

RECEIVED

Aug 11 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JAMES RONNIE NICHOLS, JR.,

APPELLANT.

APPELLATE CASE NO. 2020-001538

RECORD ON APPEAL

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201
(803)734-3797

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
HEARING TRANSCRIPT DATED NOVEMBER 9, 2020	1
JURY SELECTION.....	3
PRETRIAL MOTIONS	20
TESTIMONY	
WILLIAM BURKE	36
TRANSCRIPT DATED NOVEMBER 10 & 12, 2020	93
OPENING STATEMENT BY MR. BOGLE	121
OPENING STATEMENT BY MS. ZMROCZEK.....	125
TESTIMONY	
AMY C. SWAN.....	127
MOTION FOR A DIRECTED VERDICT.....	210
TESTIMONY (CONTINUED)	
JAMES RONNIE NICHOLS, JR (AS READ).....	232
DEBRA BARRY MOORE.....	236
MOTION FOR DIRECTED VERDICT (RENEWED)	248
CLOSING ARGUMENT BY MR. BOGLE	250
CLOSING ARGUMENT BY MS. ZMROCZEK	260
JURY CHARGE	267
VERDICT	280
CERTIFICATE OF COUNSEL	286

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Lexington	)	2017-CP-32-02122
	)	
	)	

In the Matter of the Care and	)
	)
Treatment of James Ronnie	)
	)
Nichols, Jr.	)

TRANSCRIPT OF RECORD

November 9, 2020
Lexington, South Carolina

BEFORE:

WALTON J. MCLEOD, IV, JUDGE; and a jury.

APPEARANCES:

JAMES BOGLE, ASSISTANT ATTORNEY GENERAL
Attorney for the State

Aimee Zmroczek, ESQ.
Attorney for James Ronnie Nichols, Jr.

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S
INDEX OF WITNESSES:

WILLIAM BURKE

Direct By Mr. Bogle 36

Cross By Ms. Zmroczek 57

Redirect By Mr. Bogle 71

> > > < < <

CERTIFICATE OF REPORTER 92

PLAINTIFF'S EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	articles	58	

STATE'S EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	pages from DSM-5	49	

1 THE COURT: All right. Ladies and gentlemen, we're
2 about to begin the process of picking our jury for a trial
3 this week. The trial is titled In the Matter of the Care
4 and Treatment of James Ronnie Nichols, Jr.

5 This is a case that arises under South Carolina
6 Sexually Violent Predator Act. Before we begin with
7 asking you questions, I'd like to allow the attorneys to
8 stand up and introduce themselves to say you at this time.

9 MR. BOGLE: My name is Jim Bogle. I'm with the
10 Attorney General's Office here in Columbia. I'm assisted
11 by Chris Runyan, also with our office.

12 THE COURT: Go ahead.

13 MS. ZMROCZEK: I'm attorney Aimee Zmroczek. I
14 practice throughout the State. I have an office in
15 Columbia, and this is my client, Mr. James Nichols.

16 THE COURT: Thank you.

17 Now, is there any member of the jury panel related by
18 blood or marriage or have a close personal or social
19 relationship with Mr. James Nichols? If so, please stand.

20 (There was no response.)

21 THE COURT: Following is a list of witnesses we
22 expect to be called in the trial of this case: DAUGHTER 1

23 DAUGHTER 1 SON, Deborah Berry Moore, Brad Kirkland,
24 Dr. Amy Swan, Dr. William Burke.

25 Is there any member of the jury panel related by

1 blood or marriage or have a close personal, social or
2 business relationship with any of the witnesses whose
3 names I just called off? If so, please stand.

4 (There was no response.)

5 THE COURT: All right. Has any member of the jury
6 panel ever been represented by any of the attorneys
7 involved in this case or have a close personal, business
8 or social relationship with Mr. Bogle or Ms. Zmroczek, the
9 attorneys in this case? If so, please stand.

10 (There was no response.)

11 THE COURT: Does any member of the jury panel know
12 anything about the offenses for which James Ronnie Nichols
13 was convicted of? If so, please stand.

14 (There was no response.)

15 THE COURT: Has any member of the jury panel or any
16 of your close personal friends or relatives ever been the
17 victim of sexual assault?

18 Yes, ma'am, your juror number?

19 THE CLERK: 163.

20 THE COURT: All right. And knowing that --

21 THE BAILIFF: Your Honor, we have one standing in the
22 back.

23 THE COURT: Okay. 163.

24 Ma'am, your juror number?

25 PROSPECTIVE JUROR: Forty-one.

1 THE COURT: Forty-one.

2 Yes, sir, your number?

3 PROSPECTIVE JUROR: Seventy-seven.

4 THE COURT: Your number, sir?

5 PROSPECTIVE JUROR: Ninety-nine.

6 THE COURT: Ninety-nine.

7 PROSPECTIVE JUROR: Yes, sir.

8 THE COURT: Yes, sir, your number?

9 PROSPECTIVE JUROR: Two.

10 THE COURT: Yes, sir, your number?

11 PROSPECTIVE JUROR: 136.

12 THE COURT: 136? Did I hear that correctly?

13 PROSPECTIVE JUROR: Yes, sir, 136.

14 THE COURT: Your juror number?

15 And since we're raising hands, everyone who's raised
16 their hand, please stand up at this time just so I can
17 keep track.

18 Green shirt, your number, sir?

19 PROSPECTIVE JUROR: 171.

20 THE COURT: Okay. As to all of you, would that
21 experience affect your ability to be fair -- to render a
22 fair and just verdict in this case? Would that affect
23 anyone's impartiality?

24 (Jury panel collectively responded in the negative.)

25 THE COURT: Sir?

1 PROSPECTIVE JUROR: I don't think so.

2 THE COURT: You do not think it would affect your
3 ability to be fair and impartial?

4 PROSPECTIVE JUROR: I don't know.

5 THE COURT: Okay. Tell me your number again.

6 PROSPECTIVE JUROR: I want to be honest.

7 THE COURT: Okay. I want you to be honest. Just
8 tell me your number again.

9 PROSPECTIVE JUROR: 202.

10 THE COURT: Thank you very much.

11 Okay. Y'all can sit down for a moment. Thank you.

12 All right. Has any member of the jury panel or any
13 of your close personal friends or relatives been charged
14 with or convicted of a sexual offense? If so, please
15 stand.

16 (There was no response.)

17 THE COURT: No one? Okay.

18 Does any member of the jury panel have any training
19 or experience in the fields of psychiatry, psychology, or
20 the law?

21 Yes, ma'am, your juror number?

22 PROSPECTIVE JUROR: 102.

23 THE COURT: 102.

24 Yes, sir?

25 PROSPECTIVE JUROR: 138.

1 THE COURT: 138. You're an attorney, correct?

2 PROSPECTIVE JUROR: Yes, sir.

3 THE COURT: Okay. 102, what was your experience?

4 PROSPECTIVE JUROR: I have a Bachelor's Degree in
5 psychology.

6 THE COURT: Okay. Thank you.

7 Yes, ma'am?

8 PROSPECTIVE JUROR: Paralegal.

9 THE COURT: Paralegal. What was your juror number?

10 PROSPECTIVE JUROR: 109.

11 THE COURT: Okay. In light of your experiences, the
12 three of you, would that affect your ability to be fair
13 and impartial in hearing this case?

14 PROSPECTIVE JUROR: No, Your Honor.

15 PROSPECTIVE JUROR: No.

16 THE COURT: I think this goes along the same lines
17 of, has any member of the jury panel formerly worked in
18 the fields of psychiatry, psychology or the law in?
19 Anyone new, other than the ones we just did? Okay.

20 (There was no response.)

21 THE COURT: Does any member of jury panel know or has
22 a member of the jury panel ever been involved in a case
23 where you or another party was represented by or opposed
24 by attorney Aimee Zmroczek?

25 (There was no response.)

1 THE COURT: Any member of the jury panel know or a
2 member of the jury panel ever been involved in a case
3 where you or another party was represented or opposed by
4 attorney James Bogle with the Attorney General's office?

5 (There was no response.)

6 THE COURT: Any member of the jury panel been
7 involved in a prison ministry or prison outreach program
8 or other program involving contact with incarcerated
9 persons?

10 Okay. Your juror number, sir?

11 PROSPECTIVE JUROR: 196.

12 THE COURT: What program was that?

13 PROSPECTIVE JUROR: I served with the Men's
14 Fraternity at the Lexington County Sheriff's Department.

15 THE COURT: Okay. Thank you.

16 Yes, sir?

17 PROSPECTIVE JUROR: 158, served as a minister in --
18 at a prison.

19 THE COURT: Thank you, sir.

20 Yes, ma'am?

21 PROSPECTIVE JUROR: 44, Camille Griffin Graham, and
22 my husband there.

23 THE COURT: Okay. Camille Correctional?

24 PROSPECTIVE JUROR: Yes, sir.

25 THE COURT: And with your involvement with these

1 particular ministries or organizations, would that affect
2 either of your ability to be fair and impartial hearing
3 the evidence in this case?

4 PROSPECTIVE JUROR: No, sir.

5 PROSPECTIVE JUROR: No, sir.

6 THE COURT: Okay. Thank you.

7 Has any member of the jury panel or any of your close
8 personal friends or relatives ever been subject to civil
9 commitment proceedings or been voluntarily or
10 involuntarily civilly committed?

11 (There was no response.)

12 THE COURT: Is there any member of the jury panel who
13 is related by blood or marriage to any other member of the
14 jury panel?

15 (There was no response.)

16 THE COURT: Is there any member of the jury panel who
17 for any reason believes they may not be able to be a fair
18 and impartial juror in the trial of this case?

19 (There was no response.)

20 THE COURT: Okay. Is any member of -- excuse me --
21 is anyone a member of or contribute to any organization
22 that advocates those who allege -- advocates for those who
23 have alleged to have been abused?

24 (There was no response.)

25 THE COURT: Okay. Is any member of the jury panel a

1 family member or close personal friend of a member of any
2 type of law enforcement?

3 Yes, ma'am, in the back, your jury number?

4 PROSPECTIVE JUROR: Twenty-six. My mother-in-law and
5 sister-in-law retired from SLED.

6 THE COURT: Thank you.

7 Yes, ma'am?

8 PROSPECTIVE JUROR: I'm 82. My sister is an
9 investigator for the DEA.

10 THE COURT: Thank you.

11 MS. ZMROCZEK: I'm sorry, what was that number?

12 THE CLERK: Eighty-two.

13 THE COURT: Eighty-two.

14 Yes, sir, your juror number?

15 PROSPECTIVE JUROR: 138. My father is retired from
16 the South Carolina Department of Corrections.

17 THE COURT: Thank you.

18 Yes, sir, green shirt?

19 PROSPECTIVE JUROR: 171. My sister-in-law is an
20 investigator with the Aiken County Sheriff's Department.

21 THE COURT: Which county?

22 PROSPECTIVE JUROR: Aiken County.

23 THE COURT: Lexington County. Your sis --

24 I'm sorry, I didn't mean to talk over you.

25 THE CLERK: Aiken County.

1 THE COURT: Aiken County Sheriff's Department. Okay.
2 Thank you.

3 Yes, ma'am?

4 PROSPECTIVE JUROR: 192. My father was a DeKalb
5 County sheriff in New Jersey.

6 THE COURT: Just try to help me out. Let's stand up
7 when we speak. That way, we can all see a little bit
8 better.

9 Yes, sir, juror number 202.

10 PROSPECTIVE JUROR: My cousin is a Richland County
11 detective.

12 THE COURT: Richland County?

13 PROSPECTIVE JUROR: Detective.

14 THE COURT: Thank you.

15 Were you about to stand, sir? Yes, sir.

16 PROSPECTIVE JUROR: Forty-six. My grandfather is
17 retired officer in Henderson County.

18 THE COURT: Yes, sir?

19 PROSPECTIVE JUROR: Sixty-five. My wife works for
20 the Department of Corrections at Broad River.

21 THE COURT: Okay.

22 Anyone else?

23 Okay. Yes, ma'am?

24 PROSPECTIVE JUROR: 206. I have a close friend whose
25 husband works for the Highway Department.

1 THE COURT: The Highway Department?

2 PROSPECTIVE JUROR: Yes.

3 THE COURT: Thank you.

4 PROSPECTIVE JUROR: 163. My father is a retired U.S.
5 Marshal.

6 PROSPECTIVE JUROR: Forty-four. This is out of
7 state, so does that matter?

8 THE COURT: Just whatever you think, go ahead.

9 PROSPECTIVE JUROR: I have a son-in-law who is a
10 federal agent in Houston, Texas.

11 MR. BOGLE: What was the number?

12 THE CLERK: Forty-four.

13 THE COURT: All of you who just stood up for that
14 question, would the information you told me, would that
15 affect any of your abilities to be fair and impartial in
16 hearing this case?

17 (There was no response.)

18 THE COURT: Okay. Are any of the jury members or
19 family member or close personal friends related to anyone
20 who works in a prosecuting agency, such as the Solicitor's
21 Officer or Attorney General's office?

22 (There was no response.)

23 THE COURT: Is there any reason because of the highly
24 sensitive nature of this proceeding you'd be uncomfortable
25 or unable to listen to testimony and render a fair

1 verdict?

2 (There was no response.)

3 THE COURT: Do you have strong beliefs about sexual
4 abuse of any kind that would affect you in being a fair
5 and impartial -- or being fair and impartial in
6 consideration of the evidence in this trial?

7 Your number, sir?

8 PROSPECTIVE JUROR: 136.

9 THE COURT: 136. And you believe this type of --

10 PROSPECTIVE JUROR: I don't like it. I'll say that.

11 THE COURT: Well, okay, but to be clear, do you
12 believe this would affect your ability to be fair and
13 impartial?

14 PROSPECTIVE JUROR: Probably.

15 THE COURT: Okay. Thank you.

16 Yes, sir?

17 PROSPECTIVE JUROR: Yeah. I feel pretty much the
18 exact same way. I think anything that came across --

19 THE COURT: Just -- you have some concerns. What's
20 your juror number?

21 PROSPECTIVE JUROR: 174.

22 THE COURT: All right. Thank you, sir.

23 All right. Lastly, I don't think this trial is going
24 to -- I expect this will probably take two days. If
25 you'll notice over here what appears to be a hockey rink

1 is the jury box. We've put plexiglass in between each
2 juror's seat, Plexiglass in front of each juror.

3 As you can tell, the Clerk of Court has done a great
4 job putting as much mitigation in place as really possible
5 in that jury box. If anybody has any concerns about being
6 able to sit in those quarters, we should probably know
7 now.

8 Like I said earlier today, I think 90 minutes is --
9 sometimes we go a little longer. More often than not,
10 it's shorter than that in between breaks. And you, of
11 course, will have chances to stretch your legs and hydrate
12 and all that kind of stuff. I just want to make sure
13 there's no issued with sitting in those spaces before we
14 proceed.

15 Anyone?

16 (There was no response.)

17 THE COURT: Okay. Can I speak to the lawyers real
18 quick?

19 (Whereupon, there was a bench conference.)

20 THE COURT: All right. Any issues with voir dire,
21 counsel?

22 MR. BOGLE: No, Your Honor, not from the State.

23 MS. ZMROCZEK: Not from the Respondent.

24 THE COURT: Ladies and gentlemen, what we're going to
25 do at this time is compile a list of potential jurors for

1 the trial. We'll print that list out. I'm going to allow
2 the attorneys, you know, ten minutes or so to review it,
3 then we'll pick this jury and move on from there. If you
4 can just be patient with us. We'll keep it quiet in here
5 and get moving in a few minutes.

6 And we have two alternates, correct?

7 MS. ZMROCZEK: Yes.

8 (WHEREUPON, a short break was taken.)

9 THE CLERK: Using the numbers on the far left-hand
10 side, the State will strike first and only using one
11 through 20.

12 MR. BOGLE: State strikes No. 2.

13 THE CLERK: Respondent?

14 MS. ZMROCZEK: Respondent strikes No. 19.

15 THE CLERK: State?

16 MR. BOGLE: State strikes No. 3.

17 THE CLERK: Respondent?

18 MS. ZMROCZEK: No. 11.

19 THE CLERK: State?

20 MR. BOGLE: No. 10.

21 THE CLERK: Respondent?

22 MS. ZMROCZEK: Twelve.

23 THE CLERK: State?

24 MR. BOGLE: Twenty.

25 THE CLERK: Respondent?

1 MS. ZMROCZEK: I'm sorry, I didn't hear that number.

2 MR. BOGLE: Twenty.

3 THE CLERK: He said 20.

4 MS. ZMROCZEK: Twenty. Thank you.

5 Fifteen.

6 THE COURT: Okay. Using the numbers 21, 22, 23 for

7 the first alternate. Each side gets one strike.

8 State?

9 MR. BOGLE: Twenty-one.

10 THE CLERK: And respondent?

11 MS. ZMROCZEK: Twenty-three.

12 THE COURT: Say it again.

13 MS. ZMROCZEK: Twenty-three.

14 THE CLERK: Using the numbers 24, 25 and 26 for the
15 second alternate. The State strikes first. Each side has

16 one strike.

