incriminating statements from Mr. Irby.

And that is the technical definition of an interrogation, that this was not merely the standard pre-polygraph interview that you -- you usually see pre-polygraph administration.

Q But at that time no threats or alleged threats or promises of leniency -- that hadn't been applied to him at that point?

A Correct.
Q And at that point it hadn't been an extraordinarily lengthy time, which was another one of your criticisms, is that correct?
A At that point, yeah, in the -- right. Prior to the administration of the polygraph.
Q And at that point no false-evidence ploys had been used, is that correct?
A Prior to telling Mr. Irby that he failed the polygraph, I don't recall any false-evidence ploys, correct.
Q And so let's see. And in reviewing the video and the transcript you saw that he was offered three different opportunities to take a break, get a drink. And he declined each one of those. Did that factor into your analysis?
A No.
Q How about when Detective Morgan after he got two disclosures regarding victim, the victim in this case? He then went on to kind of use these interrogation tactics to elicit a confession regarding a second victim, minor 2 . Do you recall that part of the interrogation?
A Yes.
Q Okay. He vehemently denied those allegations against the second victim, isn't that correct?

A I believe so.
Q Do you think that's a sign of truthfulness?
A I don't know whether it's a sign of truthfulness or not. Again, my role is not to judge whether he's making true or false statements, so that's beyond the scope of why I was retained or what I would testify to.
Q That's fair enough. But did that factor into your analysis?
A No, it didn't factor into any of my specific conclusions.
Q Okay. I'm sorry. I'm looking at my notes.
Okay. And in your report you stated on page 18 applicant had no meaningful choice but to cooperate and comply with Detective Morgan's requests and/or demands.
In your review of the interrogation did Mr. Irby ever even try to end the interview?
A I don't recall him using those words, no.
Q Did he ever invoke his right to remain silent or his right to an attorney?
A Not that I recall.
Q But you would concede that he was aware of those rights. He actually signed a waiver that was part of the packet, I believe, that you reviewed.
A I would concede that he signed a waiver, yes.
Q Okay. If he never even attempted to end the

interview, then why do you think he had no meaningful choice but to comply?

A Because I think he was threatened. He felt threatened, and he felt the only way out was to give the detective what the detective was looking for. And most -- in most of the false-confession cases they don't invoke their Miranda rights even when they're given them and they waive them. It's not something that's on their mind. And oftentimes it's not something they really fully understand and it has occurred many hours earlier typically in the process.

Q Okay. And I've just got a few more issues to take up with you.

Other than the records that you've reviewed in this case did you ever actually review the subject, Mr. Irby?

A Well, when you say review him, what do you mean?

Q Did you ever meet with him?

A No. I've never met him in person, no.

Q Have you ever talked with him?

A I think -- I think -- I think I did speak to him once.

Q Do you know his I.Q.?

A I do not.

Q Do you know anything about his background, his childhood, his upbringing?

A No.

Q Do you know if has any mental disabilities or psychological disorders?
A I do not.
Q Aren't these kinds of personal characteristics or traits relevant to, you know, whether or not that these techniques are like more or less likely to elicit a false confession?
A They could be relevant if somebody had mental disabilities, low intelligence, high suggestibility or -- or some mental illness. Then, yeah, it could be relevant in the sense that it could make somebody more vulnerable to the coercive pressures if they exist in an interrogation and at greater risk for making a false or unreliable confession because of their personality traits. But that didn't factor into my analysis here.

If Mr. Irby had any of those traits it would have made him only more vulnerable and only more likely to be -- to -- to falsely confess. So there's no way I can imagine cutting the other direction.

Q Okay. So it didn't -- this -- that didn't play a role in your analysis so I'll --
A Correct.
Q I'll go on to the next issue because I think that answer was complete.

So the actual statements given by the applicant during

the interview, do you -- did you remember during the interrogation he also admitted that he lied to DSS about owning his own business so that he could evade paying child support for his three biological children? Do you remember that?

A Vaguely. I'd have to -- I'd have to review it. But vaguely, yes.

Q Okay. And that was on page 55 of -- he also -- he also admitted that later in the DSS hearing transcript. That's page 55.

A Okay.

Q So -- so the fact that he's also admitting other lies during this interrogation that were actual truthful confessions, does that factor into your analysis at all in this case?

A No. It seems to me the statements that he made that are the subject of my analysis were made after the use of techniques. And these -- this statement was not the focus of the interrogation nor in response to those techniques.

Q Okay. And lastly just for the record, how many interrogations have you conducted?

A So I -- I've -- I've never conducted an interrogation. I've never worked as a police officer.

Q Okay. But I think on direct testimony you said that you trained other people in interrogation tactics, or were

you -- I was a little bit confused as to what you train other people about regarding interrogations.

A Okay. So on two occasions police departments have called me to come out and give police interrogation trainings. One was the Broward County Sheriff's Office in Fort Lauderdale, Florida, three days in a row in 2002. I put on an 8-hour class on police interrogation and confessions.

And then the second department was the Miami Beach Police Department in 2003. I put the same 8-hour course on.

They were concerned specifically about the problem of false confessions. And so since I had eight hours to work with the -- these investigators on each of the days I did it, I went over things that they would been trained in the Reid, but I also focused mostly on the academic research and what it can teach them about both being more effective interrogators and getting truthful and voluntary statements, as well as the problem of psychological coercion and false confessions and what they should know about that and what they should look for and things they can do to prevent getting false confession or realize they've gotten one if they did, in fact, elicit it.

Q Now, you mentioned in that answer the Reid method, and you're referring to the Reid technique.

A Correct.
Q Okay. Are you certified in the Reid technique?
A Yes.
Q Okay. And so would you concede that the Reid technique is pretty, I guess, it -- it yields true confessions, as well as in your opinion false confessions?
A Correct, yes.
Q So it's a successful method of interrogation.
A Well, it depends on your -- your definition of success. The false confessions -- and of course any involuntary confessions -- would be the problem. Truthful, accurate, reliable and voluntary confessions would be successful, yes.
Q And I have a question for myself. You're talking about false confessions.

Necessarily, if someone's being interrogated -- and you mention this in the guilt-presumption -- guilt presumption and guilt bias -- one wouldn't interrogate a person they thought was innocent, would they? What would be the purpose of that?
A Yeah. They -- they are trained not to interrogate people who they believe are innocent. They're trained only to interrogate people whom they believe are guilty once they've concluded in their mind that the person is guilty.

Obviously, when they get false confessions if they're

only interrogating people whom they believe mistakenly to be guilty, then they're not trying to get a false confession.

They're trying to get a true confession but -- but, in fact, they're getting a false confession from somebody they mistakenly concluded is guilty when the person instead is innocent.

Q So then the guilt presumption is going to be prevalent -- present in any interrogation.

A Any Reid-based interrogation, yes. Reid says to thoroughly interrogate before -- investigate rather -- before you interrogate. And what they mean by that is you should have a very solid basis before launching into the guilt-presumptive interrogation.

Q Okay. So, basically, the only way the guilt presumption would lead -- elicit a false confession was if the person was innocent.

A Correct, unless you get a -- got a guilty person to falsely confess to either some details of their crime or a different crime that didn't occur.

MS. GIOVANOLI: And beg the Court's indulgence just to reference to my notes.

(Pause.)

Q Okay. I want to touch on minimization. You addressed that in your report.

A Okay.
Q So -- so can you just briefly, like in one or two sentences, explain minimization?
A Sure. So minimization is the technique where the police minimize, seek to minimize, the blameworthiness or culpability or the consequences that will follow if the defendant agrees with the accusations and confesses and they do the opposite, they suggest the opposite, that there will be more blameworthiness, more culpability, worse consequences if the suspect continues to deny.
Q And minimization can also lead to true confessions, correct?
A Yes.
Q Okay. So basically with all of these interrogation techniques if you -- you're criticizing them because of their likelihood in eliciting false confessions. But if you weren't to use any of these techniques you'd basically just be interviewing these suspects and just hoping that they would spontaneously, you know, confess to crimes. Does that -- does that sound correct?
A I don't think that sounds correct because a lot of scholars and researchers have been trying to develop what they call investigative interviewing methods that are not -- not the Reid method of interrogation but also not guilt-presumptive, not accusatory, more evidence based.

And so it's not just a matter of getting spontaneous confessions or statements but sort of outsmarting and strategizing in a way that -- that doesn't have the problems the Reid techniques I described in this report have.

So there's -- there's an intermediate way. It's not just a matter of hoping for a spontaneous confession or using the Reid method of interrogation.

Q Okay. So in this case when there's no other evidence other than the victim's allegation, and if Detective Morgan didn't use any of these interrogation techniques, this case would most likely be unsolved, wouldn't it, or at least -- not unsolved. Probably wasn't a good word. You basically would only be putting up the victim's allegations on --

MS. BLANCHETTE: Your Honor, I object on speculation.

THE COURT: Overruled.

Go ahead. It's cross-examination.

Q Do you --

MS. GIOVANOLI: I'm sorry.

Q Do you realize the importance of these interrogation techniques where there really is no independent evidence outside from the victim's allegations?

A Yeah. I think interrogation, if fairly and properly done, is -- is a proper method of gathering evidence.

In this case if a crime really did occur then -- then,

yes. But if a crime didn't occur, then no. And either way, even without the confession, the prosecution may have gone forward anyway. I don't know.

Q Okay. My very last question would just be with regard to your testimony on direct.

You said lay people can't explain false confessions to a jury and lay people generally do not understand the phenomena of false confessions and the research behind it. I'll conceded they probably don't know much about the research, but what is the basis of your opinion that lay people do not know what false confessions are?

A The surveys that we've done and the questions that we've asked them -- so there's a number of published surveys that go into this and they -- they -- they have false and incomplete beliefs about various aspects of the phenomenon of confession.

Q Is one of those surveys where 70 percent of jurors said that false confessions occur but not often?

A If -- if one of those surveys says that, yes.

Q Well, you just made reference to the surveys. I'm asking you.

A Yes. There are -- there's five survey studies, published survey studies. I haven't looked at them closely in a while. And I'd be happy to go through them again. But, yes, that's the basis for our knowledge about this.

Q Beg the Court's indulgence.

(Pause.)

MS. GIOVANOLI: No further questions.

Q Thank you, Professor Leo.

A Thank you.

THE COURT: Redirect?

MS. BLANCHETTE: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. BLANCHETTE

Q Dr. Leo, just very briefly on redirect.

The state had asked you a line of questions about how the allegations made by VICTIM, the victim, were of penetration and more of what we would call rape, whereas the -- the -- what was purported as the confession of Mr. Irby didn't match up to the factual allegations of VICTIM.

You've read the transcript and you're familiar with those inconsistencies, is that correct?

A Yes.

Q And the fact that what was alleged by the victim and what Mr. Irby ultimately confessed to in that interrogation -- the fact those do not match up -- is that further proof to you that this could be -- or further indicator that this could be a false confession?

A It's -- yes. It's often the case that the -- that

when somebody gives a false confession they don't know the details, and so they say things that don't match either the physical evidence or other evidence in the case, sometimes including testimonial evidence.

Q And here if he had known the allegations and it still did not match would that be an indicator to you of a false confession?

A Well, I guess it could be, but you're saying if he had known the details but he didn't provide those details -- and then sometimes what happens is people learn the details from a third party prior to being interrogated, and so there's really no probative value if those details are included in the confession statement.

Q I think you've answered my question. I have no further questions.

A Thank you.

MS. GIOVANOLI: Nothing further.

THE COURT: All right. Thank you, Doctor.

THE WITNESS: Thank you.

MS. BLANCHETTE: Your Honor, I had originally intended to keep Dr. Leo live via skype. I just ask for the opportunity that after the state's expert has testified that I can briefly consult with him if needed.

And I'll cut off the skype connection at this time.

THE COURT: That's fine.

Q Dr. Leo, I may be reaching out to you via phone before I -- oh, he's gone.

(Pause.)

Q I may be reaching out to you via phone.

A The last part of what you said broke up.

Q I may be reaching out to you via phone to consult with you after the state's direct examination of their expert if you could just be on standby.

A Sure. I'll be on standby. Thank you.

Q Okay. Thank you.

MS. BLANCHETTE: Your Honor, just one moment while I disconnect.

(Pause.)

MS. BLANCHETTE: Your Honor, I can talk while I'm doing this. Would you like me to present very, very brief argument and that handful of cases that I have to hand up at this time or at the conclusion of the state's case?

THE COURT: Let's wait until the conclusion. I assume we'll have time.

MS. BLANCHETTE: Yes, Your Honor. It is just a couple of cases and some comments on some arguments I previously made that I want to make sure I was clear on the record.

THE COURT: Okay. That'll be --

MS. BLANCHETTE: Otherwise, that concludes the applicant's case.

THE COURT: Thank you.

Any witnesses on behalf of the state?

MS. GIOVANOLI: Yes, Your Honor, if I could briefly address something.

During your questioning of Professor Leo I noticed that you asked what did Brough know and when did he know it.

I realize that Brough, Mr. Brough, testified to that but if -- I'm not sure if at this point I want a motion to recall Mr. Brough at a later date for further testimony to clarify that if you don't recall his testimony or what he knew from Professor Leo at the time prior to trial.

THE COURT: Well, I think that's the critical issue in this case, and I had the questions, and I'm not certain they were answered.

They were answered from Dr. Leo's standpoint. But, you know, this report is so comprehensive, and if Mr. Brough had this report and disregarded it --

MS. GIOVANOLI: I'm sorry. He testified Mr. Brough didn't have that report.

THE COURT: What?

MS. GIOVANOLI: I mean, he testified that Mr. Brough didn't have that report, that they had a discussion.

THE COURT: Right.

MS. GIOVANOLI: But Mr. Brough also testified what

their discussion was about.

THE COURT: Right. I've got a 20-page report here.

MS. GIOVANOLI: That was provided P.C.R. counsel four years later.

THE COURT: I understand that.

Do you understand my level of understanding?

MS. GIOVANOLI: Yeah. And that's what I guess I just wanted for clarification because Mr. Brough testified about his conversations with --

THE COURT: I know he did.

MS. GIOVANOLI: Okay.

THE COURT: But I'm not sure he went to this extent and went through these -- each of the elements of the police interrogation tactics. I'm not sure he was advised as to the clinical psychological bases for these conclusions.

I mean, perhaps if he was that aware, then maybe he should have called Dr. Leo. But if he felt Dr. Leo's presentation to him was -- shall I use the word -- sketchy and maybe and tenuous -- then perhaps it was a reason for him not to call him. So it might be that Brough could better answer those questions.

MS. GIOVANOLI: I would agree with you and I have no problem recalling him. But at this point in time I do not have him here, so.

THE COURT: I understand.

Ms. Blanchette.

MS. BLANCHETTE: Your Honor, I -- because I did have the report, I tried to tailor some questions to address that issue. Also knowing how we were taking these things out of order, going to roll in today, I recall, if not verbatim, asking him if financial reasons were the only reason he recalled for not utilizing him. And I believe he addressed it as being merely financial.

I asked him if it was because the state was going to move to exclude his testimony. I also believe he testified that he shared with him his findings.

If Your Honor wants a further inquiry to the depth that those were shared with him -- but I think the fact that he moved to get the case set for a date certain to utilize Dr. Leo which is why I introduced those documents, yes.

THE COURT: That's your opinion. I think that's your opinion.

MS. BLANCHETTE: Yes, Your Honor. I understand.

THE COURT: And that makes sense.

MS. BLANCHETTE: I just attempted to address that matter with him.

THE COURT: I know. But the question still lingers.

MS. GIOVANOLI: And I have extensive notes on Mr.

Brough's testimony. And what I have written down was why he was not used, three reasons.

That Irby couldn't pay for the expert was the number one reason; number two, because he thinks he couldn't sway the Court in the Jackson vs. Denno hearing, which is why he wasn't used there; and then that -- that expert had indicated to him what the indicators were that he testified to today as far as the minimization.

He didn't specify those in his testimony, but he testified the expert told him what the indicators were and that he would be able to relay to the jury what indicators were present in his case but that he could not opine as to whether or not his statement was actually false.

Those are the three reasons I have that he listed as for not calling him. And that was my notes from testimony yesterday. So take what you will as to their accuracy.

Oh, I'm sorry, Your Honor. One last reason he also made was that Mr. Irby never recanted.

THE COURT: Never recanted, right.

MS. GIOVANOLI: And -- and there's a little bit of additional testimony on that part. But that was also a reason.

THE COURT: Next witness.

MS. GIOVANOLI: Yes. The state's case, I would call Mike Prodan to the stand.

THE COURT: Name?

MS. GIOVANOLI: Mike Prodan.

THE COURT: Prodcan.

MS. GIOVANOLI: P-R-O-D-A-N.

MICHAEL J. PRODAN, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. GIOVANOLI

Q Good afternoon, Mr. Prodan. Thank you so much for being here.

I have in my possession your curriculum vitae, and I have provided that to opposing counsel. I'm going to show it to you just making sure that this is the one you provided to me if you'll take a look at that.

A Yes.

Q Okay.

MS. GIOVANOLI: And I would move to admit this into evidence as State's Exhibit 2 for the convenience of the Court to be able to review his -- his résumé.

THE COURT: Any objection?

MS. BLANCHETTE: No objection, Your Honor.

(Curriculum vitae of Michael J. Prodan marked State's Exhibit No. 2.)

Q Okay. So since your résumé is in the record at this point I'm going to briefly ask you just to touch on a few of the things within that résumé, and the first being with

your education and your professional career. What's your current possess -- position? Excuse me.

A Currently I'm the captain, the special agent in charge, of the behavioral sciences unit for the state law enforcement division.

Q Okay. So let's start with your education. Can you briefly describe your educational background?

MS. BLANCHETTE: Your Honor, I would stipulate to all of the information contained in the curriculum vitae. I'd just like to be able to voir dire him as to his qualifications.

Q Okay. So we'll go on to the relevant training in this -- in this instance.

What type of training have you had with regard to interrogations?

A I would say I've had maybe 250 to 300 hours of specific training in interview and interrogation.

The training was by various organizations including the federal bureau of investigation, the California Department of Justice, John Reid and Associates, Specialized Training Services, Inc., which primarily was involving detecting malingering and deception.

There was a few other courses. There was also another week's course, I believe, early on in my career with the police academy at Rio Hondo, California.

Q Okay. How long have you been conducting interrogations?
A I became a police officer in 1974, and so that entire time interviews and interrogations. Close to 45 years.
Q All right. Have you trained other law enforcement officers with regard to interrogation tactics, techniques?
A I have in California and South Carolina and North Carolina. I would estimate in the last ten years over a thousand -- 1,500 officers.
Q Okay. And those are both state level officers and federal level?
A They would be municipal, city police officers, county sheriffs and state -- state agents.
Q And when you're training other people do y'all touch on false confessions and methods of avoiding false confessions?
A Yes, ma'am, we do.
Q Okay. Have you participated in speaking engagements, seminars where interrogations were the subject?
A Not necessarily where the interrogations were the subject.

I have -- I have done training in seminars involving interviewing individuals being charged with sexual assault of adults and children. And part of that training would be interviewing that specific population.

Q Okay. So you actually have specialized training with regard to criminal sexual conduct interrogations.
A It is -- it is -- it is a special part of the overall education.
Q Is interrogating a sex offender different than interrogating other crimes?
A It is in a sense that it is more difficult because of the nature of the offenses.
Q And by that you mean the stigma associated with it?
A Well, part of it is the stigma associated to it. It is still an offense that by and large society really, really looks down upon, these people who are involved in sexual offenses. Even other criminals may feel the same way. And people who are committing these offenses, you know, understand and recognize that -- that stigma, if you were.

But also the -- the crime itself is often a type of crime that is committed in privacy. There are maybe little or no possibility of corroborating witnesses to the offense, depending on the time of the offense to the time of the disclosure.

There may be little or no physical evidence involved in corroborating the offense. So you are, in essence, dealing with a crime where you have an allegation by a victim, either an adult or a child, saying that they were

sexually assaulted. And that's pretty much your starting point.

Q And I just wanted to touch on that statement. Is the stigma kinda enhanced when the victim is a child?

A It can be. It all depends on the thought processes of the personality of the -- of the person accused or the offender.

Q Okay. And you testified you're trained in the Reid technique of interrogations. You're certified.

A Yes. I've attended the courses, yes, ma'am.

Q Okay. Was that used in the case?

A I would say a variation was used. It's not -- it does not exactly follow the nine steps. And when I instruct officers in doing interviews and interrogations I always emphasize that each individual officer will develop a technique that fits their personality and what they're suitable and capable of doing.

No one can interview exactly like anyone else. No one can interview exactly like I can. I can't interview exactly like Bill Smith can. So --

MS. BLANCHETTE: Your Honor, at this time I object. I believe he's offering opinions. We're getting outside the scope of qualification.

MS. GIOVANOLI: Okay. I just have --

THE COURT: Overruled.

MS. GIOVANOLI: Thank you.

THE COURT: Just go ahead.

Q I'm going to ask you another question regarding your experience.

How many interrogations have you conducted approximately?

A Interrogations 1,200 with probably an additional 2,000 interviews on top of that.

Q And how many have you simply participated in or supervised?

A Of those, of that number, probably an additional 200 where supervised or consulted, observed.

Q Okay. Have you reviewed interrogations?

A There are occasions in the unit where -- where agencies will bring transcripts of -- or statements for us to -- to us to review. And those are generally, we'll refer to as, content or statement analysis.

Q Okay. Statement content analysis. And do you also do deception detective -- detection?

A Well -- well, part of a content analysis or a statement analysis is to take a close look at the statement itself to see if the individual shows indications of deception or are they leaving parts out of the statement. And this is in another course that I've attended several years ago with the laboratory of scientific interrogation.

Q Okay. Have you ever testified as an expert witness in a court of law?
A Yes.
Q And how many times?
A Well, not counting 30 to 45 times in Los Angeles County involving narcotics investigations, which I don't think is applicable in this case, I would say crime analysis and sexual assault, homicide, threat assessment approximately 25 times. California, Alaska, Oregon, Texas.
Q South Carolina?
A One time in circuit court in Charleston County on a sexual assault, murder investigation, and then several times in South Carolina on threat assessment and once in the United States District Court in Florence on threat assessment.
Q Okay. And is part of your job description -- or not job description but job duties -- testifying in court? Is that part of your job description, or is that something that you --
A When called upon to do so, yes. But -- but generally my -- myself and my unit is -- is primarily involved in analysis and consultation. We try to help other agencies through problematic -- problematic cases.
Q Okay. At this point I would move to qualify him as an expert in police interrogations generally and then

specifically in the techniques used in this case.

THE COURT: Any voir dire or objection?

MS. BLANCHETTE: I do object, Your Honor, because it appears to me he's never been qualified in this area. And I do have voir dire.

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MS. BLANCHETTE

Q Is it Agent Prodan, or what is your proper title?

A SLED uses two titles -- Captain Prodan or Special Agent in Charge. Both of those are fairly cumbersome. Agent is fine.

Q Okay. And I apologize. I'm from Chicago, so I still say my A's funny. So I will probably not say your name correctly.

But, Agent Prodan, just to be clear, you work for the state law enforcement division, is that correct?

A That's correct.

Q So the State of South Carolina pays your salary?

A Yes, ma'am. It's part of my duties.

Q Okay. Are you paid any extra fees or anything to -- as special for being involved in this case and testifying in this case?

A No, ma'am, I'm not.

Q Okay. And what is the salary you're paid by the State

of South Carolina?
A My salary -- my state published salary is $95,500 a year.
Q Okay. And at any time have you ever testified for the defense or for any party besides the state?
A Yes, ma'am.
Q Okay.
A Well, I take that back. I was -- at one time in Richland County we were called by the defense and we offered consultation. But we did not testify. I did not testify.
Q And when you say we, that would be your unit that you're referring to?
A There was another agent involved in that particular matter at the time, Captain David Caldwell.
Q Okay. And the assistant solicitor in this case has already testified that she recommended or gave the referral of your name to the attorney general in this case. Do you regularly work with the solicitor's office in Spartanburg?
A I have, yes, ma'am.
Q Okay. In what capacity?
A Involving consultation on cases.
Q Okay. And what type of consultations would those be?
A Primarily individuals who have been charged with a murder or sexual assault.

Q And are you looking at the interrogation, or just what part of the case?
A The previous cases with the solicitor's office here in the Seventh Circuit have been the overall case, primarily crime analysis involving interpersonal violence dealing with victimology, motive. And then, if necessary or if it's particularly asked for, review of statements by defendants, codefendants, witnesses, victims.
Q Okay. Have you ever testified in the state court of South Carolina regarding interrogations and interrogation tactics?
A No, ma'am.
Q Okay. In looking at your case study and technical presentations and publications section of your C.V., have you done any case studies, technical presentations and publications in the areas of expertise discussed by Dr. Richard Leo and as he was qualified?
A I'm -- I'm afraid I don't understand. If -- if in that question do you mean have I done any case studies involving interview and interrogations --
Q Yes. That's --
A No. I have not. It's -- it's primarily -- has been in -- involving threatening communications.
Q Okay. And in the cases -- and I think we've already gone over this -- that you were an expert witness what was

the -- what's the typical area where you're an expert witness?
A Crime analysis involving interpersonal crimes, sexual assault and homicide.
Q Okay.
A And threat assessment.
Q And have you ever done or published any studies regarding interrogations or is the state -- this phenomenon of false confessions?
A No. I have not.
Q Okay. And in the number of interrogations you have done, reviewed or been involved in, how many of those have you identified as a false confession?
A None.
Q And how many did you say you had been involved in?
A I would say about 1,200 in the last 45 years with another two or three hundred more interviews.
Q And are you aware of how many of those individuals were ultimately convicted?
A At this point in time, no. I would not be able to give you a number.
Q Do you know how many of those individuals had their statements suppressed in a pretrial hearing?
A I have no idea. I could give you roughly an idea that I have not -- I can -- I can say that I have not had a case

where I have personally obtained an admission or a confession where that statement has been excluded by a court for being deemed false.

I've had one case here in South Carolina where the statement was inadmissible because the Court perceived that there was a Miranda violation.

And this was involving a case in Abbeville where we -- we declined to allow the person to leave. There was an ongoing barricade and hostage situation going on, and the person wanted to leave and we said, no, it was not safe. The Court's interpretation was that we had left them -- we had remind -- we actually had taken them into custody. And so the statement was held invalid.

Q What is your involvement with the Blue Line Training Group, LLC?

A It's a private -- it's a private training organization in North Carolina, various individuals who train other police officers primarily through colleges in North Carolina, primarily Guilford Technical Community College, Stanley Community College and Catawba Valley Community College.

Q And -- and what do you do as part of that?

A Most of the time I -- I train. I teach a 3-day course in interview and interrogation.

Q Okay. And are you aware that in this transcript

Detective Morgan explains that he was trained under the Reid technique? He explains that he was trained to avoid false confessions. Are you aware of that?
A No, ma'am, I'm not.
Q Okay. And isn't that similar to the training that you're saying that you have and that you get, is that exact training?
A I have no idea because I can't say that Detective Morgan attended one of my trainings. So you're asking me to compare sight on scene, the course that I offer with someone else that I have no idea which course he's referring to.
Q Have you reviewed the transcript in this case, either the pretrial or trial transcript, and the testimony of Mr. Morgan?
A No. The only information that I've -- that I've -- I've looked at has been the -- Dr. Leo's report and then the transcript of the -- the polygraph and interview and interrogation and the statements.
Q Okay.
A I've not seen any of the police reports or the pretrial transcripts or actually the transcripts of the trial.
Q And when you were in California were you involved in the Gena Lynn Gamble case?

A In Stanislaus County?
Q It was...
MS. BLANCHETTE: Your Honor, if I could -- would you like for me to answer his question?
THE COURT: If you want an answer from him.
MS. BLANCHETTE: Yes, Your Honor. I'll ask a better question of him.
Q It says here it was in Waterford, California, in 1995.
A The name is familiar but I -- I -- after this many cases they -- they have a tendency to run together. I'm sorry.
Q Were you a F.B.I. trained D.O.J. -- department of justice -- criminal profiler, would have been named Michael J. Prodan working in California in 1995?
A That -- yes. I was.
Q Okay. Are you familiar with the book "Forensic Victimology" by Brent Turvey?
A I am.
Q And specifically in Chapter 5 where he goes into a detailed criticism of your work in that case.
A Yes. I'm aware of Mr. Turvey's criticism of me personally, yes, ma'am.
Q Okay. And he goes through bullet points in what appears to be a textbook just from my cursory review of it.
MS. GIOVANOLI: Objection to hearsay.

THE COURT: Overruled.

Q One of his criticisms is that you did not have all of the background information or all of the necessary information before reaching your conclusions. Are you aware of that?

A I have not read Mr. Turvey's book. I am vaguely aware of his accusations. All I can offer is that they are incorrect.

Q That's fair enough.

Now, you said you teach a class or do a training in false confessions. Did I hear that correctly?

A No. When I -- when I do my instructions generally whether it's a 1-day course or whether it's a 3-day course, I always include a section on the issues of the possibilities of false confessions with certain populations.

Q And would you agree, as the state has asserted, that false confessions is a common -- I'm sorry. I'll restate that. Would you agree that a lay person understands false confessions and the nature and dynamic of false confessions?

A Well, to parse out your question, I would say I think -- believe that the general public is aware that they exist.

I agree with Dr. Leo that they may not understand the

science or the social science behind the phenomenon. So it's somewhere in between. So the answer is somewhere in between.

Q And are you trained in the science or the social science --

A I'm --

Q -- of false confessions?

A I'm aware of the social science involved. I'm aware of the -- the -- the study that Dr. Leo presented involving the -- the college-students issue, the college students' experiment, if you would.

There is some -- there is some problems applying that experimental design to the real world, and that is generally a conflict, if you would, between the academic side in the criminal justice field and the practitioner side in the criminal justice field.

It's a very difficult social science to definitively say that on the basis of this social study that it applies this way consistently in the field.

Q But your familiarity or training is just with reviewing work done by individuals such as Dr. Leo, is that correct?

A I -- I -- my education, I would say, more than training.

Q That's fair enough.

MS. BLANCHETTE: Your Honor, that's all the questions I have on voir dire.

THE COURT: All right.

MS. BLANCHETTE: I do have argument.

THE COURT: Your motion?

MS. BLANCHETTE: Yes, Your Honor.

One, he has not been qualified in this area in the State of South Carolina before; two, he just admitted that he is not a social scientist, nor is he an expert in the area of expertise that I qualified Dr. Leo. So I'd say he's not a proper rebuttal expert or reply expert, however the state is deeming him.

Also, I would indicate that he is being called to merely bolster the testimony of Detective Morgan who on page 158 admitted that he was trained in the area of false confessions and throughout his testimony both pretrial and trial testified about being trained. And it appears to me that this is all that this witness can also testify about, is the training in administration and interrogations.

THE COURT: What did you just refer to? Page what?

MS. BLANCHETTE: Page 158 specifically where he says --

THE COURT: Of what?

MS. BLANCHETTE: Of the trial.

THE COURT: Trial.

MS. BLANCHETTE: Yes, Your Honor.

THE COURT: This witness testified at trial?

MS. BLANCHETTE: No. I'm saying Detective Morgan. So by calling him it's just to merely essentially retestify to things that were asked of Detective Morgan regarding training and interrogations.

I don't see how his testimony could further assist the trier of fact beyond what was asked already of Detective Morgan.

THE COURT: In trial. Detective Morgan hasn't appeared here, has he?

MS. BLANCHETTE: You're correct, Your Honor. And I'm sorry. In P.C.R. it's -- there are so many moving parts as, you know, we're going back to at the time of trial he would have been called to rebut to reply of Dr. Leo.

THE COURT: Go ahead.

MS. GIOVANOLI: Just in response as far as never being qualified, I don't think that's a basis to not have him qualified here.

We're guided by Rule 702 in this case. State vs. Jones is the authority on scientific expert testimony, but we're not trying to have him qualified as a scientist, and so therefore I do believe that his knowledge, skill, experience, training and education can all assist the trier of fact in this case, as you at trial would have been the

jury.

With regard her statement about him not being a social psychologist, I'm also not offering him as an expert with regard to social psychology or false confessions specifically.

Rather, Dr. Leo is a social psychologist, but he criticizes everything about interrogation tactics. And therefore as a rebuttal witness we're offering an expert that is actually trained and --

THE COURT: All right. Motion is overruled.

MS. GIOVANOLI: Okay. Okay. Thank you, Your Honor.

THE COURT: You may proceed.

MS. BLANCHETTE: Your Honor, may I just have a continuing objection so I don't have to continue to --

THE COURT: Certainly.

MS. BLANCHETTE: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MS. GIOVANOLI

Q Okay. So now let's talk about the police interrogation used in this case.

You touched on the Reid technique. And some of that was used in this case, correct? Can you elaborate a little bit on what the Reid technique is?

A Well, very quickly.

Once you make an accusation to an individual where you

accuse them of wrongdoing, at that point an interview has now turned into an interrogation. Anything prior to that -- any prior -- anything prior to that accusation is an interview. You're just obtaining information.

And then when you make the accusatory -- when you -- when you -- when you accuse the individual of wrongdoing, at that point you now are involved in the interrogation.

Generally what happens is in an interview the interviewer is a good interviewer, talks less and listens more. Where an interrogation, the interrogator will talk more, because what you -- what you do is you developed and -- and Dr. Leo referred to it as a threat, but actually it's referred to as a theme where you offer an alternative question.

Basically, you give the person the opportunity to choose explanation A or explanation B. And it's strictly their choice. You do not under any circumstances threaten the individual or promise them anything that you can or cannot produce.

You don't -- and examples would be, well, if you don't talk to me, you're going to lose your children. No. If you don't talk to me I'll see that you get the death penalty or I'll see that you get life without parole. Well, those things are impossible. The interrogator can't -- can't produce either one of those things.

Dr. -- Dr. Leo refers to these things as implied threats. In the -- in the -- the practical word these words -- these are referred to as themes that the person either accepts or rejects.

At this point I suppose it's a matter of the jury or the judge to determine whether this is a theme or whether this is a threat but --

Q So that term implied threat, that's sort of subjective, isn't it?

A It's -- it's -- yes. It is -- it is -- it is a -- it is a subjective -- subjective thing because you don't -- obviously, you don't threaten people with bodily harm or their life or you do -- you can't promise leniency and you can't promise immunity of any way, shape or form as a police officer involved in interrogations. You just can't do that. So to do any of those things is completely wrong.

Dr. Leo's version is that by offering an alternative or offering an example of what -- what he refers to as the third-party threat, well, this is what's happened to other people, well, the theme is it's up to the individual to either accept it or reject it.

The -- the concept of a -- of a compliant, a coerced compliant confession, is the whole basis is that the person is under such a psychological stress that they are willing to admit to something that they didn't do to relieve that

stress.
Q Okay. So if -- when we go back to the Reid technique, you mentioned that there are nine steps in that.
A Yes.
Q Is the first step where you mentioned the interview phase?
A I believe so. And I -- I -- if I could look at some notes I could you give you --
Q Sure.
A -- an outline very quickly.
Q Yes. Sure.
MS. BLANCHETTE: Your Honor, just to be clear for the record, I was never provided a report or any work product of this expert. So if he does have a report or anything I would just ask that it be provided to me.
THE COURT: Do you have a report?
THE WITNESS: No, Your Honor, I do not. These are -- this is basically an outline from the Reid course.
THE COURT: You answered my question.
Q Okay. So can you just give us a brief explanation of --
A According to the -- the -- the Reid nine steps, is the direct positive accusation, you did something. You develop a theme.
Then the person -- you expect the person to deny. You

deal with the denials. They may make objections. You overcome the rejection -- objections.