17 MR. BOGLE: Twenty-five.

18 THE CLERK: Respondent?

19 MS. ZMROCZEK: Twenty-four.

20 THE CLERK: I'm going to read your strikes back to
21 you. If you'll confirm your strikes, please.

22 State, for jurors, you struck No. 2, 3, 10 and 20; is
23 that correct?

24 MR. BOGLE: Yes.

25 THE CLERK: Respondent, for jurors, you struck No.

1 19, 11, 12 and 15; is that correct?

2 MS. ZMROCZEK: That's correct.

3 THE CLERK: For the first alternate, the State, you
4 struck No. 21; is that correct?

5 MS. ZMROCZEK: That's correct.

6 THE CLERK: And respondent, you struck No. 23; is
7 that correct?

8 MS. ZMROCZEK: That's correct.

9 THE CLERK: For the second alternate, State, you
10 struck No. 25; is that correct?

11 MR. BOGLE: That is correct.

12 THE COURT: And respondent, you struck No. 24; is
13 that correct?

14 MS. ZMROCZEK: That's correct.

15 THE CLERK: When I call your name, if you'll bring
16 your belongings and come up to Mr. Dan here, and he'll
17 show you where to sit in the jury box.

18 Elissa Macarin, Oscar Arguello, Patricia Brohart,
19 Richard Miles, Christopher Near, Jason Corley, Marcie
20 Leaphart, Duane Stevens, Jean Sternberg, Joshua Hinton,
21 Caleb Jeffries, Pamela McPherson. First alternate, Efrain
22 Berdecia, and second alternate is Lori Wicker.

23 THE COURT: Okay. Ladies and gentlemen of the jury,
24 thank you for being here this week and thank you in
25 advance for your service. I can tell you that we're going

1 to go ahead and break at this point for the day.

2 I've got some matters to take up with the attorneys
3 this afternoon. What we're going to do is we're going to
4 start back up tomorrow morning at 9:00 a.m. I'd like you
5 to be in the jury room at 9:00 a.m.

6 When you show up in the morning, the bailiffs will
7 tell you what to do. If you'll let the security know
8 you're a juror and you're here, they'll shepherd you into
9 the correct room for tomorrow morning.

10 Like I said, we'll take breaks mid-morning and
11 midafternoon tomorrow. Most important thing I want to
12 tell you for tonight is please don't discuss the case
13 amongst yourselves.

14 Please don't discuss this case with any of your
15 family members. Please do not do any independent research
16 on your own in this case. All the evidence in this case
17 that you need to have for your ultimate deliberations in
18 this matter will be right here from that witness stand.
19 So please don't do any work on this case. Please don't
20 talk about it or research it in any way.

21 There will be a number I think that may be on your
22 card. If something comes up tomorrow morning or tonight,
23 just keep us apprized of what's going on with each of you.
24 Otherwise, I'll see you tomorrow morning at 9:00 a.m.
25 When you get to your jury room and you're altogether, I

1 ask you to go ahead and just -- y'all can choose your
2 foreperson first thing in the morning and just give a note
3 to the bailiff so you'll have a foreperson when you come
4 out to begin the trial tomorrow. Have a good evening.
5 We'll see you in the morning. Thank you.

6 (Whereupon, the jury left the courtroom at 3:17 p.m.)

7 THE COURT: Counsel, any issues with jury selection
8 before we release the panel?

9 MR. BOGLE: No, Your Honor, nothing from the State.

10 THE COURT: Thank you.

11 MS. ZMROCZEK: Nothing from the respondent.

12 THE COURT: All right. Madam Clerk, they're free to
13 go.

14 THE CLERK: Yes, sir.

15 THE COURT: Ladies and gentlemen, those of you who
16 are remaining, you have made it. You're not on the jury
17 that we picked for this week, so, at this time, you're
18 free to go.

19 You've done your jury service for the week. I
20 appreciate you being here under these interesting times.
21 I know it's been tough to be around during two
22 different selection processes during the day. So have a
23 good rest of your week. Thank you for being here.

24 (Whereupon, the unselected members of the jury left
25 the courtroom.)

1 THE COURT: All right. So we've got some pretrial
2 here. The State has filed several pretrial motions as has
3 the respondent. The Respondent's pretrial motions are,
4 essentially, a carry-on to the last trial.

5 The State filed some new ones in the last few days, I
6 believe. Most of the stuff from the State, I think, has
7 generally been dealt with many times before. I say that,
8 but now I can't find them.

9 I'll let you go through them, Mr. Bogle, but,
10 essentially, as I recall, it has to do with making
11 references to prison, life sentence, that sort of stuff,
12 which Ms. Zmroczek is familiar with, as well as future
13 treatment details.

14 MR. BOGLE: Judge, our first motion has to do with
15 the location. And we ask there be no reference to the
16 location being a prison, about the person being confined
17 for life or for an indefinite time or something like that.
18 As you know, Your Honor, what we have to prove is the
19 conviction of a sexually violent crime and whether or not
20 the person has a mental abnormality that makes him likely
21 to reoffend in the future for a length of time.

22 So anything beyond that would be additional proof
23 that we're not required to make to prove this man to be a
24 sexually violent predator. So that's our first motion
25 having to do with the location.

1 THE COURT: The location of the treatment where --

2 MR. BOGLE: The location of where he would go if
3 he's -- don't call it prison, don't call it forever, don't
4 call it indefinite time, not committed for life, things
5 like that.

6 THE COURT: Ms. Zmroczek?

7 MR. BOGLE: The location itself, as Your Honor knows,
8 is out on the campus of Broad River Correctional
9 Institution. It's not behind the old fence line it used
10 to be. There's a freestanding facility built by the
11 company that does the treatment.

12 THE COURT: Right.

13 MS. ZMROCZEK: That's fine, Your Honor, but we also
14 would object to it being called a hospital, too. It's not
15 a hospital.

16 THE COURT: It's long term care and treatment
17 according to the statute, correct?

18 MS. ZMROCZEK: Correct.

19 THE COURT: So I think Ms. Zmroczek is on board with
20 your first motion.

21 MR. BOGLE: Thank you, Your Honor. The second motion
22 has to do with the type of future treatment he might
23 receive if he's committed. Again, I just outlined what we
24 have to prove. Treatment is not one of them. To require
25 us to prove the type of treatment could be an additional

1 burden on the State that's not required to make. It could
2 confuse the jury.

3 The Supreme Court in Kansas versus Crane -- or Kansas
4 vs. Hendricks said there will be a little valley where
5 prior treatment is a precondition for civil confinement on
6 this issue. So we have that right there. It's not
7 relevant what we have to prove. It could mislead the
8 jury, cause unnecessary confusion.

9 In addition, Dr. Swan, the State's expert, her job is
10 to determine whether or not the respondent has a mental
11 abnormality to make him likely to reoffend. Her job is
12 not to determine treatment. And anything she could say to
13 that would be speculative at best.

14 THE COURT: Ms. Zmroczek?

15 MS. ZMROCZEK: Your Honor, we have no problem with
16 that. We also -- kind of piggybacking on that, there are
17 two issues with Dr. Swan and that kind of thing. And the
18 first is that, as he said, she has to find if there's a
19 mental abnormality. We take issue that she says she was
20 appointed by the court because it kind of lends --

21 THE COURT: Credence to --

22 MS. ZMROCZEK: Yeah. So we would just ask that when
23 he asks how she got involved, say she was ordered to do
24 the evaluation, we're fine with that, but -- but to say
25 that the court ordered me or, you know, because it gives

1 it unfair weight, I believe.

2 THE COURT: Okay.

3 MR. BOGLE: The last time -- and I'm going to make
4 reference to the last time, but never in front of the
5 jury, of course. The last time we agreed that Dr. Swan
6 would say she was appointed pursuant to a court order.
7 The order for evaluation requires her --

8 THE COURT: I think you're using the word order
9 certainly implies that the court mandated that she do it.

10 MR. BOGLE: But it didn't.

11 THE COURT: But as far as --

12 MS. ZMROCZEK: I just think --

13 THE COURT: I don't want the language to come off
14 sounding like that I specifically chose her, that the
15 court wanted her to do it --

16 MS. ZMROCZEK: Right.

17 THE COURT: -- and I think Mr. Bogle understands what
18 you're saying and we'll just stick with the language.

19 MS. ZMROCZEK: That she was ordered to do it.

20 THE COURT: So by the Court, nothing more. Now,
21 would you please make a note to tell Dr. Swan that
22 tomorrow when you speak with her? Just if that was what
23 was agreed to last time, let's just make sure she
24 remembers that.

25 MR. BOGLE: She does. I talked to her about it

1 yesterday pursuant to the court order.

2 THE COURT: Okay.

3 MR. BOGLE: The third motion in limine by the State
4 pertains to the issue of time. We're moving for the Court
5 to prohibit any reference to the amount of time he's spent
6 confined awaiting this trial.

7 As Your Honor knows, the statute in section 44-48-80,
8 part D, says that once probable cause is found to have him
9 evaluated, he's got to be confined somewhere. He was
10 still in prison, part of the case is still pending at the
11 county jail when he gets out of prison.

12 At the same time, we have had the pandemic come up,
13 which back in March, canceled all the jury trials until I
14 think September 14th or 15th or so. We had a big gap
15 there, which was not the fault of anybody, that we could
16 not control. So the amount of time he's been in there is
17 required by statute and it's been extended by things we
18 can't control.

19 For Your Honor's information, the jury trial that got
20 the hung jury was in August 2019. The case was then set
21 for two other times. One, Dr. Swan was in a hospital.
22 One, I was in Charleston trying another case. Then it was
23 set for March of 2020 and the week before, the Chief
24 Justice suspended all jury trials.

25 THE COURT: Right.

1 MR. BOGLE: That's kind of how we got from point A to
2 point B.

3 Again, I don't think -- so he's been where he is.
4 That's a fact of life we cannot control. I think it will
5 be improper to argue to the jury the number of days or
6 number of weeks or something like that he's been there.
7 It's not relevant. It could confuse the jury, distract
8 the jury on something that's not really any of their
9 concern.

10 THE COURT: Ms. Zmroczek.

11 MS. ZMROCZEK: Thank you. And we also agreed upon
12 this last time. Last time, he was in jail for 614 days.
13 Now we're at 1054.

14 How it's going to come up, Your Honor, is that she's
15 going to testify -- she, Dr. Swan is going to testify
16 about his ability to conform to rules and be able to
17 follow rules and blah, blah, blah. He's been incarcerated
18 for 1054 days without one infraction. So I think that
19 that does -- it's going to come in through that way. I
20 don't think that the State --

21 THE COURT: Do you think she'll testify to that?

22 MS. ZMROCZEK: Well, I'm going to ask her. He may
23 testify to that, as well.

24 THE COURT: Well --

25 MS. ZMROCZEK: And so Mr. Bogle last time said we

1 have no objection to him testifying he hadn't gotten in
2 any trouble awaiting this hearing.

3 THE COURT: I think that's fine, too, but if you
4 mention 1054 days in testimony, that sort of back doors
5 what we just discussed, though.

6 MS. ZMROCZEK: Well, in a way, Your Honor, but in a
7 way, it goes to exactly what they have to prove. They
8 don't just have to prove a mental abnormality. They have
9 to prove that he is not able to control his behavior. And
10 he's been a situation where he's been able to control his
11 behavior extremely well.

12 THE COURT: And your point in theory, from your
13 standpoint, would be made better if you were able to say
14 it's been three years, but --

15 MS. ZMROCZEK: Either way, I could do three. Yeah,
16 it's the day or the year, but it's important that he has
17 been under, you know, lock and key and not just that, but
18 he's been under very strict rules and he's followed every
19 single one of them.

20 MR. BOGLE: And we have no problem with that, he
21 hasn't offended while he's been in jail, but saying he's
22 been there three years or 1054 days is the time element
23 that we're concerned about.

24 THE COURT: All right. All right. I'll make a
25 decision on whether or not I think that's appropriate to

1 mention the actual days. Both of you agree that it's
2 appropriate for you to question him and get him to testify
3 that he has not had any infractions in any pretrial
4 confinement while awaiting on this proceeding.

5 Y'all both agree on that, correct?

6 MR. BOGLE: He has had problems while at the prison,
7 but I think that's a separate issue.

8 THE COURT: Okay.

9 MR. BOGLE: I think he was a --

10 THE COURT: I saw the after report. I know what
11 your -- we're talking about --

12 MR. BOGLE: Jail.

13 THE COURT: Yeah. I'll have to think about it
14 because I don't want to confuse them.

15 MS. ZMROCZEK: Yeah.

16 THE COURT: The reality is you may just be stuck
17 without using the time. And I'll make sure I put that on
18 the record and I'll make it clear that that's the way
19 we'll do it.

20 MR. BOGLE: Thank you, Your Honor. Judge, that's the
21 State's three pretrial motions.

22 We have not been served and I need to -- I know we're
23 going to do them today, but I've got to put on the record,
24 we have not been served with any motions on behalf of the
25 defense.

1 I got an email either late last night or early this
2 morning telling me it was the same motions as last time.
3 And last time was a handwritten sheet of paper listing
4 five things. So I'm not sure what we're going into now.

5 Now I know one of them is the PPG, and one is
6 probably the diagnosis of hebephilia. To cover the
7 diagnosis of hebephilia, we'd need Dr. Swan here. So we
8 have to do that first thing in the morning. She's the one
9 who made the diagnosis. She testified the last time about
10 why that's a valid diagnosis, and I can't do that motion
11 right now.

12 THE COURT: Well, I understand. I wish I knew that
13 before I told the jury to be here at 9:00 a.m.

14 Why don't y'all plan to be --

15 MR. BOGLE: It won't take long. I think 9:00 will be
16 fine.

17 THE COURT: All right. Well, we're going to talk it
18 out off the record before we break for the day. That way,
19 I can sort of prepare before.

20 MS. ZMROCZEK: So the two motions I have, Your Honor,
21 he is correct, is the hebephilia, which I know we can deal
22 with tomorrow, and then the keeping out of the PPG. But
23 before I get into those, Your Honor, I do have to renew my
24 Due Process violation motions.

25 THE COURT: Very well.

1 MS. ZMROCZEK: You know, I understand that the
2 pandemic took a part of it, but we're still talking 1054
3 days, you know, and there's no -- there are no statutory
4 creations for bond or for anything such that -- you know,
5 in these matters.

6 And so when unfortunate things happen like scheduling
7 conflicts and/or pandemics, which are rare, but still, you
8 know, for 1054 days to be sitting in the detention center,
9 we still maintain is a violation of due process rights.

10 THE COURT: All right. Mr. Bogle, any response?

11 MR. BOGLE: No, just the point that we had a motion
12 hearing before Judge McKinnon on April 3, 2019, regarding
13 pretrial motion to dismiss with prejudice. He issued an
14 order filed April 4, 2019, that denied those motions.

15 THE COURT: Is it a formal order or a Form 4?

16 MR. BOGLE: It's a written order, a formal written
17 order, yes, Your Honor.

18 THE COURT: Okay.

19 MR. BOGLE: I think a lot of that had to do with how
20 long it took to get the evaluation based on my return to
21 the motion to dismiss.

22 THE COURT: Okay. I found it.

23 MR. BOGLE: Okay. But as far as the law being
24 invalid and any constitutional issues, I guess those were
25 dealt with by Judge McKinnon as far as I recall. The main

1 issue there was how long it was taking to get him
2 evaluated, get him to trial.

3 THE COURT: Well, I haven't read his order, but in
4 my -- I have read the cases in the past and I think the
5 main issue the courts have previously dealt with is even
6 when you've got the 90-day time limit or additional time
7 limits are exceeded, at best, the court jurisdiction --
8 and even a dismissal would not be a dismissal with
9 prejudice in the sense that the case would go away. It
10 would simply be a -- I guess I better go back and look to
11 be clear, but I believe if I recall, it said send to the
12 AG's office, which would just start the process over
13 again. You don't avoid the determination.

14 MS. ZMROCZEK: Right. We understand that.

15 THE COURT: Okay.

16 MS. ZMROCZEK: But the problem is, you know, the
17 problem is that --

18 THE COURT: You disagree.

19 MS. ZMROCZEK: Exactly. Well, and not only that, but
20 we're talking about they think that these people are the
21 worst of the worst, so let's just toss them in jail. And
22 they're like oh, it's not punitive, but that's the actual
23 definition of punitive.

24 It's 1054 days in jail while we're waiting on a
25 hearing, which is why they had those time constraints. So

1 maybe one of these cases one day will -- unless we keep
2 arguing it, then it won't.

3 THE COURT: No, I understand your argument. Just
4 since I'm here, I would like to read the previous order
5 from Judge McKinnon.

6 MS. ZMROCZEK: Oh, certainly.

7 THE COURT: I'll make a formal --

8 MS. ZMROCZEK: I did try, but it's not going to
9 matter.

10 THE COURT: I'll make the formal ruling first thing
11 in the morning.

12 MR. BOGLE: Do you have a copy? There should be a
13 copy in the file.

14 THE COURT: I've got Judge McKinnon's order.

15 So does that take us to the PPG?

16 MR. BOGLE: It would. I have not seen a written
17 motion, but --

18 MS. ZMROCZEK: I'm not required to file a written
19 motion. It's just he just keeps saying that and it just
20 makes me crazy, but that's fine.

21 MR. BOGLE: I think the rules of court require
22 motions to be filed within ten days of the hearing, and I
23 haven't received anything.

24 MS. ZMROCZEK: But they don't prohibit you from
25 raising anything at trial under Rule 70 of the Rules of

1 Civil Procedure.

2 THE COURT: So to the extent there's not a formal
3 motion to exclude any reference to the PPG in evidence in
4 the file, you'd like to make one now; is that correct?

5 MS. ZMROCZEK: Yes, Your Honor. And we are
6 challenging entry of the PPG under -- we believe it
7 requires a Council hearing under 702. The legal standards
8 for admissibility of scientific evidence, when admitting
9 scientific evidence, under Rule 702 South Carolina Rules
10 of Evidence, the trial judge must find the evidence will
11 assist the trier of fact, the expert witness is qualified
12 and the underlying science is reliable. Obviously, that
13 comes from Council here in this state, Your Honor.

14 And I'm sure you have the cite, but 335 South
15 Carolina 1, 515 S.E.2d 508, it's 1999. "When assessing
16 the reliability of scientific evidence, the trial court
17 must consider the degree to which the trier of fact must
18 accept on faith scientific hypothesis not capable of proof
19 or disproof in court and generally not accepted outside
20 the courtroom," and that comes from Jones, 273 South
21 Carolina 723. That's a 1979 case.

22 In applying the Jones standard, we have to look at
23 several factors, publications of peer review, prior
24 application of the method of type of evidence involved,
25 quality control procedures used to ensure reliability and

1 consistency of the method which recognizes the scientific
2 laws and procedures.

3 This deals with the PPG, the penile plethysmography.
4 So as Your Honor is aware -- or I think you're aware of
5 it, it's a device that measures increase in penile
6 circumference or penile volume.

7 The greater the volume, the greater sexual arousal to
8 presented stimuli, which are slides, audiotapes, video
9 tapes. We have several arguments against it, Your Honor,
10 but I believe that since we're challenging it, they have
11 to put up a witness first and then we can.

12 MR. BOGLE: I think if they're challenging it, they
13 need to call their own expert to say it's bad or,
14 presumably, whatever the arguments are. I've got a
15 witness here to talk about it. I'll do whatever you want
16 to, Judge, but if they're challenging it saying that it's
17 not scientifically acceptable, I would expect some kind of
18 evidence.

19 THE COURT: Let's just get right -- obviously,
20 there's also cases that deal with this matter, as well.
21 So you provided me with a copy of the most recent case
22 from the Court of Appeals dealing with PPG testing.
23 Obviously, that -- I don't -- the specific issue in that
24 case may not be an issue here in this trial because, in
25 theory, there's two witnesses here. And that trial dealt

1 with one expert being a conduit for the other.

2 MS. ZMROCZEK: Right, right.

3 THE COURT: However, the court also gave I think was
4 the first South Carolina appellate case that dealt with
5 really, at least, some summary of some of the legal
6 holdings that address the admissibility of the PPG test in
7 this type of context.

8 Now, I've read that. I'm looking at it again right
9 now, but that's what I recall. I suspect based upon what
10 you provided me that you would like to tell everybody how
11 the Bilton case is not current, necessarily on point for
12 the facts here.

13 MR. BOGLE: That is correct, Your Honor.

14 THE COURT: Okay.

15 MR. BOGLE: So for some reason and I -- the Bilton
16 case was based on the fact that Dr. Amy Swan testified
17 about Dr. William Burke's PPG case. She was a conduit for
18 getting in an expert's test who wasn't there. The law we
19 had at the time, we thought we could do it, but anyway.

20 So the court reversed it on that case and that alone.
21 For some reason, known not to me, they decided to throw in
22 a couple of references to the PPG, at least, one of which
23 is totally incorrect. The one that suggests that men are
24 required to masturbate to take the PPG. It's not done.
25 It's not ever been done. It's not allowed.

1 But in any event, if you want to move this thing
2 along, Judge, I've got Dr. William Burke here who gave the
3 PPG. And he is my expert witness to present it on behalf
4 of its admissibility. If I can just go ahead and call
5 him.

6 THE COURT: Okay. I'm trying to find the specific
7 line in the case you're referring to as far as compelling
8 the participant to do that.

9 MR. BOGLE: They used the word Orwellian, I think.
10 There's a federal case out there that uses the word
11 Orwellian.

12 THE COURT: Okay. I see the paragraph you're
13 referring about taking a citation from the 9th Circuit
14 Federal Appeals case; is that correct?

15 MR. BOGLE: Yes, Your Honor.

16 THE COURT: Well, the main issue to decide is whether
17 we're going to allow this testing evidence into the case.
18 So regardless, I assume you want to proffer up whatever
19 testimony?

20 MR. BOGLE: Yes, Your Honor. We would call
21 Dr. William Burke.

22 THE COURT: Let's proceed.

23 WILLIAM BURKE, after being duly sworn,
24 testified as follows:
25

1 THE CLERK: Have a seat and state your name, please,
2 sir.

3 THE WITNESS: William Henry Burke.

4 DIRECT EXAMINATION:

5 BY MR. BOGLE:

6 Q Good afternoon, Dr. Burke. What is your current
7 occupation or occupations?

8 A Two things. Basically, I'm in private practice with
9 my wife, and I have been since 1990. I specialize in the
10 assessment and treatment of individuals with sexual
11 disorders, and then I'm an Assistant Professor of Forensic
12 Psychiatry at the Medical University of South Carolina
13 Department of Forensic Psychiatry, where I run the Sex
14 Offender Treatment Program for them, teach prospective
15 psychologists and psychiatrists and therapists. And I'm
16 involved with a great deal of research there, primarily --
17 exclusively with sexual disorders.

18 Q What professional degrees do you possess, educational
19 degrees do you possess?

20 A Bachelor's of Psychology from the Citadel, Master's
21 Degree from the Citadel in counseling, a PhD from the
22 University of South Carolina in counseling with a cognate
23 in psychology.

24 Q Have you had additional specialized training within
25 the field of Forensic Assessment of sex offenders beyond

1 the education and degrees you just mentioned?

2 A Yes, sir. I've trained with Dr. Gene Able, who
3 developed Able Assessment, the Able Screen, Dr. Byrne,
4 Monarch Plethysmograph, Robert Hair, who developed the
5 Hair Psychopathy Checklist, and then I've been trained by
6 two other agents of certification for two other companies,
7 Limestone and Parks Plethysmography.

8 Q Okay. About how many sex offenders, approximately,
9 have you assessed in your career?

10 A I would have to say conservatively 7,000. I say that
11 because I'm required to keep records for ten years. And
12 we moved to a new office two years ago and,
13 conservatively, I've got 3500 files that I have to keep at
14 any given time. And I get almost one referral a day for
15 assessing individuals on probation for sexual offenses.

16 Q Now, the type of assessments you've done for sex
17 offenders, do some of them relate to the sexually violent
18 predator law?

19 A Yes, sir. I believe I was involved in the very first
20 case that went to trial, and I've been involved with 20 to
21 30 over the years.

22 Q Were you involved in --

23 A Where I testified in --

24 Q I'm sorry. Go ahead.

25 A Well, I've gone and testified because, you know,

1 sometimes I will be hired by a defense attorney and my
2 evaluation isn't favorable to what they're looking for, so
3 I'm not utilized, but I was involved in the case.

4 Q Okay. Now, your involvement with the sexually
5 violent predator act, the law as it works now, were you
6 involved in the enactment of this law?

7 A I was appointed through Judge Gadelia (phonetic) down
8 in Charleston for Governor's Counsel to review the law and
9 how it was going to be enacted.

10 Q Have you previously been recognized by the Circuit
11 Courts in South Carolina and testified as an expert
12 regarding the assessment of sex offenders?

13 A Yes, sir, well over 1,000 times.

14 Q Okay. And have you also previously been recognized
15 as an expert witness in the assessment of sex offenders in
16 sexually violent predator act cases in South Carolina?

17 A Yes, sir, every time I've testified.

18 MR. BOGLE: Your Honor, at this time, we'd like to
19 offer Dr. Burke as an expert in the field of assessment
20 and evaluation of sex offenders under the SVP law.

21 MS. ZMROCZEK: I do have some voir dire.

22 THE COURT: All right.

23 VOIR DIRE:

24 BY MS. ZMROCZEK:

25 Q Dr. Burke, you're not a medical doctor, right?

1 A Correct, I am not.

2 Q When you've been qualified as a forensic assessment
3 of sex offenders as an expert, do most of those -- the
4 majority of that come in annual reviews?

5 A The majority come in annual reviews? I don't even
6 think I counted those.

7 Q Let me ask it this way. In precommitment trials, how
8 many have you testified in?

9 A Somewhere between 20 and 30.

10 Q I'm sorry?

11 A Somewhere between 20 and 30 over the years.

12 Q Okay. And has it all been based on your work with
13 the PPG?

14 A The majority of it. Some of those -- well, I don't
15 know, maybe half of those, you know, I did the whole
16 evaluation.

17 Q Right, right. But if we're just talking about -- you
18 didn't do the whole evaluation in this case, correct?

19 A Correct, I was --

20 Q So we're just talking about the PPG here?

21 A Yes.

22 MS. ZMROCZEK: Your Honor, we wouldn't necessarily
23 challenge --

24 THE COURT: His general qualifications.

25 MS. ZMROCZEK: Right.

1 THE COURT: I think where you're headed is really
2 more cross.

3 MS. ZMROCZEK: Exactly.

4 THE COURT: I'm going to recognize him as an expert.

5 MR. BOGLE: Thank you, Your Honor.

6 BY MR. BOGLE:

7 Q Now, Dr. Burke, one last question I want to ask you,
8 have you been published with regard to the PPG?

9 A Yes, sir. I presently have two publications, peer
10 reviewed publications and I've four in the pipeline.

11 Q Okay.

12 A Just waiting on other people. Specific to PPG, yes.

13 Q Now, what has been your involvement with the
14 Limestone --

15 Madam Court Reporter, I'll spell it for you later,
16 but the word is penile plethysmography. I'll spell it for
17 you later. We're going to refer to it as PPG for short.

18 Is that okay, Judge?

19 THE COURT: Yes, please.

20 BY MR. BOGLE:

21 Q What has been your involvement with the Limestone
22 PPG?

23 A Well, I think first, I'd like to say, initially, I
24 was trained by Parks PPG from Oregon back in 1995 by Rick
25 Minich and I utilized that system for about five years.

1 And then I switched to Monarch, which is Dr. Byrd in Utah,
2 and I used that for five or six years.

3 And then I decided to purchase a Limestone system and
4 I was trained by Tyler Buttle of Limestone. But my
5 association over the last ten or 12 years has been through
6 my efforts and also the efforts of Dr. Craig Dwyer at the
7 Medical University Department of Forensics.

8 We did this together. We helped develop the training
9 protocols and certification protocols for technicians and
10 analysts to properly interpret and administer the
11 Limestone PPG.

12 And so I continue to do that. I mean, I'm presently
13 training -- this is my first training online ever because
14 of the pandemic, but I'm in the process of training the
15 doctors at the Massachusetts SVP program. And I've
16 trained California's SVP program, Texas, New York SVP
17 program and Missouri SVP program and either Illinois or
18 Idaho, I can't recall, but they're right up there.

19 Q Okay.

20 A I think the guy in Idaho.

21 Q Is the Limestone PPG an FDA approved device?

22 A Yes, it is.

23 Q Would you describe to the Court what it is and what
24 the man has to do when he's being administered a Limestone
25 PPG?

1 A Sure. First of all, when you're mentioning the Weber
2 ninth circuit case earlier, there are several things in
3 there that are absolutely false that you alluded to.

4 One is, certainly, we don't require anyone to
5 masturbate. If they started masturbating, we'd insist
6 they stop. We don't touch them in their private areas at
7 all. We don't see them put the gauge on, as the Weber
8 statement has, and we don't show them pornography to get
9 them, quote, unquote from the Weber article, get them
10 warmed up.

11 It's all done to a strict protocol that includes
12 disinfecting the laboratory, calibrating the gauges.
13 Every client sees the same videotaped instructions and are
14 given the opportunity to view it multiple times if they
15 need to.

16 Of course, a clinician is there to answer any
17 questions. When they place the gauge on their penis, it's
18 done in total privacy; nobody can see them. The only time
19 we have any sort of physical contact with them is when we
20 put the respiration belt around their chest.

21 Q Now, they can --

22 A I got lost here. Huh?

23 Q That's okay. They can opt out of the test if they
24 want to?

25 A Sure. You have to sign a consent form and be willing

1 to do it.

2 Q Okay. So, basically, they have -- they themselves
3 put this device around their penis. And then what happens
4 then? What do you show them to measure their level of
5 arousal to different things? What are you showing them?

6 A First thing we show them is a practice segment where
7 they are given sort of a dry run to go through what, you
8 know, the rest of the test is going to be like and there's
9 another opportunity to ask questions.

10 After that, they're usually two things shown,
11 initially, with no sound and those are nude images of
12 adult females and nude images of adult males. After those
13 two are presented -- the thought there and the research
14 community is you want to give them an opportunity to be
15 aroused to something appropriate. And there are no other
16 nude images in the United States. Canada, of course, uses
17 them, but no more nude images on any system in the United
18 States.

19 So then the next 25, 26 presentations are across male
20 and female, what we call persuasive scenarios where the
21 person is talked into having sex and coercive, which is
22 just rape scenarios. And age ranges are infant,
23 preschool, grammar school, teen and adult.

24 Q And all the pictures that they're shown, the stimuli,
25 if you want, that they see of minors are not nude images,

1 correct?

2 A Correct. Most of them have -- there are a couple
3 that have bathing suits on, but the majority of them are
4 fully clothed.

5 Q And what is the -- are there safeguards against false
6 positives or false negatives in this line of work, in
7 this, in what you're doing?

8 A Sure. There's a piezoelectric pad that they sit on
9 that detects any sort of muscle tension or movement. For
10 instance, if they sneeze or cough or stand up quickly or
11 something like that, you can -- the penile trace will
12 spike up very quickly, almost instantaneously and then
13 come back down. And that can be viewed as a false
14 reading, so there's a mechanism in the software to do away
15 with that reading. Plus, you have evidence that that
16 occurred with the piezoelectric pad, cushion.

17 Also, for Limestone, the entire process is digitally
18 video recorded, to include them signing the consent and
19 viewing the practice trial and then going through the
20 entire assessment.

21 Breathing, there's -- it's different than what's
22 utilized in polygraphs. Polygraphs tend to look at
23 breathing for -- looking for patterns of deception. We're
24 just looking to see if they're holding their breath or not
25 or if they're breathing really excessively.

1 Q Let's talk about polygraphs for a second. In a
2 polygraph, the examiner is looking at a whole variety of
3 graphs at the first; is that correct?

4 A Correct.

5 Q But in a PPG, you're looking for one thing, aren't
6 you?

7 A Well, we're looking for evidence of sexual arousal,
8 but we're also looking at any evidence for false
9 positives. Like I said, a sneeze can cause an elevation.
10 Or faking the stimulation, trying to beat the test through
11 holding their breath. I had a guy hold his breath for 90
12 seconds one time.

13 Q Is that what you would call dissimulation when
14 they're trying to --

15 A Yeah, dissimulation is when they're trying to beat
16 the test --

17 Q -- do something to throw off the test?

18 A Yes, sir.

19 Q Okay.

20 A Also, another safeguard is they are -- as part of the
21 instructional set, they are told to press a button if the
22 story they're listening to turns sexual or violent so we
23 can track if they're listening to the content of the
24 story.

25 We have some neutral stimuli with nothing sexual in

1 it, so they wouldn't press the button there. And then --
2 so for six seconds, you'll see like a five-year-old girl
3 and the instructions, they know that this means this is
4 who the story is about. And they'll hear the story. And
5 after the story is over, which is anywhere from a minute
6 to 75 seconds, you'll see six more pictures. And they'll
7 press the button if the person they're looking at is
8 different than the original one in the story. This is to
9 help ensure that they're viewing the content and paying
10 attention to it.

11 Q Okay. And the polygraph, of course, is not F.D.A.
12 approved?

13 A Correct.

14 Q Not admissible in evidence in most every state?

15 A Correct.

16 Q Doctor, are you familiar with the Diagnostic and
17 Statistical Manual Edition Five?

18 A Yes.

19 Q If I may approach the witness.

20 I'm going to hand you a photocopy of the cover and
21 two pages from the book. Is this the Diag -- what is the
22 DSM? How is it treated by you in your profession? What
23 is the purpose of this book?

24 A It's the standardization of diagnoses to be utilized
25 for psychiatry, psychology, counseling, social work,

1 things like that, anything to do with mental health.

2 Q Okay. And on page -- if you would turn to -- the
3 first page I gave you is the cover of the back of the
4 book; is that right?

5 A Yes, sir.

6 Q Okay. The next page is Page 686. On that page --

7 THE COURT: Not to feel left out here, but do you
8 have copy of that for me, too?

9 MR. BOGLE: I was going to introduce that one into
10 evidence.

11 THE COURT: Oh, okay.

12 THE WITNESS: Can you get me some water, please?

13 BY MR. BOGLE:

14 Q Yeah.

15 Okay. The page I gave you, if you look at Page 686
16 of the DSM-5, is there reference to the PPG in that
17 paragraph?