If the person starts to fade on you, you regain their attention. Sometimes individuals will go into what Reid describes as a -- a passive mood.

I've personally seen this as like -- it's kind of like a -- a -- almost a passive, aggressive kind of thing where they just refuse to answer anything.

You, again, present the alternative confession -- alternative question. The person either chooses to accept or deny either one of those, or neither, at which case you may offer an -- an -- an additional alternative as you develop the theme.

Q In order to apply all of these steps it has to be the -- the defendant, if you will, has to be there voluntarily, is that correct?

A Well, they may be -- a person may be in custody, but they have the opportunity simply to say I don't want to talk to you any more, and then you're done.

Q Okay. So in your training and your experience you have always basically advised a defendant of his rights prior to interrogating him.

A If -- obviously, if the person is in custody, then -- then before any of this can happen the person has to be advised of his -- of his constitutional rights. And you

have to obtain a knowing and voluntary waiver.
Q Okay. You have written -- you've read Dr. Leo's report in this case, isn't that correct?
A Yes, ma'am.
Q Okay. And do you have any particular criticisms of his report? Just kind of how he went through bullet point by bullet point.
A Well, again, it's -- it's -- it's -- it's the difficulty between the academic and the field, you know, making those things work and making those things fit.
Dr. Leo says that the officers -- and he agreed. I believe he testified that he agreed. You -- you don't accuse someone that you don't believe is guilty.
It's -- first of all, it's counterproductive. You know, you're not in the -- you're not in the business to get people to confess to crimes that they didn't commit. It's counterproductive on so -- on so many levels.
Q And that's the guilt presumption --
A And that's the --
Q -- you talked about.
A -- guilt presumption.
Now, this is the difficulty with -- with cases involving sexual assault. You -- you may not have that -- that independent corroborating evidence that an academic would want you to have.

Be -- yes. I would love to have independent physical evidence, but in sexual assault cases that's not always the case. So you -- you go with what -- with what you are dealt with in the investigation.

If you have a victim who identifies an individual who has sexually assaulted them and that person is known to them, so it's not an issue of identity where there may be some identification problems involving the classic-stranger identification. They know who this person is. And you don't have any evidence or any information to suggest that this accusation is -- is false on its face.

Then not to go -- you -- you wouldn't -- you wouldn't go into an accusation unless you believed that the person -- at least some reasonable suspicion, some probable cause that the person has committed the criminal act.

Q Okay. So you wouldn't interrogate someone that you thought was innocent.

A If you -- if you -- well, you -- again, it's -- it's an impractical thing to do because as you were proceeding through the interrogation if you don't believe that the person did this, you can't with any confidence explain to them the alternative questions because you know -- you know -- knew themselves that they didn't do it. So -- so, in essence, how can you sell it?

Q Okay. Thank you.

Now, Dr. Leo addressed the lengthy interrogation, fatigue and exhaustion. You reviewed the interrogation in full, didn't you --

A Yes.

Q -- preparing for this hearing?

Okay. So there was two and a half hours of an interview phase where the polygraph was given at the very end of the interview. And he broke for a family court hearing, went to lunch at McDonald's and then came back.

A Yes.

Q Now, Dr. Leo said that this amounted to a seven, seven-and-a-half-hour full interrogation. Do you agree or disagree with those statements?

A I would -- I would have to disagree with the -- with the -- Dr. Leo's representation.

Again, if the idea that a person is -- is coerced because of this undue pressure, when you give them a break the pressure goes away.

It even goes more -- the pressure is even lessened when the person is out of the presence in the custody of the interrogator whether that is to go home or to use the restroom or have a meal break or go back to their cell. Or I believe in this case they actually left the sheriff's office and went to a court proceeding. I -- I don't understand how that can be represented as part of the

interrogation because the interrogator isn't there.
Q And you draw a distinction between interview and interrogating, correct?
A Correct. In -- an interview, again, is you're just obtaining information.
Q Right. And Dr. Leo testified that the first two and a half hours, which were basically rapport building, getting background information, talking about the procedure of the upcoming polygraph -- would you characterize that as an interrogation or an interview?
A I wouldn't say it's an interrogation, but it's -- it's -- it's an interview, but you're preparing the person for the accusatory question, because in a polygraph the relevant questions are accusatory.
Q But you don't accuse them prior to the polygraph.
A I believe it depends on the examiners, how they proceed with their -- with their pre-polying test.

Some examiners -- I know for a fact that almost every decent examiner will tell the person these are the questions I'm going to ask you. So before that exam starts the person who is going to take the exam is told the accusatory questions.

Now, have -- have you directly accused them? It's implied. So at that point have you gone into the accusatory phase? I think you would have to say yes at

that point where you'd -- you'd tell them, hey, these are the questions I'm going to ask you and I'm going to accuse you, you know, did you do A or did you do B.

Q Okay. Now, how about when Dr. Leo talks about false-evidence ploys?

I believe his testimony was there were no false-evidence ploys aside from him being confronted with the results of the polygraph test.

A Yeah.

Q Now, do you -- in -- in your opinion were the results of the polygraph test a false-evidence ploy?

A Again, it's -- it -- it may be an issue of semantics. Polygraphs aren't evidence. I'm -- I am aware of what Dr. Leo was referring to as a false-evidence ploy where the -- the interrogator basically tells the person I have physical evidence that says you were there when they don't.

That is exceedingly risky. It is a huge bluff because if the person knows that the -- the false evidence that you are offering it's -- they know that it's not there, then you basically played your hand that you have no information at all about this individual, and, in essence, you have lost. You -- you -- you've lost probably any possibility of -- of getting any further -- any further information. That's a -- that's the false-evidence ploy.

To call polygraphs a false evidence it's -- the

polygraph itself is not evidence.
Q Sure.
A So --
Q Now, if -- now, Detective Morgan actually scored the polygraph exam and detected deception on two of the questions.
So I guess what -- what I'm getting to, is it a common practice to actually lie about the results of a polygraph exam or rather score it so that you -- you find and you detect a deception? Is that part of the interrogation process?
A I am not aware of any legitimate licensed polygraph examiner to falsify the charts, in other words, score them improperly.
I'm aware of one case per -- personally where the charts were scored in error accidently, but it wasn't purposely to develop some type of false evidence.
Q All right. So going on to Dr. Leo's next point, minimization. Can you describe to me a little bit about what your knowledge of the minimization is?
A Again, it's represented as if minimization is something that -- that you offer to someone that they've -- they've never done before, they've never had before, they've never thought about before.
Just about everybody when they do something wrong

will -- will -- will -- will have a way of dealing with that -- that -- that wrongness. They either justify their behavior, they rationalize their behavior, they minimize their behavior and then they seek validation.

It's represent -- Doc -- Dr. Leo represents this as if this is something that's handed to the person that they -- that they wouldn't naturally do.

My experience with -- with -- in my training and my interviews with dozens and dozens of sex offenders is sex offenders are very adroit in rationalization, justification and minimization.

Justification of course is, yes, I did it but there's a justifiable reason for it. Rationalization, again, is, yeah, I did it but I have an excuse. It was -- I have a drinking problem. It was I'm a sexual addict, you know. The -- the person -- you know, she initiated the contact. Those types of things are rationalizations to behaviors.

Minimization is, yeah, I did it but I really didn't -- it really wasn't that bad. I didn't really hurt anybody physically. That would be minimization.

So when -- when you offer minimization to somebody, again, it's not like you're -- you're giving them something that they haven't probably already thought of, because in my experience in interviewing and interrogating, you know, lots of people, just about everyone does it in one -- some

way, shape or form.

Yeah, I -- yeah, I committed the robbery but I didn't pistol whip the clerk. Well, yeah, I did but I really didn't hurt them that bad. Or, well, I only stole $20. It's not like I stole two hundred.

Q And this rationalization -- rationalization, justification, minimization -- is that something that innocent people do?

A It is exceedingly rare unless a person is in a special population for an individual to -- to offer rationalizations or justifications or minimizations of things they just didn't do.

Q So in this case when you reviewed the interrogation did Mr. Irby engage in that rationalization, justification, minimization in --

A Well, in this particular case it's interesting, is that Mr. Irby does not make any kind of -- of minimization towards the two relevant questions in the polygraph that he failed or he's been -- I'm sorry -- that he's been reported to have failed.

Q And let's clarify for the Court.

The two questions that he failed were did you put your penis in VICTIM's vagina and did you put your penis in VICTIM's vagina in --

A In her bedroom.

Q Okay. So go ahead. I just wanted that --
A He never -- he never -- he never offers -- he never goes back to those two relevant questions.
Now, there are -- there are -- there are -- there are statements about, well, I was asleep and she initiated vaginal intercourse with me. That could be -- you could classify that as a rationalization or you could also, could classify it as a minimization because the person initiated the behavior and I didn't so it's really not my fault and no one was really hurt.
Q And he was asleep.
A And I was asleep.
Q And it was in the living room. Still not --
A Well, that goes -- that goes back to the -- to -- to the structure of the -- of the relevant questions, which is my -- my experience in dealing with polygraph examiners is that's why the question was asked. Basically, the same question was asked in two -- two ways -- did you put your penis in her vagina in her bedroom, and then leaving off the bedroom, because that would then cover, you know, any other location.
Q Okay. And then he mentions the threats and the promises. I believe we talked about that. That's -- because -- because there were no direct threats or promises of leniency it's a subjective thing to say he was implying

a threat. And that issue was actually taken up on appeal. They argued being thrown to the wolves and the example of someone else being sentenced, that those were implied threats.

A That -- that I -- I would have to say that that is kind of like out of the realm of -- of -- of any person in the witness box. It's basically the -- the decision of the jury or the judge.

Q Okay. And I believe that would conclude most of the main points in Dr. Leo's report.

With regard to the actual interrogation in this case, let's see. On page -- you made a few notes for me with regard to the interrogation in this case and I -- do you have those notes as well?

A I do.

Q Okay. So we'll go through those. There's just a few points, I believe.

And the first one I have noted is on page 52 of the interrogation transcript. And I'll just allow you to elaborate on the note there when he says okay after the allegations.

A Oh.

Q Yeah.

A Are you referring to page 52?

"Q She says that you will come into her

room and that you will force herself on her, put your penis inside her vag -- vagina and have sex with her."

A And the answer, the response, is "Okay."

Q And what did that indicate to you in your experience and training with interrogations?

A It's not a denial.

Q All right. And then on page 53. That's right. The next page.

A Yes.

Q Do you see where I'm referring to?

A You're referring to where it says, "Never had --" starting with "Had never had sex with VICTIM"?

Q Yes.

A Okay. "Never had sex with [sic]." Is -- the answer is, "Never had sex with VICTIM."

And then the question is:

"Q What is -- I don't mean to patronize you but I have to make sure we're on the same page. What is having sex?

A Answer:

"A I mean having sex is, I mean putting your penis inside of a female. You could even fondle a female. That could be considered as sex.

"Q Okay. So you have put your fingers inside her vagina.

"A No, sir.

"Q Did you put your penis inside her vagina?

"A No, sir.

"Q Have you put your penis inside her mouth?

"A No, sir.

"Q Have you put your penis in her anus?

"A No, sir.

"Q Have you fingered her anus?

"A No, sir.

A On page 54.

"Q So you haven't had sex with VICTIM.

"A No, sir."

Q Okay. I think what we were -- maybe we're referring different, two different things. But are you finished with that line of --

A I am. Those are direct denials.

Q Okay. So all right. So basically you've noted there that he's making direct denials.

The note I have is on page 53. He denied that he repeated the question that was asked of him.

A Well, if you ask a person a question and there isn't a

language issue, in other words, everyone understands what we're talking about, everyone understands English, the question is at a level of understanding that the person can understand, and particularly if the question is a yes-or-no question and if the response is to just repeat the question back, that's referred to as a stall.

It's -- it's not answering the question if you directly accuse somebody and it's a very simple question. Did you, A, and the person goes did I "A".

Q Okay.

A It's a -- it's a -- it's a stall. You're -- the answer should be yes or no.

Q Okay. And then do you have your next note? I think it's page 69.

A I'm sorry. Page 69?

Q Page 69. This is when he was told he had failed the polygraph exam.

A Yes, yes.

Q What did you notice at that part?

A Well, again, he's -- he's -- he's advised that he failed the -- the examination, and the response is okay. Again, it's not a, no, I didn't, the machine's wrong, that's not correct. The person just acknowledges that they failed.

Q And what does that indicate to you in your experience

and training in interrogations?
A You have the right guy.
Q Okay. In your experience if a person has the opportunity to deny and he doesn't, that's how you interrupt that?
A Generally, when people have the opportunity to deny wrongdoing and they don't seize upon that opportunity, that's an indication that, pretty good indication that, they likely have done something involved in the crime that you've been -- that you are interrogating, because, again, people who do not commit crimes tell you when you -- when you are -- unjustly accuse people, did you do A, they should say, no, I didn't do it.
Q Okay. Another reference. You pointed me to page 100. And you made a note of the qualification. Specifically, it's at the bottom of page 100.
A Okay.
Q Okay. So what did you notice there?
A I have here an answer. I never -- the very -- the -- the part of the answer is, "I never put my penis inside [illegible], like I told her to lie down, lay down."
He's qualified his answer. "I never put my penis inside her, like I told her to lie down," which I would -- I would -- if -- if it was me or if I was instructing someone else I would explak -- explain -- explore this

further because he's qualifying it.

If you didn't put your penis in her vagina, you'd say I didn't put my penis in her vagina. Why do you qualify it with more information?

Q And Detective Morgan didn't really --

A He goes to another question.

He says, "Well, tell me about your finger in her vagina. What is that about?"

And then his response is, "I don't know."

Q He actually denied that, the digital-penetration allegation, multiple times throughout the transcript.

A Yes.

Q All while making statements of other sexual conduct.

A Yes.

Q Okay. So then also on page one -- let's see -- 109. There he gave an admission to a previous lie. What did -- what did you notice about that?

A I'm -- I'm sorry. I've -- I've lost where you're referring to.

Q Well, I have in my notes page 109. I'm trying to read it over specifically.

A Oh, are you referring --

Q Yes.

A -- to where the statement is written and Mr. Irby challenges the written statement and then an offer is --

changes on his own? He offers changes to the statement. Is that where you're referring to?

Q Well, yeah. I think where he says there were some things left out. It's -- he's reading it. "I also had the opportunity to tell the truth to Sergeant Morgan the first time I talked with him, but I did not. I lied up to him, upfront about sexual conduct. The reason that I lied was, one, you didn't want defame VICTIM's name by saying what she had done, plus you were also scared about how it was going to make you look." I guess what my --

A Yeah. Again, there the -- the -- the -- the -- it appears to me that Mr. Irby is challenging that, that paragraph, or that statement, and he wants it -- he wants it corrected.

Q Okay. So he's actually requesting that his previous statement be retracted, and he corrected it.

A Yes.

Q Okay. And then on page -- what does that indicate to you?

A Well, it -- it -- it -- it doesn't have the -- the flavor of a -- of a coercion because the -- the person -- person who's coerced compliant just does that. They -- they're compliant. They don't -- they just accept what the interrogator says and goes, yeah, whatever you say. And then they just sign it. Where in this particular case

Mr. Irby is challenging, you know, what the -- what the -- what Detective Morgan has written and wants it changed.
Q In your opinion after analyzing this interview did Mr. Irby seem pretty much in control of what he was telling Detective Morgan or was Detective Morgan more in control?
A Well, I -- I say the best way to explain that would be Detective Morgan is in control of Detective Morgan and Mr. Irby is in control of Mr. Irby.
Q Okay.
A Mr. Irby is not showing any signs that -- that he is, you know, just beaten down and -- and acquiescent to Detective Morgan's version of what happened. That's typically what you see in a coerced-compliant confession. The individual just agrees with whatever the interrogator says happened.
Q And repeats back the allegation.
A And then parrots back to what they -- what they're told.
Q That didn't happen in this case.
A Does not appear to be.
Q Okay. And in this interrogation -- he was being interrogated about a first victim that made allegations, and he made the first two disclosures. Is that your recollection of the interrogation?
A I believe so.

Q Okay. And then after he got the written -- after Detective Morgan got the written statement on the first victim, he then went to pursue alleg -- the allegations from the second victim and asked Mr. Irby if he had sexually molested another girl by the name of MINOR 2. Do you remember that part?
A Yes.
Q Okay. What -- what -- what was it -- what -- he wasn't -- he was able to deny the allegations made by MINOR 2 multiple times in this interrogation. What does that indicate to you?
A That he's able to deny those allegations.
Q Right. And so -- so he admitted to the first ones. Not admitted to the allegations, but he gave his own story of how the first sexual assault --
A He gave -- he gave a -- a -- an alternative version, if you would, which -- but then when -- when accused of another victim he denies it.
Q And the same interrogation tactics were used with regard to those second-victim allegations.
A It's all part of the same conversation.
Q Did you find Detective Morgan applied any of the interrogation techniques that you teach properly in this case?
A I can't say that there was anything improper. There

were -- there were style differences and that's -- and that's something that you -- you have to be aware of that each -- each -- each interviewer, each interrogator, is going to develop their own style. And to say, oh, that's -- that's improper because it doesn't fit your style is -- I don't believe that's fair.

Q There's nothing in here that you actually teach against, because you actually teach against methods that are likely to elicit false confessions. There's nothing in his --

A There are --

Q -- type of style --

A There are -- there are no -- there are no threats of harm. There's no threats that -- that -- that -- that the person's going to be, you know, sentenced to life or jail forever.

You know, there are these -- there are these metaphors, if you would, that are open to interpretation. Dr. Leo says that that's an implied threat. I say it's a metaphor and a theme. The court decides.

Q Sure. Personal characteristics and traits blend to interrogation techniques and how they're applied --

A Yes.

Q -- to the individual being interrogated.

A Yes.

Q Can you please elaborate on that?
A Well, the populations where you really have to be careful about coercion confessions are juveniles, people who are -- who have some cognitive disability, whether they're developmentally disabled, mentally retarded.

Obviously, if they're suffering from some type of -- of cognitive disorder, brain damage, those types of things, people with -- people who are mentally ill. Maybe peoples who are delusional, people who are schizophrenic. They're in a psychotic episode.

Now, it doesn't mean that you can't interview or interrogate those individuals, but you have to be very, very cautious that you don't inadvertently cause this person to think.

But, again, the telltale sign is the person just parrots back to what you -- to what you offer. You -- and the like. And it's -- and it's -- at least it's my understanding that Mr. Irby is -- is -- is, obviously, not a juvenile. And there was nothing that I was provided with that suggests that he's suffering from mental retardation, developmentally disabled or suffering from a severe mental illness.

Q Okay. Thank you. Answer any questions that opposing counsel may have.

THE COURT: Cross-examination.

The court reporter needs a break.

Let's take a short break, as short as we can.

(Whereupon, a recess was taken.)

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MS. BLANCHETTE

Q Agent Prodan, were you contacted or consulted by the State of South Carolina, or specifically the Seventh Judicial Circuit Solicitor's Office, when this case was set for a date certain back in 2009?

A No.

Q And have you ever reviewed anything pertaining to this case but for the last couple of weeks?

A That's correct. I have not.

Q Okay. Since you have never been called or qualified as an expert in this capacity, what would you typically review before you would testify in court?

A Okay. I'm -- I'm -- are you referring to the crime or are you referring to -- for interview --

Q When you testify as an expert --

A As --

Q -- understanding you've never been qualified in this area.

A Right.

Q But when you testify as an expert what do you

typically request to --
A Well -- well, typically if we're -- if we're talking about expert testimony and crime analysis for analysis of violent crime, then it is all of the case materials.
Q And in this case could you please list for me what you did review?
A I had the video recordings of the polygraph examination, pre and post test, and exam, Dr. Leo's report and the transcript of the interview interrogation with Detective Morgan.
Q And that transcript was the work-product transcript from my office, is that correct?
A I -- I assume so.
Q Okay. And I'm sorry. Did you say you had reviewed the pretrial transcript?
A No. I did not. I've not seen it.
Q Okay. So you're not aware of any of the questioning either by -- of Mr. Morgan or of Mr. Irby in the pretrial transcript.
A I -- I have not seen it.
Q Okay. And in that transcript then I'm going to specifically show you this here. Beginning on page 61 Mr. Brough is cross-examining Detective Morgan, and if you could just review 61, line 25, through the top of page 62. I think it's about through line ten or so there.

(Pause.)
Q You can just let me know when you're finished.
A Okay. I'm done. I've all the way to the bottom of 62. Keep going?
Q No. That's it.
A Okay.
Q Were you aware that at the time of the pretrial training or pretrial hearing Danny Morgan had been terminated from the sheriff's department?
MS. GIOVANOLI: Objection. That's irrelevant since he wasn't terminated for any reason involving this case.
MS. BLANCHETTE: Your Honor, I think it goes to what he's reviewed and how he's formulated his expert opinion.
THE COURT: That's fine. Overruled.
Go ahead.
Q You can go ahead and answer. Were you aware he had been terminated from the sheriff's department?
A I was not.
Q Okay. And did you have any information regarding that when you formed your expert opinions in this case?
A I did not.
Q Okay. Did you review all of the written statements and verbal statements attributed to Mr. Irby in this case?
A Again, the transcript of the polygraph, Dr. Leo's report and the videos.

Q So you did not review State's 1, which is the written statements and the waivers.
A That's correct.
Q Did you review the statement attributed to Mr. Irby as...
MS. BLANCHETTE: Your Honor, just one moment's indulgence. I'm sorry. I'll retrack that question. Just a second.
(Pause.)
Q Did you review the statement attributed to Mr. Irby from November 14th, 2007, given in the presence of the DSS worker, Azzara, and Officer Aldredge?
A I did not.
Q So were you aware that Mr. Irby had given prior statements where he made complete denials?
A I became aware of these prior statements while attending this hearing.
Q And so were you formulating your expert opinions while attending this hearing?
A No.
Q Were you regularly consulting with the state though while attending this hearing?
A No.
Q Did you have any communications with my opposing counsel while attending this hearing?

A Did I have any communications?
Q Yes.
A Yes. We had conversations, but it wasn't about the case.
Q So you at no time were consulting with her regarding questions she should be asking Dr. Irby while he was either being qualified or on the stand testifying? I mean, sorry, Dr. Leo.
A Okay. No. In that particular case, yes, there was two questions I suggested. But I thought you meant did I have qual -- forming my opinion. No. That -- we had consultations prior to the hearing.
Q Okay. No. I asked about forming your opinions, and then I asked about consulting. Were you consulting with her throughout the course of these last two days?
A I think I made it -- if -- if that includes making two suggestions of a question, yes.
Q Okay. And you've already conceded that you became aware of additional information regarding this case while sitting in the -- in the hearing for the last two days.
A That's correct.
Q Have you ever interrogated someone and reached the conclusion they were innocent?
A Yes.
Q Do you know how many times?

A Somewhere between 10 and 25.
Q And your testimony on direct -- and I believe your ultimate opinion -- was that Detective Morgan did not miss -- or he did not misapply any of the techniques in this case, is that correct?
A Well, I think the question was did he do anything inappropriate if I -- was there anything inappropriate with the Reid technique. And if I recall my answer, my answer was, well, the style is different, so.
Q Have you ever frowned in all of the interrogations that you've reviewed that an interrogator did misapply the techniques?
A Yes.
Q Do you know how many times?
A In the last 19 years with SLED I would say somewhere between 20-25 times.
Q And what were the outcomes of those cases?
A I have no idea.
Q And would that -- who would you have given that information to?
A Either the -- the agency -- most likely the agency that requested our assistance for the consultation.
MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.
(Pause.)

Q Correct me if I'm wrong, but you didn't have the written statements as part of your review of this case, is that correct?
A I don't believe I have them.
Q Could you explain to me then how you did your review? Did you sit with the transcript and the video? Did you make your own notes of the video? Because, clearly, you weren't comparing the statements to the video, correct?
A I believe I went through Dr. Leo's report first, the transcript, video, back to the transcript.
Q And when you say transcript, are you referring to the trial transcript or the 140-some-page transcript?
A The 140-some-page -- excuse me. The 140-page transcript of the interview and interrogation with Detective Morgan.
Q Okay. Did you make your own notes regarding the video?
A Yes. They're combined with the notes -- unfortunately, they're combined with the notes on the transcript.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: All right. Redirect?

MS. GIOVANOLI: Nothing further, Your Honor.

THE COURT: All right. You may come down, sir. Thank

you very much.

MS. GIOVANOLI: The state has no further witnesses, but I do believe we want to address the issue of Mr. Brough being recalled.

I have -- I consulted with opposing counsel over the break, and I believe the only one issue that's, I guess, in dispute with regard to Mr. Brough's testimony is what exactly was conveyed to him by Dr. Leo.

And so I have requested if she would accept an affidavit. I'll let her speak to that, but we could submit an affidavit in lieu of a hearing if Your Honor is okay with that.

THE COURT: Satisfactory?

MS. BLANCHETTE: Your Honor, I would just reserve the right to, if there's some matter in that affidavit that I feel needs to be further explored, I'll address that with the Court.

THE COURT: That's fine. I understand that.

MS. GIOVANOLI: Okay. May I excuse my witness?

THE COURT: Absolutely. You've already excused your first one.

(Whereupon, the witness was excused.)

MS. GIOVANOLI: The state has no further witnesses, and we rest.

THE COURT: All right. Ms. Blanchette --

MS. BLANCHETTE: Your Honor --

THE COURT: -- I understand you have something for the record.

MS. BLANCHETTE: I have two cases I'd like to hand up.

THE COURT: All right.

MS. BLANCHETTE: One I feel like I have an ethical duty to provide the Court Briggs vs. State. It was just decided here in October of 2017. A remittitur was handed down last week, I believe.

And this case essentially finds that counsel is not ineffective for failing to object to the qualifications of a forensic interviewer, and it brings us up to speed as to the most recent case law regarding the perimeters that can be testified regarding forensic interviews and therapy.

And I just feel like as an officer of the Court I needed to bring that to your attention.

This case had not been decided at the time that I did the amendment in this case.

And then I also just have a copy of Reeves vs. State, which is cited too in the amendment and I addressed in my questioning.

THE COURT: How about State vs. Navy, Kenneth Navy?

MS. BLANCHETTE: Which Mr. Brough argued on or during the pretrial? Different Navy?

MS. GIOVANOLI: I'm at a loss also. I'm sorry.

MS. BLANCHETTE: Are you getting us ready for an oral argument in a couple of weeks, Your Honor?

THE COURT: This is a test.

MS. BLANCHETTE: Are you going to give me a hypothetical like Judge Few would after that? I'm on the record here.

THE COURT: No. It's my case in which I got reversed for allowing a false confession.

MS. BLANCHETTE: I thought I searched out Lexis for everything that had false confession in it in South Carolina.

THE COURT: Well, it was a -- they considered it coerced.

MS. BLANCHETTE: Oh, it was not coercion. Okay. I looked for false confession experts. I apologize.

THE COURT: No. They kept him -- they kept him hours longer than they should have. But, nevertheless, I would use this as time for instruction.

MS. BLANCHETTE: Thank you, Your Honor.

THE COURT: I do get reversed.

MS. BLANCHETTE: I know, Your Honor. I have been involved in that.

THE COURT: I know.

MS. BLANCHETTE: Thank you for reminding me.

THE COURT: I wrote the order. Your name is not on

it. Mine is on it.

Anything further?

MS. BLANCHETTE: Your Honor, I'd request the ability to order the transcript if proposed orders are needed in this case just to make sure it's accurate so that I do not get the Court reversed.

THE COURT: Well, let's talk about time then.

END OF REQUESTED TRANSCRIPT OF RECORD

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the day of

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

January 2, 2018

_____

Linda D. Moffitt
Circuit Court Reporter

James B. Irby III

May 5, 2008

To Whom It May Concern:

I would like to take time out to write about a dear friend of mine whose name is James Irby. James has been a part of my life now, about 8yrs.

I was calling a friend of mine and I dialed the wrong number. James was the one who answered the phone. From that Saturday to the present time I've had the opportunity to know him. James and myself spent a lot of time together and shared conversation on the phone everyday hours at a time. Over the last eight years I know James as to be a God Fearing Man! He is the type that always helps whenever he can, and if he could not help you he will lead you in the right direction, so you can receive the help you need. If I felt like my patients have ran short and needed someone to talk to James gave me his undivided attention and listened to my problem. James gave me his best opinion on how to workout the problem and when I followed for the best.

James basically would give you the shirt off his back!!!

When I decided to leave my children's father and move to Newberry my children was acting out. I spoke with James about the situation he talked with my children they opened up to James then he was able to provide information to me as to what I needed to do. He also gave my children his phone number personally so they could call him anytime they needed to talk. My children loves James, every child that comes in contact with James loves him. James gather up some children and take them to work with him. When they finished he made sure he paid them to put some money in their pockets. James even plays football with the boys because he use to play in high school but sometimes those old bones prohibits him from playing a long time.

James is such a wonderful person he is a family man and I even call him," The Jack of all trade!" There is not one thing he cannot accomplish, he is so smart, loving, helpful, and softhearted and he loves to laugh.

Since James has been incarcerated I fill like I have lost my best friend, whom I call my brother. I do not believe in any form shape or fashion that he committed the crime he has been accused of, because whenever James ran into any type of problems, he always called me on the phone, so I could hear what was going on even if he and his wife were having an disagreement. Please help my friend/brother come home. This is one man that I know does not have the capability or mental structure to commit such a crime!! If you have any questions please fill free to contact me @ [redacted] or my address is [redacted].

Sincerely,

Bernadette M. Smith
Newberry County School
District
Employee

Applicant's Exhibit 1

The Brough Law Firm

Christopher D. Brough
175 Magnolia Street, Suite 202
Spartanburg, SC 29306

Phone: 864-585-3088
Fax: 864-585-3058
www.broughlaw.com

January 4, 2011

Attn: Melinda Norton
Advance America
2016 Bear Village Court
Newberry, SC 29108

FILE COPY

Re: State v. James Irby
Indictment No.: 2008-GS-42-1536

Dear Ms. Norton:

Please be advised that Ms. Bernadette Smith is under subpoena for the trial week of January 4, 2011 through January 7, 2011. As a courtesy, we place Ms. Smith on phone stand-by in lieu of requiring her appearance for the entire week. Should you have any questions, please feel free to contact our office.

Sincerely,

Kirby Lanford
Paralegal

Applicant's Exhibit 2

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG	)	2008-GS-42-1536
The State of South Carolina	)	
	)	
vs.	)	DEFENDANT'S LIST OF
	)	POTENTIAL WITNESSES
James Benjamin Irby, III	)	
Defendant.	)	
	)	

The Defendant *may* call the following individual(s) to testify in the above-captioned case:

Lillian Danette Collins

Bernadette Smith

Kirby Lanford

The Defendant also reserves the right to testify on his own behalf should he so choose at the appropriate time. Further, the Defendant reserves the right to supplement this list with any necessary reply witnesses.

Respectfully submitted,

Christopher D. Brough, Esq.
175 Magnolia Street, Suite 202
Spartanburg, SC 29306
(864) 585-3088

Date: _____
Spartanburg, South Carolina

Applicant's Exhibit 3

Windows Live™

James Irby
From: **Reese, Susan** (sreese@spartanburgcounty.org)
Sent: Thu 9/11/08 1:59 PM
To: broughlaw@hotmail.com

Chris,

I have reviewed the file on James Irby. Under the circumstances, I cannot make an offer in this case. At this time, my file notes show that you have discovery on every item with the exception of the CAC tapes. We have requested those be sent to us.

Applicant's Exhibit 4

RE: James Irby

From: **Christopher Brough** (broughlaw@hotmail.com)
Sent: Thu 10/21/10 1:46 PM
To: Susan Reese (sreese@spartanburgcounty.org)

Susan,

My client has always taken the position with me that he didn't do it, and was coerced into that last statement. That being said, if you were willing to reduce the charges, I will definately talk to him about it.

also here's my new contact information:

Christopher D. Brough
175 Magnolia Street, Suite 202
Spartanburg, SC 29306
Phone: (864) 585-3088
Fax: (864) 585-3058
Email: christopherbrough@broughlaw.com

-Chris

Subject: James Irby
Date: Thu, 21 Oct 2010 11:42:22 -0400
From: sreese@spartanburgcounty.org
To: broughlaw@hotmail.com

Chris,

I met with the victim in this case yesterday. She is ready to proceed to trial. She confirmed all of her statements to me. I just never head back from you as to whether exploring an offer is a possibility. Let me know what you think. I don't think this child has an problem testifying. The other witnesses are also available.

James Irby

From: **Reese, Susan** (sreese@spartanburgcounty.org)
Sent: Fri 12/31/10 9:00 AM
To: broughlaw@hotmail.com

Chris,

As you know we are #82 on the present docket (which could make us 1st on Tuesday the way things have been going). I was working at home last night and noticed a big typographical error in the indictment. My instructions were to indict dates 10/30/06 through 11/09/07. For some reason only 11/09/07 got put in the indictment and I signed it. I wanted to make you aware of this as soon as I realized it.

I know all the discovery gives the time frame (CAC and even DSS reports) but wasn't sure if you were willing to consent to the amendment (or if you even could) in the interest of going ahead and getting the case done.

My options are to make the motion to amend and ask for a continuance until the next term if the judge does not grant the amendment; see if we could consent to the amendment; or consent to continue until the next term. I wanted to get your thoughts today because I didn't want you to have to work over the holiday without knowing the issue.

I am going to try to get you an offer today to cap the sentence at 10. (0-10). So far the victim has been adamant against an offer largely because her mother continues to try to intimidate her about testifying. I have a meeting with her today. Can you let me know what you think about the indictment options.

If we can consent to continue it would keep us both from working over the holiday and we could put it on the Feb. 7th docket up top. If we can agree to the change, we can just get it over with. I would just like to know what you think before I invest my holiday in the case.

I'm sorry for the screw up.

Irby

From: **Reese, Susan** (sreese@spartanburgcounty.org)
Sent: Fri 12/31/10 4:52 PM
To: broughlaw@hotmail.com

I have been given the ok to offer a cap of 10 and criminal sexual conduct 2nd degree with a minor.

1/4/11 - discussed w D
A said no
talked with D about issues w victim's
credibility in light of her
CDV 3rd shoplifting

Kirby Lanford

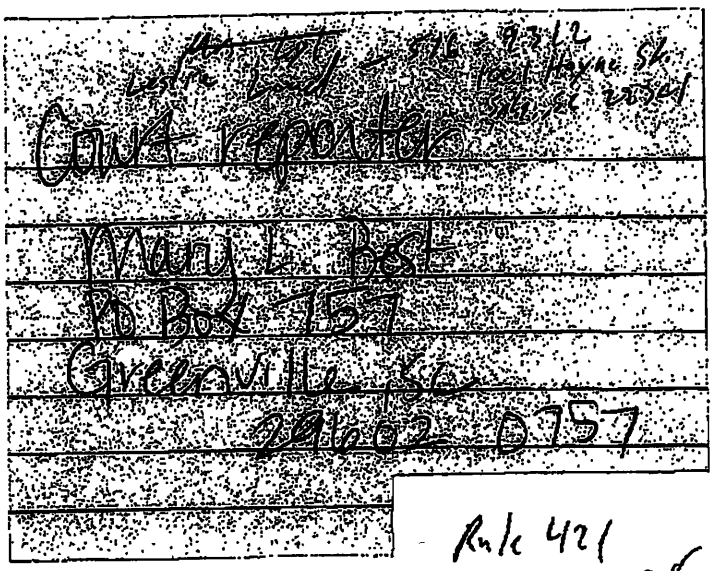
From: Richard Leo [rleo@usfca.edu]
Sent: Thursday, November 13, 2008 2:51 PM
To: kirbylanford@broughlaw.com
Subject: James Irby
Attachments: LeoAGREEMENT2007.doc; DrRichardLeoCVOct2008.doc

Hi Kirby,

I attach my CV and retainer agreement as promised. I look forward to speaking further. The best number to reach me at is 415-661-0162. Please mail all materials to me at 15 Ashbury Terrace, San Francisco, Ca 94117. Please waive signature if you send anything by fed X. Let me know if you need any more materials or have any other questions. Otherwise, I look forward to speaking to you or the attorney soon. Thanks.

Richard

Richard A. Leo, Ph.D., J.D.
Associate Professor
University of San Francisco School of Law 2130 Fulton Street San Francisco, CA 94117
(415) 422-6513
SSRN: <http://ssrn.com/author=1020356>http://ssrn.com/author=1020356



Rule 421
A276.25

Applicant's Exhibit 7

Print | Close Window

Subject: RE: State v. James Irby DVD
From: Richard Leo <rleo@usfca.edu>
Date: Tue, Mar 10, 2009 2:36 pm
To: kirbylanford@broughlaw.com

Hi Kirby,

Thanks for your email. I just put together the billing to date. I have spent 11 hours on the case, but you paid me a 10 hour retainer. So at the moment the balance is: $250.

If I understand Mr. Brough correctly, he would want me to fly out to South Carolina on May 31st, then be present June 1, 2 and 3 and return on the evening of the 3rd. Please confirm that (also please let me know which airport I would be flying in and out of as it may be difficult to get out of SC on the night of June 3rd depending on the airport and could add another day to the trip). If so, here is my best estimate:

8-10 hours X 4 days (May 31-June 3) for travel and/or testimony = 36-40 hour (the midpoint would be 38 hours x $250/Hour = $9,500

+ any consultation with Mr. Brough and/or review of any additional documents prior to flying out. I'll estimate 2 hours here, but of course it is just an estimate and may be low. 2 X $250/hour = $500

Plus expenses (roundtrip airfare from San Francisco to South Carolina, hotel, ground transportation in SC, airport parking in San Francisco). I would just estimate this at $500

Adding these figures is my best estimate, but again only an estimate:

$250
$9,500
$500
$500

Total estimate: $10,750

Let me know if you have any questions. Thanks.

Richard

At 09:04 AM 3/9/2009, you wrote:
>Mr. Leo,
>Is there any way you could give me an estimate of what your services
>will cost our client?
>
>Kirby Lanford
>Paralegal
>The Brough Law Firm
>184 N. Daniel Morgan Ave.
>Spartanburg, SC 29306
>Phone: 864-585-3088
>Fax: 864-585-0088
>
>
>
>-------- Original Message --------
>Subject: RE: State v. James Irby DVD
>From: Richard Leo <rleo@usfca.edu>
>Date: Fri, March 06, 2009 9:31 pm

>To: kirbylanford@broughlaw.com
>
>Thanks, Kirby.
>
>Richard
>
>At 08:05 AM 3/6/2009, you wrote:
> >Mr. Leo,
> >I apologize for not getting back to you sooner, I have been out
> >sick. The Judge did sign the Motion for Continuance and the trial is
> >scheduled for June 1, 2009. It should last through the 3rd. Please
> >hold those 3 days for us! Thanks,
> >
> >Kirby Lanford
> >Paralegal
> >The Brough Law Firm
> >164 N. Daniel Morgan Ave.
> >Spartanburg, SC 29306
> >Phone: 864-585-3088
> >Fax: 864-585-0068
> >
> >
> >
> >-------- Original Message --------
> >Subject: Re: State v. James Irby DVD
> >From: Richard Leo <rleo@usfca.edu>
> >Date: Thu, March 05, 2009 6:29 pm
> >To: Kirby Lanford <kirbylanford@broughlaw.com>
> >
> >Dear Ms. Lanford --
> >
> >I left a message three days ago asking someone from your office to
> >call to confirm that you want me to hold June 1-3 for Mr. Irby's
> >trial, that it has definitely been rescheduled to those three days.
> >Please let me know. Thanks.
> >
> >Richard
> >
> >At 11:08 AM 1/22/2009, Kirby Lanford wrote:
> > >Mr. Leo,
> > >I have converted the DVD's to an mpg file and I will save them onto
> > >a jump drive and mail them to you that way. They can be opened in
> > >Windows Media Player and they are playing all the way through. I
> > >will mail them off by tomorrow.
> > >Thanks,
> > >
> > >Kirby Lanford
> > >Paralegal to Attorney Christopher D. Brough
> > >164 N. Daniel Morgan Ave.
> > >Spartanburg, SC 29306
> > >Telephone: (864) 585-3088
> > >Fax: (864) 585-0068
> > >kirbylanford@broughlaw.com
> > >
> >
> >Richard A. Leo, Ph.D., J.D.
> >Associate Professor
> >University of San Francisco School of Law
> >2130 Fulton Street
> >San Francisco, CA 94117
> >(415) 422-6513
> >SSRN:
> ><<<http://ssrn.com/author=1020356>http://ssrn.com/author=1020356>ht
> tp://ssrn.com/author=1020356>http://ssrn.com/author=1020356
>

>Richard A. Leo, Ph.D., J.D.
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The Law Offices Of
Christopher D. Brough

184 N. Daniel Morgan Ave.
Spartanburg, SC 29306

Telephone (864) 585-3088
Fax (864) 585-0068

December 2, 2008

VIA US MAIL

Mr. Richard Leo
15 Ashbury Terrace
San Francisco, CA 94117

Re: ***State of South Carolina v. James Irby***

Dear Mr. Leo:

Enclosed please find a signed copy of the retainer agreement and a check in the amount of Two Thousand Five Hundred Dollars ($2,500.00).

I have provided you with copies of the videotaped polygraph examination, videotaped confession, written statements, SC Department of Social Services report, and a Spartanburg County Sheriff's Office incident report.

Please do not hesitate to call if you have any questions.

Sincerely,

Kirby Lanford
Paralegal to Christopher D. Brough

Enclosures

Applicant's Exhibit 8

AGREEMENT

This agreement is entered into by Dr. Richard A. Leo, Ph.D., J.D. and the undersigned (ATTORNEY).

I/We the undersigned ATTORNEY do hereby agree to retain Richard A. Leo, Ph.D., J.D. to serve as a LITIGATION CONSULTANT and/or EXPERT WITNESS in the matter of State of South Carolina v. James Irby. ATTORNEY is responsible for all fees and expenses incurred by Dr. Richard

Dr. Leo shall be compensated at the rate of $250.00 per hour for time spent in consultation, review of case materials, analysis, preparation, travel, attending court, giving testimony and/or any other services performed in this matter.

A case initiation fee (Retainer) of $2,500.00 shall be paid to RICHARD A. LEO & ASSOCIATES, INC. (Tax ID #: 20-3610291). This retainer is a case minimum fee. It is a non-refundable case minimum fee, regardless of the amount of work requested or performed.

Until the final invoice is presented all invoices will be predicated upon the retention of the full $2,500.00 retainer. Credit for the full amount of the retainer will be given in the last invoice tendered.

Dr. Leo will calculate his time for billing purposes in increments of 1/10th of one hour. Balances shall be paid within 30 days of the date of the invoice. Invoices will be sent no more frequently than every 30 days. Upon the request of Richard A. Leo, all outstanding invoices will be brought current prior or to any deposition, courtroom testimony or trial appearance.

The undersigned acknowledges that ATTORNEY, rather than the party or parties' ATTORNEY may represent, is solely responsible for paying all invoices in this matter.

The undersigned ATTORNEY agrees not to put Dr. Leo's name on any list of witnesses in this matter without advising Dr. Leo in advance and until ATTORNEY and Dr. Leo have agreed that Dr. Leo may be of assistance in this matter.

Travel must be scheduled at least 21 days in advance. Upon request from Dr. Leo all travel related expenses will be prepaid. In addition, ATTORNEY agrees to be responsible for incidental necessary costs and expenses incurred by Dr. Leo in connection with this case. Such costs include, but are not limited to: FED EX, courier or other delivery services, postal charges and purchasing and/or photocopying research materials.

In the event that ATTORNEY fails to pay an undisputed bill, all costs of collection, including compensation for Dr. Leo's time incurred in any collection activities, will be borne by the client. Any dispute regarding a bill must be raised within 30 days of the date the bill was mailed or faxed to the ATTORNEY. In the event of a dispute regarding a bill, Dr. Leo and the

SCANNED
APR 27 2016

ATTORNEY will confer. If this does not produce a resolution. Dr. Leo and the CLIENT agree to submit the dispute to mediation.

The ATTORNEY retains the right to terminate Dr. Leo's services at any time. In the event of termination. ATTORNEY will compensate Dr. Leo for services rendered and expenses incurred up to the date of termination. Dr. Leo retains the right to withdraw from this undertaking following notice if the terms of this agreement are not fulfilled.

I have read this AGREEMENT, acknowledge receipt of a copy of it, and agree to its terms and conditions. There are no other oral or written agreements in force between Dr. Richard A. Leo and ATTORNEY. I hereby employ the services of Dr. Richard A. Leo as set forth above in the matter of State of South Carolina v. Foby

AGREED:

Christy D. Boyd
ATTORNEY

DATE: 12/11/08

DATE: _____

Richard A. Leo, Ph.D., J.D.
RICHARD A. LEO & ASSOCIATES, INC.
LITIGATION CONSULTATION/
EXPERT WITNESS

RICHARD A. LEO & ASSOCIATES, INC.
15 Ashbury Terrace
San Francisco, CA 94117
(415) 661-0162 (Phone)
(415) 661-0172 (FAX)
Email: rleo@usfca.edu

BILLING STATEMENT

TAX IDENTIFICATION NUMBER: 20-3610291

To: Christopher Brough
Attorney at Law

Today's Date: May 22, 2009

Billing Rate: $250/Hour

Re: James Irby

DATE	ACTIVITY	TIME SPENT TOTAL
11/13/08	Consultation with Christopher Brough	0.3
11/18/09	Consultation with Christopher Brough	0.1
11/19/09	Consultation with Christopher Brough	0.1
11/26/08	Consultation with Christopher Brough	0.1

12/1/08	Consultation with Christopher Brough	0.5	
12/15/08	Review and analysis of case materials; Consultation with Kirby Lanford	1.6	
12/17/09	Consultation with Kirby Lanford	0.1	
12/18/08	Consultation with Kirby Lanford	0.1	
1/21/09	Consultation with Kirby Lanford	0.1	
1/22/09	Consultation with Kirby Lanford	0.1	
1/31/09	Review and analysis of case materials	2.2	
2/1/09	Review and analysis of case materials		3.1
2/2/09	Review and analysis of case materials		1.7
2/5/09	Consultation with Chrisopher Brough		0.5
3/3/09	Phone message for Kirby Lanford		0.1
3/5/05	Email to Kirby Lanford		0.1
3/10/09	Consultation via email with Kirby Lanford; Christopher Brough	0.2	
5/4/09	Consultation with Christopher Brough		0.2

Sub-Total	11.2 Hours X $250/Hour		$2,800.00
MINUS RETAINER		-	$2,500.00
New Sub-Total			$300.00
Total Amount Due at This Time			$300.00

STATE OF SOUTH CAROLINA)	**IN THE COURT OF GENERAL SESSIONS**
)	**SEVENTH JUDICIAL CIRCUIT**
COUNTY OF SPARTANBURG)	
The State of South Carolina)	**MOTION FOR CONTINUANCE**
)	
vs.)	
)	
James Benjamin Irby III,)	**Indictment No(s):** 2008-GS-42-1536
Defendant.)	
)	

The Defendant respectfully requests that the court continue this case scheduled for trial during the February 23, 2009, term of court. The Defendant plans on calling an out-of-state expert witness to testify in the area of false confessions. The witness's name is Richard Leo and his CV is attached to this motion. The Defendant believes that Mr. Leo's testimony is critical in order for the defendant to have a fair trial. Therefore, the Defendant requests that this case be set for a date certain of April 13, 2009, which will comply with Mr. Leo's schedule and allow him to be present to testify.

Respectfully submitted,

Christopher D. Brough
184 N. Daniel Morgan Ave.
Spartanburg, South Carolina 29306
(864) 585-3088

Dated: February 10, 2009

RECEIVED
FEB 10 REC'D
BY:

Applicant's Exhibit
10

MARC KITCHENS
2009 FEB 10 AM 10:27
FILED

Applicant's Exhibit 12

I Lillian Dannette Collins-Irby verify that on my first and only joint consultation with my daughters (VICTIM) therapist Gina Odom at the Children's Advocacy Center. My daughter had a question that she wanted a answer to. It was "why did I chose James (my husband) over her" I explained to her that I was in the middle and that I didn't choose anyone. That I had to be there for her because she is my daughter and I had to be there for James because he is my husband. Then I proceeded to ask her a question that I needed an answer for. I asked her " VICTIM I need to know what happened if anything happened because I had heard all kinds of stories from a lot of people but she hadn't talked to me. She said "Nothing happened" I looked at her, then at Gina and I asked again VICTIM I don't understand what that means because... these are some very serious charges Once again she said "Nothing happened." Again I looked at Gina and VICTIM and In a calm voice I asked again VICTIM what happened for the third time she said "Nothing happened" I said I don't understand then VICTIM looked at Gina and said he tried I asked he tried what? Her therapist Gina stopped the session. Didn't ask any questions and didn't comment on anything. She said we would schedule another session, but when I called

her to do so. She refused to schedule a session. When I was told that she had made a statement of me being confrontational which is a blatent lie. I was never confrontational, loud, aggressive or anything. I was soft, quiet and reassuring for my child. I have never been separated from my child her entire life and I know my child better than anyone and if my child told me nothing happened and she did so three times and the fact that I asked her if she was still a virgin and she told me that she was and all her test results show that she still is. Then I believe that nothing happened.

Jillian Danielle Collins-Irby

Jillian Danielle Collins-Irby

Notary Public for South Carolina
My Commission expires: 10/29/2018

Polygraph Interview

Q = Dan Morgan, Interviewer

A = James Irby, Interviewee

D= Detective Aldridge

Q: Well if you're like most people I'm sure you're at least a little bit nervous about taking one.

A: Um – yes, sir. Just a little bit.

Q: That's completely to be expected. Uh – everybody's nervous when it comes to taking a polygraph. It's the ones who come in here and try and tell me, "Nah I'm not nervous" those are the ones who are usually lying. There's no way not to be nervous. I do polygraphs all the time, but if I was sitting in that chair, I'd be nervous, because there's just no way around it. It's to be expected. And, um, a lot of times people are concerned -- did I introduce myself by the way? I'm Dan Morgan --

A: Okay. Nice to meet you, Dan.

Q: But a lot of times people are concerned that being nervous will cause them to fail a polygraph test. And that's a natural assumption. But if you think about it, that can't be the case. If nervousness causes you to fail a polygraph, everybody would fail, right?

A: Yeah.

Q: I mean, it makes sense. So obviously that's not the case. If everyone was going to fail, we wouldn't do it because we would know it didn't work, right?

A: Yeah.

Q: So it's not about nervousness. In fact, the majority of people who take polygraphs pass. So it's obviously not nervousness, because everybody's nervous, alright? But I'll explain that to you a little more as we go through the process, okay?

A: Okay. Is it a long process or a short process?

Q: Um, generally from the time you come into the room, it's at least two to two and a half hours. There's a lot that's involved with it, so let me tell you what we're going to do step-by-step so

you'll understand why it takes so long. The first thing is, I want to do a couple of pieces of paperwork with you that shows that you're here voluntarily to clear you of any suspicion or wrongdoing on your part.

A: Okay.

Q: After that, I'm going to talk to you about how you're doing today to make sure that you're capable of doing the polygraph.

A: Okay.

Q: So that mentally, physically, you're okay to do the polygraph. After that I'm going to talk to you about your background some and I'll explain to you why that's important when we get to that point. After that I'm going to talk to you about the polygraph itself and I'm going to explain to you how the polygraph works and more importantly why the polygraph works, and I'll answer any questions you have about the polygraph at that time.

A: Okay.

Q: Then after that I'm gonna talk to you about these allegations that . [illegible] do you call her [illegible]?

A: I call her [illegible].

Q: We'll talk about these allegations that [illegible] made against you. Okay? And you can fill me in on the family dynamics, what's going on there, why you think she would say stuff like this.

A: Okay.

Q: So, tell me what's really going on there. Okay?

A: Okay.

Q: Then after that I'm gonna go over a list of questions with you. And these are the questions that'll be on the test. So before you take the test you'll know what all the questions are.

A: Yes sir.

Q: Then after that, we'll take a brief break, give you the opportunity to use the restroom, get a drink of water, and then we'll come back in and get started with the test.

A: Okay.

Q: Now, the first test I'm gonna do with you is what's called an "acquaintance test" and it just gets

you acquainted with what it feels like to do a polygraph. It's just one brief test, it doesn't count. Like I said it's designed to let get you familiar with what it feels like to do a polygraph, it doesn't count, and it gives me the opportunity to make sure that everything is working correctly.

A: Okay.

Q: After the acquaintance test, we'll begin your examination, and your examination will consist of about 5 tests, but each test is always the same test. The only thing that I do differently is just change the sequence, or the order, of the questions around.

A: Okay.

Q: The wording of the questions stays the same, I just change the order around some.

A: Okay.

Q: Alright. Um, now I say we'll do about five tests. Sometimes I don't have to do five, sometimes I'll stop at three or four, but anywhere between three and five is a normal amount.

A: Okay.

Q: Now after all the tests have been done, what I need to do, and I'll take the time to evaluate each one of the charts and do some quality control checks and then I'll go over with you how you did on the test.

A: Okay.

Q: Alright? Any questions so far?

A: Not at the time.

Q: Okay, well let me go over this paperwork with you. Now I'm not sure, I'm assuming that at some time the investigators have already done this with you once, this is just advising you of your rights. I always do it again before the polygraph. I'm licensed in the state of South Carolina to do polygraphs through SLED, and part of the requirements is that I always read a person their rights before we do a polygraph. So I'm just gonna do it again. Okay?

A: Okay.

Q: So just follow along with me. Stop me if there's anything that you have a question about. (Reading) "Before you answer any questions you must understand your rights. You have the right

to remain silent. Anything you say can, and will be used against you in a court of law. You have the right to talk to a lawyer and be advised before we ask you any questions, and have a lawyer here present with you during questioning. If you have no money for lawyer's fees, the court will appoint one to represent you without cost to you if you wish. If you decide to answer questions now without a lawyer present, you still have the right to stop answering questions at any time. I have read and understand what my rights are." If you understand all of those, then sign there.

A: Okay. (Signs.)

Q: This next segment says (Reading) "I am willing to make a statement and answer questions at this time. I do not want a lawyer at this time. I understand and know what I am doing. No threats or promises have been made to me and no pressure or coercion of any kind has been used against me." If that's correct, then sign there.

A: (Signs)

Q: This next one is a Consent to Interview with a Polygraph. (Reading) "Before we begin examination by means of the polygraph, concerning Decole's accusations that you have been having sex with her, you must understand your rights. You have the right to refuse to take the polygraph test. If you agree to take the polygraph test, you have the right to stop the test at any time. If you agree to take the polygraph test, you have the right to refuse to answer any individual questions. As I have read of my rights and understand what my rights are, I voluntarily agree to be examined by means of polygraph during this interview. I understand and know what I am doing. No threats or promises have been used against me to obtain my consent to the use of the polygraph. I understand the examination room contains an observation device, that my exam may be monitored or recorded, and that any recording may be used in training Sheriff's Office personnel."

A: (Signs). I'm quite sure y'all probably got other people you can use for training purposes. What about what is mine going to be used for training purposes?

Q: It's just, a- so far I haven't used anybody's for training purposes. It's just a formality put in there in case a need ever arose for me to do a training class of some sort. If you'd rather me just strike

that out, I can strike it out.

A: Yeah let's strike it out.

Q: The recording itself will still be there. It's still gonna be recorded. But I struck out the part about it being used for training purposes. I put my initials there, just go ahead and put your initials there, too.

A: Alright. (initials)

Q: Alright. Now I told you I wanted to make sure that you're able to do a polygraph, and that's medically, mentally, and physically.

A: Okay.

Q: Um, how would you describe your general health overall?

A: It's good.

Q: Okay. And what is a normal amount of sleep for you? I imagine now you're probably getting a lot more than normal, (laughs) but-

A: Really about three hours.

Q: Even now? While you're in jail?

A: Yeah about three hours. I go to sleep at about 12, and we get up about 4.

Q: Some guys come in here and tell me they sleep 10, 12 hours a day. Okay. So about 4 is normal for you?

A: (Nods)

Q: Well, since this time yesterday, how many hours have you slept?

A: I got four today. Yeah.

Q: Okay. And to the best of your knowledge, do you have anything wrong with your heart? Any kind of heart disease, high blood pressure, heart defects?

A: Uh, no.

Q: Okay. Any kind of neurological disorders- like seizures, or tremors, or anything like that?

A: Um, what do you mean by tremors?

Q: Uh- an uncontrollable- uh, now, not to be mistaken with, my hands have a little kind of shaking

(holds up hand) when I try to hold them up like that, but when I hold them down here I don't have any shake. I'm talking about-

A: You mean like, when I get cold I have a little (hold up hand)-

Q: Now that's normal. I'm talking about a person who sits there and like-

A: Oh no-

Q: -has some kind of uncontrollable tremor or something running through them.

A: Yeah I mean when I was in the other room, I was a little cold and I-

Q: Yeah that's brought on by being too cold. We try to keep the temperature in here a little better than that. I'm talking about medical problems.

A: Oh, no.

Q: Okay so no medical neurological problems or anything?

A: No.

Q: How about any kind of respiratory problems? Like asthma or something like that?

A: No.

Q: Do you have anything wrong with your hearing?

A: (Shakes head)

Q: You're able to hear me okay?

A: Yes.

Q: And, not pregnant. Do you take any kind of medication on a regular basis? Any prescriptions or anything?

A: Not by mouth.

Q: What do you take?

A: I take something on my skin, it's called-

Q: Oh you're talking about something you rub onto your skin

A: Yeah.

Q: Um, have you ever been treated in the past by a psychologist or a psychiatrist for anything?

A: For depression.

Q: When was that?

A: That was back in maybe, '99. Maybe.

Q: Okay. Were you diagnosed with anything? Manic depressive or bipolar or anything?

A: Well I had been through a bad relationship, and I felt that that relationship had made me feel like I had some kind of post-traumatic stress disorder. It had basically felt like being in a battle. And I talked to someone, and when I talked to him they said I had some kind of symptoms, they said when I talked, when I talked about the situations that happened, I would like start to – tense up.

Q: Okay. Did they actually diagnose you with PTSD or diagnose you with something? Or was it just something that going through some verbal counseling helped to alleviate some things, let you get it out in the open, and now you're okay?

A: Well really, back then, I went down to Patrick B. Harris and I stayed for a while, and that didn't really help, so I told my parents to come and get me. I was going through this program called the Fatherhood (?) Program to help people with child support and stuff like that and um, during that time they wanted people to see a psychiatrist or whatever and he was the one that told me that.

Q: Are you having any kind of ongoing problems with that? Are you having to see a psychiatrist now? Are you on medication for that or anything like that?

A: Well-

Q: You're not currently seeing anyone for it?

A: I'm not seeing anyone for it. But, when I was- see I been with my wife for three years- that's [redacted]s mother. And, man, just being down there alone, it was a lot to deal with. I had to deal with- at first it was things she was doing, and then that kinda straightened out. And then it always been things [redacted]was doing, because when I first came, I never seen a child that would act like she would, you know? I can remember sitting in the living room, and we were trying to enjoy a peaceful evening, and just watch TV, and when we were sitting in there, the child just kept making noise, making noise, making noise. This is what she kept doing, she kept saying - (makes noise) - like that. And she said, "James don't say nothing, just observe," because I'm new to the family. So it kept on for a couple of days, and man I was so miserable I didn't know if I wanted to laugh or

cry. So, have you ever heard of the game "Hitman?"

Q: (Makes affirmative noise.)

A: So I said, man I need to find something to get me away from all of this. Cause I didn't wanna whoop the child, cause I was new to the family. Also I was wondering why the mother was letting all of this go on. So I started playing Hitman, and that kind of let me escape from that for a little bit. But um – like I said, sooner or later you got to come back from the game, and if it wasn't [illegible]. it was the parents, if it wasn't the parents, it was the father's. You know she got, other children. But the other children, they were perfectly okay. Never been any problem. The son, he's-

Q: Is [illegible] the oldest?

A: She's the little child.

Q: She's the little child?

A: Yeah. But like I said, it's been such a problem, we asked the brother- me and her mother asked the brother- "what do you think we should do with [illegible]?" Cause sometimes- cause when I was growing up I had a sister. And sometime I knew my sister's best interest. Cause I paid more- I don't want to say I paid more attention- but I knew more about my sister than my mother did. And so we asked Avery- cause it kinda felt like he might know some more things about her than we did. And when we asked him what he thought we should do, he said "Send her away," like send her to some kind of- but I didn't think that was the answer. Cause she was way out of hand.

Q: So basically what it sounds like you're telling me is that you have some ongoing problems that cause you to feel some depression.

A: No- more like stress.

Q: Okay, stress. So you have a lot of stress in your life, and you had a lot of stress back in '99 that led you to seek some counseling for depression which is what they ultimately told you that you had?

A: Um, yes.

Q: Okay. Okay. But right now you're not having to take any medication for it or anything like that?

It's not at the point where you're having to do that?

A: No, it's not at that point.

Q: Okay. Um- I don't suppose you've had any alcohol to drink in the past 24 hours have you?

A: No, sir.

Q: Well you never can tell what you can find in jail, right?

A: (Nods.)

Q: Okay. Do you ever use any kind of drugs? Marijuana, pills, cocaine, anything like that?

A: No, sir.

Q: Alright.

A: I don't even smoke.

Q: Oh, good. Do you have any other health problems that you are concerned might impact the polygraph in some way?

A: Um, not that I am aware of.

Q: Okay. Well tell me this. Is there any medical reason that you can think of that would keep you from being able to sit still for 5 minutes? Can you make yourself sit still for 5 minutes?

A: Well I'm sitting still now. I mean, I touch my leg.

Q: You look like you're fine. I just wanted to know if there was any medical reason you could think of that would keep you from being able to sit still. So, basically if you're like most people, you have the ability to make yourself sit still.

A: Yeah.

Q: Okay. Alright, James, the reason I ask you about sitting still is because there are only two things a person has to do to pass a polygraph. To pass a polygraph is really not that difficult, okay? The two things you have to do- the first one's pretty obvious- you have to tell the truth. Right? Okay. But even with telling the truth, you still have to do something else to pass, and that is you have got to be completely cooperative. You have to follow all of my instructions. Okay? Um- some of the instructions I give, or one of the instructions I give at the beginning of every test, I always say it, "the test is about to begin, please remain still." Okay?

A: Okay.

Q: Now, when I say "remain still" I'm not talking about sitting real stiff like a statue, or being afraid to blink, okay? I'm just talking about sitting comfortable in the chair without, you know, bouncing your legs around or drumming your fingers or doing a lot of that, or doing (sniffs, clears throat, swallows hard) or anything like that. Extreme movements like that, they cause disruptions in the flow of the chart, it makes me have to repeat questions, do tests over, things like that. Okay?

A: Okay.

Q: Now, as you can probably imagine. There is a lot of psychology involved in a polygraph. Makes sense, right? We're dealing with a human brain so there's gotta be some psychology involved, right?

A: (Nods)

Q: Even something as simple as those instructions there, there's a pretty big psychological factor to this, okay? So I want you to think about this. There are only- just give me the first thing that comes to your mind, okay? There's no right or wrong answers. There are only two kinds of people who take polygraphs. Do you know what two kinds of people take polygraphs?

A: People who tell the truth and people who don't, I would think.

Q: That's real close. Real close. But it's actually more in the present. You're talking about in the past, okay? People who tell the truth, people who don't. That's past tense, okay? In the present tense, the two types of people who take polygraphs are those who are going to tell the truth, and those who are going to lie.

A: Okay.

Q: When it comes down to it, everybody who sits in that chair is going to do one or the other. Because you could take an inherently truthful person, who will come in and lie. Or you can take an inherently lying person who will come in and tell the truth. It all depends on their circumstance. Okay. So the two kinds of people who take polygraphs are those who will tell the truth during the test and those who will lie during the test. Those are the two types of people. It doesn't matter why they're here or what the circumstances are, or anything else, okay?

A: Okay.

Q: A lot of people tell me guilty or innocent, or things like that. That's not the case. Because even a guilty person can come in here and tell the truth. Anyway, the reason I say that is, going back to that psychological factor, okay, you take the individual who is going to tell the truth. Okay, they've been telling the truth. They've been telling the truth to their family, their friends, the police, the detectives, and they come in here, and they're telling the truth, they want the polygraph to work-

A: Yes.

Q: They're counting on the polygraph to work, to show, "Hey, I'm telling the truth, I didn't do this, y'all need to go look somewhere else."

A: Mhm.

Q: Okay? The person who is telling the truth, if I tell them you have to be still to pass the test, you have to follow my instructions, they're gonna follow my instructions. Because they want it to work. Sounds simple right?

A: Mhm.

Q: And it is. And most psychological things are pretty simple. Okay? The flip side of that is, we have people that are going to lie. The ones that are going to lie are the ones that are going to come in and intentionally do those flinching around stuff, do the swallowing and the sniffing, and doing their lips and stuff, they're going to do things to try to mess the test up. Because the last thing they want is for the polygraph to work. Because they're hoping that it won't work, right?

A: (Nods)

Q: I mean they want to look like they're cooperative, because they know "well if I don't go take the polygraph, everybody's gonna think I did it." So they want to look like they're cooperating, but the last thing they want is for it to work. So they're the ones who will intentionally do things to try and mess the test up. Okay?

A: Okay.

Q: Okay. Now anybody could cough, or sniff, or swallow during the test. Just because somebody does it one time doesn't mean I automatically assume you're a liar. So I always give a warning the

first time, and I'll even give a warning the second time. I will tell you "you need to stop doing this, you need to start doing that" or whatever. I'll give at least two warnings.

A: Okay.

Q: If it gets to the point where I have to warn somebody three times to stop doing something, then by that point it's pretty obvious to figure out what category that person falls into. So at that point I usually just go ahead and terminate the test and wrap up as a failure due to the lack of cooperation.

A: Okay.

Q: So, from a psychological standpoint, it tells me a lot about an individual's truthfulness just by how well they follow the instructions. How well they sit still and do what they're supposed to do.

A: Okay.

Q: You look like a good candidate for a polygraph. I don't see anything here that would indicate to me that you should have a problem with it, so if you do those two things, if you tell the truth and follow my instructions, I don't see any reason why you won't pass.

A: Okay.

Q: Okay? Let's talk about your background some here for a minute, and let me explain to you why we do this. Because this is the part that kind of makes things long.

A: Okay.

Q: And why people don't understand the polygraph takes a while. Okay. And the reason is this. A lot of people who have never had a polygraph think that, you know, you just come into a room, sit in a chair, I'll hook stuff up to you and ask you "did you do it?"

A: Mhm.

Q: You know, 20 minutes goes by and you're done. If we did a polygraph that way, everybody would fail. Okay? Because a person has to be prepared to do a polygraph. They have to be psychologically ready to do a polygraph, okay? But um – the thing about a polygraph is that there's always at least two issues that I have to test a person on, okay?

A: Okay.

Q: Now these two issues, one of them is pretty obvious, okay? [redacted] has made some allegations against you, so you know I'm going to ask you questions about those allegations during the test, right? So you know that. There will be some questions on the test related to what she says.

A: Okay.

Q: But, that's only going to make up a small portion of the questions on the test. Actually, less than 50% of the questions on the test are going to be from what she says. The majority of the questions on the test are going to come from the second issues. And the second issue comes from what we refer to as the psychological profile, or some examiners call it the criminal profile. Basically it's profiling. Have you heard the term profiling before?

A: From T.V.

Q: Okay. Now I'm not talking about the negative connotation. You know, you've heard of racial profiling. I'm not talking about "driving while black-"

A: No, no I didn't think you were talking about that. I just thought you were talking about an individual-

Q: Right, we're talking about an individual, psychological profile. Okay? Now there are some T.V. shows out there like Criminal Minds – I love Criminal Minds, love watching it, okay – what I do is a type of profiling, but it's not nearly as glamorous as what they do. Well actually, the real profiling is not that glamorous either. It's a T.V. show. It's like C.S.I, they gotta make it look good. Okay? But essentially it's very similar to that. What you're doing in a profile is you're taking – you take an in depth look at an individual, and see if that individual has certain aspects in their background, or certain red flags in their background that would indicate that that person is likely to have done whatever it is they're accused of. Okay?

A: Yes.

Q: To see if they fit to profile. Now in this case, we have an allegation that would be of a sexual nature. Okay? So I'm going to be using a profile – a sex offender profile. Okay? Now, given [redacted]'s age, and given that the allegation is from one child, I'm not going to be doing a child molester profile. I'm going to be doing a sex offender profile. That probably sounds like – you

know – I'm talking semantics there, okay, but there is a difference, okay. A person can be a sex offender and not be a child molester.

A: Okay.

Q: In fact – it'll probably confuse you – you've heard the term "pedophiles" before?

A: Uh, yes.

Q: Okay, just to show you – the sex offender area is such a big area, and there's a lot of things that go in that. Did you know that not all child molesters are pedophiles?

A: Okay.

Q: But, all pedophiles are child molesters.

A: Okay.

Q: Okay. What that means is that you've got – pedophiles are people who prefer children.

A: Yes.

Q: To the extent that they generally only have sex with children. They won't have sex with anyone else. And even within the pedophile, there are breakdowns within the pedophile – like some like boys, some like girls, some like pre-pubescent, some like post- pubescent, some like adolescent, you know – they've got different – some like brown hair, some like black hair. So they've got their own tastes and everything. Pedophiles are very specific.

A: Okay.

Q: So every pedophile is a child molester. But, not all child molesters are pedophiles, because the majority of child molesters are ones who are considered – they're called situational child molesters. That means that they're really indiscriminate. They're people who will have sex with anybody. And, if at the point and time when they're horny, and there happens to be a child there, well that'll do. So, that doesn't mean that they're child molesters, they're just indiscriminate sexually, and so they're going to go for anything. So since we only have an allegation here from one child – okay, we don't have multiple children saying things about you like that – there's no indication that you're a pedophile, so I'm not going to be doing a child molester profile.