18 A Yes, sir, the last paragraph.

19 Q Would you read me the sentence that includes
20 reference to the PPG?

21 A The type of comparison it can be and usually is
22 employed in psychophysiological measures of sexual
23 interest, such as penile plethysmography in males or
24 viewing times in males and females.

25 Q At the top of the page, this is the section of the

1 book that deals with paraphilic disorders; is that
2 correct?

3 A Yes, sir.

4 Q By paraphilic, we mean deviant disorders, sexually
5 deviant disorders; is that correct?

6 A Well, the Greek word para means aside, so aside from
7 normal. Some paraphilias aren't deviant.

8 Q Okay. Would you turn now to the second page I gave
9 you or the third page I gave you, a copy of Page 699 of
10 the DSM-5. At the top of the page, it's a section on
11 pedophilic disorder, where it says development and course?

12 A Right.

13 Q Down at the very bottom where it says diagnostic
14 markers, would you read the underlying language in that
15 first five lines of that paragraph, please?

16 A Psychophysiological measures the sexual interest may
17 sometimes be useful when an individual's history suggests
18 the possible presence of pedophilic disorder but the
19 individual denies strong or preferential attraction to
20 children.

21 The most thoroughly researched and longest used of
22 such measures is penile plethysmography, although the
23 sensitivity and specificity of diagnoses may vary from one
24 cite to the other.

25 Q Now, was the DSM-4, the predecessor to this book, did

1 it mention the PPG?

2 A I don't believe it did.

3 Q Okay. Can I have the pages I gave you?

4 A Yes, sir.

5 MR. BOGLE: For the purposes of this hearing, Your
6 Honor, I'd like to introduce these into evidence,
7 photocopies from the DSM-5.

8 THE COURT: All right. Any objection?

9 MS. ZMROCZEK: Not for the purposes of this hearing.

10 THE COURT: So admitted.

11 (Whereupon, State's Exhibit No. 1 marked for
12 identification.)

13 BY MR. BOGLE:

14 Q Now, Doctor --

15 THE COURT: So admitted for the purposes of this
16 hearing, but not in evidence.

17 MR. BOGLE: Well, yeah, Your Honor, whatever.

18 BY MR. BOGLE:

19 Q Now, Doctor, is the limestone PPG -- regarding
20 Mr. Nichols, the subject of this hearing, were you called
21 upon to do a PPG hearing of him?

22 A Yes, sir.

23 Q Was it Limestone the PPG you gave Mr. Nichols?

24 A Was it?

25 Q It was a Limestone --

1 A Yes, sir.

2 Q Okay. We've mentioned polygraph analogy as being a
3 false analogy, why is that?

4 A Well, polygraphy is -- well, as you stated, there's a
5 lot of differences. It's not an F.D.A. approved medical
6 instrument and it's measuring -- there's an equation
7 involved with pressure and heart rate for the blood
8 pressure cuff.

9 Penile plethysmography, the value that's most
10 important is an increase or decrease in tumescence or in
11 circumference of the penis, which is the only -- presently
12 the only direct measure of sexual arousal, but they're
13 working on stuff.

14 Q Okay. When we talked about dissimulation a minute
15 ago, you look for that as well to see if the person is
16 trying to throw the test or fake the test?

17 A Yes, sir.

18 Q Let's talk about standardization, would you address
19 the issue of standardization as to how this examination
20 was given to Mr. Nichols?

21 A Well, as I testified a little while ago, the
22 Limestone system and the -- you know, the Monarch system,
23 too, those are the two systems being used right now. And
24 they're both really good systems and they both have
25 standardized protocols, standardized training and

1 certification to administer and interpret the data. So
2 that's going on, okay.

3 Also, the -- everyone is subjected to the same
4 stimulus and depending on whether it's Monarch or
5 Limestone and the interpretation by both companies is done
6 in a standardized way. You have to pass a test.

7 You know, you go through 72 hours of training to be
8 able to administer and interpret the data and write the
9 reports. So it's both companies do about the same thing.

10 Q Is the Limestone the more prevalent company in this
11 country?

12 A It is right now.

13 Q About how many labs use the Limestone, do you know?

14 A I don't know exactly in the United States. It's -- I
15 would say close to 100. There's maybe 250 laboratories
16 now on the planet and about 150 or so are Limestone.

17 Q Okay. Now, as you mentioned earlier, might have
18 alluded to earlier, in some countries, like Canada, they
19 can actually show nude images of children to the person
20 taking the test; is that correct?

21 A Right.

22 Q But that's not lawful here and it's not done?

23 A Correct.

24 Q In addition in the United States, in Canada, is there
25 a different number of millimeters the person has to

1 expand, if you will, or arouse to be counted as a valid
2 response or arousal to the particular stimuli that he's
3 looking at?

4 A Well, in Canada, the standard, which is set by the
5 government is two millimeters -- any increase of
6 two millimeters from baseline is positive for sexual
7 arousal.

8 Q Okay.

9 A In the United States, I guess both companies are
10 trying to give the person the benefit of the doubt,
11 Limestone, you have to have 4.7 millimeters of increase
12 and it's 6.0 for Monarch.

13 Q So is the Limestone PPG method used in the United
14 States standardized as far as the stimuli go and how it's
15 to be interpreted and how it's to be read?

16 A Correct.

17 Q Now, the population you're administering this to,
18 like Mr. Nichols, does that fit a similar population?
19 Sort of a standard population is getting involved in these
20 types of tests?

21 A I'm not clear on what you're asking.

22 Q Let me rephrase the question. You do assessments you
23 mentioned before, some pretrial in criminal cases, some
24 pretrial in SVP cases?

25 A Right.

1 Q Sometimes you're hired by the defense?

2 A Right.

3 Q Has the PPG been published and subjected to peer
4 review?

5 A For about 50 years.

6 Q Okay. Have there been prior applications of the PPG
7 in cases involving the Sexually Violent Predator Act? You
8 testified about this earlier I think, but I've got to ask
9 you again.

10 A Right. Yes, it has. I will say there were two SVP
11 cases I was involved with and I believe it was with you
12 where -- no, no, it wasn't. It was allowed in -- I've had
13 them all allowed in that I did the full evaluation. I
14 think one has not been allowed because it was in -- the
15 victim was an adult female. But then, again, I had
16 another case where it was an adult female victim and it
17 was allowed.

18 Q What quality control methods are used regarding the
19 Limestone PPG? There's something called Real Child
20 Voices, the voices that are -- the person listens to.
21 What quality control methods are used in that?

22 A Well, I mean, I've gone over all those already, the
23 standardization of the training, the standardization of
24 the presentation to the client. You know, the real child
25 voices, which, you know, I'm co-developer of initially,

1 has been utilized -- you know, like you said, it's
2 utilized in roughly 100 labs in the United States. It's
3 also utilized somewhat in Canada.

4 There is presently several studies that have utilized
5 the real child voices. And I've got -- if you'll allow me
6 to read and I can give you these publications. Let's see
7 from -- well, this is measurement of male arousal interest
8 with penile plethysmography.

9 This is from Dr. Laws and Dr. Donahue. It just
10 mentions that there is Limestone and Monarch and each of
11 these suppliers provide stimuli sets that are used during
12 the testing and are standardized from the Journal of
13 Sexual Medicine June 2019.

14 Furthermore, some standardized stimuli sets, such as
15 the Marshal Ottawa Sexual Behavior Clinic set and the Real
16 Child Voices set are used regularly in laboratories
17 internationally.

18 In the International Review of Psychiatry 2019, steps
19 toward international standardization is -- well,
20 essentially, what it's saying they're trying to merge the
21 Canadian and American way of doing things and what's
22 being -- what's being worked on is to take the real child
23 voices and merge that with Canada's nude images for them.
24 The United States won't have nude images.

25 But there's debate on -- they're going to raise it

1 from two millimeters maybe to four, something like that.

2 Those are the arguments for standardization right now.

3 Q The PPG, is it consistent with recognized scientific
4 laws and procedures?

5 A It is. It passed the Daubert challenge in 2016 in
6 Florida. And that was with the Limestone system and the
7 Real Child Voices for females.

8 Q By Real Child Voices, you have tape recordings, audio
9 recordings of children saying things, right?

10 A Correct.

11 Q Not pornographic things, but just saying things?

12 A Correct.

13 Q And see how the man reacts to that, hearing the
14 child's voice?

15 A Well, I mean, the children don't say anything
16 pornographic. They don't say anything sexual at all, but
17 it's like cutting and pasting a document. It's put into a
18 scenario it could be interpreted as sexual.

19 For example, there's -- one of the stimulus
20 presentations is a ten-year-old boy in a camp shower with
21 his Scout master. The Scout master under the auspices of
22 teaching him good hygiene and is going to wash his
23 genitals and have him wash his. So the boy was told to
24 say things like, "Gee. Nobody ever told me to do this
25 before, that feels good."

1 They were told to imagine that they wanted to pet
2 this dog, but they were afraid the dog was going to bite,
3 so wanted to be a little timid and say, "Can I touch it?"
4 Things like that. And then it was put into a scenario to
5 make it sound sexual.

6 Q Okay. Phrases that aren't sexual by themselves are
7 then put into this scenario. And if the person is a
8 pedophile, they're going to show a reaction to it. Is
9 that what we have here?

10 A Well, that's what the research is indicating, yes.

11 Q Now, in the case of Mr. Nichols, you tested him; is
12 that correct?

13 A That's correct.

14 Q His diagnosis by Dr. Swan was pedophilic disorder and
15 other specified disorder, hebephilic disorder, which
16 involves post-pubescent, but still illegally young
17 teenagers. Are the findings you found, his reactions
18 consistent that type of diagnosis?

19 A Yes, sir.

20 MR. BOGLE: Thank you, Your Honor. No more
21 questions.

22 THE COURT: All right. Cross-examination.

23 MR. BOGLE: Can I have mine back and give you the one
24 that she marked or have you been coloring on it.

25 THE COURT: I'm sorry, I wrote on it.

1 MR. BOGLE: Okay. Okay. No problem.

2 THE COURT: Can we make copies of that after this?

3 MR. BOGLE: No problem. I'll get more.

4 THE COURT: Sorry about that. I thought that was for
5 me to have.

6 MR. BOGLE: Thank you, Your Honor.

7 CROSS-EXAMINATION:

8 BY MS. ZMROCZEK:

9 Q Dr. Burke, there is no known potential error rate for
10 these; is that correct?

11 A No, that's incorrect.

12 Q Okay, what's the potential error rate?

13 A Depending on the laboratory, it's anywhere from three
14 to seven percent.

15 Q Right. Depending on the laboratory, right?

16 A Right.

17 Q And the problem is that that varies because there are
18 variations, right?

19 A It varies because there are variations?

20 Q You said the known potential error rate -- and where
21 is that published, that error rate?

22 A Well, there are different ones. There are -- the
23 more recent one is in Laws -- give me one second.

24 Richard Laws and Donohue 2016. I thought it was
25 2019. 2016. There's some others, as well.

1 THE COURT: Are you referring to a case?

2 THE WITNESS: No, sir, published --

3 THE COURT: Okay.

4 THE WITNESS: -- post articles.

5 THE COURT: Thank you.

6 MS. ZMROCZEK: And, in fact, I'll go ahead and mark

7 this just for a Court's Exhibit. Do you have one?

8 THE WITNESS: Well, if I can continue to answer --

9 (WHEREUPON, Respondent's Exhibit No. 1 marked for
10 identification only.)

11 BY MS. ZMROCZEK:

12 Q You're referring to Dr. Richard Laws when you say
13 Laws, right?

14 A Right.

15 Q And he is someone -- sorry.

16 MS. ZMROCZEK: I don't know if it's my shoes or my
17 height, Your Honor, but I can't see. Since there's no
18 jury, can I just move this over here? I can't see with
19 all these sticks.

20 THE COURT: That's fine. That's fine.

21 MS. ZMROCZEK: Thank you.

22 BY MS. ZMROCZEK:

23 Q And he is someone who does a lot of research and
24 studying on these?

25 A Oh, yes.

1 Q And you're familiar with the article that he wrote on
2 July 2nd, 2009, that was entitled penile plethysmography
3 strength, limitations and innovations, correct?

4 A Yes.

5 Q And, in fact, he advocates still that it is still not
6 widely accepted?

7 A Well, if you can show me that. I don't think -- that
8 might be out of context, but that's -- what I'm citing is
9 2016 and there's other stuff, 2018, 2019 that
10 meta-analytic studies.

11 Q Because it's still be --

12 A That say you should use it.

13 Q It's still being studied, correct?

14 A Well, every -- it's going to always be studied. I
15 mean --

16 Q Right.

17 A -- everything is always studied. Once -- even it
18 enters in use, there's always room for improvement. Where
19 are you -- can you show me?

20 Q I'll come back to that and I'll tell you the page in
21 a moment.

22 A Okay.

23 Q But I wanted to talk about that, yes. And they
24 absolutely agree that it should be used in treatment of
25 sex offenders, correct?

1 A Correct.

2 Q Okay. There is dispute whether or not it should be
3 used as a diagnostic tool, correct?

4 A No.

5 Q There's no dispute amongst --

6 A Well, yeah, there is dispute among some doctors, but
7 DSM-5 and the vast majority of publications. I mean, how
8 do you treat somebody if you don't utilize it -- if you
9 can use it for treatment, then how are you going to
10 diagnosis them properly? I mean, that -- the cornerstone
11 of treatment is accurate diagnosis. And this is the
12 only -- presently, the only instrument or test we can
13 specifically measure sexual arousal in males.

14 Q All right. It's been published. It's been
15 researched, yet, the conclusions are inconsistent, would
16 you agree with that?

17 A Historically, I agree with that, but in the last five
18 years, there's really a consensus moving towards you
19 really need to utilize this test.

20 Q It's not widely accepted in the field and it's been
21 determine inadmissible in several courts, correct?

22 A Correct. But as I testified earlier, it's utilized
23 by the State of New York for SVP assessments. On
24 training, it's used in Massachusetts, it's used in
25 Missouri, California. It's been used here.

1 Q It's been rejected here as well, right?

2 A There's that one time I brought up earlier that I
3 know of. I don't know --

4 Q Okay.

5 A -- well, it's either my laboratory or MUSC's
6 laboratory -- excuse me, actually, the SVP laboratory here
7 like ten years ago had a lot of problems.

8 Q Okay. In William Marshal sex offender treatment
9 volume one, 2006, you're familiar with that?

10 A Yes.

11 Q States, on the basis of these observations, the
12 routine use of phallometric assessments is part of an
13 evaluation of a sex offender is not recommended?

14 A Right. That's 2006.

15 Q Right. And he has not -- there's not -- they have
16 not changed that position since 2006, correct?

17 A He's retired. He retired a couple of years after
18 that.

19 Q Right. That has not been changed.

20 You talk about the agreed-upon standards for
21 Limestone, but you would agree that there are no
22 universally agreed-upon standards for performing these
23 procedures. In fact, I think you talked about in Canada,
24 they used nudes and here they don't. So there are
25 differences amongst the countries, much less amongst the

1 states?

2 A Well, I totally agree that there are differences
3 between the countries. I disagree that there are
4 substantial differences in the United States because it's
5 either Monarch or Limestone and both instruments
6 require -- if you're going to purchase it, you have to
7 meet certain educational requirements, licensure
8 requirements.

9 You just can't get it off of eBay. Then you have to
10 go through this rather rigorous training and pass a test
11 and then submit three or four lengthy reports that are
12 reviewed afterwards. It's an F.D.A. approved instrument.
13 Anything to do with the F.D.A. requires strict guidelines
14 for administration and interpretation.

15 So no, I disagree with that because those are the two
16 main companies. I don't even think Parks -- anybody even
17 uses Parks anymore.

18 Q Okay. You would agree that Monarch and Limestone
19 have two different sets of requirements?

20 A Two different -- yeah.

21 Q Okay.

22 A But limited to this, okay. They have a different
23 stimulus set.

24 Q Right.

25 A And they go with six millimeters of change and

1 Limestone goes with 4.7 for significance. Everything else
2 is -- I've been trained by both companies.

3 Q I understand.

4 A I mean, those are the difference. That's not much.

5 Q But there are differences?

6 A Well, there's Ford and Chevy, but, you know, it's,
7 basically, you know...

8 Q Okay. So what studies do you have that shows that
9 the use of PPG results relate to recidivism?

10 A Well, the Static 99 Meta-Analysis by Hanson and
11 Bussiere in 1999 said -- and this is pretty much a
12 quote -- the single greatest predictor of recidivism
13 regarding child molestation is a positive response to
14 children in the plethysmograph laboratory. And I think
15 that's an exact quote.

16 Q Okay. And that --

17 A You know, everybody is required to use Static 99 in
18 the derivatives of that and Hanson is the statistician
19 guru that sex offender evaluations are based on. I mean,
20 he's the guy. And he's saying -- Hanson and Bussiere and
21 then Hanson and another French guy, I can't remember. But
22 that was 2000, 2004, they did it again, another
23 metanalysis and came to the same conclusion.