A: Okay.

Q: I'm going to do a sex offender profile.

A: Okay.

Q: So what that entails is this. Well, let me ask you. When I talk to you about your background, when I'm looking for red flags, what kind of things do you think I'll be looking for? If I wanted to see if James Irby is likely to fit the profile of a child molester?

A: That I don't know.

Q: Okay, there's no right or wrong answer, and a lot of people don't. A lot of people don't sit around thinking about what makes a person a child molester. So, that's fair enough. But I ask that because it kind of gives me an idea about where a person is at, because some people do have a vast knowledge of different types of things. So I just ask to kind of gauge a little bit about you.

A: Well, I mean, no. The only thing I got to say about that is I had dated other women who had girls, and I ain't never had this problem before.

Q: Okay.

A: I mean –

Q: Well that obviously speaks well. That's a checkmark in the good column. Well let me tell you what I'll be looking for. Now, a profile, a full in-depth profile would take – it can take as long as three days – obviously I don't have three days, I've got about thirty minutes, so um – excuse me, just one second – (answers phone call) – So anyway, the red flags are things I would be looking for. First of all, what we know about child molesters is that – first of all, child molesters are very good deceivers. They're very good at fooling people.

A: Mhm.

Q: Okay, because they're able to – they've got to be – they've got to be able to get close to a target of what they are sexually attracted to, they've got to be able to make that person think that it's safe to let me be around you.

A: Yes.

Q: So they're good at deceiving people. Now, what is the first – what's the most common word for "deceivers?"

A: The most common word for deceivers? I would say trickery.

Q: How about liars?

A: Okay.

Q: Yeah, liars are deceivers, right? Okay. So if I wanted to know if you were a good deceiver, well I'd want to know if you were a good liar. Okay? Now I'm not going to be holding you up to some impossible standard, I'm going to explain to you what kind of lies I'm talking about. Alright? But essentially what I'm talking about is these people who lie frequently, okay? Now they're gonna lie – basically they're going to lie all the time. They're going to lie, obviously when they feel they need to, but they're also going to lie when they don't need to. Because it keeps them in practice, okay? Because how do you get to be good at anything in life? You practice. Right? The more you do it, the better you get. So these are the type of people who are going to lie all the time to stay in practice with it.

A: Okay.

Q: So I want to make sure that you're not the kind of person who goes around lying all the time.

A: No, that's never been a part of my life.

Q: Well good, good. Secondly, I want to make sure that you don't have any psychopathic tendencies. Psychopathic tendencies, uh, I'm not going to spend a long – I'll try not to spend a long time – I'll actually spend more time explaining it to you now than we'll actually will going to see if you have any psychopathic tendencies. But essentially, psychopathic people are people who care nothing about anyone else. Everything that they do is about themselves. Now everybody has a measure of self-interest. That's – we're designed – we have to have a measure of self-interest, but I'm talking about this person goes beyond that –

A: Let me give you an example of someone and you tell me if this is kind of what you're explaining. The first time I ever had to whoop [illegible]. I asked her first, "do you think you deserve to get a spanking" and she said "yes" so I spanked her. But I mean, after I spanked her, I felt bad about it, you know what I'm saying?

Q: Mhm.

A: She was crying, I was crying –

Q: A psychopathic person probably would not feel that way.

A: Yes.

Q: But, just as I explained – I'm going to – but that's going a little more in depth in the psychology portion of that, and like I said I don't have time to do a full in-depth profile, so I generally stick to one area. What we know about psychopathic people is that everything they do is about themselves. This means they don't care about what is right or wrong, what's legal or illegal, what's moral or immoral. Everything they do – if it's something they want to do, they're going to do it. Regardless of whether it's legal or illegal. So generally what we, as a standard to see if people have psychopathic tendencies – now, and please don't get me wrong. I am not trying to diagnose you, I'm just looking to see if you have any tendencies towards psychopathic behavior.

A: Okay.

Q: So this is not full, in-depth – this is not definitive. This is just delving into it a little bit.

A: No, I'm not taking that way. I mean – 'cause – I don't –

Q: Well what I do is, to find out if a person has psychopathic tendencies – people that we know have psychopathic tendencies, these are the people who are out there committing crimes all the time. Okay? They're out there breaking the law, okay? Now, just because you're sitting here with an orange jumpsuit on – obviously you've been arrested for something, I haven't asked you yet, but, obviously you've been arrested for something. But just because you've been arrested for something doesn't indicate to me that you're psychopathic. Okay?

A: Yes.

Q: So I haven't pre-judged you because of what you're wearing. Okay? But psychopathic people are out there committing crimes all the time. They're out there – they're out there just doing their own thing regardless of whether it's legal or illegal. Okay? So to make sure that you don't have psychopathic tendencies, I'd want to make sure that you're not the kind of person who's not routinely out there committing crimes, breaking the law, and doing stuff like that.

A: Okay.

Q: And then lastly, since it is an allegation of a sexual nature, I want to make sure that you don't have any kind of deviant sexual behaviors in your background, or any deviant sexual tendencies such as that. Now if I use a term you don't understand, don't worry about it, I'll explain it to you when we get there, okay?

A: Okay.

Q: But I'll want to make sure that you don't have any active or passive voyeuristic tendencies, that you don't have any um, addiction to pornography, or any um, masturbatory infatuation, or latent homosexual tendencies or behaviors, or socially unacceptable sexual fantasies and things such as that.

A: Yes.

Q: Okay. So just, in general, deviant sexual behaviors. Okay? So when I talk to you about your background - and I'm going to try and do this within about thirty minutes – when I'm talking to you about your background to try and see if there are any red flags about you that would indicate that that's the case. Okay?

A: Okay.

Q: Alright. So, so far, does that sound like I'm talking about you?

A: No. Not that crazy stuff.

Q: Okay, okay, good (laughs). It's always a little bit disconcerting when I go through all of that and I say "does that sound like I'm talking about you" and the guy goes "well yeah, kind of." And I kind of think "oh man, it's going to be a long one." Well good, that doesn't sound like I'm talking about you, alright. Well tell me a little bit about your family. Who were you raised by?

A: My mother and my grandmother.

Q: Okay. Where is this at? Where are you from?

A: Spartanburg.

Q: Okay. Did you have brothers and sisters?

A: A sister.

Q: One sister?

A: One sister.

Q: Is she older or younger?

A: She's younger.

Q: Okay. How much younger is she than you? You're 38 right?

A: I'm 38, she may be... 30.

Q: Okay, so she's considerably younger than you.

A: Yes.

Q: But you did grow up in the house at the same time together?

A: Uh, yes sir.

Q: Okay. Did your mother and grandmother live together? Or did you split time between households?

A: All of us lived together.

Q: Okay. And, uh, let's see. Where did you go to school at?

A: Spartanburg High School.

Q: Did you graduate from Spartanburg?

A: Yes sir.

Q: What year was that?

A: '89.

Q: Okay. After high school, did you go on to tech school, trade school, college? Any other higher education beyond high school?

A: Um, I started at tech, but I didn't get to finish.

Q: How long did you go to tech?

A: It was actually just a couple of weeks.

Q: Okay. And uh - let's see – do you remember – what's the first job you remember having?

A: Community Cash. As a bag boy.

Q: Alright. How long did you work at Community Cash?

A: Maybe two years.

Q: Okay. And after Community Cash, where did you work?

A: *unintelligible* 35:00

Q: Okay and how long did you work at *unintelligible*?

A: Maybe about three years.

Q: Okay. And then after *unintelligible*?

A: I was with the Department of Corrections.

Q: You worked for the Department of Corrections?

A: Mhm (affirmative noise.)

Q: What did you do?

A: I was a C.O. at *unintelligible*

Q: Okay. And how long did you work there?

A: Uh, a year.

Q: And after D.O.C?

A: Uh, I.N.A. (barra?), that's (spelling) I-N-A Barra? I stayed with INA for two years.

Q: Okay. Do you remember a guy named Bruce Alexander that used to work there?

A: What did Bruce do?

Q: Some type of management, human resources –

A: Oh, Bruce was the, um, he was the personnel manager.

Q: Yeah, I know he had something to do with personnel or something like that. He was my best friend in high school.

A: Okay. He's retired now.

Q: Yeah, he left there, and last I heard – we don't keep up with each other – last I heard, he was doing personal training or massage.

A: Okay.

Q: Doing something like that. He was working out of one of the gyms. Okay, after I.N.A.? Where'd you go to after that? Just the best that you can remember.

A: Maybe Haysen (spelling?)

Q: Okay. And how long did you work at Hasen?

A: I stayed at Hasen 2 years. That's kind of when I started having the problems with the relationship I told you I was in at the time.

Q: Right. And after Hasen?

A: After that I moved to Charlotte with the same female. So after that I wasn't stable at all.

Q: Okay. So you worked a few different places or something?

A: Yeah a few different places, but it might have only been like a week or two –

Q: Alright, well what's the next stable job that you had after that?

A: The next stable job? I actually, man, my life was now just beginning to get stable.

Q: Okay. Alright. Do you have a job most currently? The most current job you have?

A: Well Carolina News is the employer I'm with now, if I get to keep that job.

Q: And how long have you been with them?

A: I had just started, then they locked me up for child support.

Q: Alright. Alright, so uh, the child support is what you're under arrest for now then?

A: Uh, yes sir.

Q: Is that the only thing that you've been arrested for? You haven't been arrested for other things have you?

A: Uh, just CDV. Maybe assault, um, driving charges. That's basically it.

Q: Was the assault domestic related? Or?

A: It was domestic related.

Q: Okay. So, you've had some domestic problems, some problems meeting your child support obligations, and a couple of driving offenses?

A: Yes sir.

Q: So not any - no real criminal behavior?

A: Nothing.

Q: There was nothing to get you put in prison or anything like that?

A: No sir.

Q: Okay, well let me go ahead – oh, um, before we do that, let me come back to this. I want to ask

you about significant relationships. Obviously a marriage would be a significant relationship, but basically what I'm looking for here is any relationship where you've dated someone for 6 months or more. 6 months would indicate some level of commitment there. Okay?

A: Yes.

Q: Okay, so any significant relationships going back to about the age of 17 on up, any significant relationships lasting 6 months or more. Just the first names only. What's the first name of the first significant relationship?

A: That'd be Beverley. She is my children's mother.

Q: Okay, and how long were you and Beverley together?

A: Man, it was from high school to maybe about '95.

Q: Okay, so about 5 years there. After Beverley, the next significant relationship?

A: I would say that would be the relationship with the person that I had the CDVs with.

Q: Okay. What was her first name?

A: Kiccy.

Q: Kizzy? K-I-Z-Z-Y?

A: K-I-C-C-Y.

Q: C-C-Y, okay.

A: That's the relationship that I was unstable in.

Q: Okay. How long were you and Kiccy together?

A: Maybe about three or four years, maybe.

Q: Okay, and after Kiccy? The next significant relationship?

A: That's my wife.

Q: The one you're with now?

A: Yes. We've been together for about 3 years.

Q: Okay, and what's her first name?

A: Danette.

Q: Danette? And you said three years?

A: Uh, yes sir.

Q: Okay. Well let me go down here and get this psychopath question out of the way. I told you it wouldn't take very long, that I'd spend very little time with it, but you've had a couple of minor arrests for some minor things, nothing really significant enough to get you real jail time. Most of all these things are just going to be enough to get you a fine, right?

A: Yes.

Q: When it comes to the child support thing, they handle it a little differently, but it's not like you've been out there committing crimes and stuff like that. Or at least from what I see here. Okay?

A: Yes.

Q: Um, you can probably imagine, I get some people in here who have a criminal history long enough to wall-paper this room with. You know, they've been involved with everything, okay? But the majority of people that I test are more like yourself. They either have no criminal history, or very little. Okay, like yourself, very little. But even those who come in with no or very little criminal history, they still fit into one of two categories. They either have no criminal history because they're not out there committing crimes to get arrested, or they have no or very little criminal history because they're very good at it and they're out there getting away with crimes and stuff. You don't have much of a criminal history, is that because you're not out there committing crimes, or is it because you're out there getting away with it all the time?

A: Um, a lot of –

Q: Are you out there committing crimes and doing stuff that you could go to prison for?

A: No.

Q: Okay, so there's not any real crimes that you've committed – I'm not talking about, you know, like I said, driving without a license or something like that, I'm not talking about minor stuff like that. We're talking about doing the kind of stuff that could get you put in jail for, for a significant period of time or something.

A: The only thing I've done, that I've *really* done – 'cause some of those CDVs I didn't do.

Q: Okay.

A: You know, she would just call and –

Q: Okay, I only asked if you've been arrested, I didn't ask if you did them.

A: Oh, okay.

Q: I was only asking about arrests.

A: About the arrests?

Q: Yeah. Now I'm asking, are you out there doing things, or have you been out there doing things, committing crimes, and getting away with it?

A: No sir.

Q: Okay, so there's not any crimes out there that you've been committing and getting away with?

A: No.

Q: Okay. So you don't have any psychopathic tendencies from that standpoint?

A: No sir.

Q: Great. Okay. Alright, um – let me ask you a few things here about growing up. You grew up in Spartanburg, your grandmother and your mother raised you in the same household together, you had a younger sister. Um, do you feel like your mother and your grandmother did a good job of providing for your needs, uh, providing you with a stable upbringing, teaching you right from wrong, things like that?

A: Yes, they did.

Q: Okay, good. I always use this analogy with people. If you were going to build a house, would you build the roof first?

A: No, I wouldn't build the roof first.

Q: What do you have to build first?

A: The framework –

Q: Yeah –

A: The foundation.

Q: There you go, that's the word I was looking for. You got to have the foundation first, because the foundation is what you're going to build on.

A: Okay.

Q: If you got a good, solid foundation in place, you can build a good, solid house.

A: Mhm.

Q: If you've got – you know if you're more interested in getting it built as fast and cheap as possible, you get you a crew who will come in there and throw a foundation in place. Right? And you could still build a house.

A: Mhm.

Q: And initially, side by side, it would look like any other house, from the outside anyway. But before long there's going to be problems that usually can only be seen from the inside – the cracks in the wall, the sagging in the floors, the doors and windows that don't open properly. It goes back to the quality of that foundation.

A: Yes.

Q: Now I want you to think about people from the standpoint of a foundation. People are kind of like houses, because people get a foundation, too. As kids, we all get some kind of foundation. Now of course when you're talking about foundations with people, you're talking about principles. So being taught – being taught, "Don't lie, don't cheat, don't steal, be a good person, work hard for a living, don't hurt people" et cetera, things like that. The kind of stuff that we're taught as kids, right?

A: Mhm.

Q: That you share your toys, all those things. Okay? All of that is stuff that we're taught as children. Now some kids get a better job - or a better foundation than other kids do. So essentially what I was asking you there is do you feel like your mom and your grandma did a good job of providing you with a good foundation?

A: Yes, I do.

Q: Okay, good. The reason I go into that is because, I've been doing this for a long time, and it's just my experience that people that come from a good foundation, when they screw up in life – not if they screw up, but when, because everybody makes bad choices, okay? It doesn't matter what

kind of foundation you've got, everybody's going to make some bad choices, okay? But when they screw up in life, they fall back on that foundation a lot faster. These are the people who go "man, I was wrong, my head was in the wrong place, I shouldn't have done that." Okay? They accept responsibility for their screw up, they learn from it, and move on, and be a better person. But people who don't have that kind of foundation, these are the ones who are going to be like, "What, me? It wasn't me. Nobody saw me do it, you can't prove I did it." They're just not going to accept responsibility because it's not the way they were raised.

A: Yes.

Q: They were raised to get over and get by whatever way they have to. Okay? And I'm sure you've met some people like that who come from that kind of foundation. We all know people like that. Okay? But knowing that you come from a good foundation, at least gives me a good starting point to assume that you're more than likely not the kind of person who's out there trying to, you know, lie your way through life, being a deceiver, and stuff like that.

A: Yes.

Q: So let me jump ahead though to a phase. There are phases in life - regardless of foundation - there are phases of life that all kids go through. And for kids, on average, somewhere between the age of 10 or 11, lasting on average until they're around 14 or 15 or so, there's a stage that kicks in – you can give or take a year on either end – but there's a stage that kicks in where kids want to start being more independent.

A: Mhm.

Q: Where you want to make more decisions for yourself. You don't want – you know, you want to decide for yourself what kind of clothes you want to wear, what kind of music you want to listen to, how you're going to wear your hair, who your friends are, you know, these are decisions that kids are going to want to make for themselves. They don't want mom telling them how to wear their hair, okay? It's a part of growing up and it's a part of establishing their own identity. Alright, now during this time though they are still kids, they're still childish, they don't realize they are, but they are. Okay, their brains have not matured enough to be able to make some decisions. It's

almost like kids during this stage will kind of get it in their head of thinking that "Mom, grandma, always says 'do this and do that.' If I keep doing everything that mom and grandma says, I'm going to be their kind of person. So therefore if I want to be my own kind of person, I have to do the opposite." Okay, now as an adult, that sounds pretty stupid. But at that age it makes perfect sense to them, okay? So this is the kind of time that kids will do things that they have been taught not to do. Now, you know, we're talking about kids stuff like smoking their first cigarette, drinking their first beer, maybe experimenting with marijuana, or a buddy saying "I bet you can't go into the store and steal this or that," you know, I'm not talking about robbing banks or anything, we're talking about kids kind of stuff, you know. These are things they've been told not to do, they know they're not supposed to do them, but they'll go out and try them anyway. Okay?

A: Mhm.

Q: Because they're kind of establishing their own identity. And of course, at some point in time you come home and mom and grandma, one of them looks at you like "James, did you do such and such?" and you get that deer in the headlights look like, "No ma'am."

A: Mhm.

Q: Because the most natural thing is to lie. You don't want to get in trouble for it. Okay?

A: Yeah.

Q: So, it's natural. So when I talk about this time period, I don't go into it to ask you what you did, or if you did anything, I go into it assuming you did a few things that you weren't supposed to do, and I assume you lied a few times to try and get out of trouble. Because it's natural.

A: Okay.

Q: Alright? The reason I bring it up though, is because it's really more important – there's two reasons to bring it up. One, is because it's important to me to know how your mom and your grandma handled that. Okay?

A: Mhm.

Q: Did they let you get away with lying to them? Or was there some type of punishment involved?

A: Okay. Are you asking the question?

Q: Yeah, yeah.

A: Yeah they always punished –

Q: Okay so they didn't just let you lie to them and do whatever you wanted to do then?

A: Yes.

Q: Right, okay then. So there was punishment involved when you tried – or when you did things wrong or tried to lie to get out of trouble. Right?

A: Yes.

Q: Okay. Um, and the reason I ask that is because in this time period, is when most habits in life get started.

A: Okay.

Q: When I mentioned smoking your first cigarette. If you take somebody who's 40 years old and is smoking two packs of cigarettes a day, I can guarantee you they didn't start smoking when they were 38. Okay?

A: Mhm.

Q: Now, they weren't smoking two packs a day when they were 12, but they were sneaking it when they could get it. Okay? Same thing with your alcoholics. They can trace it back to sneaking those beers on a weekend. Even your drug addicts go back to experimenting with marijuana during these early years. Okay? So most habits in life go back to this time period. And even lying can be traced back to this time period, because lying is the kind of thing that becomes a habit.

A: Yes.

Q: When – when parents let their kid get away with lying, when the kid goes out and does something wrong, comes home and the mom says, "Did you do this?" and the kid says, "Oh no, I didn't," and they're like, "Okay." What does the kid learn? The kid learns that lying works.

A: Yeah.

Q: So next time, it's easier to lie. So that's how that habit of lying gets started during this time period. So knowing that your parents – your mom and grandma, didn't let you get away with lying, tells me that you probably didn't develop the habit of lying. Okay, good. Which is a good thing. Okay,

because obviously if you had developed a habit of lying, you know, if you're still at the age of 16, 17 years old, if you're still lying to your mom and your grandma at this stage, well now you've got 5 or 6 years of practice at it, and people who are lying at that age are generally lying at 25, 30, and so on. So knowing that there was some punishment involved, they didn't let you get away with lying, probably tells me that more than likely you didn't develop the habit of lying.

A: Yes.

Q: Okay. Everything that I'm going to talk to you about now, I'm going to jump ahead to the age of like around 16 or 17, okay? It doesn't have to be a cutoff date, you know, so just a –

A: I understand.

Q: - around that age. Now the reason I pick that age is because this is the age that most kids have gotten a part time job, at least. You know, at least a part time job somewhere. Most kids have got their driver's license, they've got the ability to come and go a little bit more. You know, a little more freedom, responsibility, things like that. So it's really the kicking off stage of adulthood. So we pick that age – so everything I'm going to talk to you about will be from that age up on to the present. Okay?

A: Okay.

Q: Would you say that by that age, you mom – oh, I wanted to tell you this, what kind of lies I'm talking about. I'm not going to hold you to a saint status. When I talk about lies, generally any lie that a person tells is going to fit into one of two categories. It's going to be a selfish lie, or an unselfish lie. Okay?

A: Okay.

Q: Now unselfish lies are the ones like this, you've got a girlfriend, she cooks a meal for you, and you sit down to eat and it's - you're thinking, "Man, I hope I can get through this." It's not mom's cooking, it's not grandma's cooking, but you know she put a lot of effort into it and when she says, "What do you think, James, do you like it?" Odds are you're going to say "Hmm, yeah. Yeah, babe, it's good." Or, you know, you've got a woman that you've been with for a while, and she says, "Does this dress make me look fat?" You know, or, "Does it look like I'm getting old?"

Something like that. It doesn't matter what she looks like, you better know the right answer, right?

A: Yes.

Q: We tell people lies sometimes because we don't want to hurt their feelings. And it's not just men and women. It can be friends, coworkers, whatever. But sometimes we tell people lies because we don't want to hurt their feelings. Alright? That's an unselfish lie. I'm not concerned with unselfish lies, as far as this goes. Alright? What I am concerned with are the selfish lies. Because selfish lies tell us more about what kind of integrity you have; what kind of a person you really are, okay? Selfish lies are the ones that, you know, if you've done something wrong, and you don't have enough integrity to stand up and say, "Yeah, I screwed up. I shouldn't have done that." Okay?

A: Mhm.

Q: People that, uh, want to spread the blame around, you know. They don't want all of the blame on themselves. So it's like, "Well I wouldn't have done it if so-and-so hadn't done this." You know, they want to shift that blame some. Then you've got the people who have a low sense of self-esteem. They don't think much of themselves so they lie to make people think that they're richer or smarter or more popular, or a bigger stud, things like that. Okay? So any lie that a person tells where the motivation for the lie is to protect themselves or enhance their image in some way, that's a selfish lie. Okay?

A: Okay.

Q: So obviously, those lies are important because people who are in the habit of telling selfish lies would probably tell lies in a situation like this. Okay?

A: Yes.

Q: So, by that age of 16 or 17 or so, did your mom or your grandma know that they could trust you not to be telling selfish lies anymore?

A: Yes.

Q: Good. So you weren't telling them selfish lies about what you were doing, where you were at. They knew they could trust – that doesn't mean you always did the right thing, but you didn't lie

about things, you didn't try to deceive them, did you?

A: No, they trusted me.

Q: Great. Okay. How about as a student in school? In high school were you known to be an honest student in school? You didn't go around lying to your teachers, principals, administrators and stuff like that, did you?

A: You'd never meet nobody bad who would tell you something bad, from high school even until now.

Q: Okay so no lying in school, no selfish lies there. How about with your friends, classmates, peer groups, stuff like that? You didn't lie to people in your own age group, did you?

A: No, I was always a straight up person.

Q: Great, okay. So no selfish lies there, good. How about as an employee? At Community Cash, when you were an employee there, were you known to be an honest employee there?

A: Yes sir.

Q: So no lying to your coworkers, supervisors, things like that?

A: No sir.

Q: Great. I always - when it comes to the jobs – I always add in, as honesty, I add in no unethical behaviors because there are ways to be dishonest without verbally being dishonest. If you're in a job where you have access to money or goods, or something like that, and you're stealing those things, that stealing from your employer is a type of dishonesty.

A: Yes.

Q: You worked at Community Cash. I understand you got access to lots of stuff. You didn't go around stealing anything on the job, or being dishonest or anything like that were you?

A: No. Actually I found some money one time and I - someone dropped a wallet and it had – one of the other bag boys, someone was stealing, and this bag boy – we didn't know who was doing it – he stole the girl's purse, and when the girl was coming back, he dropped it. I found it, I thought it was just a customers.

Q: Mhm.

A: And I turned it in.

Q: Okay. Good, so no unethical behaviors on the job there.

A: No sir.

Q: Alright. You worked at Lee (?) for three years?

A: Yes sir.

Q: As an employee there, were you an honest employee there? No lying to coworkers, no unethical behaviors or things like that?

A: No sir.

Q: Okay. At DOC for a year. WEre you an honest employee there?

A: Yes sir.

Q: Good. So no lying to your supervisors or your coworkers or things like that?

A: No sir.

Q: Great. Obviously no unethical behaviors in- you weren't involved in bringing inmates contraband or anything like that were you?

A: No sir.

Q: Good. Okay. At INA, or INA Bearing, were you an honest employee there?

A: Yes sir.

Q: Great. And then you said that you were at (Hasin?) for about a year, and that was your last stable job? As an employee there, were you an honest employee there?

A: Yes sir.

Q: Good. So no lying to people, no dishonest behavior or unethical behavior there?

A: No sir.

Q: Great. Okay. Alright. You had a few times where you were involved with the police, there were some arrest situations or incarceration for child support and stuff. Um- in these situations you haven't been lying to people in authority have you? You haven't been lying to police, lying to jail personnel, lying to judges or court personnel or things like that have you?

A: No sir.

Q: Okay. You sound like a very honest person. Uh- the last area of honesty is in your significant relationships. Um- and I'm not going to go in depth in your relationships, there's going to be three areas that I'm going to look at. Uh- as far as honesty, or as far as people who lie, in a domestic relationship or a significant relationship, there tends to be that all lies can be traced to three categories- and these are the three categories that generally lead to the most problems- that leads to the break up, to the separation, to the divorce, or significant problems in the relationship. These three areas tend to be- one is money, lying about how much you make, how much you've got, what you spend it on, how much you spend, things like that. Another one is vices. Vices like drinking, drugs, gambling, pornography, prostitution, et. cetera- any personal vices. OKay? Uh, and the third one is sex. Whether it's an outside relationship- the girlfriend cheating on the boyfriend, the wife cheating on the husband, or vice versa. Okay?

A: Yes.

Q: Lying about the outside relationships. Those are the three big areas that most- all lies- tend to break up relationships- tend to come from those three areas. Okay?

A: Yes.

Q: Now, you were with Beverly for five years. During that time with Beverly did that relationship come to an end because she couldn't trust you? Because you were telling her selfish lies?

A: It came to an end because I was- I wouldn't stay home- basically I was cheating on her.

Q: Oh you were cheating on her?

A: Yes sir.

Q: Were you lying to her about this? Or did she know- I mean- did she ever ask you about it?

A: Well, no, she didn't ever ask me about it, it was just- I wasn't staying at home.

Q: Okay. But you never did look her in the eye and lie to her though, you know? You didn't look at her and tell her selfish lies did you?

A: No sir.

Q: Okay. So no selfish lies in that with Beverly. With Kizzy, were you dishonest with her, were you lying to her about stuff? In those three big areas there?

A: No sir.

Q: That relationship didn't come to an end because you were lying to her then?

A: No.

Q: And you've been with Danette now for three years, and that relationship with Danette, you don't tell her selfish lies do you?

A: No sir.

Q: Okay so there's no selfish lies involved with her?

A: No sir.

Q: Great. Okay. You sound like a very honest person, you sound like the kind of person that people know they can trust to tell the truth, you don't sound like the kind of person who goes around telling selfish lies. That's great. Okay. Uh- you don't sound like you have any psychopathic tendencies, no crimes that you're out committing that you've gotten away with, so we got two out of three areas covered. The last area has to do with any sexual deviant behaviors. Okay?

A: Okay.

Q: Now, I used some terms earlier that you may not have understood, but, as I go into it, I'll explain each one to you, okay? Um- again, obviously since it's an allegation of a sexual nature, people who generally get involved with these types of things do have some deviant sexual things going on in their background, okay? So that's why we delve into this with you, alright?

A: Okay.

Q: Um, I used a term- well first of all, growing up- before we get into those terms, since most habits in life tend to get started in that early age, um, we find that a lot of sex offenders had some unusual sexual things going on during those early years there. Stuff like having an unusual sexual attraction to your mom, your grandma, or something like that. Sneaking into your mom's room and going through her underwear drawer, playing with her underwear or stuff like that. Sometimes if you got sisters or cousins, uh, things such as that, going through the sister's panty drawer or sneaking a peek at them when they're getting out of the shower, trying to see them naked or things like that. Okay?

A: Yes.

Q: Growing up, did you have any kind of unusual sexual attractions to family members or anything like that? You weren't playing with anybody's panty drawer or anything like that, were you?

A: No sir.

Q: So no unusual sexual behaviors growing up then?

A: Yes.

Q: Okay. Alright. I used the term "active and passive voyeurism." Are you familiar with the term "voyeurism?"

A: Um.. Probably that's fantasies, I guess.

Q: Well fantasies play a large part in it. Okay, but voyeurism is a person who- a voyeur gets sexual arousal by watching people when they don't know they're being watched. Preferably in an intimate situation. Uh, generally involving nudity. Okay, so you've heard the term "peeping Tom?"

A: Yes.

Q: Okay so a peeping Tom is a person who stands outside somebody's window when they're getting undressed, when they're getting in and out of the shower, or something like that- that's a peeping Tom. Well that person is a voyeur. Okay? But you used the term "fantasies" and I'm going to show you how- everything that I talk to you about here will go back to the mind- to what's going on in the brain. That's where the real danger lies, in what's going on up in the brain. Okay?

A: Yes sir.

Q: So, the active voyeur is a person who will actually put himself in a position to see something that's going on. Okay? So the person who's standing outside of somebody's window is an active voyeur. Okay?

A: Okay.

Q: But you can mostly be an active voyeur if you've got a pair of binoculars or a telescope to see something farther away, okay? You can be a voyeur that way. Now with today's technology, and the internet, you can be an active voyeur, sitting in your home, sitting at the keyboard, looking at

these hidden camera sites. They've got- voyeur's will be attracted to these hidden camera sites- you've got hidden cameras in stairwells, in locker rooms, in dressing rooms, in hotel rooms, bathrooms, you name it. Anywhere where somebody thinks they have privacy, and somebody can slip a camera in, they'll do it. Okay? These voyeurs are attracted to these hidden camera sites. Um, I don't know if you're much into computers or the internet, or anything like that. Do you have much familiarity with that?

A: Mostly with games and stuff.

Q: Okay. Alright. But you understand that there are a lot of sites out there that would attract these kinds of people? To these sex scenes where people don't know they're being videotaped, stuff like that? So that's what these voyeurs are attracted to.

A: Okay.

Q: So these are active voyeurs. Um, and I'm going to show you how everything goes back to the mind in a minute here. But, do you have any kind of active voyeuristic tendencies? Do you get sexual arousal from seeing people when watching people when they don't know they're being watched? Any stuff like that?

A: Well actually, I don't even like going to strip clubs. That's nothing that--

Q: Nothing that interests you there? Okay so that's- so you don't have any kind of active voyeuristic tendencies there.

A: No.

Q: Great. Uh- passive voyeurs, these are people that are going to a new level. They're going beyond the active stage, and these are people who now- they're worse off. Okay? These are people who have been so- they've been in this lifestyle for so long that now, just about everything they see- they turn it into a sexual fantasy. They can take innocent situations and make it a sexual situation, mentally. Okay?

A: Okay.

Q: And the easiest way to describe this is just to tell you about two guys that I've dealt with in the past. I've dealt with a lot more passive voyeurs than just these two guys, but these two guys are just prime examples. Okay?

A: Mhm.

Q: One guy was in his mid forties, he was overweight fella, with long, stringy hair, smelled terrible, okay. Just think of the worst looking person you can think of, and that's what this guy looked like. Um, his job was cutting grass. That was the only thing that he was capable of doing was cutting grass. He didn't have his own business, he worked for somebody who told him, "go cut grass here, go cut grass there," that's what he did. Okay? While he was telling me about cutting grass one time, in this neighborhood, and of course he didn't know anybody there, his boss had told him, "go cut the grass at this address." So he's there cutting grass, and he said that about two or three houses down, there was a woman out there washing her car. It was summertime so he described her as having a pair of short cutoff blue jeans and wearing like a halter top or a bikini top or something like that. He said that he was so-- that he got so-- engrossed in trying to watch her-- she's bending down to wash the tires, leaning across the hood-- that he got so sexually aroused watching her that he had to go back around the house and masturbate while fantasizing about having sex with her at the car. Okay, so that's a passive voyeur. He took something that-- she's just over there washing her car-- but he turned it into a sexual situation in this mind. Okay?

A: Yes.

Q: Um, the other one was a guy who was in his late sixties. Now this guy was a retired fella whose hobby was to go out and hang out at Westgate Mall. He said that he would sometimes sit and watch people go by, but he'd like to walk into stores and if he saw an attractive salesgirl, he would

kind of go over and hang around the sales girl's area until she would come over and ask him, "is there something I can help you with?" And he told me he was thinking, "oh there's some things you can help me with..." He said that it was nothing for him to make 3 or 4 trips a day to the restroom to go in the stall and masturbate while he fantasized about this salesgirl or that salesgirl giving him blowjobs in the break room-- in the storeroom, things like that. Okay? Now these guys, these guys are passive voyeurs. They take situations that are not sexual and turn them into a sexual fantasy. Now, here's where the danger lies. I'm going to show you how it ties back into the mind, okay? Everything that's going on here goes back to that fantasy. Now, just the very first thing that comes to your mind, what would you say "rape" is?

A: Something that's forced on someone.

Q: Okay, well obviously a forced sexual encounter would be a rape. Okay, but what about somebody who is drunk or drugged, and the guy has sex with her?

A: That'd be rape.

Q: That'd be rape. He's not forcing her. What about somebody who's in a wheelchair and is mentally incapable of saying "yes" or "no?"

A: I'd say that would be rape.

Q: Okay. So, what I'm getting at there is that force doesn't have to be used.

A: Yes.

Q: If a person doesn't want it, or doesn't say "oh baby, do me," okay, if they're not saying "do me, do me now," then it's rape. So if there's no consent involved, it's a rape. Okay. So if-- let's say that if we were able to transport ourselves in time to this woman who is washing her car, when this guy is out there behind the house, if we could go up to her and say, "Excuse me ma'am, sorry to disturb you, but do you know that right now while you're washing this car, that there's a big, smelly, sweaty, stinky fella over here, he's over here behind the house masturbating while he's fantasizing about having you bent over the hood of the car, laying the pipe to you--

A: Yeah--

Q: What do you think she's going to feel like?

A: Probably violated.

Q: Yeah. She's probably going to strike the victim pose, which is crossing their arms over their chest, she's probably going to be pretty grossed out. Like you said, she's going to feel violated. Okay. Now, he hasn't laid a hand on her, but he's made her feel like a victim. Any one of these young salesgirls, if you were to go and tell them, "right now, there's a guy who's old enough to be your grandfather in there mastubating while he's fantasizing about you on your knees giving him a blowjob," they're probably going to feel the same way.

A: Yes.

Q: So essentially, what these guys are doing is, at least mentally-- it's like they're mentally raping these women. It's like they're turning these women into sex objects. Now, I don't want you to get me wrong, I'm not some kind of a Puritan or something like that, and I'm a grown man-- I can see a good looking woman and say, "wow, she's a good looking woman," and say, "wow, she's got a nice ass, she's got nice tits." But, it's one thing to recognize to recognize an attractive woman. It's another thing to have to go somewhere and masturbate while you're fantasizing about all the different sexual positions you'd like to see them in. Okay? Or going home, having sex with my wife while I'm fantasizing about my coworker or something like that. That's going a little bit overboard with it. Okay, so it's one thing to-- I'm sure that you have seen good looking women before--

A: Yes--

Q: I'm not, I'm not, uh, trying to say that-- meaning don't recognize a good looking woman. But I'm talking about going to the extreme of turning around and turning them into sex partners in your

mind. That's going a little bit extreme with it.

A: Yes.

Q: So, as far as passive voyeuristic tendencies, do you do stuff like that?

A: No, that's crazy--

Q: You don't turn women into sex partners in your mind or stuff like that?

A: No.

Q: Good, okay, okay. Um, I used the term "masturbatory infatuate"-- basically masturbatory infatuate is a chronic masturbator. Okay, now when you're-- when you're 13 or 14 or 15 years old I expect you were a chronic masturbator, because we all were at that stage. We didn't have a regular sexual outlet. But as you become a grown man and you have real sex then, um, you know, obviously, you know-- real sex is a whole lot better than self-sex. You know, so if you're a grown man and you have a sexual outlet, but you're still choosing to masturbate you know, as often as once or twice a month, when you're a grown man, well then you might be a masturbatory infatuate at that stage. Okay, so as a grown man, since you've been an adult or whatever, you haven't been masturbating as frequently as once or twice a month, have you?

A: No.

Q: Okay, good. So no masturbatory infatuation.

A: No sir.

Q: Alright. I used the term "addiction to pornography" uh-- everyone has seen pornography before. Uh, and I'm not talking about hearing that they've got some-- if I heard that they've got some new shots of Beyonce in this month's Playboy, you bet I'm buying it. Because, you know, hey, it's the novelty of it. Right, I'm not talking about stuff like that. We're talking about your hardcore-- your hardcore porn that shows all of the penetraion and ejaculations and all of that stuff. Like that kind of pornography. Guys that have an addiction to this kind of stuff-- these guys are going to

have their own little supply of it-- they're going to have their own little box or bag or their books or DVDs or videos and all that stuff, and they keep it hidden somewhere. They've got it hidden in a closet or the trunk of their car or something like that where they can get to it if they want it. These guys that have an addiction to it, they look for the opportunity to take their pornography out so they can look at it and masturbate. They'll spend sometimes hours going through their pornography and masturbating. Okay, so, um, as far as an addiction goes-- I'm sure you've seen pornography before, but you don't have like an addiction to it, do you? You've never sat around, watching pronography and masturbating for any length of time or anything like that have you?

A: No, I don't own any.

Q: Okay good so you don't have your own pornography or any addiction or pornography or anything like that?

A: No.

Q: Great. Okay, um-- let's see, I used a term "latent homosexual tendencies" um-- this is not to pass judgment on homosexuals, whether it's right or wrong, I'm not getting into that kind of argument at all. But, from a mental health standpoint, whether I or you agree with their lifestyle or not-- from a mental health standpoint, the guy who says, "I'm gay, accept it or don't," from this standpoint, that guy is more mentally healthy than a guy who is married with kids, who professes and everybody thinks that he's a straight male, but on the side he's over there living down low-- uh, having sexual encounters with men, or fantasizing about sex with men or stuff like that. That person's not as mentally healthy because he's trying to live two different lives, okay?

A: Yes.

Q: So, latent homosexual tendencies like that, you don't fantasize about sex with men or you don't have secret sex with men or stuff like that, do you?

A: No sir.

Q: Okay. Alright, and then lastly, any kind of illegal sexual behaviors? You've never forced or coerced a girl into doing something she didn't want to do or something like that, have you?

A: No--

Q: You've never had sex with somebody who didn't want to have sex? You've never-- I get some guys who for some reason have just kind of a hangup on anal sex. Like, they've got to have it and they'll just keep pushing and pushing until the girl finally says, "okay, just do it, shut up." You know,

the girl doesn't want to do it but she gives in just to get the guy to shut up, kinda stuff. You've never pushed a girl to do something that she didn't really want to do, have you?

A: No, sir.

Q: Okay, no illegal sexual stuff? You don't expose yourself in public or other things like that?

A: No sir.

Q: Okay. Well, James, you sound like a very normal individual. All of your background there-- I don't see any red flags. You sound like-- obviously no psychopathic tendencies, no crimes or anything that you've gotten away with. You sound like a very honest person. No selfish lies to people, friends, family, coworkers, stuff like that, and uh-- no deviant sexual behaviors. You sound like a very normal person so, uh, I don't see anything from your background that you would fit the profile of somebody who would do what [illegible] said you did.

A: Yes.

Q: So, as long as you've been honest with me about all that, you'll do fine with the questions on the test about that.

A: Okay.

Q: Alright, let's talk about the polygraph itself. What-- what if anything, do you know about polygraphs? If you don't know anything about polygraphs, that's fine.

A: I don't know--

Q: Alright, I'm gonna run through this and I'm going to try and do it as brief as possible. But I still

want to make sure you understand it. If there's something that if after I explain this, you don't understand it-- you got a question, you let me know, okay?

A: Okay.

Q: Alright, the first thing is, uh-- just a little bit about the human body. You've got a brain. Your brain controls everything that goes on in your body. Nothing happens in your body that your brain is not aware of. You've got two basic systems in the body. That is the voluntary system and the involuntary system. Your voluntary system is what you have some control over-- we all have control over, and that's things like your movements. I have set this down and I'm leaning forward in the chair, and I'm moving my hands while I talk. Those are things I have control over. I could be sitting here and talking to you like this the whole time (*motions off camera*). So I have some control over that. You have some control over movements. Now, your brain is still ultimately in control, because the brain has to send the proper signals to make those movements happen--

A: Yes.

Q: So your brain is ultimately in control, but you can put input into it. That's what your voluntary system-- you have input into. Your involuntary system though, covers a wide range of functions that you don't have input into, and these are basically the functions that are needed for survival. Okay?

A: Okay.

Q: You're 38 years old, I'm assuming you've never died and come back to life, have you?

A: No.

Q: Then for over 38 years now, your heart has been beating 24 hours a day. Right?

A: Yes.

Q: Have you ever had to sit around and tell your heart to beat?.

A: No.

Q: No, it just works. When you go to sleep at night do you have to tell yourself to breathe?

A: No.

Q: Of course not. You breathe all night long. These things are always working whether you're thinking about it or not. And there's a lot of other functions that are going on, obviously, that are needed for our survival, that you don't ever have to pay any attention to it, your brain is always regulating it and making sure all these things work together to keep you alive. Okay, so that's your involuntary system. Now, have you ever heard of a term called the "fight or flight reflex?"

A: Um-- no.

Q: Okay, the fight or flight reflex, whether you've heard of it or not, I guarantee you have experienced it before. We all do. Alright? The fight or flight reflex is simply this-- your brain is constantly monitoring your environment. Everything that's going on around you, your brain is monitoring it through your five senses: taste, touch, smell, hearing, seeing. Uh, this information is being brought into your brain about what's going on around you. When your brain gets some information that it perceives to be some type of a threat to you, it tells your body to get ready to deal with this threat.

A: Okay.

Q: That is, it's going to tell the body to go into fight or flight mode. To get ready to deal with the problem. Alright? Now let's use an example that applies to pretty much everybody. You've mentioned some driving-- you've had a valid drivers license before, right?

A: Yes.

Q: I don't know if you do now or not, but let's go back to a time period when you had a valid driver's license.

A: Okay.

Q: Even during that period when you've had a valid driver's license, I'm going to guess-- I'm going to go out on a limb and guess that you may have driven over the speed limit at some point in time.

A: Yes sir.

Q: Alright, so let's think about one of these times when you're going down the highway, okay? You've got a valid driver's license, you're not doing anything illegal, you're not transporting any drugs or anything like that, the only thing that you're doing is 10, 15 miles over the speed limit. Okay?

A: Yes.

Q: You're not driving reckless or anything, you're just going over the speed limit, okay? It's a nice day outside, you've got the radio on, you're cruising along, listening to the music. So you're comfortable, you're relaxed, but you know that you're speeding. You're trying to look off into the distance to see if you can see any cops on the side of the road, things like that, normal stuff. Um, but-- you're relaxed, you're calm, but you know you're speeding. But then you go over a hill and around a curve and then boom-- there's a trooper sitting right there. Things are gonna change? Right?

A: Yes.

Q: Some of these changes are going to be voluntary system changes, like movement changes-- when you lift your foot up off of the accelerator, look down at your speedometer, or look up in your rearview mirror. Those are going to be movement changes, or voluntary changes that happen because you saw the trooper. But before you can do those voluntary system changes, there are going to be involuntary system changes that are going to kick in. These are going to be primarily-- these are things that are going on inside your body. The most obvious one, that most people can remember is the heart--

A: Mhm.

Q: Right off the bat-- you see the trooper, you're speeding, there's going to be a pretty significant change in the heart. It's going to start beating a lot faster. Not just faster, it's going to beat harder.

People can feel it thumping in their chest, you know--

A: Yeah.

Q: So it's a pretty dramatic change with the heart. A lot of people describe feeling a hot flush come over them. It feels like their temperature kind of spikes all of a sudden, they get a little sweat on the forehead, okay? Um, another change that occurs that most people don't even realize at the time that it's happening is that there's always a breathing pattern change.

A: Mhm.

Q: See, before you see the trooper, you're sitting-- your body is in motion because the vehicle is in motion, but essentially the body is not expending energy. You're just sitting still,

A: Yes.

Q: So your body is pretty much at rest. So you've got a normal, rhythmic, in and out pattern of breathing. Same amount in, same amount out, okay? But then when you see that trooper, there's going to be a breathing pattern change. Now, this change is unique to the individual, largely depending on the physical fitness, things like that. But people will have a change in their breathing pattern. Some people start breathing faster, some people start breathing slower, some people freeze up and don't breath at all, just kind of stop breathing for 5 to 10 second to see if he's turning around to come and get them. There's always some kind of breathing pattern change. Now there are a lot of other functions in the involuntary system-- changes that go on when the fight or flight system kick in, but I mention those because those are primarily the ones that we're looking at with the polygraph. The way that this relates to the polygraph is this: remember, there are two kind of people who take polygraphs, those who are going to lie, and those who are going to tell the truth.

A: Yes.

Q: Well, you take the individual who is going to lie, okay? He knows he's going to lie, because he's

been lying. So he's already made his mind up before he comes in here that he's going to lie.

A: Yes.

Q: This is like an individual-- I mean he has committed to this path that he has chosen. This is like an individual that-- it's like he's doing 100 miles an hour down the highway, and he knows there's a trooper just up ahead, but he's going to do 100 miles an hour anyway. He knows he's very likely to get caught, but he's just got to roll the dice and hope for the best kind of thing.

A: Yes.

Q: So for them, remember I told you we'd go over the questions before the test?

A: Yes.

Q: For them, they already know ahead of time-- when I'm doing the test and I say "did you do--" before I can even finish the question, the brain already says, "uh-oh, there's that questions, you're gonna lie, they're gonna catch you, they're gonna know it." The brain processes that in a microsecond, and causes that fight or flight reflex to occur. So those changes start happening because the brain recognizes that "you're gonna lie, and they're gonna find out." Okay, so those changes start happening. Now, the flip side of that is we have people who tell the truth. Now the ones who tell the truth-- sticking with that driving analogy, this is like a person who is going down the highway, the speed limit is 70 and they've got their cruise control set for 65. Now this person is well under the speed limit. They know they're not speeding. But, granted, even if you've got your cruise control set, and you're not doing anything wrong, when you see a police officer, you're going to have a recognition response. Okay, you're still gonna look at your speedometer, you're still gonna look in the rearview mirror, right?

A: Yes.

Q: I mean, we all do that. Even if we have the cruise control set, and that's just normal. That's called a recognition response, and as far as the polygraph goes, I call that a recognition response. You're

going to hear the question and you're brain is going to be like "That's one of those important questions," okay? But what happens is, just like if you have the cruise control set, you see the police officer, you look down at your speedometer, you look in your rearview mirror, your brain kicks in and says, "whew, good thing you had the cruise control set. Boy that was close, good thing you weren't speeding." So, even though you have a recognition response, your heart's not beating out of your chest. You don't break out into a cold sweat, okay?

A: Yes.

Q: And the same thing with the polygraph. The brain hears the question, recognizes those are important questions and says, "whew, it's a good thing you're telling the truth about that. It's a good thing you're not lying." So, I'm not saying a little blip of response, of a recognition response, but I'm not seeing a dramatic changes that's associated with a person lying.

A: Yes.

Q: So that's a simplistic way of describing how a polygraph works, but these are the different components that I use here. These tubes are called pneumograph tubes, one will go across your upper chest, and one will go across your upper abdomen, and they will monitor your upper body movements. These little pads here are stick on, disposable pads. I'll put two of them on your hand, and then attach those little white leads right over your shoulder there, attach these tubes to it, and they will monitor your electrodermal activity across the palm of your hands. That's a big way of saying sweat gland activity.

A: Okay.

Q: Minute changes in your body's core temperature will have changes in your sweat gland activity.

A: Okay.

Q: The blood pressure cuff there, the standard blood pressure cuff-- I'll be using that to monitor what's going on with your heart. Everything that's going on with your heart, from beginning to end, I'm able to watch your blood pressure cuff. I'm able to see changes in blood pressure, changes in

blood rhythm, in heart rate, even blood volume. I can tell if your heart's pumping more blood or less blood through the blood pressure cuff.

A: Okay.

Q: And then this little small device-- to be as small as it is, has got a really big name. It's called a photoplethysmograph. Okay? All I'm going to do with it is just clip it to your earlobe, and what this does is it monitors blood flow going to your brain. When a person tells a lie, there's an increase in brain activity. This increase in brain activity requires an increase in blood flow to support the increase in brain activity. So when a person tells a lie, there's a noticeable, dramatic increase of blood flow going to a lie. When a person is telling the truth-- the blood flow, the normal blood flow to the brain will stay the same. Okay?

A: Yes.

Q: So the photoplethysmograph helps me to see if there are blood flow changes going to your brain during the test.

A: Okay.

Q: So those are the different components. And that's how the polygraph works. But let me tell you why the polygraph works. The reason that I know the polygraph works-- the reason that I'm confident that I'll get the right answer is because I'm looking at things that you can't change. Okay?

A: Yes.

Q: I'm looking at physiological changes that you don't have the ability to make happen, or have the ability to stop them from happening either. Okay? And the best example is this: if I had a hundred dollar bill, I could put a hundred dollar bill right here in front of you and tell you, "James, this hundred dollar bill is yours, if when I snap my fingers, you can make your heart beat twice as fast." You know, I could give you chance after chance, but you can't just sit there and tell your

heart to beat twice as fast at the snap of a finger. You can't make it happen. Likewise, if your heart was beating twice as fast, you can't say "slow down" and make it drop back to normal. So you can't stop it from happening either. Okay?

A: Okay.

Q: Um, you can't sit there and say "sweat" and make yourself sweat. So you can't make this stuff happen, but you can't stop it from happening either. So that's where the validity of the polygraph comes in. When I'm asking these questions during the test, if those changes are there, they're there for a reason. Okay? Likewise, if the changes aren't there, there's a reason why they're not there, too. So that's how the polygraph works, that's why it works, those are the different components. The last area was nervousness. I told you I'd address that one more time with you. The reason that nervousness doesn't impact the polygraph is-- you've already told me you haven't died and come back to life, so that means that for over 38 years now, your body has been operating at some level for 24 hours a day.

A: Is it.

Q: You are alive so your body has been operating on some level. Now that level changes, depending on what you've been doing. Uh, if you're the type of person who likes to read a book at night before you go to sleep, then at that point in time, you're operating at a lower level. If you're up, involved-- well you mentioned the game Hitman, I imagine there's some pretty tense moments in there. You've got lots of stuff going on around you. When that's going on, you're operating at a higher level, even though you're not physically expending energy, your body is operating at a higher level because of the tenseness of the game. Whatever level you're operating at, you stay at that level until you change that activity.

A: Yes.

Q: So, when it comes to the polygraph, you're going to be nervous. From the time you came in, to the point that you're at now, your nervousness level has probably gone down a good deal. You're probably more relaxed now than you were when you first came in. Right?

A: Okay.

Q: Okay, guess what? When I put all this stuff on you, it's going to go right back up. There's no way around that. You're going to be nervous. The thing is, that's going to be the level that you're operating at. Okay? As far as the polygraph goes, I don't care where your base level is. Your base level can be down here, or your base level can be up here. Because it's a polygraph, your base level is going to be pretty high, alright? But that's your case level. That's where you're starting from. I'm not concerned with the base level. I'm looking at the changes that occur during the test. So you can have a higher base level, but you choose to lie, you're going to come off that base level and then come back to the base level. So being nervous is just a base level.

A: Okay.

Q: So it won't cause you to fail the test. Alright?

A: Okay.

Q: Any questions about any of that as far as how it works and why it works?

A: Uh, no sir.

Q: Good. Okay. You've already given me some insight into-- well, let me tell you what I understand and what you've already told me about your relationship, okay? You've been with Danette for three years--

A: Yes sir.

Q: And-- are you married? You are married--

A: Yes sir.

Q: Okay, so, [redacted] is how old now?

A: Thirteen.

Q: Thirteen. So she was about ten when you met her-- have you been married for three years or have you been together for three years?

A: Um-- been together for three years.

Q: Okay so she was around ten when you came into the picture?

A: Yes sir.

Q: Okay. VICTIM obviously has something going on.

A: Yes.

Q: Some problems-- uh-- is she under treatment, or doctor's care or been diagnosed with anything?

A: Well they had her going to like-- mental health, but um--

Q: No specific diagnosis come from anything like that?

A: Just, basically, can't control herself. You know, anything she do is never her fault.

Q: Okay, alright. So she's got some problems. She has made these allegations against you, says that you have been having sex with her.

A: Yes sir.

Q: She says that you will come into her room, and that you will force herself on her, put your penis inside her vagina and have sex with her.

A: Okay.

Q: Okay? Why do you think she says this about you?

A: I think she just wants to get me out of the way. That's what I think. I mean-- basically-- since I came down there, I've been telling her mother to handle things, handle things, but I believe her mother was at the point where she'd been handling things for so long-- before I came-- that she had gotten kind weary or tired or whatever. When I came, she said "James I want you to handle things with the kids." If the kids ask her, you know, "Can I go somewhere?" they ask me-- and they used to going. There were weekends when I was trying to plan something for the family as a whole, but the children already had plans of their own. I ain't never been in a house where children made plans of they own, and there were just a lot of things that I had to put a stop to.

Q: Now, [redacted] you say is the middle child?

A: She's the middle child.

Q: What are the-- who are the other kids?

A: There's a 16 year old, and a-- maybe 5 year old girl.

Q: A 5 year old girl? And a 16 year old boy?

A: Yes.

Q: Alright. Do they have any other step brothers or step-- did you bring any kids into the house too?

A: Uh, no.

Q: So it was just the three kids there?

A: Just the three kids.

Q: So what you're telling me though is that you've never had sex with [redacted]?

A: Never had sex with [redacted].

Q: What is-- I don't mean to patronize you, but I have to make sure we're on the same page-- what is having sex?

A: I mean having sex is-- I mean-- putting your penis inside of a female. You could even fondle a female. That could be considered as sex.

Q: Okay. So have you put your fingers inside her vagina?

A: No sir.

Q: Did you put your penis inside her vagina?

A: No sir.

Q: Have you put your penis inside her mouth?

A: No sir.

Q: Have you put your penis in her anus?

A: No sir.

Q: Have you fingered her anus?

A: No sir.

Q: So you haven't had sex with VICTIM?

A: No sir.

Q: Okay. Let's start with the questions that will be on the test, and then we'll take a brief break, okay?

A: Okay.

Q: Now, all the questions on the test are designed that you'll be able to answer them "yes" or "no".

A: Okay.

Q: So listen to each question and answer it to me the way you're going to answer on the test.

A: Okay.

Q: If you don't understand something, make sure that you ask me. I don't want there to be any ambiguity here before we do the test. I want to make sure you understand each question okay?

A: Okay.

Q: Since we just got done talking about VICTIM and those allegations, let me go ahead and go over those questions first, okay? Regarding VICTIM's allegations that you had sex with her-- do you understand that?

A: Yes.

Q: --do you intend to answer each question about that truthfully?

A: Yes sir.

Q: Okay. Just a simple "yes" or "no" will be fine for the test, okay?

A: Okay.

Q: Also, when you answer the question during the test, you don't have to impress me with how emphatic you are. Some people will say "no" like that-- like they want to impress me with their strength of denial. That just tend to cause movement, especially in that pad that you're sitting on. You just have to say "yes" or "no"-- whatever the answer is. Just answer it that way.

A: Okay.

Q: Did you put your penis is VICTIM's vagina?

A: No.

Q: That's pretty explanatory there, right? I don't need to explain that to you. You know what your penis is, you know what her vagina is, right?

A: Yes.

Q: Did you put your penis in [redacted]'s vagina in her bedroom?

A: No.

Q: Because she said most events occurred in her bedroom. So while you being in her bedroom, has your penis been inside her vagina?

A: No.

Q: Okay. That's all the questions I'm going to ask you about her allegations there. I told you there wouldn't be that many, right?

A: Yes.

Q: Alright. This next set of questions-- there'll be more of these-- they're going to be about all the time I spent talking to you about your background to see if there were any red flags about you that fit that profile, okay? Everything that you told me about yourself, there were no red flags there. You sound like you don't fit that profile. I imagine you're going to answer "no" to each one of these questions from what you've told me, but I have to go over the questions with you ahead of time so that you'll know what each question is.

A: Okay.

Q: Let's do that psychopath questions. You've already told me that you didn't fit that. But let me go over this question with you. Now what age range are we talking about here?

A: As in-- psychopath?

Q: Yeah, all these questions here-- this age 16 to 17-- that age, up to the present.

A: Okay.

Q: Did you ever commit a crime without getting caught?

A: No.

Q: Good. Couple of questions about your level of honesty. You sound like a very honest person, but let me go over these questions with you here. Now remember, when we're talking about lies, we're talking about selfish lies, not unselfish lies, okay?

A: Okay.

Q: Just selfish lies-- and the same time period.

A: Okay.

Q: Did you ever lie to someone who trusted you? Now who are the people who trust you?

A: Mother, father--

Q: So family. Family members. How about loved ones? Girlfriends, wives, those are loved ones. Um, friends. You're friends trust you.

A: Yes.

Q: How about co-workers, supervisors, people that you work with? They've trusted you, right?

A: Yes.

Q: So basically it's the people that know you that are going to trust you, right?

A: Yes.

Q: Okay, so, did you ever lie to someone who trusted you?

A: Uh, no.

Q: Great. Did you ever lie to get out of trouble?

A: No.

Q: Good. That's all the questions there about your level of honesty. The next two questions have to do about the sexual deviancy stuff that we talked about, okay? DId you ever indulge in inappropriate sexual fantasies? That was the stuff that I talked about-- the turning a person into a sex partner in your mind, seeing a woman and then going home and having sex with your girlfriend or wife while you're fantasizing about somebody else, sitting around looking at pronography, masturbating to pronography, being a chronic masturbator, thing like that. Okay? So, did you ever indulge in inappropriate sexual fantasies?

A: No.

Q: Last one is: did you ever engage in any unusual sex acts?

A: No.

Q: So an unusual sex act would be stuff that's not normal stuff. You know, you're not involved in-- obviously that illegal stuff we talked about-- forcing or coercing a girl into doing anything would be an unusual sex act. Being involved in homosexual stuff would be unusual-- if you're not claiming to be a homosexual, then being involved in homosexual stuff would be unusual. Getting involved in threesomes, group sex, wife-swapping, sex with animals, stuff like that would be unusual stuff. So did you ever engage in any unusual sex acts?

A: No.

Q: Okay. That's all the questions there from the background. The three other questions that will be on the test at some point in time-- these are questions that are very simple questions. They're called "known truth" questions. And what a known truth question is, is when you're answering, I know that you're telling the truth.

A: Okay.

Q: What that allows me to do-- it allows me to see what your body's physiological response levels look like when I know that you're being honest. And that way I can use that to compare to all of your other answers. That way-- anything that I just asked you, you could have just lied about everything I just asked you, right?

A: Mhm.

Q: So, if I have these known truth questions in place, I can use that to compare all of your others to, to make sure that they're very similar. So the known truth questions are-- basically it's a comparison question-- are you now in South Carolina?

A: Yes.

Q: Are the lights on in this room?

A: Yes.

Q: Are you now sitting down?

A: Yes.

Q: Okay. Very simple stuff, right?

A: Yes.

Q: Those are all of the questions that will be on the test. I'm not going to ask you anything than what we just went over there. That's not the order they'll be in. From test to test I'll change the order around some, but I won't ask you any questions other than those.

A: Okay.

Q: Any questions about any of that?

A: No sir.

Q: You ready to take a break there? Use the restroom, get some water?

A: Uh, I'm fine.

Q: Do you mind if I go out and use the restroom?

A: Go ahead.

Q: I'll be back in just a second then.

A: Okay.

(Dan Morgan leaves the room.)

(Dan Morgan returns.)

Q: I need you to take your jacket off now.

A: Okay.

Q: (Dan begins placing polygraph equipment on Irby) Put your hands on the top of your head for me, and remain slightly forward. This is going across your upper back. Stay in that position for me. Hold you chin up for me. (Dan speaks on cell phone.) (1:49:00) (Hangs cell phone up.) Just rest your arm right on top. Try not to rest down on it. Rest your arm there. Keep your right arm straight for me right there. Everything feel alright?

A: Yes.

Q: Alright James. Let's say we do an acquaintance test first. So you can get a feel for how we do a test, and it gives me the opportunity to make sure everything is working.

A: Okay.

Q: With any polygraph that you do, there has to be a potential for a lie there, for me to be able to pick one out.

A: Okay.

Q: Now during the test that we're going to do after this, I'm hoping you're not going to tell me any lies during that. But during the acquaintance test I'm going to get you to tell me a lie, to try and pick out when you're lying. The way I'm going to do that is I'm going to use some cards. Are you familiar with a deck of cards?

A: Yes sir.

Q: This is not a full deck of cards, I only have a few cards here. The cards that I do have-- I don't have any face cards, I don't have any aces, no 10s. Just numbers 2 through 9, and only one of each. Okay? So it doesn't matter if it's red or black or diamonds or clubs, the number on it is the only thing that's important, okay?

A: Okay.

Q: What I'm going to do is-- I'm going to fan the cards out. You're going to draw one card, look at it and see what your number is, and put it face down on the arm rest. Okay? And then what I'm going to do is I'm going to ask you a series of questions, and all you have to do is answer "no" to every question.

A: Okay.

Q: Now the first questions I'm going to ask you in this test is: Regarding the number of the card you picked, was it the number 1? And you're going to say what?

A: Uh, yes.

Q: No, you're going to say "no." You're going to answer "no" to every question. Okay?

A: Okay.

Q: Now you're going to answer "no" to every question. So the first thing I asked you was- regarding the number you picked, was it a number 1? You're going to say---

A: No.

Q: No. You're going to say no for two reasons- one, because I told you to, and the other one is, remember I said there are no aces?

A: Yes.

Q: An ace represents a 1, so if there are no aces, you could not have possibly picked a 1. So that means it's a known truth question, like the "are the lights on in this room" question.

A: Okay.

Q: I will know that you didn't pick a 1, so I'm going to get your truth level established with the first question, and use that to compare all of your others to. Because 2 through 9, it could have been any of them.

A: Okay.

Q: So I'll ask you "was it the 2, was it the 3, the 4," so on, and you're going to keep answering "no" each time.

A: No matter what the card is?

Q: No matter what the card is.

A: Okay.

Q: So let's say for instance that whatever card you did pick was the number 6. When I say "was it the 6?" what are you going to say?

A: No.

Q: You're going to say no. Even though that was the card, you're still going to say no. Now, here's the interesting thing. Your brain always tells the truth. That's just the way we are wired. The very first thing that comes to a person's mind is always the truth. Okay? So you have to override the truth to tell a lie. Now in this case, if it was the 6, if I say, "was it the 6?" your brain is going to

remind you that it was the 6. It may do that by a mental flash of seeing the 6 in your hand, but in some way the brain is going to say yes. But you're going to override that and you're going to say no. And that's what is going to cause that brief mental conflict-- that little bit of a fight or flight reflex. Okay? Now it's just a card, it's not a big deal. I told you to lie, so I don't expect you're going to blow my computer up. But I still expect some kind of a change there. Enough for me to be able to tell that that's the card you picked. Okay?

A: Okay.

Q: Then I'll finish up with "was it the 8, was it the 9?" and that'll be the end of the test. Okay?

A: Okay.

Q: So you see, what happened here is you answered truthfully every time except for once, because you're only picking one card. So what I should see is basically all of them pretty much the same, except one is going to have some changes to it. At least enough for me to be able to pick it up.

A: All the answers are going to be "no"?

Q: "No" to every one. Okay. Any questions?

A: No.

Q: Okay. Now you draw whichever one you want, you look at the number, then put it face down on the arm rest. You got it down?

A: Yes.

Q: So let me give you this instructions for each of the tests that we're going to do today. For this test and the other ones that we do. What I want you to do during each test is look straight ahead, so I'm not distracting you with my movements over here. Before each test, I'll put air in the cuff. I'll put a little more air than normal at first to get the air bubbles out of the way and then we're going to let that air off. There's not going to be much air in the cuff and initially you're not going to feel much of anything. But after about a minute, minute and a half, it's going to start getting uncomfortable. It's normal to get uncomfortable, feel a bit of tightness, it may hurt a little bit, but

it's not going to last very long. Okay, I'm going to *inaudible*... Okay. Any questions?

A: No.

Q: You remember the card you picked, right?

A: Yes.

Q: Now I want you to make it a challenge for me James. Okay? So during the test, try to convince yourself that you've picked another number, or you didn't pick that-- try and make it a challenge for me. Alright? I'm still counting on your brain to give me the one that tells the body what to do, but I want you to try and make it a challenge for me. Now just remain still, the test is about to begin. Regarding the number you picked, was it the number 1?

A: No.

Q: Was it the number 2?

A: No.

Q: You gotta sit still in the chair there.

A: Okay.

Q: Was it the number 3?

A: No.

Q: Was it the number 4?

A: No.

Q: Was it the number 5?

A: No.

Q: Was it the number 6?

A: No.

Q: Was it the number 7?

A: No.

Q: Was it the number 8?

A: No.

Q: Was it the number 9?

A: No.

Q: That completes this portion of the test. Please remain still. Okay, you can move you arm now. You can move it between tests back and forth like that. Um, let's go over a couple of things. That pad you're sitting on is extremely sensitive. There were a few times there were some flinches and movement that you've got to be careful of. Even something as simple as pressing your toes down is going to cause it-- cause some movement in that sensor.

A: Okay.

Q: Another thing is your breathing. I try never to mention the breathing if I don't have to. I was saying telling you not to think about your breathing is like telling you not to think about an elephant. It's the first thing that's going to come to your mind. What's happening with your breathing is you're breathing very shallow, and then you're taking some deep breaths.

A: Yes.

Q: And the reason that happens is because you're thinking about your breathing. What happens if you don't let your body get the normal amount of oxygen-- that's why those deep breaths come into play. If you slow your breathing down or take shallow breaths, your body makes you take deep breaths to compensate for short breaths. On a polygraph, what looks best is normal.

A: Okay.

Q: Your normal breathing is what looks best.

A: Okay.

Q: People think that breathing shallow or breathing slow represents calm, and calm represents truth, but that's not how it works in the polygraph. What looks best is normal. If your normal breathing pattern is fast, then breathe fast. So that's what looks best. Now, with all that being said, um--

A: I wasn't thinking about breathing though, I was just breathing.

Q: Okay. Well, the number that stood out the most compared to all of the others was– I'd probably have to go with 7. Was 7 the one you picked?

A: 7 was the one I picked.

Q: Okay. And as you can see, they're not all 7s. Okay, so I didn't stack the deck on you. That test is a good test because from a person who was telling the truth, it tells them that "okay, the polygraph does work." The person that's telling the truth-- it makes them feel better, it gives them a little confidence in it.

A: Okay.

Q: I'll let you know the people who come in here and tell lies, it works just the opposite on them. They're like "oh crap, I only lied about a card, how am I going to lie about this?" so it just works the opposite on those guys. Okay, so you remember the questions we went over?

A: Yes sir.

Q: So just remember to answer the questions the same way during the test as you did. Okay?

A: Mhm.

Q: Just remain still, the test is about to begin. Are you now in South Carolina?

A: Uh, yes.

Q: Regarding [redacted]'s allegations that you had sex with her, do you intend to answer questions about that truthfully?

A: Yes.

Q: Do you indulge in inappropriate sexual fantasies?

A: No.

Q: Did you put your penis in [redacted]'s vagina?

A: No.

Q: Did you ever engage in any unusual sex acts?

A: No.

Q: Did you put your penis in [redacted]'s vagina in her bedroom?

A: No.

Q: Did you ever lie to someone who trusted you?

A: No.

Q: That concludes the portion of the test, *inaudible* your arm. Okay. You can move you arm. I'll always give you about 5 minutes between each test to give you time to recuperate.

(Silence)

Q: Alright, are you ready for the next one?

A: Yes.

Q: Please remain still, the test is about to begin. Are the lights on in this room?

A: Uh, yes.

Q: Regarding [redacted]'s allegations that you had sex with her, do you intend to answer those questions truthfully?

A: Uh, yes.

Q: Did you ever lie to someone who trusted you?

A: No.

Q: Alright, I'm going to have to stop that chart. James, you got to do something about your breathing. You're going long stretches of time without breathing.

A: Okay.

Q: Um, you're going sometimes 5, 10 seconds without breathing.

A: Just steady breathing.

Q: Just let yourself breathe steady. Just breathe. Please remain still, the test is about to begin.

Q: Are the lights on in this room?

A: Yes.

Q: Regarding [redacted]'s allegations that you had sex with her, do you intend to answer those questions truthfully?

A: Yes.

Q: Did you ever lie to someone who trusted you?

A: No.

Q: Did you put your penis in [redacted]'s vagina?

A: No.

Q: Did you ever lie to get out of trouble?

A: No.

Q: Did you put your penis in [redacted]'s vagina in her bedroom?

A: No.

Q: Did you ever commit a crime without being caught?

A: No.

Q: That concludes this portion of the test, please remain still. Remain still until I tell you it's okay to move. Okay, you can move now.