24 Q And you would agree that Hanson has said and still
25 does that even the Static 99 is at best moderately

1 predictive?

2 A Yeah, but we're talking about -- that's correct, but
3 we're talking about PPG.

4 Q Right. And we don't have any -- we don't have any
5 science-based productivity or prediction rates for the
6 PPG?

7 A Prediction rates? Well, those two studies, you know,
8 meta-analytic studies which involved over 1,000
9 individuals in both cases said that was the greatest
10 predictor. All right. So there's a thing called area
11 under the curve and R.O.C., receiver operator curve. It's
12 statistical analysis.

13 Q Uh-huh.

14 A And that's what they're basing it off of, okay. To
15 give you an example, smoking, cigarette smoking, the
16 R.O.C. for that is 0.51. Now, R.O.C.s are really closely
17 related to correlations, okay, so, 0.51. The first
18 metanalysis for PPG was .43 and then the second one was
19 .39. Because they're still really robust.

20 If those are cigarettes, you'd get cancer. I mean,
21 they're right there. That's pretty robust statistically.
22 You can't -- it's -- to say -- I'm not even sure what
23 you're asking when you say percentage. I mean, how many
24 are accurately predictive of PPG, I think you're correct.

25 I don't know of any specific percentile or percentage

1 ranging, but the R.O.C. and the area under the curve are
2 pretty robust predictors, very robust predictors.

3 Q Now, you said you received a lot of training, but
4 you're not the actual technician who conducts the test?

5 A I am. 90 percent of the time, I do.

6 Q And you did it in this one?

7 A I believe so. Yeah.

8 Q Okay. So 90 percent of time, you are doing the
9 actual test?

10 A I am.

11 Q Okay.

12 A Let me say, since the last three years, I've done all
13 of them. When I moved to my new office, you know, I
14 didn't bring my technician.

15 Q Do you do these tests on non-sex offenders?

16 A Do I do them on non-sex offenders? I mean, I have
17 when been asked to, you know, for strange reasons, but I
18 have.

19 Q Okay. So when we're talking about -- I want to talk
20 about criteria validity?

21 A Right.

22 Q In other words, the ability of the test to
23 differentiate sex offenders from one another, as well as
24 from non-offenders, right?

25 A Right.

1 Q There's no strong evidence that this case can do that
2 -- that this test can do that?

3 A No, that's not, correct. That's not correct.

4 Q Okay.

5 A And it's also a red herring and I'll get back to
6 that. So what we have is the research I was involved with
7 Dr. Dwyer initially was we gave the PPG to 30 people who
8 did not have a record of a sex crime and seven of them
9 responded to children, okay. Then we polygraphed
10 everybody and all seven either failed the polygraphed or
11 admitted under the interview in the polygraph that they
12 had molested children before.

13 Now, the Real Child Voices has been taken up in
14 Canada's Ottawa clinic with Dr. Fedoroff. Their initial
15 study, which had 60 people involved, 30 of them normals,
16 there was no deviant arousal in the normal population at
17 all. And I don't -- I've lost -- I don't know what the
18 numbers are right now, several hundred that they have now.
19 So --

20 Q So where are these studies published?

21 A Well, the one with Dwyer, Dwyer took the job at the
22 State department and that's sort of frowned on.
23 Dr. Murphy and myself presented to the International
24 Association of Sexual Researchers in 2017 and published --
25 presented the initial study that I just talked about. And

1 then the -- okay. Let me make sure I understand. Ask me
2 your question again.

3 Q Okay. You said that you've done studies on comparing
4 sex offenders and non-offenders and that those studies
5 have been published and I just asked where?

6 A No, I didn't -- no -- we're trying -- it was supposed
7 to be published. It's going to be published.

8 Q Hasn't been published?

9 A No, it hasn't, but it has Canada with the Ottawa
10 Clinic and then the last two metanalysis that have been
11 published that's got nothing to do with me, nothing to do
12 with Limestone or anything else and it used Limestone and
13 Monarch plethysmograph systems found that it was the most
14 robust predictor of recidivism. There was that particular
15 study and I don't think that study had the normal in it.

16 Q Okay.

17 A Let me -- now, I think -- this is why I said I
18 believe it's a red herring because what we're talking
19 about is a specific population of people who have been
20 convicted of sexual crimes. We're not talking about
21 somebody off the street.

22 We're talking about that specific population when
23 they are given this test in response to children, they are
24 more apt to reoffend at a much higher rate than those who
25 do not respond to children. Because some people molest

1 children and really don't meet the definition of
2 pedophilia.

3 Q And what is that rate?

4 A What is what rate?

5 Q You said at a much higher rate. What is the rate?

6 A Well, I said, you know, the R O.C. is .47. I mean,
7 that's pretty close to smoking cigarettes causing cancer
8 is the easiest way I can sort of --

9 Q But not everyone that smokes cigarette gets cancer?

10 A I'm not a licensed actuarial, but I've had six
11 graduate courses and three of the graduate courses --
12 three PhD, well statistics courses.

13 Q All right. Let me move on. Results can be
14 influenced by a person's age, correct?

15 A Correct.

16 Q Results can be influenced by a person's health?

17 A Yes.

18 Q Results can be influenced by a person's medication?

19 A Yes.

20 Q Results can be influenced depending on the time since
21 they last ejaculated?

22 A Yes.

23 Q It only measures the circumference and not the length
24 of the penis?

25 A Correct.

1 Q Various aspects can also affect results, the mood of
2 a person?

3 A Right.

4 Q The -- we already talked about the age.

5 A Uh-huh.

6 Q The IQ?

7 A Yes.

8 Q The arousal to novelty?

9 A Yes.

10 Q Brightness?

11 A I'm sorry, what?

12 Q Brightness or the hue or the loudness of the voice?

13 A Brightness or --

14 Q Or pitch of the audio, excuse me, not the voice?

15 A I haven't seen that in -- I haven't seen that, no.

16 Q Introducing normal sexual material at the beginning
17 of the assessment tends to produce greater subsequent
18 arousal to deviant stimuli, correct?

19 A Normal -- say that again.

20 Q Introducing normal sexual material at the beginning
21 of an assessment tends to produce greater subsequent
22 arousal to deviant stimuli?

23 A Are you getting that from the Weber article? Because
24 that sounds like pornography.

25 Q Okay.

1 A And that's true, but nobody in the United States does
2 that.

3 Q Okay. You would agree that there is -- at this time
4 still a general lack of acceptance amongst the scientific
5 community for PPGs?

6 A No, I disagree.

7 Q Okay. And how many times has the PPG been used to
8 diagnose a mental abnormality?

9 A Well, you're not supposed to use one data point
10 specifically to derive at a diagnosis. What you are
11 supposed to do is use, you know, multiple data points,
12 which include things certainly like review of records,
13 criminal records, interview, psychological testing, you
14 know, visual reaction time, you know, like the Able
15 assessment or something and PPG.

16 You know, you use all the available tools you have,
17 actuarial skills you're suppose to use. There are
18 standards of care that you're supposed to uses, okay,
19 according to ATSA, Association for the Treatment of Sexual
20 Abusers, which is a worldwide organization, and
21 plethysmography is listed as one you should do.

22 Q It's not listed in any DMH requirements, correct?

23 A DMH?

24 Q Department of Mental Health, where we are here?

25 A I don't understand.

1 Q There are no policies and procedures that require the
2 use of a PPG in a precommitment evaluation in the State of
3 South Carolina?

4 A Policies and procedures for the Department of -- I
5 don't -- since that company from Florida came up, I don't
6 know what they're doing.

7 MS. ZMROCZEK: Okay. Your Honor, I have no further
8 questions. I will have argument, though.

9 THE COURT: Any redirect?

10 REDIRECT EXAMINATION:

11 BY MR. BOGLE:

12 Q The question about the person's age and the
13 medication the person might be on and things like that,
14 don't you interview the person about all those things
15 before he's given the test?

16 A Yes, yes.

17 Q Okay. And despite all these things, medications,
18 age, whatever, if he still is aroused by certain things,
19 he gives a reading, correct?

20 A Right.

21 Q He gives a reading?

22 A There's often the worry that a particular medication,
23 like Viagra, will cause you to have a deviant response.
24 There's two studies that I know of that that's not what is
25 indicated.

1 You may get a larger response in tumescence overall,
2 but the range -- order of your responses don't change. So
3 they've given it to people without Viagra and then later
4 with Viagra. But if they're aroused to adults only,
5 they're only aroused to adults. If they're aroused to
6 adults more than kids, but still kids, the same thing. It
7 doesn't affect the rank order.

8 Q In this case, you said --

9 A He didn't say he was on Viagra. You know, if
10 anything, the medications suppress arousal that he was on.

11 Q In this particular case, you mentioned earlier that
12 you show him some regular nude images of adult people, man
13 and a woman, as a starting point?

14 A Right.

15 Q Is there any suggestion that him seeing that to begin
16 with is going to affect his later results when he shows
17 results to deviant things, like child --

18 A Well, actually --

19 Q Young girls, young boys, things like that?

20 A Actually, what happened with this particular test --
21 and I'm really fogged up over here. I'm sorry.

22 Q The fact in general --

23 A Okay. Let me answer that, okay. He was shown nude
24 females, okay, and he started -- his baseline was 84
25 millimeters, and he increased 3.36, not enough for

1 significance, okay.

2 His baseline hovered around 85 to 86 until we got to
3 grammar school male coercive -- no, I'm sorry, teen female
4 persuasive, then he got significant arousal. And we
5 couldn't get him to -- and I noted this in the report. We
6 could not get him to detumescence, okay.

7 Q Okay.

8 A He got turned on by the teenage girl scenario, which,
9 you know, I've got to say, I'm not that concerned about
10 but I mean, from, you know -- from being a response from
11 plethysmography, but -- so the rest of his test, his
12 baseline was then, at least, 106 where it started at 84.
13 We couldn't get him down, okay.

14 Nevertheless, he continued to respond. Like teen
15 female coercive, clearly, he had to have a full erection,
16 it was 33.43 millimeters.

17 So I'm just responding this particular test on this
18 day with this individual showing nude images of adult
19 females, he didn't respond significantly and his baseline
20 stayed the same until he got to the teen female portion
21 and then it wouldn't come down.

22 Q Okay.

23 A But then he continued to reach significance beyond
24 that anyway.

25 Q And what were the deviant sexual things he was shown

1 that he showed enough response to count? You mentioned
2 teen female persuasive and coercive, what else?

3 A Teen female persuasive, adult female persuasive,
4 which is good, we want to see that. Teen female coercive,
5 rape of an adult female, preschool male coercive, rape of
6 a five-year-old boy, 9.25.

7 You know, there are also indications of
8 dissimilation, you know, attempting to suppress
9 significantly for most of the test. So as I put in the
10 report, I don't think this is really the clearest picture
11 of his arousal patterns that we have.

12 Q And these were consistent with the diagnoses that you
13 heard Dr. Swan say that he had?

14 A Yes, sir.

15 Q Pedophilic disorder and hebephilic disorder, correct?

16 A Yes, sir.

17 MR. BOGLE: Thank you, Your Honor.

18 THE COURT: Anything else?

19 MS. ZMROCZEK: I have no more questions.

20 THE COURT: You can step down.

21 MS. ZMROCZEK: I do have argument.

22 THE COURT: You can step down, Doctor. Thank you.

23 MR. BOGLE: Can he be released?

24 THE COURT: He's free to go.

25 THE WITNESS: What time should I be here tomorrow?

1 Well, I'm assuming a lot, aren't I?

2 MS. ZMROCZEK: I need to make sure that that article
3 got...

4 THE COURT: All right. Where shall we begin? I'll
5 let you start. I trust you disagree with some of the
6 things you heard.

7 MS. ZMROCZEK: I do. Your Honor, here's the problem.
8 If we're going to let -- precommitment, if we're going to
9 let this testimony in, which, candidly, a judge at this
10 courthouse has called junk science. What we're concerned
11 about is --

12 THE COURT: Well, not this Judge.

13 MS. ZMROCZEK: Not this judge. Not this judge.

14 THE COURT: Thank you.

15 MS. ZMROCZEK: No, no, not this judge.

16 THE COURT: I don't know who you're talking about,
17 but this is not me.

18 MS. ZMROCZEK: No, that's Judge Keesley. But, you
19 know, every judge is entitled to evaluate his own when
20 we're in this situation which is why we're presenting it
21 to you this way.

22 Here are my concerns, you know, scientific, technical
23 or otherwise special knowledge, that's supposed to assist
24 the trier of fact. And when he starts talking about all
25 these different age ranges and, you know, oh, I'm not

1 really concerned about that, oh, you know, then there was
2 the boy, the young boys, but, you know, and then the
3 teenage girls.

4 But then specifically testified to that he showed
5 naked pictures before and then agreed with that statement
6 when I said introducing normal sexual material at the
7 beginning of the assessment tends to produce greater
8 subsequent arousal to deviant stimuli.

9 He's like yeah, but we don't do that here. But then
10 he turned around and said that's exactly what he did, was
11 he showed nude pictures and then started to create a
12 baseline.

13 It was all very confusing. The reason I was asking
14 about where these studies are published and then I guess
15 it finally came out that they aren't published or they may
16 becoming published is because they're not published yet.
17 It's just not -- the underlying science is just not
18 reliable.

19 He talked about -- I think I wrote it down. Well,
20 they're close enough. Well, close enough isn't what we
21 using when we're making these kind of decisions. We're
22 talking about giving a jury information.

23 And then, Your Honor, while I'm thinking about it
24 because I had it written down, if his involvement
25 discusses the polygraph and things like that, obviously,

1 we would object to any of that coming in. And then -- so
2 there's that whole area of confusion with the result of
3 this -- you know, of this test.

4 And then even -- let's just -- under Council, under
5 Jones, Your Honor, we don't believe that it makes -- that
6 it meets that standard as you being the gatekeeper. But
7 even if you were to find that it's somehow unreliable, the
8 probative value of this is substantially outweighed by the
9 risk of unfair prejudice, especially when he starts
10 talking about rape scenarios of young boys and things like
11 that are not -- those A, were not his charges.

12 I understand that that's what he's looking for in
13 his, you know, deviant looking, but that has nothing to do
14 with what my client pled to. My client pled to a very --

15 THE COURT: I read the report.

16 MS. ZMROCZEK: Okay. Yeah, so he -- you know, so he
17 has pled to a very specific incestual nature. This is
18 just as -- just as -- it's just our basis, Your Honor,
19 that this is not -- this testimony is not at all going to
20 assist the trier of fact.

21 It's rooted in unreliable principles and methods.
22 The reliability of the expert is going to depend on which
23 the trier -- the trier of fact must be able to interpret
24 and take.

25 There's no scientific hypothesis. You know, I asked

1 about all of the things that could change it, that can
2 change the results, the age, the health, medications,
3 things like that.

4 And that varies amongst populations and so there's no
5 standard. They keep using the word standard saying sure,
6 I'll admit that there is a standard for that test, but
7 that's not what that's limited to. When we're talking
8 about this kind of information, it has to be standardized
9 across the community.

10 THE COURT: Now, just one of things he testified to
11 and I suspect this goes towards reliability, but one of
12 the questions you had was about the historical
13 inconsistency, but he testified that there were many more
14 consensus over the past five years.

15 MS. ZMROCZEK: And that's why -- that's why I just
16 asked for the name of the studies because if that had been
17 published, then I certainly wouldn't be asking him these
18 things. But testimony just saying it's been published or
19 it's coming down the pipeline versus, you know, a
20 peer-reviewed decision. Those are two very different
21 things.

22 I mean, I wasn't trying to be smart, I simply was
23 like where is it published so that I can read it and agree
24 with you or disagree with you, but I can't because it's
25 not out there.

1 THE COURT: One other point I'd like you to address,
2 or either one of you. I recall reading in cases about how
3 I think it's fairly accepted that this type of test is
4 appropriate in a treatment context, but the way Dr. Burke
5 responded to you was how do you have treatment without a
6 diagnosis.

7 I haven't thought about it from that angle, but I
8 think we would -- well, if we were in a context of an
9 annual review --

10 MS. ZMROCZEK: Then I wouldn't be making this
11 argument at all. I agree, I think that that is where this
12 is appropriate, this sort of -- but -- because the studies
13 have been -- and I think the studies that he was drawing
14 on rely to for annual reviews and for the treatment and
15 for the progress. I think that's very different than what
16 we're talking about.

17 THE COURT: Mr. Bogle.

18 MR. BOGLE: Thank you, Your Honor. May it please the
19 Court. In my argument, I'd like to also incorporate the
20 filed return to the motion to exclude the PPG, which has
21 been filed with the court.

22 THE COURT: Yes, sir.

23 MR. BOGLE: All right. Let's talk about what you
24 have to look at under State V. Council analysis. First
25 off, will the evidence assist the trier of fact? Well, in

1 this case, the jury has to decide whether or not
2 Mr. Nichols has a mental abnormality that still makes him
3 likely to commit acts of sexual violence.

4 He was convicted in 2010. The PPG evaluation was
5 done about two-and-a-half years ago. The fact that his
6 convictions involved young boys -- a young boy and a young
7 girl over a period of years.

8 It also involved the sexual solicitation of a minor,
9 again, for an early teenage girl. So the fact that he did
10 these crimes and so long ago, the jury is going to be
11 wondering hey, does he still have the problem? The fact
12 that he still --

13 THE COURT: Well, that's a question you'll ask
14 Dr. Swan, though, would you not?

15 MR. BOGLE: True.

16 THE COURT: All right.

17 MR. BOGLE: And the diagnosis is more than one data
18 point. She did the Static 99. She looked at all the
19 police records. She interviewed him. She looked at
20 comments he made, which she also had Dr. Burke on the PPG.
21 So there's another data point to assist the trier of fact
22 in knowing that despite the fact ten or 15 years have
23 passed, he's still aroused by these sort of things.

24 The next question is was the expert qualified? That
25 doesn't seem to be any doubt. The next thing, is the

1 underlying science reliable? I would observe that
2 attached to my return is a 2019 article about the PPG in
3 Canada, the UK and the United States. I'm hearing about
4 things done by a Dr. Marsh in 2006. That's like 14 years
5 ago.

6 THE COURT: What page are you talking about?

7 MR. BOGLE: Attached to my return form.

8 THE COURT: I don't have those printed out.

9 MR. BOGLE: Okay, there's an attachment to it.

10 THE COURT: Well, I've looked at them, but I don't
11 have them in my binder right now.

12 MR. BOGLE: So the question is -- and this was
13 covered by the doctor without a whole lot of opposition.
14 Has the technique been published and received peer review?
15 He talked about that and I've got, at least, one example
16 attached in my return.

17 Has there been prior applications of the method with
18 the kind of evidence in this case? Yes, it has. He
19 mentioned several cases in South Carolina. He mentioned
20 how it's been accepted in five or six other different
21 states in pre-commitment, as well annual review.

22 The next thing is a quality control method to ensure
23 reliability. He testified about those with the Limestone
24 test. There's certain types of stimulus shown. You've
25 got to be trained in how to show them, trained in how to

1 read them. Everyone that uses Limestone has to be trained
2 in the same way and there's 100 some odd labs in the
3 United States.

4 Finally, the consistency of the method recognized
5 scientific law and procedures. And the best way to argue
6 that to you, Your Honor, is talking about the polygraph.

7 The polygraph, which we all know is not admissible,
8 but in a polygraph, the examiner is measuring all kinds of
9 things: Breathing, heart rate, skin response, sweating,
10 things like that.

11 And the PPG, it's one thing, blood flow to the penis
12 and that's it. He's looking for other signs the guy might
13 try by trying to beat the test like holding his breath,
14 pushing up, things like that to keep having what is
15 happening. There's one basic test, blood flow to the
16 penis. Is he aroused by what he sees or by what he hears?

17 So there's your issue with consistency of the method,
18 the recognized scientific laws and procedures. So that's
19 what we've got here, Judge, 4th Amendment violations, 14th
20 Amendment violations; I've covered in my return.

21 The only evidence you heard, there's been no expert
22 testifying on the other side that this is a bad thing and
23 shouldn't be allowed. You haven't heard that. You heard
24 about records that are as old as 2006.

25 Dr. Burke, I think has established that he's an

1 expert in the field and the PPG is backed scientifically
2 and it has been used in South Carolina.

3 The Bilton case we've all talked about in the
4 beginning, in the Bilton case, the Court of Appeals
5 reversed not because of the PPG, but because Dr. Swan, who
6 uses a conduit to introduce Dr. Burke's PPG result. Dr.
7 Burke didn't testify in that particular case. Here, we'll
8 have him. We have Dr. Burke here to testify.

9 Now, the Bilton case did make some comments about the
10 PPG. I think I sent you a supplemental evaluation we had
11 done by our psychologist in Charleston. I mailed it out
12 I think Friday or so last week.

13 THE COURT: Supplemental evaluation?

14 MR. BOGLE: Analysis.

15 THE COURT: Okay.

16 MR. BOGLE: I think as the court said why that's
17 false. For example, the court says when you give the PPG,
18 you have the guy masturbate. Nobody does that. It's not
19 supposed to be done.

20 Why the court let that in, I don't know, but the
21 Court of Appeals did throw in some language mentioning
22 some bad things about the PPG. But it's not part of their
23 opinion.

24 At the same time, the PPG has been mentioned in the
25 analysis supporting evidence and other South Carolina,

1 Supreme Court and Court of Appeals cases in the past.
2 Judge, the Tucker case and the Kennedy case.

3 So we would submit under the -- based on the evidence
4 you've heard and the only expert that testified that the
5 Council -- State v. Council and State V. Jones
6 requirements have been met to allow the PPG into evidence.

7 MS. ZMROCZEK: First of all, I want to address burden
8 shifting now before we get in front of a jury because we
9 don't have the burden. I am challenging it. I don't have
10 to put an expert up to say it. I can say with my
11 questions.

12 Your Honor, the fact that we're even arguing over
13 this or that the Court of Appeals is still arguing it, you
14 know, and that like he provided the supplemental
15 evaluation of it, it goes to show that there is no
16 consistency across the State and especially, you know --

17 THE COURT: Well --

18 MS. ZMROCZEK: -- in the nature of these cases.

19 THE COURT: Well, if I could, yes, the Court of
20 Appeals was clear in saying you can't have an expert just
21 serve as a conduit, you know, read -- the situation was in
22 that case, Dr. Swan, essentially, published the PPG
23 results and was questioned about it.

24 We don't need to get into it, but I understand that's
25 not the scenario we have here because we have two

1 witnesses who are available.

2 However, why the appellate court put in the opinion
3 what they did, but they did put some language in there
4 that courts have uniformly declared that PPG results are
5 inadmissible as evidence because they are no accepted
6 standards for this test in the scientific community.

7 I just found a typo, but that is what's typed. Now,
8 that's not something they just made up from the hip
9 either. I mean, to be clear, I think that Dr. Burke
10 testified that the study of this procedure has been an
11 ongoing thing over the last few decades.

12 You know, one of the cases that the Court of Appeals,
13 at least, notes is -- I'm sure you're both familiar with
14 the Commonwealth vs. Ortiz, which there may be another
15 case, but I'm not aware of another one that gives a
16 rundown of the numerous jurisdictions that have rulings on
17 the PPG as far as admissibility.

18 They also make reference to the appropriate context
19 in the treatment of sexual deviancies, makes reference to
20 diagnosis in the context of civil commitment being
21 troublesome. That's not a quote, that's just a
22 paraphrase.

23 It's interesting, the DSM page you put into the
24 record, I understood -- Ortiz worded it a little bit
25 differently. Ortiz's language says quote, the DSM-5

1 description of the PPG, however falls short of enforcing
2 its use for diagnosis specifically cautioning that the
3 exam's sensitivity and specificity diagnosis may vary from
4 one site to another.

5 Actually, the way that paragraph reads in the case is
6 a little bit different than that. It's so -- anyway, it
7 is by no means a settled question and it won't be settled
8 after today anyway.

9 Let me see that. Oh, I'm sorry. I'm talking again
10 for no reason.

11 (Whereupon, there was an off-the-record discussion).

12 THE COURT: Let me ask some other questions, I did
13 have an opportunity to read through the report. I'll read
14 it again. But, obviously, a PPG is not the -- you know,
15 no examination by Dr. Burke or Dr. Swan is going to be
16 totally -- it's not going to hang its hat on the PPG; is
17 that accurate?

18 MR. BOGLE: Or any tests.

19 THE COURT: Like Dr. Burke said --

20 MR. BOGLE: Like he said --

21 THE COURT: Multiple data points there. So the PPG
22 was conducted here, obviously, an in-person interview, a
23 review of the respondent's criminal convictions, which
24 also include some convictions prior to --

25 MS. ZMROCZEK: Right. And we'll deal with that --

1 that will be.

2 THE COURT: I'm saying --

3 MS. ZMROCZEK: Yeah.

4 THE COURT: It's a data point.

5 MS. ZMROCZEK: Right.

6 THE COURT: Static 99-R test. Now, pedophilic index
7 and rape index, that is something different, just a
8 different analysis?

9 MR. BOGLE: You mean Dr. Swan or Dr. Burke?

10 THE COURT: Probably Dr. Swan. I'm just reading the
11 report. It doesn't say which -- this is Dr. Swan's
12 report. I take that back.

13 MS. ZMROCZEK: But that comes --

14 MR. BOGLE: She was quoting Dr. Burke. At one point
15 in her report, she quotes Dr. Burke's results.

16 THE COURT: Well, if you could, tell me everything
17 Dr. Burke did.

18 MR. BOGLE: Dr. Burke ran a Limestone PPG on
19 Mr. Nichols. The way that works is you heard it, Mr.
20 Nichols puts the device on his penis, he's then put in a
21 quiet room --

22 THE COURT: We've been through the PPG, but what
23 else?

24 MR. BOGLE: And Dr. Burke got a lot of responses on
25 the PPG to deviant stimuli involving children and adults.

1 And these stimuli were consistent with the two diagnoses
2 that Dr. Swan came up with, pedophilic disorder, attracted
3 to both, boys and girls and other specified paraphilic
4 disorder, hebephilia, which is the sexual attraction of
5 post-pubescent teenagers, which is illegal.

6 THE COURT: If I'm reading it correct, it says Dr.
7 Swan had her diagnosis before Dr. Burke did the PPG?

8 MS. ZMROCZEK: Yes.

9 MR. BOGLE: I would suggest that's probably the case.

10 THE COURT: Well, that's what it said.

11 MR. BOGLE: I can't say that. I know that she had
12 the PPG ran and then she wrote a report. So I can't
13 really say that she made up her mind or it was reinforced
14 by Dr. Burke.

15 THE COURT: My specific question is, in addition to
16 the PPG, Static 99-R, that's a separate analysis?

17 MR. BOGLE: Correct.

18 THE COURT: And pedophilic index is a separate
19 analysis?

20 MR. BOGLE: And that's referring to Dr. Burke's
21 order.

22 THE COURT: So that's something Dr. Burke did in
23 addition to the PPG?

24 MR. BOGLE: No, that's part of the PPG, the
25 pedophilic index, where his numbers on the -- as I

1 understand, his numbers on the PPG, where they go.

2 THE COURT: Okay. So you reviewed his prison
3 disciplinary history?

4 MR. BOGLE: Yes, sir.

5 THE COURT: Obviously, the in-person interviews. You
6 reviewed the general sessions files?

7 MS. ZMROCZEK: Right.

8 MR. BOGLE: Correct.

9 THE COURT: All of his criminal records.

10 MR. BOGLE: Talk to him, ask him what he did, why he
11 did it.

12 THE COURT: Addressed the dynamic factors.

13 MR. BOGLE: Uh-huh.

14 THE COURT: Coping skills, problem solving skills.

15 MR. BOGLE: Dynamic factors are what we call change
16 factors, things that can be addressed in treatment.

17 Static factors are things you're stuck with. Static, they
18 don't change.

19 THE COURT: And static -- we're getting ahead of
20 ourselves, obviously, because Dr. Swan not here. Static
21 score was zero?

22 MR. BOGLE: Yes, sir, it was. The range is minus
23 three to plus one.

24 THE COURT: Oh, I thought I read minus one to ten.
25 That's why --

1 MR. BOGLE: Minus three to plus one.

2 THE COURT: Okay.

3 MR. BOGLE: And she accounts for that in her
4 testimony and in her report.

5 THE COURT: The reason I said that is the score is
6 zero out of a possible 12, then it's got scores of --
7 excuse me, negative one to zero. I didn't see anything
8 about negative three, but I'm sure it's there. She'll
9 explain it to us.

10 Anything else?

11 MR. BOGLE: No, Your Honor.

12 THE COURT: Give me a minute to -- let's take a short
13 break, five minutes.

14 (WHEREUPON, a short break was taken.)

15 THE COURT: All right. I just wanted to take a short
16 break, and this is an issue that I've seen come up before
17 and it's come up several times over the years and -- well,
18 not necessarily in this context in the appellate case, but
19 it's starting to show up more I think under these
20 circumstances.

21 And, you know, I have reviewed the report that's in
22 the file. I don't think the Bilton case is -- directs any
23 ruling from this court, I think if nothing else provides a
24 different scenario, but nevertheless, it certainly does
25 give some appellate opinion based on the PPG in general.

1 You know, I cited a -- I'm not sure how many cases I
2 did. Obviously, I noted the Ortiz case certainly gives a
3 history. In light of all the facts and circumstances, I'm
4 going to exclude the PPG. We'll take it up first thing in
5 the morning, but there are, obviously, some things with
6 Dr. Swan I think you'll want to discuss.

7 If you want to talk about -- we need to get everybody
8 outside the building. If you want to talk now, we can,
9 just in chambers, just give me a heads up of what's coming
10 tomorrow. We'll start tomorrow morning at 9:00 a.m. And
11 I appreciate you just updating Dr. Swan as far as her
12 testimony and trying to steer in these rules.

13 MR. BOGLE: The first thing we'll have to do is an
14 out of jury hearing on -- this morning, we talked about
15 the diagnosis of the PPG. Because the motion to exclude
16 to not have her talk about that.

17 THE COURT: Let's talk about that in chambers real
18 quick.

19 Anything else for the record today?

20 MS. ZMROCZEK: No.

21 THE COURT: All right. Let's talk back in chambers.

22 (Whereupon, the proceedings were concluded.)
23
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Lexington County, South Carolina, on the 9th day of
November, 2020.

January 27, 2021

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

1 State of South Carolina) Court of Common Pleas
2 County of Lexington) Eleventh Judicial Circuit
3
4 In the Matter of the Care) Transcript of Record
and Treatment of James)
5 Ronnie Nichols, Jr.,) 2017-CP-32-02122
6 Respondent.)
7 _____)

8 November 10th & 12th, 2020
9 Lexington, South Carolina

10 B E F O R E:

11 The Honorable Walton J. McLeod, IV, Judge
12

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

14 James G. Bogle, Jr., Senior Assistant Attorney General
15 On behalf of the State of South Carolina

16 Aimee J. Zmroczek, Esquire
17 On behalf of the Respondent

18 Stacy S. Johnson
19 Circuit Court Reporter
20
21
22
23
24
25

I N D E X

	PAGE
Jury Selection (Reported by Karen Ambroziak 11/9/20)	
Pretrial Matters	4
Amy C. Swan (In-Camera)	
Direct Examination by Mr. Bogle	6
Cross-Examination by Ms. Zmroczek	16
Redirect Examination by Mr. Bogle	20
Opening Statement	
By Mr. Bogle	29
By Ms. Zmroczek	33
WITNESSES	
Amy C. Swan	
Direct Examination by Mr. Bogle	35
Cross-Examination by Ms. Zmroczek	86
Redirect Examination by Mr. Bogle	112
Recross Examination by Mr. Zmroczek	114
Motion for Directed Verdict	118
James Ronnie Nichols, Jr. (Testimony as Read)	
Direct Examination by Ms. Zmroczek	140
Debra Barry Moore	
Direct Examination by Ms. Zmroczek	144
Cross-Examination by Mr. Bogle	150
Redirect Examination by Ms. Zmroczek	153
Motion for Directed Verdict (Renewed)	156
Closing Argument	
By Mr. Bogle	158
By Ms. Zmroczek	168
Jury Charge	175
Verdict	188
Certificate of Reporter	193

E X H I B I T S

			<u>ID</u>	<u>EVD.</u>
1				
2				
3	C-1	Jury Charge	186	
4	S-1	Certified Conviction (Lexington)	24	54
5	S-2	Certified Conviction (Lexington)	24	54
6	S-3	Certified Conviction (Saluda)	24	60
7	S-4	4/23/09 Letter	24	67
8	R-1	Recidivism Estimates	94	95
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1 (The following proceedings were held November 10,
2 2020, beginning at 9:07 AM.)

3 THE COURT: All right. Good morning.

4 MR. BOGLE: Good morning.

5 THE COURT: All right. Do we have Dr. Swan here?
6 Yes, we do.

7 Good morning, Dr. Swan.

8 DR. SWAN: Good morning.

9 THE COURT: All right. So the jury is in the
10 process of picking a foreperson as we speak and if we
11 could just go ahead and -- well, actually just for the
12 purposes of yesterday, I told you I'd give you a ruling
13 on your motion to dismiss and the previous motion to
14 dismiss, which you renewed, is denied.

15 We issued rulings on other matters. The only
16 thing I have left is just the issue of Dr. Swan on that
17 secondary diagnosis. Is that correct?

18 MS. ZMROCZEK: Uh-huh.

19 MR. BOGLE: Correct. There's an objection, I
20 believe, to the diagnosis of hebe -- other specified
21 paraphilic disorder, hebephilia.

22 THE COURT: Okay. And obviously we discussed
23 this in chambers yesterday and had arrived at --
24 certainly it's a part of the fact that I believe it's
25 the DSM-5 doesn't specifically list it as a condition.

1 Is that correct, Ms. Zmroczek?

2 MS. ZMROCZEK: That's -- but not only does it not
3 -- that is correct, but that's not the only thing. It's
4 also debated amongst the APA, the psychological world,
5 of its diagnosis.