A: Man that breathing thing ain't easy.

Q: You did a lot better that time just letting yourself--

A: Can I move?

Q: Yeah.

(Silence.)

Q: Ready for the next one?

A: Yes.

Q: Please remain still, the test is about to begin. Are you now sitting down?

A: Yes.

Q: Regarding [redacted]'s allegations that you had sex with her, do you intend to answer these questions Truthfully?

A: Yes.

Q: Did you ever lie to get out of trouble?

A: No.

Q: Did you put your penis in [redacted]'s vagina?

A: No.

Q: Did you ever commit a crime without getting caught?

A: No.

Q: Did you put your penis in [redacted]s vagina in her bedroom?

A: No.

Q: Did you ever lie to someone who trusted you?

A: No.

Q: That concludes this portion of the test. Please remain still. Okay, you can move.

(Silence)

Q: *inaudible* (2:30:00) I'll be back in just a minute. You can go ahead and peel those off. There's a tissue right there for you.

(Dan Morgan Exits)

(Dan Morgan Returns)

Q: James--

A: Yes.

Q: --did you know you had court today?

A: I had court today?

Q: Yeah. You have a family court-- I don't know. They called over here from the jail and told us you had a 2:00 family court appearance. They called me on the phone about it. So, uh, Tanya, the detective is going to take you over there for your court appearance and then as soon as you're done bring you back here. That'll give me time to go over your charts and uh, get an answer on it.

A: Okay.

Q: Let me get your jacket.

(End of Disc 1)

Q: How'd your court thing go?

A: I gotta be back in court tomorrow, so--

Q: Back in court tomorrow *inaudible*

A: Sir?

Q: What are they going to do tomorrow?

A: They're going to hear the case tomorrow.

Q: Is this about the child support?

A: It's about the child support.

Q: Did you get something to eat?

A: Yes, I got something to eat.

Q: Alright, well I've got your charts all evaluated and everything. We're going to go over every test. What did you think of it? It's your first time doing a polygraph, what did you think?

A: I think that breathing thing-- everybody breathes different. I was an athlete all my life, and still pretty much athletic and, you know, my breathing is not-- it's not like that.

Q: Yeah. It's-- and it's fine. I can see what is a normal pattern.

A: Yeah.

Q: And that's not a-- I mean-- it just caused me to stop one test and restart it. It's not that big of a deal.

A: No-- well, I mean it's like I said. You said to breathe-- and that's not my breathing pattern.

Q: Mhm.

A: You know--

Q: It's just-- it's hard not to think about breathing. But uh, it's not a big deal. As long as it's-- the one I had to stop there, it's because you weren't breathing at all--

A: Okay.

Q: You were taking long stretches of not breathing.

A: Okay.

Q: And that's not normal.

A: That's not normal.

Q: Yeah, so-- and once you got past that, you did fine today.

A: Okay.

Q: So, um, the breathing wasn't a problem after that.

A: Okay.

Q: But um, as far as the testing itself, was it about what you expected? Or--

A: I didn't know what to expect, so I was just going with the flow. I was trying to follow your directions as close as possible.

Q: Well I appreciate you-- you've been a very cooperative person. I appreciate that. You've been easy to talk to.

A: Yes sir.

Q: I get some people who are hard to deal with, but you haven't been. You've been very cooperative. Thank you. Um, unfortunately though, you did fail the test.

A: Okay.

Q: And um, it's just-- I get, you know, normally-- there's lots of-- my job is just to do the polygraph.

A: Yep.

Q: And then at that point, once I've got the answer, my job is finished.

A: Mhm.

Q: But I've alway been the type of examiner-- I've always been the type of person that doesn't want to just do the minimum.

A: Yes.

Q: Especially when I've got somebody that-- had you come in here and been a real pain in the butt or something like that, you know, I would have said "he failed the test, do what you've got to do with him," and turn you back over to them. But when I've got someone in a case and I feel like there's probably more to it--

A: Yes.

Q: Then uh-- then what's just on the surface-- if I've got someone who isn't a bad person, then I'd rather take the time to talk to them--

A: Mhm.

Q: --to find out exactly what's going on. Because all I know at this point-- what I can tell from this is that you haven't been completely truthful about--

A: Mhm.

Q: -- the contact between you and VICTIM.

A: Yes.

Q: Now, exactly what that means-- that could be something fairly minor--

A: Mhm.

Q: --it could be something that she's initiated herself.

A: Yes.

Q: Or it could be that you're a rapist.

A: Yes.

Q: I don't know. But all I know is that.

A: Yes.

Q: I'd rather take the time with you to find out what exactly this is-- what exactly is going on here rather than just assume the worst and turn you over *inaudible*.

A: Yes.

Q: I don't think that you're a bad person. I do meet a lot of bad people and I don't think that you're a bad person. I've been doing this a long time, 16 years of this. What that 16 years of experience tells me is that very rarely do I ever get the complete truth going into a test.

A: Yes.

Q: Okay? And that means that not only is the person I'm testing not necessarily telling me the truth, it also means the person telling the complaint isn't always telling the truth either.

A: Yes.

Q: Usually what I have is, you've got one person's story over here, the complaint. The other person's defending themselves over here and saying "this is what did or didn't happen." And generally what happens is you find the truth somewhere in the middle of that.

A: Yes.

Q: Because it's natural human tendency to protect ourselves.

A: Yes.

Q: And that's to be expected. But um, but-- you also have to-- a lot of times what I see is I get a lot of people in here who are pretty good-- who are good people who have screwed up or messed up somewhere along the way--

A: Mhm.

Q: -- but because they don't know what to expect, they find themselves needing to make some choices that turn around to be hindrances to them. Like, choices that are bad choices. You make a bad choice to begin with by, you know, doing something that was out of character.

A: Mhm.

Q: But then they make other bad choices just because they're scared--

A: Yes.

Q: -- and don't know what to expect. In situations like this-- I'm not saying that I can make everything all better for you. But I can help you to understand what's going to happen, or what is likely to happen if you go this way, what's likely to happen if you go that way.

A: Yes.

Q: That's kind of where you're at at this point. You're at a crossroads, or at least a fork in the road where you've got to decide which path you're going to take.

A: Yes. I wish I was on the right path. Like I said, it was nothing like that. But ever since I been down here, there's been a lot that's been going on. Even sexual activity that didn't involve me. You know what I'm saying. I mean--

Q: What are you talking about?

A: Like I said, it's not me I'm trying to protect. There's a lot of stuff about the child I hadn't even told. I mean, we were--

Q: Well, let me step into it and see if I can-- I'm going to venture out here-- and this is not a real great leap of faith here. This is based on experience. My guess is that she is not an angelic little child.

A: Man that child is *inaudible*

Q: Right. She's probably also, my guess is, she's probably also already sexually active. Uh, I don't

know with how many people but I'm sure that she's had more than one sexual experience already.

A: Well I mean--

Q: This is based on some of the things I already read about the case file--

A: Yeah. I mean, like I said, there's a lot of things that I observed and had to handle that I told her mama she needed to handle it. I told her, I said you put me in a situation that it's going to come back and bite me. But I was the man of the house and I feel like, if she ain't going to handle it, someone better step in and handle it. So that's the choice I made, and I felt that it was a good choice cause I was trying to save the child.

Q: Mhm.

A: You know what I'm saying? Like I said, I always told my wife "this going to come back to bite me" cause the child, she done threaten me, and that's when I first started kind of picking up on things. And everything that ever happened in the house, I always communicated it either to my wife, to my mother, to my father, and they always said "be careful." They said cause you know, from them-- my mom never really came down to the house, and my dad, he just observed the child, and they said "son, be careful, because she's fast."

Q: Mhm.

A: So--

Q: Yeah, and that's very good advice. What do you know about-- was she-- has she been sexually molested earlier in her life that you know of? Has there ever been any hint of that?

A: Well, the only thing I know of, she was in daycare and something about she performed oral sex on someone. But also I know an incident to be very true-- we had some-- my step-son, he's 16 he has two friends. They come over, and I tell them that um, when they come over, you know I like to be around the guys, they're good guys and I try to help them. They're at the age where they can go left or right--

Q: Mhm.

A: -- so I try to help them, you know, where they at. And the little boys would come over there and

VICTIM would always be on the little boys. I remember one incident they were with their shirts off. It was VICTIM and another girl--

Q: She had her shirt off?

A: The boys had their shirts off, they were out playing basketball. There was another little girl spending the night with VICTIM which was her cousin--

Q: Do you remember who that was?

A: I'm going to tell you about that. This is where it gets--

Q: Okay.

A: So the whole time VICTIM and the other little girl was out there, they was making comments about the little boys. And so the little boys was telling them to go ahead, you know, *inaudible* (referring to his step-son) had his friends over here and VICTIM had her friends over there. VICTIM was supposed to be doing whatever with her friends and *inaudible* (referring to his step-son) was supposed to be doing whatever with his friends. VICTIM and her friend-- her cousin actually, they was over there making comments about the little boys, their chests and *inaudible* this and *inaudible* that. So, I told them to go on, but like I said VICTIM don't listen. So it got night time. When it got night time, me and my wife went to bed. The kids rooms on the other end of the hallway. So when I got up that morning, I seen pillows lined up in the hallway-- no, the night before I gone to bed, they had already lined the pillows up in the hallway. Before I went to bed I had said "darn that's strange" but I just went on to bed because I thought that was just kids being kids. No, that wasn't so. Them little girls had a plan. Them little girls had performed oral sex on those little boys after we went to bed. So me and my wife, we didn't know anything about it. But how we found out about it, the little girl that spent the night, she went home and told her brother which is my wife's sister-- and the little boy told the mother, and that's when the mother called Danette and let her know what her and the little girl had done.

Q: Which girl is this? What's her name?

A: Her name is MINOR 3

Q: MINOR 3

A: Yes. But I'm gonna tell you when all of this got started. We was going to the same church that Danette's sister was going to. Danette's sister was going with a guy named Thomas, and um-- something came up about Thomas messing with MINOR 3 | VICTIM and MINOR 3

Q: What is MINOR 3 hort for?

A: MINOR 3 | VICTIM and MINOR 3 are pretty close cousins. So I say, I --looked at my wife and I said "Okay, so"-- like I said, Thomas had to go through all us himself. He was the boyfriend of J.J., which he as kinda like the stepfather of MINOR 3

Q: Mhm.

A: They took him through us, about him messing with MINOR 3 and shortly after that, that's when VICTIM started making these comments. Shortly after that-- and actually that's the female that brought the cops to our house.

Q: Mhm.

A: That's who MINOR 3 called.

Q: Okay.

A: Out of all the people she chose to call, she chose to call her.

Q: Mhm. Okay.

A: And I told Danette, I said--

Q: Well tell me about this daycare thing. She would have had to have been what, 5?

A: Yeah she was young when it happened.

Q: Okay. I know you weren't in her life then, but um--

A: But can I tell you about another story? That ain't the end. Well even after VICTIM performed oral sex on those little boys, I talked to VICTIM and I told her "that's not the way to go." Her mama talked to her, and I talked to her. We told her about diseases and things that she could catch. But, there was another incident, and it's always been VICTIM that's behind this. VICTIM ad a friend, a little girl that spent the night, and the little girl, she was about 16, 15, right about that age, and um, the little girl was liking my step son. And on that particular night, me and my wife went to bed, but I felt like something wasn't right. So I got out of my bed, i went outside, and I looked through the

little boy's window, and I saw that the little girl was in there. So I went back inside and told Danette, my wife, that she need to go down that hallway-- see that was one of the problems. My wife never went down the hallway, never. And I kept telling her, ever since I've been there, I said "Danette, you need to start going down the hall to find out what's going on. Cause that's not my responsibility, that shouldn't be my responsibility to go down there and see what them kids doing." I'm the one going through their book bags to make sure there's no, nothing that they're doing that we need to talk to them about. You know what I mean? So um, the little girl spent the night, and like I said I caught the little girl in they room. So I went back to tell my wife, and my wife went down the hall and caught the step-son about to have sex with her. So there was a big thing about that, and don't you know when everything came out, they said that I told the little girl-- no, not they. VICTIM the little girl that VICTIM old her that I said it was okay for them to have sex.

Q: Okay.

A: Everything that's going on in that house, it all revolves around VICTIM It ain't-- The other two children fine. The other two children fine.

Q: Okay.

A: Like I said, none of that should have been placed on me.

Q: Have you heard anything about VICTIM being molested when she was a child, around the time around the daycare time, do you know who was in Danette's life at that time? Do you know what man was in her life?

A: No I never questioned what man was in her life at that time.

Q: You see, uh, first of all. Elementary and kindergarten age, they don't know how to perform oral sex.

A: Okay.

Q: It just-- it doesn't make sense.

A: Well that was what I was told.

Q: Oh no, no, I believe you. I bet she did.

A: Yeah.

Q: The only way that a child at that age is going to--

A: Can I tell you something before you say that? And also it was relevant because I heard it from the children. I mentioned the girl J.J., my wife's sister. She has three kids. My wife has three kids. We're not talking about the baby. We're talking about her oldest son, and VICTIM All three of them kids, they done sat around and watched porno flicks before. But where they got porno from, I don't know.

Q: Mhm.

A: But one of the kids told me this. And they told me when they was watching porno, . MINOR 4 he's the oldest child, . MINOR 4 was masturbating during that time.

Q: Mhm.

A: So--

Q: Well what I was about to say was that she is-- even going back to the age of kindergarten-- she has been exposed to sex whether it's been through pornography, or whether she has been molested herself.

A: Yes.

Q: She has been exposed to that at a very early age--

A: Okay.

Q: -- which does not surprise me based on the level of sexual activity that she's involved in now.

A: Yeah.

Q: Okay, it's a sad but true outcome of molestation is that girls that have been molested will be more sexually active-- more sexually provocative and everything else--

A: Yes.

Q: -- at an inappropriate age. At the age of 10, 11, 12, they're coming on to men.

A: Mhm.

Q: And I'm not just pulling this out of the air. If you talk to anyone that's involved in-- like I said I've been involved in this level of investigating crimes against children and things like that for more than 10 years--

A: Well I even put that in my statement. I don't know if you read my statement--

Q: I did.

A: Yeah.

Q: But-- so that's why I'm sure that she's been molested. Whether that's ever came out or not-- that, uh, I'm sure that that's happened to her. I'm sure that she is sexually provocative. I'm sure that she has come on to you. I'm sure that she has made suggestive comments and probably even done some suggestive things. A lot of times, it's just-- see, most people, unless they've ever experienced it themselves, or work in this line of work, can't picture it. They can't imagine-- I mean, I have known girls as young as 6 and 7 do strip teases to come onto men. One of our prosecutors over here who has been doing this for-- again, many many years, he um, was having a visitation with a little girl that had been molested before. He was visiting with her prior to her going to court, she was about 6 years old, 5 or 6 years old. He said she climbed up in his lap, looked up at him and said, "You want me to give you a blowjob?"

A: Hmm.

Q: People just can't understand that this stuff is real; that this stuff happens. Um, so, obviously she's had some things going on in her past that has turned her into the kid that she is today.

A: Yes. But the thing--

Q: But--

A: Can I say something? The child has been to the hospital. They examined her. And I told them, there's no way possible that I'ma put my penis in that child," you know, there's no way possible--

Q: Yeah. What? Not tear her up, you mean?

A: Yeah. That's what I mean.

Q: Well that depends on how sexually active she is.

A: Okay.

Q: I mean we've got girls-- I've known girls that are less than 10 years of age that are having sex with adults on a regular basis because the body-- the vagina is made to accommodate.

A: Well I mean, based on what her mother told me, her mother asked her, when that happened, did

she bleed? And she told her mother no, that's-- the only time that happens is when you're on your period.

Q: Mhm.

A: Her mother says did inserts that you put in her, she says that-- you know, extra large insert, her daughter's talking about "it hurts." You know what I'm saying? So her mother says that she's not sexually active.

Q: I wouldn't-- I wouldn't put any stock in that.

A: Yeah--

Q: But, uh, anyway let me get back on track here with this, James. I feel for where you're coming from.

A: Mhm.

Q: And, and because I know that that happens, I believe that she has come on to you, and I believe that she has let you know that she's available.

A: Mhm.

Q: And more than likely-- and there's two ways of thought here. Sometimes this happens because you've got girls who um-- and depending on the age, a lot these girls are looking-- you know. There was a man that I interviewed one time who was raped.

A: Mhm.

Q: He was raped by another man. He was having the hardest time dealing with this. Being raped is bad enough, but what happened was, while he was being raped, he got an erection.

A: Okay.

Q: Because, even though he didn't want this to happen, there was still the undeniable part of it, that, somehow or other, it felt good.

A: Yeah.

Q: It caused him to get an erection. So he's dealing with not only the fact that he was raped, he's also questioning whether or not he's a queer.

A: Mhm.

Q: So he's got all this stuff going on. Alright, so uh, the point of that is, even children who are molested who experience pain, the fact is that they're still involved in something that is inherently pleasurable. Sex feels good. So what happens with a lot of these girls is that they start-- they've gone through something that they didn't want to go through, they didn't ask for it, at the age that they're at, they don't understand why. A lot of times they think it's their fault.

A: Mhm.

Q: And, on top of that, they know they shouldn't feel good, but it did feel good, so they've got a lot of confusion there. So what happens is they become sexually promiscuous, a lot of times because they want to have control over that feeling. They want that feelings again, but they want it on their terms.

A: Mhm.

Q: And, if they have been-- if they were molested by moms, by father, by stepfather, grandfather, something close like that, they have been-- they want somebody in their life that they can trust.

A: Yes.

Q: Somebody that they can-- so a lot of times these girls will turn to the newest man in the life, if they feel comfortable with him.

A: Me and [illegible] never got along.

Q: Well I'm just saying sometimes-- there's two different ways of looking at this. She's either turned to you because she wanted-- she likes you, and she wanted to feel that with you.

A: Okay.

Q: Or she turned to you because she is at that age where she's devious enough to know that if she can get you to do this, then she's got this over you, and she can hang you with it.

A: Mhm.

Q: And that happens too.

A: Yes.

Q: Sometimes girls do it not because they're trying to get you in trouble, and sometimes girls do it because they are trying to get you in trouble. It could very well be that [illegible] is doing this to get

you in trouble.

A: Mhm.

Q: Now at this point, though. Those are all things that we can talk about.

A: Yes.

Q: But, what we've got to get to here is this-- James, there has been sexual contact between you and VICTIM. You have been involved in having sex with her. The thing is, I don't want to just see you being thrown to the wolves with this.

A: Mhm.

Q: I think that this stuff needs to be pointed out.

A: Mhm.

Q: I think it needs to be clear what she was doing, how she did this, because James, you've had a lot of stuff going on with you. Okay? Now, some guys will turn around and blame their actions on drugs, blame their actions on alcohol, things like that, and to some degree there is some validity in that because a person who is under the influence of drugs or alcohol does not make good decisions.

A: Yes.

Q: We already know that. It doesn't absolve them of their responsibility, but it is a factor that needs to be considered when a person does something.

A: Yes.

Q: But you tell me that you don't do drugs or alcohol so it's not like you were under the influence or drugs or alcohol.

A: Yes.

Q: But James, you are under the influence of a tremendous amount of stress in your life--

A: Oh yeah.

Q: -- that has been there since at least before 1999. And you said yourself that you're just now starting to get stable again.

A: Yeah I just now started to get stable.

Q: Um, a person who went through a lot of mental problems-- I'm not saying crazy-- but a lot of mental problems, whether it's stress, anxiety, depression, or whatever, is just as incapable of making good decision and good choices as a person who is stoned--

A: Yes.

Q: -- because you're not thinking clearly. What I would like to find out, and figure out with you is what-- how did this happen? What happened that led to you and VICTIM having sex?

A: Me and VICTIM never had sex. It never happened. What has happened-- like I said-- I've been trying to-- there's a lot of stuff that even on the paperwork, I didn't write. Like I said, VICTIM has approached me, asked if I wanted to smell her. Telling me she's smelling my underwear, but sex never happened. The only thing that ever happened is I was sleeping in the living room one night and VICTIM comes in and I'm asleep, but the house was kinda hot and I was uncovered and the shorts I had on they were kind of loose and I believe my self was exposed and VICTIM was basically on me.

Q: On you how? With her hand, with her mouth?

A: Her mouth.

Q: So she put her mouth on your penis?

A: Yeah.

Q: And how long was that going on before you woke up?

A: I woke right up. I mean you're not going to sleep through that.

Q: Okay, and what happened then?

A: I told her she needed to go to her room. I mean--

Q: What did she say?

A: She went to her room.

Q: Okay, and how long ago was that?

A: That was maybe, maybe in October.

Q: Of this year?

A: Yeah. But like I said--

Q: Who have you told about this?

A: I haven't told anybody.

Q: Okay. Did the investigator ask you if there had been any kind of sexual contact or anything like that?

A: No they didn't.

Q: Alright.

A: I mean they asked me if I had done anything, but I hadn't done anything.

Q: Okay.

A: So no one- nobody asked me that.

Q: Okay.

A: I got a friend and I would tell her everything that would go on. And I told her when DSS interviewed me I told her I didn't tell them everything, and she said, "James that's your life that's going on." And I told her I said, "I'm just trying to protect the child." And she said "James you gotta- you shoulda told them everything." She said cause in the end it's gonna put you *inaudible*

Q: Yeah, and that's true, that's true.

A: Man, that's my family. You know what I mean?

Q: Yeah. But at the same time, you know, you gotta be honest.

A: Yeah.

Q: It's not about making her look bad. It's about your life. James, it's possible-- it's slim, but it's possible-- that that could have influenced how you did on the test. Um, but there is a reason I didn't ask-- and I explained to the investigator, because she and I always talk about what questions I'm going to ask you on the test. Um, there is a reason I didn't ask the question "Did you have sex with [illegible]" You remember what the question was?

A: No not really.

Q: "Did you put your penis in [illegible]'s vagina?"

A: Yes. That was the question.

Q: The second questions was basically an extension of that, "Did you put your penis in Decole's

vagina in her bedroom?"

A: Yes.

Q: So it's the same question twice.

A: Mhm.

Q: And that's just the format of how we do the polygraph.

A; Yes.

Q: There was a reason I didn't ask if you had sex with herm.

A: Mhm.

Q: Um, if i had asked "did you have sex with VICTIM?" then what you just described there would probably explain why you failed the test. But it doesn't explain why you failed the test with the question is very specific, "did you put your penis ir VICTIM's vagina?"

A: Yes.

Q: Okay, so, um-- I'm not able to accept that and just say that's why you failed the test.

A: Yes.

Q: I appreciate that you're telling me that because it is important that you're completely honest.

A: Yes.

Q: Because this-- I mean, this is not going to go away.

A: I know this isn't going away.

Q: This is a big deal.

A: Yeah I know it's a big deal.

Q: Okay, and, the thing is this. First of all, I am not giving you legal advice.

A: Yes.

Q: Okay? Let me make sure I say some things that are clear, very very clear. I'm not giving you legal advice. I'm not telling you that if you do this, then you're going to get this kind of deal, or you're going to get that kind of deal. I do not have any kind of power at all to make deals.

A: So basically what you're saying is I'm going to get charged with--

Q: Well, I'm going to talk to you about my past experience, with how long I've been doing this--

A: Yes.

Q: -- and I'm going to tell you some things that I have seen happen when certain people have done certain things.

A: Okay.

Q: Okay? Plus I'm going to tell you about my experience with doing this for so long, what I have seen happen with the criminal justice system with people who make certain choices.

A: Yes.

Q: None of this is designed to tell you that you should do this or you should do that.

A: Mhm.

Q: Those are choices that you're going to have to make. Okay? Um, do you-- first of all, every thing that has happened, should be looked at all at one time.

A: Yes.

Q: Okay? It's better to have all of the information about every single incident that has occurred so that it can all be dealt with at one time.

A: Yes.

Q: Rather than getting parts of the information, having decisions being made on that, and then later more information comes to light.

A: Yes.

Q: Because then it makes you look like you've been withholding stuff.

A: Yes.

Q: Which makes you look worse.

A: Yes.

Q: Which is kind of the situation you've got yourself in now by withholding the information about her performing oral sex on you.

A: Yeah.

Q: By not saying anything about that, it makes it look like you were hiding that.

A: Yes.

Q: Now, I understand what you're saying and I could be sympathetic with that because this is-- 90-- well, 80% of the tests that I do is for situations like this.

A: Yes.

Q: Most of the stuff that I do is going to be situations involving some type of sexual activity.

A: Yes.

Q: Okay? And the vast majority of that is going to be between adults and kids.

A: Mhm.

Q: So this is what I deal with all the time. So it's not unusual for me to hear that, that yeah-- I mean-- part of that's true, you didn't want to make her look bad. Okay?

A: Yes.

Q: But you've also got to be, you know, honest with yourself and with me. A lot of that was also you didn't want to make yourself look bad either.

A: Yes.

Q: And that's understandable.

A: I mean, I didn't want to make myself look bad, I mean-- I said my wife--

Q: Which I understand--

A: -- you know...

Q: And I understand, so I understand both sides of that, but I do believe that you were also concerned abou victim too--

A: I was--

Q: -- and making her look bad--

A: -- I was.

Q: So I believe that there was some admirable qualities in there with that, okay?. But you can't just write it off as all that. A part of it was self-preservation too. And that's not-- I'm not-- I'm not coming down on you for that. That's just human reaction.

A: I mean yeah, I said that the self-preservation was-- I didn't want to hurt my wife, and I didn't want her to think different of-- different of her daughter or different of me, you know?

Q: Right.

A: And I just said you know, I'm the man of the house and I can take care of this.

Q: Well, I don't believe that's all the occurred, okay?

A: What do you mean?

Q: I believe there has been more sexual activity occurred. The reason that I believe this has to-- there's a lot that has to go on with this-- there's a lot of stuff that I know that I have not told you about.

A: Okay.

Q: Okay? The reason that I do that-- I'm not trying to trick you.

A: Mhm.

Q: But, I'm trying to give you the opportunity-- it looks so much better on your part--

A: Yes.

Q: -- when you are the one who puts everything on the table.

A: Yes.

Q: Because when you put everything on the table, then it looks like you are truly remorseful--

A: Mhm.

Q: -- and you really do want to do the right thing.

A: I always have wanted to do the right thing.

Q: Some guys, though are going to make me push them to put everything on the table. They'll put everything on the table once they've been backed into a corner and they have no other choice.

A: Yes.

Q: For that individual, how do you look at two guys, who have both put everything on the table, the one guy puts it on voluntarily, and the other guy makes you drag it out.

A: I understand.

Q: Which guy are you gonna look at from the standpoint of being an outside individual-- which one are you going to be more sympathetic towards?

A: Um, I guess the one that puts everything on the table.

Q: Voluntarily?

A: Voluntarily.

Q: The one that brings it all out himself. So, I haven't told you everything that I already know and that's because I'm wanting you to-- I want you to take that step, because I want to be able to help you put this all down on paper so that the best possible light can be shown.

A: Yes.

Q: I don't think that you're a bad person.

A: Yes.

Q: I think that you got involved with a woman who has some kids who got some problems, and unfortunately you got sucked into those problems.

A: Yes.

Q: Um, that doesn't make you a bad person. That makes you a man who made some bad choices.. But those are not things that you can't overcome.

A: Yes.

Q: It's not things that in my opinion should dictate how you're going to be viewed for the rest of your life.

A: Yes.

Q: The thing about it is this-- and this-- you truly are looking at the rest of your life here.

A: Oh, I know.

Q: And I'm not talking about the standpoint of jail or anything like that, I'm talking about what you do right now is going to impact the rest of your life, okay?

A: Yes.

Q: If you go ahead and tell me the truth about everything, what all has happened-- I know that VICTIM-- I really don't believe that you would have done these things without VICTIM initiating them, okay? But the fact is that there has been a lot more happened between you. If you go ahead and get all of that out in the open, then everybody who has to deal with you from this point on is able to look at you in one light-- they can either look at you in this light or in that light. One way

they can look at you is: here's a man who has admitted that he made mistakes and made bad choices. He's admitted that he screwed up. He's remorseful about what he did. Here's a person that could probably be one of the few out there who would actually benefit from counseling. Who would benefit from therapy. Who can overcome this. Who is not likely to, with the proper amount of therapy and counseling and whatever else, is not likely to be a threat to another child in the future. This is somebody who can be rehabilitated. Okay? But the only time they're going to look at somebody and say "this is a person who probably can be rehabilitated" is when they can believe that that person has been completely upfront and honest.

A: Yes.

Q: And that they are remorseful, sorry about the choices that they made. Okay? When you've got somebody who gets backed into the wall, okay? This is a prime example. A case that I did about two years ago, I had a guy who eventually told me everything that he had done.

A: Mhm.

Q: And this guy had done everything.

A: Yes.

Q: But the children in this case were 6 and 7 years old, okay? It took him a long time to get around to the realization that the only thing he could do was tell the truth. Okay? He wound up– because nobody wanted to cut this guy a break.

A: Mhm.

Q: Nobody was looking to do anything for this person. This guy ultimately got the maximum sentence of 30 years–

A: Yes.

Q: -- for each child. And on top of that, not 30 years concurrent, running together, but 30 years consecutive.

A: Yes.

Q: He's going to do 30 years for the first child, and when that one's finished, he's going to do 30 years for the next one.

A: Yes.

Q: Okay? He got the absolutely most sentence that he could possibly get, and the reason was nobody believed that he was telling the truth about what happened because he was remorseful.

A: Well let me ask you this. You keep on saying that the decisions I made. It's nothing that I initiated.

Q: Well, I don't-- I understand that. I'm not saying that you did initiate--

A: Yeah.

Q: -- but you do still have a role in this.

A: Oh yeah, I understand that I have a role in it. I understand that.

Q: Now, as far as her coming into the room there, putting her mouth on your penis while you were asleep, you didn't have a decision making process there. Okay, but James, that's not all the sexual contact that there was.

A: Yes.

Q: There has been other sexual contact. And-- I know that you had sex with her. I know that your penis has been inside her vagina. That was a choice you made. Now, the choice that you made-- your thinking may have been clouded, your judgment may not have been at its best for any number of reasons. The stuff that you've been going through does impact you. See-- one thing that makes me different than your detectives out here, is that-- and a lot of times people think that I'm too liberal, okay? Or a little too easy. But it's because I know that the human brain is very fragile.

A: Yes.

Q: And I know that some people have great willpower, but the average person does not. The average person does not.

A: I'm going to tell you what happened.

Q: Okay.

A: We had a get together at our house, and I had been drinking, and I believe me and my wife, we got upset with each other. I slept in the living room. When I slept in the living room, I mean-- the other time I was in the living room is when she tried to perform oral sex on me. When I was-- you know, well aware of what was going on--

Q: You were sober.

A: Yeah. But this particular time, when that incident happened. VICTIM had come in-- you know, she didn't have no clothes on period. Like I said, a lot of times-- a lot of times I sleep naked, and most of the time when I sleep naked, I have a hard-on all night, and she came in there and got on top of me.

Q: This is the night that you were intoxicated?

A: This is the night I had been drinking.

Q: That you had been drinking.

A: And actually, when I woke up, I whooped VICTIM on that particular night.

Q: So you woke up, and she was having sex with you?

A: She was on there.

Q: When you say "on there" are you talking about with her mouth or with her vagina?

A: With her vagina.

Q: Okay so she had gotten on top of you and put your penis inside of her vagina?

A: Yeah.

Q: Okay. When--

A: I want to say my penis wasn't inside her-- it was like, on her lips, like. It wasn't--

Q: How do you know it wasn't already-- how do you know she wasn't on the upstroke?

A: I can't say she wasn't on the upstroke.

Q: Right.

A: I can't say that.

Q: Uh, when did that happen?

A: That was probably also in October.

Q: Okay. Alright.

A: All these-- all the stuff kinda started happening when-- you know, she made them comments about the underwear or about the *inaudible* a long time before this came around and all the other stuff-- you know, she would-- she might come through the house with no drawers on-- I mean,

with panties on and I would tell her "hey go in your room and put some clothes on." I mean, her mama has been witness to that.

Q: Right.

A: And um, I mean, that's the kind of little stuff she would do.

Q: Mhm. Okay, and, I already knew going into it that that was going to be a lot of the situation was, that she was going to be doing stuff like that. Not because I know VICTIM but because I've been doing this long enough to know that's how this stuff works. These things go that way.

A: But the only thing-- I kept telling her mother. I'd say-- and the mother didn't know why I was pleading with her-- you need to do this, do that–

Q: You're in between a rock and a hard place.

A: Yeah, I was in a rock and a hard place for real. It looks like I still am. I told my wife I say, if-- when all this stuff-- I say ain't nobody-- cause I knew the child. I knew the child by going to school, seeing how she dealt with adults, or how she was trying to be controlling at school, how she was trying to control things at home, and I said, you know-- I just know the little girl.

Q: Okay.

A: But like I said, it's nothing that-- where I had to make a decision and say "I'm gonna do this" or anything like that. That wasn't the case.

Q: Well, James, the situation that you're in is-- is like this. Um--

A: But I was communicating to everybody what had been going on, but I just didn't tell about those two incidents because I figured that-- I was always hoping that the mother would get a grip on the daughter. That's what I was hoping. I never figured that all this would come-- I'd let it come to this.

Q: Okay.

A: Was the child trying to put me over a barrel.

Q: Well, this is the kind of situation that you're in. The solicitor's office is going to have to evaluate what they're going to do with this. They're going to have to decide what they're going to go to the grand jury with. What they're going to try and get an indictment for. What they're going to

prosecute you for. Okay? Their decision is going to be based on whether or not they feel like you've been completely upfront with them.

A: Okay.

Q: Um, these are not people who uh, are blind to the ways of the world--

A: I mean--

Q: -- blind to the ways of kids. They do know that girls will do certain things. Okay? But, when they've got still, two divergent stories, if they can't reconcile that, then they're going to have to go with the one who is most credible. Okay? Now in this situation, what VICTIM has not said, was anything about sex on the couch.

A: Mhm.

Q: She said the sex has occurred in her bedroom.

A: Yes.

Q: Okay? Now, of course, she's going to frame it in the light that it was all forced on your part. Okay? Which may or not may not be true, but that's her story. Now she's got it all going on over here in the bedroom.

A: Yeah.

Q: And yours is over here on the couch--

A: It's in the living room, I was on the floor--

Q: Okay. Living room, okay? Couch or whatever, it was in the living room. So you've got these two different-- you still got two different stories here. Now the thing that plays against you here is that-- first of all you should have talked to the mother and told her what was going on in the beginning.

A: Yes.

Q: But you didn't do that.

A: I didn't do that.

Q: I can step back, from an outsider viewpoint and say that I understand-- not a very smart decision, but I can understand how you came about that decision.

A: Yes.

Q: But then, when it becomes a police matter, and you're talking to an investigator, you should have been telling her the truth.

A: Yes.

Q: Okay? Then when you come in here with me, and I ask you "Is there any kind of sexual contact?"

A: Mhm.

Q: And I ask you "What is sex?" I even let you describe it for me. I talked about penis in vagina, penis in mouth, fingers. We talked about all of that. I asked "has there been any kind of sexual contact?"

A: Mhm.

Q: You told me "no."

A: Yes.