6 THE COURT: Okay. Well, do you-all want to -- do
7 we need to go --

8 MR. BOGLE: I'll just call Dr. Swan and have a
9 brief hearing on it.

10 MS. ZMROCZEK: I think he's --

11 THE COURT: Oh, I'm sorry. I forgot.

12 MS. ZMROCZEK: Pardon me. May I step into my
13 office?

14 THE COURT: Sure. Sure.

15 (Pause in proceedings.)

16 (Whereupon, Mr. Nichols enters the courtroom.)

17 THE COURT: Okay. Are we ready to proceed?

18 MS. ZMROCZEK: Yes, Your Honor.

19 THE COURT: All right. Mr. Bogle.

20 MR. BOGLE: Thank you, Your Honor. We would call
21 Dr. Amy Swan.

22 THE COURT: All right.

23 For the purposes of just this pre-trial context,
24 we can skip the background and qualifications and let's
25 just get to the meat of the --

1 MR. BOGLE: Your Honor, I was gonna ask if we
2 could just go ahead and stipulate for the purpose of
3 this hearing that she's an expert witness in the field
4 of forensic psychology?

5 MS. ZMROCZEK: That's fine.

6 THE COURT: No objection. All right. It's so
7 noted.

8 (Whereupon, Amy Swan was duly sworn by the Clerk
9 of Court.)

10 THE CLERK: If you'll have a seat please and state
11 your full name for the record.

12 THE COURT: Okay. And just real quick before she
13 starts, our foreperson of the jury will be Juror 109,
14 Marcie Leaphart. Marcie Leaphart.

15 AMY SWAN,

16 having been duly sworn, testified as follows:

17 DIRECT EXAMINATION (In-Camera)

18 BY MR. BOGLE:

19 Q. Now, Dr. Swan, were you appointed pursuant to a court
20 order to evaluate Mr. Nichols, the Respondent in this case?

21 A. Yes, I was.

22 Q. Okay. And as part of this -- is he in the courtroom
23 today? Is that him sitting over there?

24 A. Yes, he is.

25 Q. Okay. Did he consent -- is it part of your evaluation

1 to require the person to consent or not consent to the
2 evaluation?

3 A. Yes. In order to conduct an interview, they must
4 consent.

5 Q. Okay. Now moving ahead -- and he did -- did he
6 consent?

7 A. Yes, he did.

8 Q. Okay. Moving ahead, after you finished your work,
9 what were the diagnoses of mental abnormalities that you
10 found pertaining to Mr. Nichols?

11 A. I found that he suffers from pedophilic disorder,
12 sexually aroused by both, nonexclusive type, and other
13 specified paraphilic disorder, hebephilia.

14 Q. Okay. And pedophilic disorder, the criteria for that
15 briefly are?

16 A. Over a period of at least six months the individual
17 must demonstrate recurrent sexual arousal to prepubescent
18 children as manifests -- manifested by fantasies, urges or
19 behaviors.

20 Q. Okay. And is part of it -- the words attracted to
21 both means it was both boys and girls?

22 A. That's correct.

23 Q. Okay. His victims were both boys and girls?

24 A. Yes.

25 Q. Okay. So in this case I think you last time saw the

1 convictions, he had been convicted in Lexington county of
2 criminal sexual conduct with a minor in the first degree
3 and lewd act on a child under sixteen, and then in Saluda
4 county, criminal solicitation of a minor, correct?

5 A. That's correct.

6 Q. Now the second diagnosis was called -- repeat it
7 again, the other diagnosis.

8 A. Other specified paraphilic disorder, hebephilia.

9 Q. Okay. Were these diagnoses based upon his sexual
10 convictions that I just talked about both in Lexington
11 county and in Saluda county?

12 A. Yes, they were.

13 Q. Okay. And the children what were involved, what
14 were their names; do you remember? I can hand you the
15 indictments, but --

16 A. SON, DAUGHTER 1 and DAUGHTER 2

17 Q. Okay. Because there were -- were there some warrants
18 that didn't get convicted?

19 A. Yes.

20 Q. Okay. Now and is it -- as part of your job, are you
21 required to look at all pending charges, as well as charges
22 where he was convicted?

23 A. That is correct.

24 Q. And why is that?

25 A. Because research indicates that even being charged --

1 arrested or charged for a crime increases risk for a sexual
2 re-offense even if they were not convicted of that charge.

3 Q. Okay. Now this second diagnosis, repeat again what it
4 was.

5 A. Other specified paraphilic disorder with a qualifier
6 of hebephilia.

7 Q. Okay. What are the criteria for that?

8 A. So the criteria -- in each section in the DSM-5, at
9 the very end they have a section for other whatever the
10 disorder is and these are disorders that meet the criteria
11 for a para -- for a particular disorder, but they do --
12 have not been specifically delineated.

13 Q. Okay. Let me approach and hand you a copy of page 705
14 from the DSM-5, if I can.

15 A. Yes.

16 Q. How are we gonna do this, at a distance?

17 A. Thank you.

18 MR. BOGLE: And, Your Honor.

19 THE COURT: Thank you.

20 BY MR. BOGLE:

21 Q. Now on that page I handed you, is the definition of
22 what's called other specified paraphilic disorder, what
23 does it say there as far as what that includes?

24 A. This category applies to presentations in which
25 symptoms are characteristic of paraphilic disorder, but

1 are not specifically named.

2 Q. Uh-huh.

3 A. But they give examples of presentations that can be
4 specified using the other specified designation including,
5 but not limited to, and there are several different
6 disorders such as telephone scatologia, necrophilia,
7 zoophilia, coprophilia, klismaphilia or urophilia.

8 Q. Okay. Now so the language is including, but not
9 limited to, and it lists about five or six things?

10 A. That is correct.

11 Q. Does that including, but not limited to, exclude the
12 other five hundred and some odd paraphilic disorders?

13 A. It does not. An Indian psychiatrist set about to
14 identify all the known paraphilias for which there is
15 research --

16 Q. Uh-huh.

17 A. -- and he identified 547 paraphilias. There are
18 eight specifically delineated in the text of the DSM-5.
19 All the other 539 paraphilias would be listed under the
20 other specified paraphilic disorder.

21 Q. Now the book you held up a minute ago --

22 A. Yes.

23 Q. -- is that the book that mentions those other
24 diagnoses?

25 A. Yes, it is.

1 Q. What it called?

2 A. It is called Forensic and Medico-legal Aspects of
3 Sexual Crimes and Unusual Sexual Practices.

4 Q. Okay. Now is there some dispute or some political or
5 some context about -- about hebephilia?

6 A. Well, there was not. When it was first identified
7 in the 1950's, this was around the time of Masters and
8 Johnson and Kurt Freund started doing research on male
9 arousal, so between the early 1950's and 2002 there was no
10 dispute about it at all, but in the context of sexually
11 violent predator cases there were some rumblings in 2002.
12 But it really came to a head in 2009 when the task force
13 working on the revision of the DSM-IV TR said that based
14 on research a change to pedophilic disorder should be made
15 and that it would pedo-hebephilic disorder because there's
16 some men who are aroused to strictly prepubescent children.
17 Some men are aroused to prepubescent and early pubescent,
18 those just entering puberty, and some men are exclusively
19 aroused to the early pubescent subtype.

20 Q. Okay. So now the American Psychiatric Association,
21 they had issues, did they not, with sexually violent
22 predator laws?

23 A. They do and the -- let me give you a context. The
24 DSM-5 is published by the American Psychiatric
25 Association so historically there's been some belief on

1 the part of psychiatrists that psychologists were not
2 legitimate mental health professionals and, in fact, in
3 the courts in Florida and other places in the United States
4 it's only been in recent years that psychologists could
5 testify as an expert witness. That was strictly reserved
6 for psychiatrists. So although the American Psychiatric
7 Association includes psychologists on their workforces,
8 the Board of the American Medical Association has the last
9 word on what gets included in the DSM-5 or not and since
10 psychiatrists are venomously opposed to sexually violent
11 predator laws they believe that any diagnosis that would,
12 in their words, widen the net and permit more people to
13 be committed as sexually violent predators, should not be
14 included in the DSM-5; however, research at the Wisconsin
15 Sexually Violent Predator Program and the Florida Sexually
16 Violent Predator Program indicated that, in fact, including
17 the diagnosis of hebephilia does not widen the net at all.

18 Q. Okay. Let's back up a little a second and get onto
19 hebephilia, the definition. What is hebephilia?

20 A. So hebephilia is a paraphilic disorder in which the
21 arousal is to early pubescent individuals, males or
22 females, and what we mean by early pubescent is that
23 there's a series of stages that designate the secondary
24 sexual characteristics. They range from a Tanner scale
25 of 1, which is no secondary sexual characteristics or

1 prepubescent, and up to a Tanner scale of 5, which is
2 normal adult secondary sexual characteristics. So Tanner
3 stages 2 and 3 are the early stages of secondary sexual
4 characteristics, and these are characterized by -- it
5 would be breast buds, not full breasts, peach fuzz as far
6 as pubic hair, and the testicular volume between one and
7 six milliliters, so that would be very small, just -- just
8 over prepubescent.

9 Q. Okay. And Mr. Nichols' victims, did they change into
10 this early pubescent -- not prepubescent, but cross the
11 line into the early teenager stage as well?

12 A. Yes, they did.

13 Q. Okay. And that kind of contact is illegal to begin
14 with, right?

15 A. It is.

16 Q. Okay. So hebephilia is the sexual arousal to the
17 young pubescent teens who've gotten past the prepubescent?

18 A. Yes, and that's normally referred to between the ages
19 of eleven through fourteen; however, that's not specific
20 enough to go by strictly the ages because you could have a
21 nine or ten-year-old girl who is fully developed and you
22 could have a sixteen-year-old that's still prepubescent.
23 So the development is an individual characteristic, it's
24 not uniform among all males or females, and so that was
25 just a guideline, but now we know that puberty is occurring

1 much earlier and so it should not be limited to that
2 guideline.

3 Q. Now on page 705 of the DSM-5, which I showed you a
4 minute ago, where it uses the language other specified
5 paraphilic disorder -- or paraphilic disorder and then it
6 says including, but not limited to. Could you explain
7 what that language including, but limited to, means in
8 your profession as far as diagnosing people with mental
9 abnormalities?

10 A. What that means is that these are some specific
11 examples of paraphilic disorders that are very well-known
12 that could be the focus of other specified paraphilic
13 disorder, but it's not limited to those because there are
14 539 other paraphilias that could basically be used as the
15 qualifier for other specified paraphilic disorder.

16 Q. Okay. So when they say including, but not limited
17 to, and give a list of seven or eight things, the fact that
18 this hebephilia is not specifically on that list does that
19 mean it's intended not to be diagnosed?

20 A. Not at all.

21 Q. Okay. Was it intended not to be in the DSM as being a
22 valid diagnosis?

23 A. Not at all.

24 Q. Okay. You mentioned in the earlier conversation with
25 me something called the ICD-10 from the World Health

1 Organization. What does that stand for?

2 A. You know, I'm drawing a blank on what the ICD means,
3 but the World --

4 Q. International Classification of Diagnoses, Tenth
5 Edition.

6 A. Yes, that's it.

7 Q. Okay.

8 A. So that's a book published by the World Health
9 Organization that is used in virtually every country
10 except the United States and it's very similar to the
11 DSM-5. That book also includes physical disorders and
12 that's used to classify, for example, if you go to the
13 hospital for an appendectomy as well, but in the ICD-10 it
14 states a sexual preference for children, boys or girls,
15 usually of prepubertal or early pubertal age. So they
16 specifically include a hebephilic focus in the ICD-10, but
17 because of the American Psychiatric Association it is not
18 included in the DSM-5.

19 Q. Okay. But the fact it's not included, does the words
20 including, but not limited to, give you a range of all
21 those four or five hundred diagnoses to look at?

22 A. That is correct.

23 Q. And in this case with Mr. Nichols, that's what you
24 found; is that right?

25 A. That is correct.

1 Q. Okay. And that was because the age of his victims,
2 they started -- he started when they were very young and
3 continued well through the early pubescent phase?

4 A. Yes.

5 Q. Okay. Have you diagnosed hebephilia before in
6 sexually violent predator cases?

7 A. Yes, many times.

8 Q. Can you give me an example of what states -- now what
9 states are you licensed to practice in?

10 A. I'm licensed in Florida, Missouri and South Carolina,
11 and I've diagnosed hebephilia in all of those states.

12 Q. Okay.

13 MR. BOGLE: Thank you, Dr. Swan. Please answer
14 any questions counsel may have or the Court may have.

15 THE COURT: Ms. Zmroczek.

16 MS. ZMROCZEK: Thank you.

17 CROSS-EXAMINATION (In-Camera)

18 BY MS. ZMROCZEK:

19 Q. Doctor, you would agree that there is not
20 consistency --

21 A. I know that bar comes right in the middle of where
22 you are.

23 Q. It really does.

24 THE COURT: You-all move the podium anywhere you
25 see fit.

1 BY MS. ZMROCZEK:

2 Q. You would agree that there is inconsistency amongst
3 psychologists such as yourself as to whether or not it's a
4 -- it's a diagnosis?

5 A. That's correct. There -- there are obviously
6 psychologists that believe that it's a legitimate
7 paraphilic disorder. There are some that don't.

8 Q. And that there are -- and that there are also
9 peer-reviewed articles that recognize it and some that
10 don't?

11 A. That is correct. I have 101 peer-reviewed articles
12 that are research studies that identify hebephilia as a
13 paraphilic disorder.

14 Q. And how many do you have that aren't? Have looked at
15 those at all?

16 A. Oh, absolutely.

17 Q. Uh-huh.

18 A. It's incumbent upon anyone who testifies as an expert
19 witness to understand both sides of the story and the
20 primary proponents of hebephilic disorder are individuals
21 who testify in civil commitment trials where those who are
22 opposed to civil commitment typically find that it's not a
23 legitimate paraphilic disorder.

24 Q. And so how many articles did you find that it wasn't?

25 A. I probably -- I probably have maybe twenty-five.

1 Q. Okay. But you would agree that the literature is on
2 both sides?

3 A. Oh, absolutely.

4 Q. Okay. And you have looked at -- you mentioned being
5 licensed in other cases. So you're familiar with the
6 caselaw, for example, in Illinois and in New York that
7 found that it is not a mental illness?

8 A. Yes, and I have those studies right here, but with --
9 with all due respect to the Court, I'm a psychologist, and
10 while a court may find that it does not meet criteria to
11 be utilized in court, that does not take away from the
12 research by actual individuals who do treatment with sex
13 offenders, and the articles that are typically in favor of
14 hebephilia as a paraphilic disorder are by individuals who
15 actually do treatment, and I don't think there's any doubt
16 among those individuals. For example, the individuals that
17 are against it are primarily Allen Frances and Michael
18 First. They're psychiatrists. They've never done research
19 or treatment with sex offenders.

20 Q. Okay. But we're talking about something completely
21 different, not treatment. We're talking about a
22 pre-commitment, right?

23 A. Yes.

24 Q. Okay. So in your book that you have, the DSM-5, it
25 lists for what we call in the legal world elements, like

1 things that have to define pedophilia, for example, right?

2 A. Yes.

3 Q. And what are those elements?

4 A. Well, over a period -- well, with all the paraphilic
5 disorders they have to extend over a period of at least
6 six months and they have to have recurrent and intense
7 sexual arousal as manifested by fantasies, urges and/or
8 behaviors.

9 Q. Okay. So what are the elements that are listed for
10 hebephilia?

11 A. Well, with the other specified paraphilic disorder,
12 there's no specification except that it must have symptoms
13 characteristic of a paraphilic disorder and so that means
14 there must be at least six months of recurrent intense
15 sexual arousal involving early pubescent males or females,
16 Tanner stage 2 and 3.

17 Q. And you would agree that when they were -- when
18 the DSM-5 was being put together that hebephilia was
19 discussed?

20 A. Yes, it was. Pedo hebe -- hebephilic disorder was
21 discussed --

22 Q. Right.

23 A. -- and when it was rejected, there was no reason
24 given for the rejection.

25 Q. Right, but it was --

1 A. The psychiatrists did not give us a reason.

2 Q. Right, because it -- but it was rejected?

3 A. It was rejected.

4 MS. ZMROCZEK: Okay. Your Honor, those are all
5 the questions that we have at this time.

6 THE COURT: Thank you.

7 Any redirect?

8 MR. BOGLE: Just one last.

9 REDIRECT EXAMINATION (In-Camera)

10 BY MR. BOGLE:

11 Q. Dr. Swan, you testified about testifying in
12 pre-commitment hearings in different states where
13 hebephilia was a diagnosis.

14 A. Yes.

15 Q. I forgot. Did that include South Carolina?

16 A. Yes, it does.

17 Q. Okay.

18 THE COURT: Anything else, Ms. Zmroczek?

19 MS. ZMROCZEK: No.

20 THE COURT: All right. You may step down.

21 (Witness excused.)