Q: So you've got active lying on your part.

A: Yes.

Q: Okay? I'm not mad at you about it, but that's just the way it is.

A: Yes.

Q: So when the solicitor's office has to step back and evaluate-- who are they going to be looking at as being the most credible, you've already put yourself in a situation where you have lied.

A: Like I said, you got to understand that my life ain't been stable--

Q: And I do--

A: -- since '99; and I wanted my life to be stable, and I love my wife, and I knew that me and her could be stable.

Q: And that's what I'm saying. The decision that you made, not telling your wife-- in hindsight, it's not the best decision, but I can be sympathetic with you.

A: This is what I want to say. I knew we could be stable, but I knew also we had this child, you know what I'm saying, that could tear things up. I mean, like I said, I done asked her that the child

be sent away; and I said I done think that's in her best interest. We talked about that more than once. But like I said, I didn't want the child to go somewhere and get worser off than what was already going on. So...

Q: And, so--

A: I guess my role was just to protect, man.

Q: But you can understand though, the situation that leaves the solicitor's office in.

A: Yeah.

Q: Are they going to be able to look at you and say "Well, he's told us this, so we're going to believe everything he says"?

A: Yeah.

Q: When VICTIM is still saying that "No, this happened this way."

A: Yeah.

Q: Okay. It puts you back in the situation of-- they're not able to comfortably, ethically decide "this is what we can do."

A: Yeah.

Q: And to come back to you and come back to your attorney and say "this is what we are willing to do." Because they won't be able to do that because they don't feel like they've gotten the truth.

A: I mean the only thing-- well-- the only thing-- I do go down in VICTIM's room-- sometimes I have to go down there more than once, at night. So like I said, one time I went down there and she was in her room, and basically messing with herself-- that's what she was doing. Like I said, when I seen that, she would stop and I'd say "hey you need to turn off your TV and go to bed." And she turn it off and went off to bed. But I believe-- that the hall is messy-- so what I believe that-- really she had always knew that I was coming down this hall--

Q: It wouldn't surprise me. James, I'm going to have to fall back on human nature. This doesn't have anything to do with you as a person, I'm not in anyway trying to make an assumption about you as an individual, okay? This is human nature. HUman nature is this, even if you didn't have alcohol or drugs or any other kind of mental problems in your life-- you're not going to see a whole lot of

studies of this, because it's a hard thing to do a scientific study on-- but when a man has an erection, you know what causes an erection?

A: Yes. Blood.

Q: It's blood. Okay? Blood fills up to make you rigid.

A: Yes.

Q: For that to happen, blood has to leave other parts of the body. One of the areas that normally has more blood flow to it is in the brain. Have you ever seen someone get cut on the forehead? They bleed profusely.

A: Yes.

Q: Tons of blood, because you've got a ton of blood in your head. When a man gets an erection, a large portion of blood has to go to his genitals to cause an erection. Depending on how large a man is, it's going to take more blood.

A: Mhm.

Q: A lot of men make really bad choices when they get an erection. Now, this is-- I know you've heard this statement before, and it sounds funny, but there is some scientific basis behind it. You've heard of a man thinking with the wrong head?

A: Yeah.

Q: So we know what that means, and it's funny. But it's also scientific in nature. Because when a man has an erection, this brain, this head, doesn't have a normal amount of blood flow to it.

A: Yes.

Q: More blood flow is going down, and he's not thinking the same way he would--

A: Yes.

Q: -- when a man has an erection. In this situation, you've got this girl coming on to you, making herself readily available to you.

A: Yes.

Q: She is offering herself to you verbally, and has offered herself to you by putting her mouth on your penis, by getting on top of you and putting your penis in her vagina. She has made herself available

to you.

A: Mhm.

Q: Human nature kicks in at that stage. It's going to be hard for you, once that line has been crossed, okay? Whether she crossed the line or you crossed the line, once that line has been crossed, you can't unring that bell.

A: Yes, I know that.

Q: It's already been done. So, once that line is crossed, the barriers, the taboos, or anything else that would stop you from doing it aren't there anymore.

A: Okay.

Q: James, I believe that there has been an ongoing sexual relationship with you. I'm not saying every week. I'm not saying every night.

A: Yes.

Q: Okay? But this has been more than the one time with her mouth on your penis, more than one time with her climbing up and mounting you. Okay? There has been an ongoing sexual relationship here. I don't believe it was initiated by you. I don't believe that you married Danette-- Danette, right?

A: Danette.

Q: -- with the idea of getting into [redacted]'s pants. I don't believe that you had that. Some men do, but I don't believe that's the kind of man that you are.

A: No.

Q: But once that line was crossed, once she made herself available to you, and she crossed that line, the barriers aren't there anymore. And that's why I believe that there is more to this. That there has been an ongoing sexual relationship. At this point, James, I got to tell you that it really doesn't matter. Okay? At this stage it doesn't matter who started it. At this stage it doesn't matter if it was one time or 100 times, okay?

A: Yes.

Q: The fact that it has occurred at all, is-- and, because you didn't come upfront with this in the

beginning.

A: Yes.

Q: You made yourself look bad denying it when you had the opportunity to tell the truth. So at this stage, it really doesn't matter if it was 1 time or 100 times, it doesn't matter anymore at this stage whether it was her starting it or you. Where you're at right now, is that you just need to get all of it out in the open. So it can all be dealt with. It's not going to change anything, as far as making you look worse, or making you look-- it would make you look better from the standpoint that you are not withholding anything anymore.

A: Yes.

Q: And once a person has got to a point where they are completely open, then you can start to rebuild.

A: Yes.

Q: And then you can start to build with that.

A: Yes.

Q: James, what I'm asking you to do is to think about this for yourself. Don't do it for me, because-- you know, at the end of the day, I will-- tomorrow I'll do another polygraph on somebody else.

A: Yes.

Q: It'll be another day. Okay? I'm asking you to think about yourself and your future here.

A: I mean that's what I always think about--

Q: Okay.

A: -- I mean ever since I got with Danette.

Q: But you need to-- I'm asking you to go back. Just tell the truth about everything.

A: Yes.

Q: This has been an ongoing thing. This wasn't a one time thing. Okay. Just get it all out in the open now.

A: Yes. Well like I said, I mean-- it was on the floor. I mean about the-- about her putting her mouth on me and about her climbing on top of me. But it was always just advances-- you know what I'm

saying?

Q: Mhm.

A: That's mostly what it was. All advances. I mean she would try to-- you know-- sometimes she would go, like, in our bathroom and you know, and basically just expose herself-- you know what I'm saying? As far as-- as far as taking off all her clothes, you know what I'm saying-- and letting me see her.

Q: Mhm.

A: Not far as coming in front of me and letting me see her--

Q: See this is what--

A: -- she would leave doors open and stuff like that, and all that stuff, it used to make me uncomfortable. I mean--

Q: I mean, James, this is the part that-- because this is what I do all the time-- this is that part where I start to see-- it's just, it's almost inconceivable. I don't see how you could have resisted.

A: Yes.

Q: You know? I mean, you're a man. When a woman keeps putting it out there in front of you, eventually a man's gonna take it.

A: Mhm.

Q: And that's what I'm saying here. At this point it doesn't really matter if it was just what you said, just those couple of times, or if it's been going on for 2 or 3 years and it's been 100 times.

A: I mean, I don't know what you want me to say. I told you exactly--

Q: If that's all there is, okay, fine.

A: Yeah, I told you what happened. She--

Q: But what I'm concerned about is if you don't tell everything--

A: Yeah.

Q: -- that other things are going to-- (*aside*) Jason I'm in a polygraph, I have to call you back-- keeps calling me. Um, what I'm concerned about is that other things are going to come up that's going to make you look bad.

A: Yes.

Q: And if you don't tell the truth about everything-- I think you eventually will-- it's either going to be today or it's going to be sometime down the line. The problem is if you wait to do it down the line, it's going to look like it was forced.

A: Yes.

Q: Where you only made this decision because you didn't have anywhere else to turn.

A: Yes.

Q: In my opinion, based on years of experience, I think that you do yourself a better turn by getting everything out in the open upfront.

A: Yes.

Q: And that's what I'm asking you about here. James, I believe that this has been going on for awhile.

A: Mhm.

Q: I believe that you have been having a sexual relationship with her that has included full course vaginal sex and that it's been happening numerous times.

A: No, I'm going to tell you I never had full course vaginal sex with Danette-- I mean VICTIM. Never. It never happened.

Q: Okay. What do you call full course vaginal sex?

A: My penis in her and it's going in and out.

Q: Okay. I'm not talking about 15 or 20 minutes of sex, I'm talking about your penis has been inside her.

A: I mean on that particular night I described to you. I mean I said to myself it's quite possible my penis could have been inside of her. Yeah. I said it's quite possible.

Q: But I don't believe that's all there was to it. I don't believe that it was just that one night. I believe that there's been more nights than that. And see, she's describing-- she's describing completely other situations.

A: Yeah.

Q: She's describing this as being going on in her bed.

A: Mhm.

Q: In her bedroom--

A: Yeah.

Q: -- multiple times.

A: Yeah. But VICTIM don't sleep in her bed by herself. Her sister sleeps with her. Her sleeps with-- her sister sleeps with her every night. And then on top of that, I mean, the bed stays cluttered, the room stays cluttered, I mean--

Q: Okay. Well, I don't-- I mean-- I'm not going to-- I'm trying to beat you over the head with it. Like I said, at the end of the day, you're the one who has to make the decisions for what you've got to do. And you're--

A: Yeah. I mean this is what-- it seems like it went from one thing to another. It went from did I put my finger into her vagina, did I put my penis in her vagina to now, I'm having full fledged sex with VICTIM and I'm like man-- you know-- how'd it get from me putting my finger in her to now it's full blown sex?

Q: The allegations always been that. I'm not sure about how Detective Aldridge questioned you or whatever--

A: That's not what I was told. The allegations were that I put my finger inside

Q: Who told you that?

A: They asked me that down at DSS.

Q: I mean I can't-- how DSS-- what DSS said and everything else, I have no--

A: That's the only time I've been interviewed. And they asked me did I ever put my penis inside VICTIM and I said no, I never put my penis inside VICTIM-- like I told her to lay down--

Q: Well tell me about your finger in her vagina-- what is that about?

A: I don't know. Like I said that's what they initially asked me. Like I said I never put my finger in-- let me explain. The situation was that we was wrestling-- me, her brother, and VICTIM And in the midst of us wrestling, I was supposed to put my finger in VICTIM.. That was what--

Q: Supposed to have? Or did?

A: I didn't.

Q: Oh okay.

A: So that was the story-- that's the story about the time I was supposed to put my finger in her. And, about me putting my penis in her vagina, that was-- they just asked the question. But I know it was specifica about did I ever put my finger in victim while we was wrestling.

Q: Okay. And you said you had not?

A: No, I didn't... I mean just because I hadn't come upfront and told you everything that had happened, I didn't try to hide-- the fact that, you know, I came here and took the polygraph, I was just trying to protect the child. Some of it had to do with, you know, protecting myself too. And I knew if it ever came down, that I would get all the heat.

Q: You have to bear with me just for a minute. I want to refresh my memory on something.

A: Okay.

Q: Can I get you a drink of water?

A: I got a soda.

Q: You got a soda? That's still your water cup, by the way.

A: So I'm like man, what am I supposed to do? I want my life to be on track, I'm doing everything I can to get it on track...

Q: So where does Danette stand in all of this?

A: What's her stance?

Q: Yeah. Does she believe you or does she believe--

A: I mean, she believe I wouldn't initiate anything like that.

Q: Now granted, she doesn't know about the oral sex, she doesn't know about the vaginal--

A: No, she don't know about those two incidents.

Q: Okay, but as far as the allegations that you have-- the initial allegations going into it, that you put your finger in her, that you put your penis in her-- what does she believe about that?

A: I mean she standing behind me, that she don't believe that, just because she knows the history of

VICTIM.

Q: Okay.

A: I mean like I said, anything that that child does, it's never her fault. If something happens in school, VICTIM comes home and we question her, it's always the teacher's fault or it's the other child's fault.

Q: Okay.

A: It's always been the situation.

Q: Well, now you told the people at DSS that the play wrestling and stuff-- that the allegations were that you put your finger in her vagina, and you said that wasn't true.

A: Yeah, that's not true.

Q: Okay. Now, when your wife talked to them-- she states that her daughter told her that James had put his finger in her sometime last year.

A: Mhm.

Q: She states that they were wrestling and giving wedgies and he put his finger inside of her. She states that he is tall and has long fingers and if you do something to him, he will do it back, so he is not beyond hitting her. She states that James told her that he and VICTIM were play wrestling and giving wedgies and that VICTIM "accidentally" put her finger in his rectum while they were wrestling and that he was going to do it back to her and he "missed her rectum and got her front."

A: No that wasn't-- let me tell you exactly what was said about that. Now, I told VICTIM-- I mean I told Danette about what VICTIM had done, and I felt it was a mistake and VICTIM -- VICTIM told her mother about what happened. Danette asked me, I told Danette that VICTIM had put her finger in my rectum and then Danette said "Well James," she say-- it was almost something like-- but I know, if she done that to you, you the type of person, if someone does something to you, you gonna do it back to them. And I said "what?" but how you read that off it's reading like I actually done it back to the child, on purpose--

Q: That's what-- that's what Danette told DSS.

A: Yeah.

Q: She said that--

A: But I'm telling you--

Q: She told-- that you told Danette-- this is Danette saying "James told me that he 'missed her rectum and got her front'."

A: No, no. That was-- man, that was over maybe a year ago and I still remember the statement, you know, as it was today. I mean--

Q: But you understand--

A: -- based on what she said--

Q: -- this is what--

A: -- it makes me look bad--

Q: -- this is what Danette said--

A: Yeah.

Q: -- that you admitted to her that you put you finger in, but it was an accident--

A: I did not tell her--

Q: -- if it was an accident, I need to know that.

A: Yeah, but I didn't tell her that--

Q: Why would she say that? She is on your side. She's trying to protect you.

A: Yeah, but, let me tell you something. I don't know where she got that-- confused that she saying that I told her I did. I mean, if I did I would sit here and tell you-- I mean, I told you about the other stuff. I would say "yes I did and it was a mistake." But it didn't happen like that. I told her what [redacted] did-- like I said, [redacted] first told--

Q: So [redacted] put her finger in your rectum?

A: Yeah.

Q: How does that happen?

A: I mean--

Q: How does she get near your bare anus?

A: Man, like I said, we was wrestling and-- and it just happened. I can't tell you how it happened. I

mean I can't describe it, I mean she was trying to give me a wedgie, I was trying to give her a wedgie, and--

Q: You think she put her finger in your rectum intentionally?

A: I didn't think that. I didn't think that at all. All I took it was--

Q: Then how are you certain that your finger didn't go in her vagina?

A: Because--

Q: You were doing wedgies with her.

A: I didn't have my fingers down-- I had my hand here-- trying to-- not, in front.

Q: But what I don't understand is-- I mean, your wife is very clear.

A: Yeah.

Q: From talking with the investigator, she is very clearly trying to support you.

A: Yeah, and I mean that's--

Q: So, I don't understand why she is going to go to DSS and tell them that you told her that you were trying to put your finger in her rectum and missed and got her front.

A: I-- my hand before God, I did not tell my wife that.

Q: Okay. But, you said, it made you look bad, right?

A: Yep. I'm thinking that something that-- she got confused-- when that happened, I'm gonna tell you her statement to me, her statement to me was "James I know when somebody do something to you, you gon' do it back to them"--

Q: Which is consistent with what she's told DSS.

A: Yeah and I said what are you talking about, and actually that was the end of it. I told her that that didn't happen and she said what she said, what I just told you "I know if somebody do something to you, you gon' do it back to em" and that's not my character to do anything like that. But that makes me look bad.

Q: Yeah, it does. It does.

A: But like I said-- it makes-- the only thing I know, like I said-- I'm gonna put it like this. This is my wife. I done caught my wife doing some things, like sending emails to guys. Cause we had

problems at first, she said she was going to change her email address-- no, not email, she said she was going to change her home number and she was going to change her cell phone number so guys wouldn't call. So I said to myself she didn't say nothing about emails, cause this female, you know, she's-- she works with computers everyday. So I sit back and I waited just to see what would happen, and I asked her about this one time. She always had a different story about what happened. I mean she wouldn't really tell-- it was like she was forgetting what we talked about-- you kinda understand what I'm talking about? And it was always something different, and I said "that ain't what you told me way back-- way back when." I mean I just didn't have stress from the children, i had stress coming from her too, you know what I'm saying? And, like I said, that-- that never happened like that.

Q: Alright. James, well what I-- what I think you need to do is-- we need to-- you gave this one statement to the detective--

A: Yes.

Q: -- that you clearly didn't include everything.

A: Yes I did.

Q: And you clearly did look at me and lie to me when I asked you about sexual contact.

A: But-- okay--

Q: So, I understand, now you can rationalize it out and say "well I didn't initiate it or whatever" but I didn't ask you who initiated it. And when you're getting ready to take a polygraph, I think it's very important that you be completely upfront. That's why I gave you that opportunity to be upfront with everything. Um, you got this one story-- this one statement that says absolutely nothing has happened. This is up to you, but I think you need to provide a new statement that clearly shows what VICTIM has been doing, what she has been-- how she has been trying to lead you on, how she came in the room and put her mouth on you, how she came in on another day and mounted you and got on top of you. Okay?

A: Even before I took the polygraph-- I mean, it was obvious that I didn't tell everything because I put on there, I wrote it up about her asking me if I wanted to smell her cookies, her smelling my

underwear. I had an opportunity to tell DSS that then, and you know, I said, you know, I'm trying to protect the child. You get what I'm saying?

Q: And that's why I'm saying-- you know, now you have the opportunity to provide a statement that says "I did not say all of these things, this is the reason I did not, I was trying to protect [redacted]. I didn't want to make her look bad." You have the ability to provide a new statement that shows this is why.

A: Well once all this stuff escalated, and you know I told my friend about it, she said "James you need to tell them everything 'cause this is your life." So I sit in there, my hand forgot-- I started not to write that on that paper-- I started not to write that on that paper about the cookies and the smelling all the underwear, but I said you know this is my life at stake, I gotta-- you know, like I said-- none of that stuff *inaudible*

Q: Do you want to provide a corrected statement now that has the truth in it now?

A: Uh, yes. I mean-- I'm not trying to do no 30, 60 years. I don't know what a sentence like that is--

Q: Okay, and you understand I'm not threatening you with 30 years of 60 years, that's not what I'm doing.

A: Yeah--

Q: I told you those girls were younger.

A: Yeah. What is a sentence for something like that?

Q: This would be-- that was a first degree-- I'm guessing this would be a second degree, if not a third degree, which would be anywhere from zero to I think twenty. I think it's 20.

A: I didn't do anything.

Q: I'm not, I'm not-- like I said, it's anywhere from zero. It could be zero.

A: But I mean, I'm going to get pinned with this anyway. That's how that's going to be.

Q: Well listen, as far as the statement goes, a lot of times, um, a lot of times, guys will ask me to write the statement for them because a lot of times-- emotionally it's a little tough to think at this time, to get your words down and everything. To have somebody disinterested to put it together is sometimes a reason that others will ask me to do it. Another thing is that if you want me to write

it, I'd be glad to write it for you. If you want to write it that's fine too.

A: Okay.

Q: But, if I write it for you, I will not write down anything that you don't tell me to write down. Additionally, everything that I write down, I will read back to you to make sure that it's accurate, and initial that it's accurate before we move on. So I won't write down anything that you don't want me to write down. Okay?

A: I'd rather for you to write it cause I can't hardly function right about now *inaudible*.

Q: Okay. Let me refresh this-- get you a cold glass of water.

A: Oh, I'm fine, I'm fine.

Q: Okay, well I'm going to go get a drink of water myself.

Dan Morgan exits rooms

Dan Morgan returns

Q: Got you some cold water at least.

A: Okay, thanks. You think they'll try to charge me with this even though I didn't initiate nothing?

Q: Um, the only things you got going against you is that you weren't completely upfront. That's what I see going against you at this point. But a lot of that's going to depend on whether or not they feel like they've gotten the complete story from you.

A: Yeah. I'm going to start from the part with the oral sex, if that's fine.

Q: Well, if you let me kind of walk you through it there. Because this-- I do this all the time, so I know what kind of flow you need to have with it.

A: Okay.

Q: *inaudible* everything. Uh, let me get-- what's your full name? James...

A: James Benjamin Irby.

Q: 38. And your address?

A: 683 *inaudible*

Q: Street?

A: Street.

Q: Spartanburg?

A: Mhm.

Q: Zip code?

A: 29306.

Q: 306? Phone number?

A: .

Q: Date of birth?

A: .

Q: Social security?

A: .

Q: Okay. Whenever I'm starting off a statement-- well, the very first thing I'm going to write here is that I have asked Sergeant Daniel Morgan to write this statement for me because, as I think your words were, "I'm just barely functioning right now." That you just don't feel up to writing it yourself because you're barely functioning right now.

A: I couldn't write it because I'd be real nervous, misspelling words--

Q: So I'm going to write out that-- first of all acknowledging that I'm the one writing it--

A: Yes.

Q: -- at your behalf. I'm also going to put in there that I've told you that I'm not going to write anything that you don't want-- tell me to write and I'm also going to give you the opportunity to review every paragraph before we move on.

A: Yes.

Q: Okay?

A: About that fingers in her vainga, I don't think she told DSS that, I think she told the cop that night.

Q: That's in the DSS report that's written by the DSS person.

A: Okay. That ain't the way that happened. I don't think she would-- we'd have had problems with that.

Q: Follow along here. *Reading from statement* "I James Irby have asked Sergeant Daniel Morgan

to write this statement for me because at the present time I am not feeling up to writing it myself. Sergeant Morgan has assured me that he will not write down anything that I have not told him, and he has told me that I would be given the opportunity to review each paragraph for accuracy before moving on to the next paragraph. I will acknowledge this first paragraph with my signature and each paragraph after that will be verified by my initials." So if you'll just sign that first paragraph. Okay, the first paragraph that I usually do here is acknowledging that I gave a statement earlier that did not include the complete truth; there were some things I left out; also I had the opportunity to tell the truth with Sergeant Morgan the first time I talked with him, but I did not. I lied to him upfront about sexual contact. The reason that I lied was one, you didn't want to defame Decole's name by saying what she had done, plus you were also scared about how it was going to make you look.

A: I mean--

Q: I mean if that's correct. Was that you reasons for not telling me?

A: I mean i didn't want to look like, you know, I had done something you know, a lot.

Q: You were afraid of the perception that-- you were afraid of what we would think of you if you said that--

A: Yeah. I was afraid of what my wife would think if she found out, and you know, what you all would think if you found that out, cause man, before this-- cause like I said I been going through this stuff for God knows how long. And like you said, self-preservation, my self-preservation was trying to get my life back on track.

Q: Okay. So what I'll put is that when you lied the first time and didn't tell everything it was because one, you didn't want to make VICTIM look bad, and additionally you were scared of how people were going to perceive you, or what they were going to think of you if you told everything that had happened.

A: Yes.

Q: Okay.

A: Not just people, my wife too.

Q: Well instead of saying "people" I can put down "how my wife, and how the police would look at me and view me if I told them everything that had happened."

A: Okay.

Q: In hindsight now, do you regret that you weren't honest upfront? Do you wish that you had been honest? Basically I'm asking you would you like to say that "I'm sorry that I wasn't honest in the first place? And in hindsight I wish I had been?"

A: Yes. I mean I wish I would have told my wife what had happened, and when it came down to DSS I wish I had told them upfront everything that had happened, and also in here I wish I had told everything that had happened, and it might have been a different outcome for the polygraph we was doing. I tried everything possible to make that situation with me and my wife and the kids and work situation.

Q: Okay, this one here--

A: Can I make another statement? *inaudible* I told DSS that I didn't-- they asked me if I had my own business. I told them I didn't. The only reason I said that, I'm trying to get my life back and I said "dark, if I tell them, they'll know I'm making more money than what I am, then they'll try and get this little bit of money too." I was trying to put my family in a better situation, you know what I'm sayin? That's all there was to it. Ever since '99 to now, it's been "gimme, gimme, gimme" I don't have it like that. I mean, it's--

Q: What do you want me to write? I'm trying to figure out how you-- you want me to boil that down into a statement. What is it you want me to say?

A: I told DSS I didn't have my own business when they asked me, and that wasn't the truth, but actually I do. But I didn't want them to find that out. 'Cause I asked my wife I said "How do they know that?" 'Cause I didn't want them to find that out and just take more income from the family. I said "I'm gonna find me a job and pay my support, what I'm supposed to pay, but my money over here is for the household and for us." Basically what I'm trying to show you-- every decision that I was making was to watch out for my family. I guess they were bad decisions.

Q: Let me read this to you and you tell me if we should add something to it. "I want to start by

acknowledging that I made a statement earlier today that was not completely truthful. Additionally, when I was speaking with Sergeant Morgan earlier I lied to him about the extent of the sexual contact between VICTIM and myself. I withheld this information for two primary reasons. One reason was that I didn't want to make VICTIM look bad by telling what she had done. The other reason was that I was scared for myself and I was afraid of what my wife and the police would think of me and how they would view me if I told them everything. In hindsight, I wish that I had been completely honest with everyone upfront. I'm sorry that I was not completely truthful from the start." I'm going to get you to initial by that scratch out there. "I was even untruthful at DSS in regards to them asking if I owned my own business. I lied to them and told them that I didn't because I knew that they would try to take what little bit of money I had for my back child support. I lied about this because I was looking out for my family and I wanted to provide for them." Is that good? Let me get your initials there and by that scratch out there. Okay. So now we'll address how VICTIM has been coming on to you and making sexual advances towards you for how long would you say that's been going on?

A: Maybe about two years.

Q: Okay. For about the past two years VICTIM has been making sexual advances towards me, by making sexually suggestive comments, and by letting me know that she was available to me sexually if I wanted it.

A: Yeah, it started out as just, you know, gestures you know lie, smelling on the cookies, and her smelling my underwear. It started out like that. Yeah, and um, then it went from-- like I said, I got-- it went from that, and then it went from-- like I said, she threatened me one time about all the dolls, how they dating, and that was around back the same time she made those comments. And um--

Q: That was about 2 years ago?

A: Yeah about 2 years ago. But I was-- DSS asked me-- I told DSS anytime I went down that hallway to tell them children to turn off their TV-- because I didn't just go to her room, I'd go to the son's room too, because they would leave TVs on all night. I said I would tell my wife, and the

reason I would do that is because of the threat that VICTIM had made about her dolls and how they date. I said there ain't no telling what this child is capable of saying. I say, well why should I be afraid to go down this hallway or anywhere else in this house, so you know, um--

Q: Okay. Um, after-- what did it progress from, from the comments? What was the next level of suggestiveness or advances on her part?

A: Maybe coming through the house maybe with just panties on. Um, like I said, a whole year had went by. Like I said the second year, I knew she had never done that, smelling on the cookies, smelling all the underwear-- now she coming through the house with just panties on. You know what I mean? Maybe like, if I didn't know she was in the bathroom, you know-- I would always try to keep her out of our bathroom. Tell her, I say "you got a bathroom down the hall." She'd be in our bathroom for no particular reason. Maybe, you know, with her shirt off or whatever, something like that. It went from-- it just progressed. It went from comments, to walking around in panties, to maybe her being somewhere where I could see her body. Like I said, the room situation where she knew I was coming and her messing with herself, and that's how it progressed.

Q: Okay. Did she ever make-- other than the cookies and stuff like that-- did she ever make comments about her telling you "I want you to have sex with me" stuff like that?

A: I'm gonna tell you what she did one time. I took it as playing. We was in the living room and she had on shorts a what she literally did-- she nearly-- we would play all the time-- I didn't take this as playing. She nearly jumped on me and wrapped her legs and arms around me and the way she did it, it made me feel kinda like it was sexual, you know what I'm saying? And I pushed her off of me and she tried to come at me again-- she tried to make it seem like ti was playful, but it didn't feel playful.

Q: Alright. So were there ever any direct comments where she said "I want you to have sex with me" or something like that? Or she offered sex to you, offered blowjobs to you? Did she ever make any direct comments like that?

A: No, only the comment about if I wanted to smell her cookies; and how I took that is, you know, if

I'm going to smell your cookies you're going to take off your panties or your underclothes and I'm gonna get between your legs and smell you, you know what I'm saying?

Q: Right.

A: And that right there said a lot to me, you know what I mean? Because when she said that, I said--

Q: Well let me ask you this, were you initially trying to write this off as just playfulness, and then eventually it dawned on you that it wasn't play?

A: Not about the cookies. No.

Q: But you said the cookies was the first thing she did.

A: The cookies was the first thing she did. I took that serious.

Q: So the whole time, all of this, you've taken it as being serious. That she actually meant it?

A: Yeah. Cause like I said, I took it as, if you smelling my underwear, you must want to see more than that. I think if a man's smelling a woman's underwear, he wants to have sex with her. And that's what it translated to me. I didn't ask her what that meant. That's what it translated to me when I looked at it. But these comments that I'm making to you now, I told my mother about them. And also, I don't know if you can put it in that paragraph there, there's another thing I had told her mama about. I told her mama "hey, you need to start going through your children's things." I said "because I went through your daughter's pocketbook," and I said "I found a note that she wrote in there talking about she need to buy some kind of sex toy."

Q: Who was this note to?

A: It just said "I need to buy a sex toy." That's all it said. It didn't have who it was to or anything like that. I was just trying to get her mother to get more active in what's going on. Start going down the hall, start going through the children's things. Cause they felt if I went through their things, the first time I did it, they said I violated them. Like I said, when I came down there, started changing up the whole program, none of them children took to kindly to it. The oldest two didn't. They were doing what they wanted to do.

Q: VICTIM's only 13 years old right?

A: Yes.

Q: She's being sexually inappropriate for a number of years now?

A: I say it all started maybe about that second year-- two years.

Q: Two years now?

A: I mean even the statement that-- when I sent Danette down the hall-- about catching her son with that little girl, we also talked to VICTIM and like I said-- the little said that VICTIM told her that I told her it was okay to go in the room and have sex with the boy. When we talked to VICTIM that's what VICTIM said she done said and um, what else did she say? She also made a comment um, that when her and the-- her and the brother and the girl was having sex she was basically at the door watching. Like, I mean, like I said that to me-- that's what she wanted to happen between them. She wanted to watch, cause she was doing that day-- you know they was out playing and everybody had went to the park, and even at the park and they was--

Q: *Reading* "I have been with my wife Danette, VICTIM's mother for about three years. For the past two years VICTIM has been making sexually suggestive comments and sexual overtures towards me that made it clear to me that she was available sexually if I wanted it. The first thing was comments such as telling me that she has been sniffing my underwear and asking me if I wanted to smell her cookies. I knew that this was common slang for a woman's vagina and that she was asking me if I wanted to put my head between her legs. Her comments progressed to more overt actions like walking around the house in her panties and making sure that I had opportunities to see her naked. She would do stuff like come into the bathroom when she knew I was in there and she would have her shirt off. One time she was in her bedroom masturbating when I walked in. I am sure that she was doing this with the intention of me seeing her because she would have been able to hear me coming. I also found a note in her pocketbook one time that she needed to buy a sex toy. VICTIM is only 13 years old but she has been acting inappropriately for about two years now."

A: Yes. *initials* You were asking me about my wife's standpoint. I'm gonna tell you about that situation right now. My wife claims she ain't never been with a man that really gave her the time of day, you know what I'm saying? As far as-- it's hard for me to communicate with my wife.

When I talk to her or ask her questions she'll look at me like a deer in headlights. She acts like she don't understand some things, and I asked her why it's like that and she says "I ain't never had a man that I could talk to." So i said well, even in our marriage counseling, it came up and I told the pastor that this is a problem in our relationship. Also the other problem was-- if it was with her parents, with baby daddies, I'm gonna make it point blank-- any given situation that went on down there, I had to be a man and stand up for the whole family. She never had my back. I mean the baby daddy, he was causing problem with her. I told her, I said he's a monster, keep him away. If you keep feeding a monster, it's gonna grow. She listen to what I said, and eventually he stopped coming around, he stopped calling. THe parents, they was a problem. If we was trying to discipline the kids-- one time I disciplined VICTIM, they tried to turn around and say I child abused VICTIM and they was gonna call the cops. I told them to do what they had to do. I told them I do what I do because I love the child and I don't want her to get to far out of hand. And they weren't doing that. Nobody was doing nothing. The children was just on autopilot. That's how they was. Even with the next door neighbors. We had problems with the next door neighbors. That trailer that we stay in, it's not in Danette's name, it's not in Danette's name. And we was having a land dispute, and the next door neighbor, they was saying her land was on they trailer. And it even got to the point where we was out there working and I was trying to cut down a tree or anything, they wanted to get verbal. And actually it got violent. It finally came to the point where I had to fight the next door neighbor, cops came-- they came on our land, I didn't come on his land. He came over, we got in a fight, and the whole time Danette was out there, it was like I was out there by myself. I mean, it was like that with the baby daddy, she was out there on the road-- she was out there on the road, and we was in the house. It was dusk dark. I heard someone out there cussing. It sounded like they was cussing each other out. So I looked out the window, it was her. I told MINOR 4 let's go out there and get your mama. I did not go out there with the intentions to fight. I mean, all my past history stuff, it's been violent. I'm trying to change man.

Q: Mhm.

A: So I didn't go out there with the intentions to fight. I went out there with the intentions to get

Danette to tell her to come on. I say you don't have to stand out there in that road and argue with anybody. When I went out there, that's when basically all hell broke loose. The guy pulled a gun on me, he stays on that road. So I said man, if I don't do nothing, and this guy done pull this gun on me, everytime he see me he's gonna think he can run me. He figured he was gonna think that he could come up and *inaudible* things at the house. I didn't care if the guy shot me at that point in time cause that was when I called my family. You know, Danette, . , /, and VICTIM, I stood up to the guy. I punched him, he still threatened to shoot me but he got the point that I wasn't playing. Everything down there, even trying to get a handle on VICTIM I had to dip in the bucket myself. Nobody was ever there. And I told Danette since I been in jail. I said man, there's been so many ways it was putting stress on me and her relationship. Like I said, I love her but things was too much and you know I was saying something had to be done and she wasn't doing it and I told her she came and visit me. I said maybe this time in jail is what I needed to get all this hurt off me, you know what I'm saying? Because she didn't-- I don't think she-- some of the things she didn't know. And I don't think she understood what I was going through when I was down there.

Q: Okay. So let me go back to refresh my memory here on the-- October of this year one occasion was where she came in. You were asleep on the couch wearing a pair or loose-- was it boxer shorts or just loose shorts?

A: Just loose shorts.

Q: Loose shorts?

A: Yeah.

Q: And your penis was hanging out the leg of the shorts?

A: Yeah. This is-- let me tell you how it happened. Like I said, a lot of times my wife, if I was sleeping in the bed with her-- I sleep with my head covered. A lot of times she would start to give me oral sex in my sleep. I wasn't on the couch, I was on the floor. When that started, I thought it was my wife, but when I came up from under that cover, it was VICTIM

Q: Mhm.

A: So that's how that happened.

Q: About how long do you think she was performing oral sex on you?

A: I would say maybe about 2 or 3 minutes. Bout 2 or 3 minutes. Because sometimes my wife would perform oral sex on me you know, I wouldn't take my head up under the cover right then.

Q: Mhm.

A: You know like I said, when it started-- and I'm waking up, and then I come up from under the covers, it's her. I would probably say about 2 or three minutes.

Q: And the second one happened after?

A: Yeah it was after that.

Q: On this night, you had had a party, you had been drinking some.

A: Yeah I had been drinking.

Q: And you were sleeping naked--

A: Yeah I was sleeping naked.

Q: -- on the floor in the living room?

A: Yeah on this particular night.

Q: And on this one you woke up--

A: And she was--

Q: -- and VICTIM was naked, straddling you--

A: She had no clothes on.

Q: -- and she had been having sex with you?

A: She was on top of me. Like I said, you know, I would say that she had-- there's a good chance that she had, you know, had sex with me.

Q: Did your penis feel wet?

A: Yeah it was wet--

Q: So she must have had--

A: The head of my penis was wet.

Q: Okay. Alright, the rest of your penis, do you recall?

A: The rest of my penis wasn't wet.

Q: It wasn't wet--

A: It was just white stuff on the head of my penis.

Q: Okay.

A: Yeah. That's why I was saying I don't think full penetration happened.

Q: Okay.

A: Far as sexual activity down that hallway, the only thing I observed-- we left victim at home by herself one time, her and her sister. We told her not to have nobody in the house. During this time she had a little boyfriend. We came home and she didn't know we was coming, and her and the little boy was coming down the hall. Then we had to have a talk with her about-- you know, we told you to keep people out of the house.

Q: *Speaking on the phone* Yes? Yes?

A: Hey let me ask you something. Is it possible for me to call my wife?

Q: Um, probably not. I'll leave that up to the detective because you still have to be under the same rules here that you would be in the jail. And I don't think-- they got certain times they allow you to use the phone and stuff. She would know more about that.

A: Okay.

Q: You woke up and found it was victim performing oral sex on you, what happened next?

A: I made her stop. I made her go to her room. The next day I put her on punishment.

Q: You were drinking at the party if I remember right, you said you and your wife got into an argument and that's why you were sleeping in the living room?

A: I'm not going to say it was so much as a party as it was-- we was at the house and we was-- we had had a disagreement. Basically was like all disagreements you know, being by my side and standing up for me when I'm trying to stand up for everything that's her situation. And um--

Q: But y'all had had a disagreement and that's why you were sleeping in the living room?

A: Yeah. We had a lot of disagreements. Most of our disagreements, that's what they was about. It was about her just sitting back while things happened. Whether it was with our family or with our

kids. Nobody wasn't establishing no consequences except for me. I'm not used to a child hollering at me.

Q: What did you do about it this time?

A: About the time that she was on me?

Q: Mhm.

A: I whooped her.

Q: And--

A: I whooped her and she went to bed.

Q: And you sent her to your room?

A: Yeah. I didn't tell her mother what happened, but I told her mother that I had to whoop her.

Q: Okay. Any other incident of sexual contact?

A: No.

Q: Let me reiterate again, at this point, if it's happened more than this--

A: Yeah.

Q: -- and even if you had succumbed to her advances--

A: Mhm.

Q: -- it's really not gonna--

A: Yeah I know you said it's not gonna make a--

Q: -- change.

A: -- change.

Q: The main thing is that you're honest here.

A: Yeah.

Q: It's important.

A: Yes.

Q: Because if you're honest it looks a lot better that you're being honest now.

A: I'm trying to think-- you can't even imagine how much stuff that's happened.

Q: I know-- I mean I'm not talking about every sexual advance she's made, I know there's been a

lot. But it's not hard to remember having had sex with her. If it was one time or 100 times, like I said it really doesn't matter. It's all going to be looked at as one situation.

A: Yeah. There's nothing else as far as having sex or touching or anything like that. It's just the other thing they were talking about the finger with what her mother said. Like I said the comments that VICTIM told her mother that I put my finger in her. I told Danette that that didn't happen. I told Danette what had actually happened. And the statement that-- the statement Danette made to me was that if VICTIM did that to you I know you would do something to get her back, as in the same thing.

Q: Okay. I'm gonna read this to you. *Reading* "There were two incidents of sexual contact with VICTIM that I didn't tell about before. Both of these incidents were initiated by VICTIMBoth of these were in in October of this year. The first one was one night while I was asleep on the floor of the living room I was wearing a pair of loose fitting shorts and my penis was out of the shorts. I woke to the feeling of someone performing oral sex on me. Since I usually sleep with a blanket or something over my head, and since my wife will often perform oral sex on me while I'm asleep, I initially thought it was my wife. I let the oral sex go on for 2 or 3 minutes before I uncovered my head and saw that it was VICTIM performing oral sex on me. I made her stop and go to her room. The next incident occurred in October as well. On this night I had been drinking--" I'll get you to initial where I scratched out "at a party" *reading* "On this night I had been drinking early in the evening and I got into a disagreement with my wife. I decided to sleep on the floor of the living room. I was not wearing any clothes this night. I often sleep naked. I usually have an erection while I'm asleep. I awoke this night to find VICTIM naked and straddling me. She had my penis at the entrance of her vagina. Because the head of my penis was wet and it had white stuff on it, I assume that she had been having sex with me. When I woke up I gave her a whooping and sent her to her room. There were no other incidents of sexual contact between me and VICTIM I know VICTIM said I put my finger in her while wrestling, and Sergeant Morgan has told me that Danette told DSS that I said I did, but it was accidental. I do not know why Danette would say that but it is not true. I never told Danette that." Initial there and there.

A: I think Danette's standpoint is that she's trying to protect me and the child. Almost like-- like my same standpoint. That's what I think. But like I said, when the cop asked her on that particular night, I mean, she was-- she was like stuttering like she didn't know what to say. And I asked her--

Q: Let me cover a few formalities here with you, okay? Uh, first of all, do you feel like you have been treated professionally by Detective Aldridge and myself?

A: Yes.

Q: Have either one of us treated you unprofessionally, been rude, have we been threatening or coercive or anything like that?

A: No.

Q: While you've been here have you been given the opportunity for restroom breaks, water breaks things such as that?

A: Yes.

Q: We did have to stop to take you over to court, uh, did she stop and get you some food on the way back?

A: Yes.

Q: Okay. You realize that you've been here for awhile now?

A: Uh, yes.

Q: We're probably about-- I think we got started at 11, you've probably been here since about 10:30, and it's quarter to 6 now.

A: Yes.

Q: Do you realize that we would not have been here this long if you had told this stuff upfront.

A: Yes, I understand.

Q: So you been here for awhile but it's largely due to the fact that you had not been completely honest in the beginning.

A: Yes.

Q: Okay. Anything else about the way you been treated or anything else you want to say here?

A: No. I just hope you understand the whole scope of the story and the situation that I was put in.

Q: I do.

A: Because it was a situation to where, man, the choices I made I felt they was the best-- I thought they was the best choices. Let me ask you this. You said you been doing this for a long time, do they choices seem crazy to you?

Q: No, I understand. LIke I said, I've heard a lot of stuff. And I understand people make choices, sometimes they make bad choices. But I understand how you can get into this kind of situation.

A: That's what my friend told me she said "James you can't watch out-- you got to watch out for yourself." All the way up to this point-- it's just what it's been *inaudible*. Besides this stuff that's done happened about [redacted] all the other things was going pretty good besides getting locked up about child support. So you think they'll try to charge me for this?

Q: Uh, I think more than likely, yeah. There probably will be charges there.

A: And I'll be on TV and all that.

Q: I mean we don't have any control over the media but, it's not something that's going to be-- this stuff happens all the time.

A: A lot of times you see it on the news, on the TV. So what will be the charge?

Q: I'm not sure.

A: Not sure. Why do you feel I need to be charged?

Q: I didn't say you need to be. You asked me whether or not I thought they would.

A: You think that's what the--

Q: I think that's probably what will happen.

A: -- prosecutor's going to do.

Q: Mhm. I'll talk to you soon about that.

A: Can I add this to my statement? Cause I also told DSS this and I still feel that way.

Q: Tell me.

A: What I told DSS is, um, you know I don't hold [redacted] no kind of way-- what's the word-- I don't have any bad feelings towards [redacted] because you know she made all these allegations. I still

love the child and you know...

Q: Yeah, we're gonna get you to put something in here about that in just a minute. Where'd y'all get food from?

A: It was McDonald's.

Q: You get a hamburger?

A: Just a hamburger and fries.

Q: Is everything you're telling now the truth? What you're telling now?

A: Yes.

Q: Are you telling the truth now because you've been forced or coerced into telling the truth? Or are you telling the truth because it's the right thing to do.

A: It's the right thing to do.

Q: So you haven't been forced or coerced into saying anything?

A: Uh, no.

Q: Okay, now what you're saying about VICTIM is that um-- basically if I'm understanding what you're saying is that, although you wish this had never happened, you don't blame VICTIM for it, and you don't have any hard feelings towards her?

A: I mean, she just a child. One day she'll come to regret hopefully what's happened because-- I was in a *inaudible*.

Q: Okay. Alright. So we'll make this the end of the statement. I'll end the statement by saying that I don't have any hard feelings towards VICTIM she's just a child, and... what?

A: I mean she's just a child, and I still love her.

Q: Okay. *Reading* "I was picked up at the jail today by Detective Aldridge and brought to the Sheriff's office for an interview with U.S. Sergeant Morgan. I got here around 10:30 AM and it is about 5:40 PM now. I did have to stop for about 1 and a half to 2 hours to go to a family court hearing. I know that in total I have been here for several hours, but I recognize that this is mainly because I was not completely honest in the beginning. If I had been honest to begin with, then I would not have been here this long. I would also like to say that I have been treated respectfully,

and with professionalism by both Detective Aldridge and Sergeant Morgan. I have been given opportunities for several restroom and water breaks. Detective Aldridge also bought me some McDonald's for food on the way back from Court. Everything that I am saying now is the truth. I have not been forced or coerced into saying anything. I am telling the truth now because it is the right thing to do. I want to end this statement by saying that I do not have any hard feelings towards VICTIM She is just a child and I still love her." Is that it?

A: I mean, i just want y'all to know the broad scope of things– what I was dealing with. Because you was saying something about a statement from my past to now, what I had to deal with then being-- I had to deal with a lot. You said that I was wanting to know– based on the decisions I made-- just a Detective right?

Q: Mhm.

A: So you don't think nothing's wrong with me?

Q: Uh, no, I don't have the-- it's not my professional capacity to determine if there's something mentally wrong with you, if that's what you're asking.

A: Yeah. So the test-- a lot of tests I failed-- I can see that?

Q: *Speaking on phone* Tanya can you come back here to the polygraph room? Thanks. *Hangs up phone* Let me read you the comment that's on the bottom of all 5 pages here, and then I'll have you sign all 5 pages when she gets here. All 5 of them have the same comment it says "I have read the statement consisting of 5 pages and I swear that the statement I have just given is the truth--"

Knock on door

Q: Come in. "-- the whole truth, and nothing but the truth, so help me God. I also swear this statement has been given freely and voluntarily and I have received a copy of my statement. This statement was completed at 5:55 PM on the 5th day of December, 2007." All 5 pages have the same comment, if you'll sign in the same place on all 5 pages. You're a notary Tanya, right?

D: Yes sir.

Q: Can I get you to notarize all of those and give him his copies? Take him to the restroom, give him

a drink of water, and then bring him back.

D: Okay.

Q: You got a pen?

Dan Morgan exits room

A: Well I guess that's the last McDonald's meal I'll have for a long time. What's your name? You said Ms. Ald--

D: Mhm. Aldridge.

A: Well Ms. Aldridge, like I said, the reason I wasn't upfront with you all-- I was trying to protect my family, also trying to you know, watch out for myself too. Man, my life was just about on track. Financially being able to take care of my house, so. What you feel gonna happen?

D: I'll present this to a judge.

A: What do you think happen-- what do you think charges need to be pressed against me?

D: We have to leave that up to a judge. I just bring in the evidence.

A: I believe one of them statements y'all-- it wasn't clear, the one that Danette made. I don't think that statement was clear because what me and her talked about, and what she said was two different things.

D: There's your copies.

A: Thank you.

D: You need to go to the restroom?

A: I'm fine.

D: Okay. Come on and take a break. Get up and stretch your legs.

A: Okay.

Both exit room

D: He'll be right back with you.

James Irby returns

A: Okay.

Dan Morgan Returns

Q: Did you get your copies yet?

A: Yes.

Q: You can't be cold are you?

A: Uh, it's cool.

Q: James, uh, I told you that there are some thing I knew that I had not gone over with you.

A: Yes sir.

Q: And I just want to run over a couple things here with you.

A: Okay.

Q: You remember MINOR 2 ?

A: Yes sir.

Q: What do you remember about MINOR 2?

A: I remember she was trying to say I touched her.

Q: Mhm.

A: But I didn't. Let me tell you about the situation with that. The situation with MINOR 2 and also with MINOR 4's friends-- anytime the children would come over there they say they would want to play the wedgie game. And they called that, with the children coming over there being initiated. And that's what we always did. But, when I played that game with MINOR 2, she took it all the way out of context, and you know the next morning when she woke up she said that I tried to touch her and all that, and it was nothing to that effect.

Q: Mhm. Well, um, you ever heard of the Children's Advocacy Center?

A: No sir.

Q: The Children's Advocacy Center is staffed with professional forensic interviewers.

A: Okay.

Q: These are not therapists. They have the ability to be therapists, but their job is different. A therapist tries to work with a person to get them over something. A forensic interviewer is a person who is trained to conduct an interview to gather information.

A: Okay.

Q: The purpose of the interview is to get the truth.

A: Yes.

Q: So these are people who are-- who do nothing but everyday all day, they talk to kids. Ranging in age from 4 year old to 15, 16 year olds.

A: Okay. But the things about it we were talking about VICTIM-- if you had brought that up, I would have told you exactly what--

Q: Yeah. I know. But I-- this is completely separate from VICTIM .

A: Okay.

Q: Now VICTIM has been to the Advocacy Center, and so has MINOR 2.

A: Okay.

Q: The foundation I went over you with about the Advocacy Center-- these are people who are trained to kids and to differentiate between what is real, what is made up, what is maliciously made up, and what is fantasy.

A: Yes.

Q: The opinion of the professionals at the Advocacy Center is, at this point, and I believe-- I'm not sure about VICTIM but I know MINOR 2 does and I think both of them have at least 1 or 2 more interviews to do.

A: Okay.

Q: At present, the opinion of the forensic interviewers is that both girls are being truthful.

A: What is MINOR 2 being truthful about?

Q: Well let's go over that. MINOR 2 reported that she spent the weekend with her friend VICTIM in 2005 from Friday to Sunday. She had previously been friends with VICTIM when their families had lived next door to each other. They lost contact for a couple of years, then she and VICTIM ran into each other. VICTIM called her and invited her to spend the weekend. VICTIM's household includes Danette, stepfather James, siblings MINOR 4 and MINOR 5. The following incidents occurred on the Saturday night. On Saturday evening, MINOR 2, VICTIM and MINOR 5 were watching TV with James Irby. MINOR 2 and VICTIM went to VICTIM's bedroom and went to sleep.

MINOR 2 was awakened by James placing MINOR 5 in the bed with her. Twice during the night, James took MINOR 2 into MINOR 4's bedroom and MINOR 4 was not home. ONe time he pulled her into MINOR 4's bedroom by pulling her from behind and putting his hand over her mouth as she was coming out of the bathroom. He offered for her to sleep in MINOR 4's room. Another tie he picked her up out of the bed in VICTIM's bedroom and carried her into MINOR 4's bedroom. He again covered her mouth. He tried to look down her shirt, he tried to touch her private parts, he leaned in to kiss her. At one point he was straddling MINOR 2 on MINOR 4's bed, trying to go between her legs and rub her with "his stuff." He kissed her on her shirt and tried to kiss her on her belly. He held her hand and tried to make her touch his stuff.

A: Where's all these statements coming from? None of that happened. None of that happened. The only thing happened is-- they wasn't even asleep. They was still up.

Q: James. You're in a bad situation.

A: I know that.

Q: Okay. Um, you're in a bad situation because you've got-- first of all, you've got two different girls--

A: Two allegations.

Q: -- two allegations. Both of a sexual nature. Both of them, at present-- the professionals who are-- these are people who are considered expert testimony. Okay? They are experts in their field and that means they go to court all the time, they testify all the time, they've already been certified in the 7th Judicial Circuit as expert witnesses.

A: Yes.

Q: Okay, that means they have the ability to offer their opinion, and their opinion is considered to be higher than the opinion of the average joe. Okay? These are people who are trained to know how to get to the truth.

A: Yes.

Q: And their opinion at present is that both MINOR 2 and VICTIM are being honest.

A: Well that's not true. I'm gonna tell you--

Q: That's their opinion. The situation is that you've got these two different allegations. You've got all this stuff that's being said about you.

A: Yeah.

Q: The-- as far as we know, they're credible-- the opinion of the interviewers is that they're credible, they can be believed. You, on the other hand, have proven yourself to not be credible.

A: Mhm.

Q: You have proven yourself to not be trustworthy because you lied. Okay? You lied about the sexual contact with MINOR2-- I mean VICTIM

A: With her I might as well go and close the casket on me--

Q: So I'm telling you it looks that bad.

A: But I'm telling you--

Q: It looks that bad. Now what I'm trying to get you to understand is this. You still have a choice to make, because you haven't walked out of here yet.

A: Yeah. But I don't want to walk out of here till y'all know the facts.

Q: As far as I'm concerned, you're still at that crossroads. Now, we didn't go into great detail about it, but I'm still going back and telling you once again, I don't have the ability to make a deal with you. I'm not making deals with you.

A: Mhm.

Q: Okay? I'm not threatening you and telling you this is what's going to happen.

A: Yeah.

Q: I can tell you that based on the years of experience that I have, what I have seen happen that different things happen to different people based on the choices they make. You're at that crossroads, or you're at that fork in the road where you're going to decide to stick with the story of one, that everything you just said about VICTIM was all the truth, that there hadn't been any kind of sexual contact. That you haven't been having sex with her any other ways than what you just said. And two, that MINOR2 is also lying about you. And that she's making this stuff up for some reason.

A: That's what I want to get out there, exactly what happened.

Q: Now, the situation's this. MINOR2 didn't just come out of the blue and report this MINOR2 's not trying to get you in trouble. If MINOR2 and them were trying to get you in trouble, and they were making it up, they would have pushed this stuff back in 2005.

A: Yeah.

Q: The only reason they came up is because her name got mentioned in the statement.

A: Yes.

Q: And the investigator, being a good investigator, follows up on everything.

A: Yeah I understand that.

Q: So she went and found MINOR2. So MINOR2 didn't come forward looking to get you in trouble. Alright? Nobody told MINOR2 anything from our side about games or anything else. You're talking about this game that she blew out of proportion. She didn't say a thing about a game there. She's talking about other stuff.

A: Yeah. But I'm saying is what you just read to me, none of that stuff happened like that.

Q: If it didn't happen, then fine. We stick with that story.

A: I just want to tell what happened in that situation.

Q: Okay well you'll get your opportunity to tell what happened in that situation. Here's the situation that you find yourself in now. Okay?

A: Okay.

Q: You're looking at whatever charges are going to come up because of [redacted].

A: Yeah.

Q: Now, even though you say it was all on her, and she initiated all of it. Now, I would like to believe you on that. And I also do know that girls like this will be sexually provocative. I'm still willing to go with you on that. Okay? But I'm not willing to just stop at that.

A: Mhm.

Q: Because she is still giving completely different stuff.

A: I mean--

Q: There was more to it than what you said. There's been more sexual contact between you and VICTIM than what you have said. That's one situation. The other one is MINOR 2 here. What does she have to gain in this? You're not her daddy. You didn't put her on restriction.

A: Sounds like--

Q: She's not mad at you--

A: Sounds like those statements didn't come from MINOR 2.

Q: They came from MINOR 2.

A: But that's not the truth.

Q: That's your story, but here's the situation. You've already proven yourself to be unreliable--

A: Unreliable--

Q: Uncredible--

A: That's one nail down.

Q: Yeah. And nail number two is you've got two girls.

A: Yep.

Q: Okay? Talking about basically the same kinds of things.

A: Yeah.

Q: And the third nail is these girls are going to have professionals behind them saying that they're truthful, that they're credible.

A: I guess I'm cooked.

Q: The only way that I can see for you to get ahead of this-- you can either stand on the tracks and wait for this train to run over you, or you can get in front of it and stay in front of it is being truthful. At this point, I've already told you, it does not matter how many times you've had sex with VICTIM And it does not matter if you gave into temptation after she started making herself available to you. If you went ahead and you took the ball and ran with it, it really doesn't change anything. What's going to happen with MINOR 2 is going to be a follow up to this. Based on what she is saying right now. All she's talking about right now is a lewd act. Which is a much lesser offense than criminal sexual conduct.

A: Yeah.

Q: Now that's just what she's saying right now. What happens with many of these cases is initially they're kids. They're going to tell you a part of it and as time goes on, as they feel more comfortable with the person they're talking with, they open up more and disclose more about what really did happen. I'm not saying that there was more with MINOR 2. Okay? Maybe there wasn't. Maybe that's all there is. Maybe it really is a lewd act. But, the one-- the Solicitor's office can look at all this and put it all together in one package and deal with it all at one time.

A: Yes.

Q: If they feel like you are a truthful person, feel remorse about the mistakes you've made and are worthy of being looked at as someone who can be rehabilitated.

A: Yes.

Q: On the other hand, if they feel like that you still can't be trusted, that you've only given part of the truth, and that you are still not being completely truthful, then they can push hard on one case with VICTIM, CSC with a minor, second degree, and a whole separate situation with lewd act. Now I'm not saying this is gonna happen.

A: Yeah.

Q: But what did I tell you happened with the other guy? He had two different girls and he was giving the maximum sentence on each. Not to run concurrent, which normally happens, normally they run them together. But in this guy's situation they stacked them one on top of the other.

A: Yeah.

Q: The reason was was they felt like this guy deserved it. He didn't deserve any kind of latitude or anything like that. Okay? I'm not saying that's going to happen with you. But I can say that you put yourself in jeopardy of that happening to you based on the decision you make. At this point, like I said, whatever happened with VICTIM if it was more than that it really is not going to change anything.

A: Mhm.

Q: Okay? The main thing you have the ability to do here is get all of the truth out so that they can

look at you as a person who is being completely truthful. Then, with that, they have the lesser offense with MINOR2. It can be looked at and it is a lesser offense, it carries a lesser amount of time. It doesn't change anything about who you are. But if they choose to look at it in such a light, they can put it all together and let everything run at the same time. That's a choice they can make okay? But you put yourself in jeopardy by not being completely truthful. See this stuff with Brittany doesn't make anything worse.

A: Yeah.

Q: Okay? Depending on how you handle it. But it can be worse depending on how you handle it.

A: Well like I said, I want y'all to know the truth even about that situation.

Q: Okay.

A: Should I go ahead and tell you?

Q: Yeah.

A: The situation is, VICTIM was telling me "oh we need to initiate MINOR2 in the wedgie game." We also grabbed-- me and MINOR4 both we would grab VICTIM and put our hands over her mouth and we done that several times cause a lot of times if we was playing in the house VICTIM would yell to the top of her voice and then the mother would get into it and "what y'all doing Y'all need to stop playing like this." Same situation with MINOR2. I did not try to look down her shirt. I did not touch her or anything like that.

Q: Okay.

A: Yeah.

Q: Alright. We've been here for a long time. There's no point in us spending anymore time with it. Okay? I just want you to understand where you're at. It's a decision that you're making--

A: Let me tell you about this last thing. The only thing else is about the room incident. VICTIM had asked me could she perform oral sex on me. And through all that-- she been coming onto me, coming onto me, coming onto me. you know, that's what happened.

Q: When was that?

A: That was around about-- back during the summer.

Q: So back during the summer, she called you into her room? Or did you just walk into her room? How-- did it-- tell me how--

A: How I always go down to make sure their TVs were off and I walked in there and she was laying on the bed and she asked me could she do this.

Q: Okay. And that was back during the summer?

A: That was back during the summer. See the allegation was--

Q: See this--

A: It's all twisted. The little-- when she say I done something, I didn't do anything. SHe said that it happened-- what she initially told the police was-- it was like um-- the police came out-- I don't know the day-- she said I done that during the week. The only thing I had done to victim was told her that if she hadn't done her room clean. I went down into the hallways and said if you don't have your room clean, then you're not going on this fieldtrip. And then from there I guess she said basically-- well "you not gonna stop me" or whatever-- whatever came to her mind, I don't know. I didn't have no communication, I didn't talk to victim no more that day. Me and Danette stayed in the bedroom and talked about all the different situations that had been going on. It was always basically the same conversation. Cause like I said, you know, I knew I was in a situation and I wanted the mother to step in.

Q: Okay.

A: As far as minor 2--

Q: Tell me about this oral sex situation. How long did she perform oral sex on you?

A: Man, like I said, I knew I was making a bad decision. When she put her lips on me, you know, and started. Like you said, you described that thing about the brain--

Q: You stopped thinking.

A: -- and all that.

Q: Right.

A: And when that happened, once she started performing, I stopped. Cause I said man this ain't the right-- it's not the right thing to do.

Q: You had enough mental clarity to stop?

A: I had enough mental clarity to stop.

Q: Before you ejaculated?

A: Before I ejaculated?

Q: Yeah. Before you came?

A: Yeah. Before I came.

Q: How long did it go on then?

A: It didn't go on long--

Q: Say 2 or 3 minutes?

A: -- it went on long enough for me to go--

Q: Or what?

A: Man I would say maybe--

Q: Less than 5?

A: Less than 5.

Q: Two to three minutes then you stopped it?

A: Yeah.

Q: So you did not ejaculate?

A: I did not ejaculate.

Q: Okay. Is that-- is there any other? That's like I said, it's not going to--

A: I already know--

Q: It's not going to change things.

A: I already know it's not going to change things.

Q: Okay.

A: I already know. But like I said that stuff with MINOR2, it did not happen that way. I did not try to look down MINOR2's shirt, I did not try and put my hands down in MINOR2's pants, I did not fondle her or anything like that.

Q: She says that you did grab her leg on the inner thigh, you did grab her private parts on top of her

clothes. She's not saying that you put your hands inside her pants, but you did grab her private parts with you harnds.

A: I did not. I did not grab her private parts or anything like that. I mean, like I said, no. It didn't happen like that. And I don't know why. Like I said, she has nothing to gain, nothing to lose, but that's not even the story that she told that day. I mean, that's not the story she told.

Q: Alright.

A: That's why I said, you know, how did it get-- a lot of stuff's twisted. What Danette said, some of the stuff [illegible]'s saying, and a big majority of that sheet right there.

Q: Okay. Do you want to address that in the statement? Along with what you just told me about [illegible]?

A: Yeah okay. Add that into the statement. Like I said man, this child was on me all the time.

Q: *Speaking on the phone* Yes, do you want to go ahead and arrange for a transport? Okay. Yeah Yeah, just give me few more minutes, I'm writing out a statement. It won't take us long. Alright Bye. *Hangs up phone*

A: Can I ask you this?

Q: Mhm.

A: Through this whole process, me as a human being. Do you even care what happens to me? Or do you just want statements?

Q: Yeah I care about you. I mean that's why I'm trying to talk to you. I really do want you to understand that at this point-- it's not like they're going to charge you with 100 counts of criminal sexual conduct with a minor--

A: Man, my life. I been trying to get my life together for so long. I finally got a woman who kinda got a head on straight, and now all this...

Q: I am listening to you, and I am trying to write cause I know you've been here a long time and you've still got a lot-- I've still got a lot of stuff to do, but uh, you know--

A: I made a bad decision.

Q: Yeah, you did.

A: I made a bad decision.

Q: But like I said, I really do-- I do this job because I care about it. You know, I could have been home much earlier. I could have been home with my family and my kids and everything--

A: That don't--

Q: -- but I'm here--

A: It's not supposed to be like this. It's not supposed to be like this.

Q: James, we all-- we all have stuff in our backgrounds that we wish we hadn't done.

A: But it's not supposed to be like this man. I ain't' supposed to be in *inaudible*.

Q: At some point in time, James, you got to realize when the time to come completely clean is. And, I hear what you're telling me about VICTIM I hear what you're telling me about MINOR 2 And if that's all there is to it, that's fine. But I am telling you as clear as I can tell you. The way to get-- no you're not going to make it all go away, and no it's not going to make everything all better.

A: Some--

Q: But you have the ability to control some of the damage by being completely honest now.

A: Some of them statements there are not true.

Q: Some of them?

A: Yeah, as far as a lot of that stuff that you read about MINOR 2, even what my wife-- let me tell you what's not true. What my wife communicated, a lot of that stuff in there about that MINOR 2 girl and some of that stuff about what VICTIM said. Like I said man, for a long time I felt like she was trying to trap me. She *inaudible* I made a bad decision.

Q: Let me get you to sign this. *Reading* "I James Irby asked Sergeant Morgan to write out this addition to my previous statement for the same reason as I had him write my other statement. I will also review everything the same as before." Sign your signature on that.

A: Just initial or sign?

Q: No, signature on that. So what you're going to add in is that back there in the summer there was an incident where VICTIM performed oral sex on you?

A: Uh, yes sir.

Q: Are there any other things that you want to add in here besides that incident?

A: No. That's what happened in the bedroom.

Q: Okay.

A: No sex. Just that... Guess a trial like that-- you just got to wait forever for a trial like that.

Q: Well again, that has to do with the choices that you make. As far as whether or not there is a trial with a jury and hiring attorneys and all this other stuff-- or public defender or whatever. As far as going through a trial is your choice. Okay? You have the decision to decide whether you want to plead guilty to what you've done or if you want a trial. Okay?

A: Okay.

Q: Um, that's--

A: If I plead guilty then what happens?

Q: Uh, those are things that I can't really-- I can't tell you what's going to happen. But the choices that you make, okay-- if you choose to plead guilty, a lot of times the Solicitor's office may make an offer to you of if you choose to plead guilty, this is what we will put before the judge and the judge will determine from there. Okay? That's something that your attorney works out with the solicitor's office. Most of the times, that tends to work out in the favor of the person-- of the defendant. Uh, again I can't tell you, I can't give you advice on that as to what you should or should not do. But a lot of times it tends to work out in your favor.

A: Okay.

Q: On the other hand, you could go to trial on it and you could plead not guilty to all of it and if everything works out great for you, you could be found not guilty and everything goes away.

A: Yeah.

Q: The downside to that is if you're found guilty the-- the penalty may be uh-- it could be anywhere from 0 up to the max.

A: But see the thing about it is then they're going to come at me with the MAJOR 2 stuff.

Q: Uh, no they'd probably do it one at a time.

A: That's what I'm saying. They're going to come at me about this, then they're going to come at

me--

Q: That's what I'm saying. If you did a plea on everything--

A: Mhm.

Q: You have the ability to try and get everything worked together into one package. If they do it in a trial, they can't try both of these at the same time. It would have to be one trial for one and then one trial for the other. But those are decision that you have to make talking to your attorney and find out what's best for you.

A: Man I can't afford no attorney.

Q: Well you'll have a public defender. Now once-- by this time tomorrow, you will have already talked with a public defender about this and you're going to be advised not to talk to the police anymore. That's why I'm saying what you do right here, right now is pretty much the last time that anybody is going to talk to you.

A: Yeah.

Q: Other than your attorney telling you what the solicitor's office says.

A: Yes.

Q: And that's why I'm trying to tell you, it's my opinion that I really think you need to get all of this out right now. Get it all upfront. So that there's no-- so that everything is known. And that way the solicitor's office has the ability to make the best decision possible.

A: Well like I said, the only bad choice I made was that right there and-- that stuff about MINOR 2-- that stuff isn't-- not true.

Q: Okay. As far as the situation with-- about this oral sex with VICTIM, how did you feel about it from the standpoint of-- do you wish that you had told the truth, are you sorry that you didn't tell me about this earlier? Did you regret having withheld this?

A: I regret everything.

Q: Do you regret the decision you made to let her perform oral sex on you?

A: Yes I did. I always did regret that to myself.

Q: I'll just put one sentence in here about these allegations that MINOR 2 has said.

A: Okay.

Q: You're saying you -- the allegations that [redacted] has made against you about touching her are completely false. They're lies. You have not touched her and you have not had any type of sexual contact with her.

A: Like I said all I did was play that wedgie game. I did not touch her thigh--

Q: But you did not have any sexual contact with her?

A: No. No sexual contact with her. What-- what isn't in that statement right there and you know, my wife verified this-- them children got mad at me that particular night about [redacted] They was wanting to go to this place called Bulldog Boogie and I told them they couldn't go. Both her and [redacted] got mad. That's why when you were reading all that stuff off it didn't sound like it came from [redacted] It sound like it came from [redacted].

Q: That didn't have anything-- there was no talking--

A: No but that's what I'm--

Q: -- between them or this.

A: Yeah but that's what it sound like. Like man... So I guess any kind of probation will be out the question for that one.

Q: I don't-- I don't have any idea on that.

A: Yeah.

Q: If they feel like you haven't been completely honest though, I doubt that that would be an offer. *On the phone* Hey can you come notarize this one? Thanks *Hangs up phone*

A: I doubt there will be an offer with two different people saying I did this when actually it's only one that is really true. So once again, I'm out in this water by myself. Once again. My wife knows more than what she been telling. So what do she stand at?

Q: Come in.

Detective Aldridge enters

Q: Okay, follow along with me. *Reading* "I want to add another incident of sexual contact with [redacted] that I did not include earlier. Back during the summer, [redacted] performed oral sex on me in

her bedroom. She had been making sexual advances toward me for so long I just gave in to the temptation. I went into her bedroom and she offered to perform oral sex on me and I let her. It only lasted 2 or 3 minutes before I came to my senses and stopped her. As before, I regret that I did not disclose this incident when I claimed that I had disclosed everything to Sergeant Morgan. I am also sorry that I agreed to allow VICTIM to perform oral sex on me. I made a lot of stupid choices and not disclosing this incident was another stupid choice. As for the allegations made against me by MINOR 2 , all of those allegations are lies. I have not had any sexual contact at all with MINOR 2 Again all I am saying here is the truth and I have not been threatened, coerced, or forced into saying any of this." Initial next to that, then "I have read this statement consisting of one page and swear the statement that I have just given is the truth, the whole truth and nothing but the truth so help me God. I also swear this statement was given freely and voluntarily. I have received a copy of my statement and this statement was completed at 6:50 PM on the 5th day of December 2007." Initial there. We need to learn how to start doing statements on the computer. I imagine we can do that, can't we?

D: Oh yeah.

A: But to answer my question, where did my wife stand? Cause--

Q: I don't know. I didn't talk to your wife. I'm sorry. Let me give you this copy here. Did you make arrangements for somebody to come and pick him up? So his transport is already there? And you're going to talk to a judge at some point?

D: Mhm.

Q: Alright James, I'm going to walk you back over here to this interview room where I got you from earlier. I'm going to have an officer come and pick you up and take you back over to the jail, okay?

A: Okay.

Q: Good luck to you.

(End of Disc 2)