22 THE COURT: Okay. Ms. Zmroczek.

23 MS. ZMROCZEK: Your Honor, with respect, obviously
24 they're still gonna get up and talk about pedophilia.
25 We're not challenging that. It's properly -- I think

1 identified, properly elemented out in the criminal world
2 as we say. My problem is with the hebephilia. It was
3 specifically rejected from the DSM-5 and so then they
4 want to kind of couch it in under the catchall, but,
5 again, here we are in a situation where there's --
6 there's states and psychologists and people on both
7 sides, meaning it's not settled, and so, you know, I
8 think -- I know that, oh, well, it's been accepted here,
9 you know, this is my first opportunity to have to
10 challenge it and, you know, just talking to the other
11 psychologists, even psychologists that work for DMH,
12 and being provided the literature from other states
13 such as New York, such as Illinois that have rejected
14 hebephilia as a diagnosis. Again, we're talking about,
15 you know, a very a new area that, again, is not
16 well-settled and when we're using that to make a
17 decision on whether or not someone is committed for
18 long-term care, control and treatment that that gives
19 me cause for concern.

20 THE COURT: Yes, ma'am.

21 Mr. Bogle.

22 MR. BOGLE: Yes, Your Honor. May it please the
23 Court?

24 I think the language is -- first off, the
25 overwhelming number of articles Dr. Swan has researched,

1 a hundred and something versus maybe twenty-five,
2 recommend that hebephilia is a valid diagnosis. The
3 second issue is it seems from what I heard that
4 hebephilia per se wasn't rejected, it was a combination
5 of pedophilia with hebephilia that they didn't put in
6 there, but the language is very clear in the DSM-5 where
7 it says that other specified paraphilic or deviant
8 disorders included, but are not limited to, and it lists
9 about four or five things. Not limited to gives you
10 the range of the over five hundred disorders which can
11 exist, and this is one.

12 We have conduct by Mr. Nichols involving
13 prepubescent children and conduct that continued for
14 several years extending past your early pubescent
15 period, so you've got the hebephilia contact done
16 by him, so we would rely upon the including but not
17 limited to language in the DSM-5 as allowing this
18 diagnosis.

19 THE COURT: Okay. Anything else, Ms. Zmroczek?

20 MS. ZMROCZEK: Nothing further.

21 THE COURT: I'll deny the motion to exclude the
22 hebephilia testimony. Certainly I think Ms. Zmroczek
23 has got a basis for cross-examination to discuss, but
24 I'll allow the testimony.

25 MR. BOGLE: Thank you, Your Honor.

1 MS. ZMROCZEK: Thank you, Your Honor.

2 THE COURT: All right. As I said earlier,
3 our jury foreperson is Marcia-- Marcie Leaphart,
4 Number 109.

5 Anything we need to do before we bring the jury
6 in? Does anybody need a quick break before we start?

7 MR. BOGLE: That would be nice.

8 THE COURT: Sir?

9 MR. BOGLE: A quick break.

10 THE COURT: Yeah, let's do five minutes.

11 MS. ZMROCZEK: And, Judge, I just wanted to -- I
12 don't know -- because this is hybrid, you know, and so
13 I don't know if true facts or whatever are in the things
14 -- you know, in your instructions.

15 THE COURT: I'll show you what I'm -- I'll come
16 down there and we can look.

17 MS. ZMROCZEK: All right. Thanks.

18 THE COURT: I mean, it's a hybrid of my typical
19 opening charge, so I'll have to kind of go back and
20 forth.

21 MS. ZMROCZEK: Okay.

22 (Proceedings held at the bench; not reported.)

23 MR. BOGLE: Okay. And we've got the exhibits
24 from last year marked in the same order.

25 MS. ZMROCZEK: Well, and I want to -- and I'm fine

1 with 1, 2 and 3. I think I want to ask about 4 before
2 we put it in.

3 THE COURT: What is that?

4 MR. BOGLE: This is 4 right here. It had
5 something written on the back you didn't want in last
6 time, so that's why it came in that way.

7 MS. ZMROCZEK: Right. Okay. No, we're fine with
8 all that. That's fine.

9 MR. BOGLE: Okay.

10 THE COURT: Is everybody clear? If you-all are
11 good with me just saying the State's alleging he's an
12 SVP, you're saying he's not, and then you-all can fill
13 in the blanks?

14 MR. BOGLE: Right.

15 MS. ZMROCZEK: Thank you, Judge.

16 (Recess taken at 9:37 AM.)

17 (Back on the record at 9:44 AM.)

18 THE COURT: All right. If we can get your client
19 back out here.

20 (Whereupon, Mr. Nichols enters the courtroom.)

21 (State's Exhibit Number 1 through 4 were marked
22 for identification.)

23 THE COURT: All right. Let's bring out the jury,
24 please.

25 (Whereupon, the jury enters the courtroom at

1 9:48 AM.)

2 THE COURT: Okay. Ladies and gentlemen, good
3 morning.

4 Ms. Leaphart, good morning. Thank you for agreeing
5 to serve as the foreperson.

6 Ladies and gentlemen, we're about to begin In the
7 Matter of the Care and Treatment of James Ronnie Nichols,
8 Jr. Before we do that though, I'm gonna have the Clerk
9 of Court swear you in.

10 (Whereupon, the jury was duly sworn by the Clerk
11 of Court.)

12 THE COURT: All right. Ladies and gentlemen,
13 before we begin this trial, I want to tell you that
14 this trial will probably be different from what you
15 might expect. Many people do not have the chance to
16 attend actual court sessions as you are doing now and
17 may think from watching television or movies or reading
18 books that trials are always full of high drama, intense
19 action and riveting circumstances. While all these
20 things may be true at times, this trial is not for
21 entertainment. This courtroom is a place of honor
22 dedicated to the protection and preservation of citizens'
23 rights through what many have called the greatest justice
24 system ever created.

25 The attorneys appearing before you are advocates

1 for the parties they represent, but first and foremost
2 they are officers of the court, sworn to uphold the
3 integrity and fairness of our judicial system. You
4 should expect them to be professional, competent
5 and ethical in the representation of their clients'
6 interests. Remember, you've taken an oath to try
7 this case and reach a fair and impartial verdict. You
8 are also expected to be professional, reasonable and
9 ethical.

10 Now the State has brought this case under the
11 sexually violent predator law of South Carolina. The
12 State seeks the civil commitment of James Ronnie Nichols,
13 Jr., the Respondent, for long-term control, care and
14 treatment in a secure facility. This is not a criminal
15 proceeding seeking incarceration, but rather civil
16 commitment.

17 The State alleges or claims that the Respondent is
18 a sexually violent predator under the law. Respondent
19 denies that he's a sexually violent predator. The State
20 has the burden in this case and must prove its case
21 beyond a reasonable doubt. If you find that the State
22 has not met this burden, the Respondent will be released.
23 If you find that the State has met its burden of proof
24 and find that the Respondent is a sexually violent
25 predator, he will not be released but will be committed

1 to a secure treatment facility in Columbia operated by
2 the South Carolina Department of Mental Health.

3 It is my responsibility to preside over this trial
4 and I also have the duty to rule upon the admissibility
5 of evidence offered during the process of this trial.
6 In this trial, you are the sole and exclusive judge of
7 the facts and I'm the judge of the law. Do not infer
8 that I have an opinion about the facts in this case from
9 anything I say during the course of this trial in ruling
10 upon the admissibility of evidence or otherwise. The
11 law simply does not permit me to have an opinion about
12 the facts. As jurors, it is your duty alone to determine
13 the effect, value, weight and truth of the evidence
14 presented during the course of this trial.

15 In determining what the facts of this case are, you
16 must judge the credibility, which means believability,
17 of the witnesses and the value or weight to be given to
18 their testimony. You alone must decide the force, effect
19 and truth of the testimony.

20 The elements which the State must prove beyond a
21 reasonable doubt are, one, that the Respondent has been
22 convicted of a sexually violent offense and, two, that
23 the Respondent suffers from a mental abnormality or
24 personality disorder that makes him likely to engage in
25 acts of sexual violence if not confined in a secure

1 facility for long-term control, care and treatment. I
2 will define these terms in a little more detail when I
3 instruct you on the law at the end of this case.

4 Now from time to time an attorney will object to
5 some bit of testimony or evidence which the other side
6 is seeking to present. As in sports, business or any
7 other structured activity, there's certain rules that
8 both sides must obey in presenting evidence. These
9 rules have a definite purpose. They ensure that the
10 information you receive is the most trustworthy and
11 reliable evidence available. An objection is the
12 procedure used for an attorney to call a possible
13 violation of the rules to my attention as the judge of
14 this court and for this reason you should not hold an
15 attorney's objection against his or her client, nor
16 should you conclude from my ruling on the objection that
17 I favor one side or the other.

18 Finally, I will ask you to pay close attention to
19 the evidence as presented to you today. You will
20 determine the facts of this case and weigh the -- weigh
21 the believability and credibility of all the evidence
22 presented. This case will start with each side having
23 the opportunity to present opening statements. They
24 will have to decide to tell you what they intend to
25 prove in their case. Most importantly, understand that

1 what an attorney says is not evidence, be it in opening
2 statements or closing arguments at the end of the trial.
3 What an attorney says is not evidence in itself. What
4 comes from the witness stand is.

5 So you're taking part in a time-tested system. I
6 want you to pay attention closely to all the evidence
7 and we appreciate your service this week. Please give
8 your complete and undivided attention to the attorneys
9 as they make their opening statements at this time.

10 MR. BOGLE: Thank you, Your Honor. May it please
11 the Court?

12 THE COURT: Yes, sir.

13 MR. BOGLE: Ms. Zmroczek.

14 I was introduced I think during jury selection.
15 Again, my name is Jim Bogle. I'm with the Attorney
16 General's office. It is our job to present these cases
17 around the state. Some people wonder why their county
18 attorney or their solicitor might not be doing it and
19 the reason is when the Legislature wrote this law back
20 in 1998, they gave it to our office, so we do these
21 cases around the state and we're assigned different
22 counties, and I have Lexington county.

23 Now think about this. When asked why he did it,
24 the response was I don't know. Keep that in mind. I
25 think every case has a theme and I think you'll hear

1 that again and see how it plays into this case. This,
2 like the judge said, is called a sexually violent
3 predator law case brought under that law. What our
4 General Assembly, when they passed this law back in
5 1998, they made a finding that a mental abnormality, an
6 extremely dangerous group of sexually violent predators
7 exist who require involuntary civil commitment in a
8 secure facility, and they went on to say because the
9 existing civil commitment process was not -- was not
10 adequate to address this, they passed this particular
11 separate law.

12 So that's what the case is about. We are trying
13 to prove to you that Mr. Nichols is a sexually violent
14 predator as defined by this law and if you find that he
15 is, he will be committed to a secure facility for what
16 they call long-term control, care and treatment.

17 Now like the judge said, what do we have to prove?
18 Well, a sexually violent predator under this law is a
19 person -- two things have to happen. Number one,
20 convicted of a sexually violent crime, and you will hear
21 from the testimony of the State's witness that he's been
22 convicted of three; criminal sexual conduct with a minor
23 in the first degree, which means a child under eleven
24 years of age, in Lexington county, lewd act on a child,
25 also in Lexington county, and criminal solicitation of

1 a minor, and that is in Saluda county. And you'll have
2 these documents back in the jury room to look at. So
3 that's the sexually violent crime.

4 The next step is more difficult. The next step
5 is does he have a mental abnormality of some type that
6 makes him likely to do these types of crimes again
7 unless he's confined in this secure facility for control,
8 care and treatment. Pursuant to a prior court order,
9 Dr. Swan, sitting back there, she is a forensic
10 psychologist from Florida, she's licensed here in South
11 Carolina and has a contract with the South Carolina
12 Department of Mental Health to do these cases. So she
13 was given the file. She was told to evaluate this guy.
14 She brought him in, she talked to him, she looked at him,
15 she looked at all of his records, and she will testify
16 about whether or not he has that mental abnormality.

17 One thing to remember about court hearings.
18 Normally a witness can't give an opinion about something.
19 They can talk about facts like I heard the gun go off,
20 I saw the light turn red, I saw the police officer's
21 blue light come on, things like that. They can't give
22 opinions. But when a witness has the training and
23 expertise that can assist you in making the ultimate
24 findings of fact, they can be allowed to testify as
25 what's called an expert witness and give their opinion

1 about something, and that's what Dr. Swan is. As a
2 forensic psychologist who's job is to do these cases
3 and has done them in several states around the country,
4 including South Carolina, her job is to see does
5 Mr. Nichols have that mental abnormality, and he does.
6 He has two.

7 The first one is called pedophilic disorder. That
8 is a sexual attraction to prepubescent kids. The second
9 thing is something called hebephilia and this is a
10 sexual attraction to people crossing into puberty, but
11 still very young, and that's the kind of crimes he was
12 convicted of.

13 So the judge said we have the burden of proof and,
14 again, that's right. The State has the burden of proof
15 to prove everything I just talked about, the existence
16 of the crimes and the mental abnormality, to you beyond
17 a reasonable doubt.

18 Now the judge will define later on at the end of
19 the case what that means. I would suggest to you that
20 a reasonable doubt is something that leaves you firmly
21 convinced something is true, but we'll hear more about
22 -- the judge will give you the correct definition, a
23 more detailed definition of what is meant by beyond a
24 reasonable doubt.

25 So that's what the case is. Basically we are

1 saying this man is likely to do these crimes again
2 because of this mental abnormality and, therefore, he
3 should be civilly committed. The burden is on us to
4 prove it beyond a reasonable doubt and your decision
5 will be based on what you hear from that witness stand
6 and any documents that are introduced into evidence.

7 So that's the case. Again, I thank you for your
8 service to both Lexington county and the State of South
9 Carolina. These are clearly difficult times, but I
10 thank you very much for being here and paying attention
11 to what we're doing.

12 Your Honor.

13 THE COURT: Yes, sir.

14 Ms. Zmroczek.

15 MS. ZMROCZEK: May it please the Court, Your Honor?

16 THE COURT: Yes, ma'am.

17 MS. ZMROCZEK: Good morning. It's so weird that
18 you-all are back there, so I apologize if I'm way out
19 here. I know it's done for our safety. There are a lot
20 of things that are done for our safety. The State is
21 bringing this case because they're trying to say that
22 James Nichols, who you'll hear from, is a sexually
23 violent predator. No, he's not. And you'll find that
24 they have to do more than just prove that he has the
25 convictions and, yes, he has the convictions. You'll

1 hear about -- you'll hear about how he pled guilty
2 before they even took it to a grand jury, that he was
3 like yeah, I did this, I messed up, and then he got
4 time. You'll hear from the prosecutor that prosecuted
5 him. Because -- because this law was created for a
6 very, very specific group of people. James Nichols is
7 not one of those groups of people.

8 Mr. Bogle said oh, you'll hear from Dr. Swan, she's
9 the expert, she's the expert, and then you're gonna hear
10 the judge tell you about how you can evaluate that
11 opinion for your needs because the information that
12 she's gonna give you and that she's going to rely upon,
13 even she will have to say, is moderately predictive.

14 Moderately predictive. This is how we're
15 practicing law now. Is he gonna re-offend? Signs point
16 to no. There's eight different variations in here
17 where I could do this all day, but this is not beyond
18 a reasonable doubt.

19 You will hear from the son of James, you'll hear
20 from James, you'll hear from the prosecutor that
21 prosecuted these cases, and they'll all give you an
22 opinion as to whether or not he can control his
23 behavior and if he meets this limited dangerous group
24 of subclass individuals because even with their
25 moderately predictive test you'll hear what his score

1 was to re-offend. Zero. Because, ladies and gentlemen,
2 this isn't gonna take a long time, but it is important.
3 And I know that individually each and every one of you
4 will make your own determination and we'll give you that
5 information and when you do we're gonna ask that you
6 find that he's not a sexually violent predator.

7 Thank you.

8 MR. BOGLE: Thank you, Your Honor. May it please
9 the Court? The State would call Dr. Amy Swan.

10 THE COURT: Very well.

11 (Whereupon, Amy Swan was duly sworn by the Clerk
12 of Court.)

13 THE CLERK: If you'll have a seat and state your
14 full name for the record, please.

15 THE WITNESS: My name is Amy Swan, S-W-A-N.

16 AMY SWAN,

17 having been duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. BOGLE:

20 Q. Good morning, Dr. Swan.

21 A. Good morning.

22 Q. What is your occupation?

23 A. I'm a forensic psychologist.

24 Q. And how long have you worked in that capacity?

25 A. I have worked in that capacity for twenty-two years.

1 Q. What advanced degrees do you possess, educational
2 degrees?

3 A. I have a master's degree in clinical psychology and I
4 have a doctorate in clinical psychology as well.

5 Q. What states are you licensed to practice psychology
6 in?

7 A. Florida, Missouri and South Carolina.

8 Q. And have you had -- what is psychology just briefly?

9 A. Psychology is the study of the mind and behavior.

10 Q. Now you mentioned a minute go that you're a forensic
11 psychologist. When I hear the word "forensic" tied to
12 psychology, what does that mean?

13 A. Forensic means that it has some involvement with the
14 legal system. So a forensic psychologist is involved in
15 cases that have proceedings in the legal system.

16 Q. And, Dr. Swan, have you had any additional
17 specialized training or experience within the field of
18 forensic psychology beyond your doctorate degree?

19 A. Yes. I have had over a thousand hours beyond my
20 doctoral degree in the study of sex offenders and over
21 three hundred of those hours were in specifically assessing
22 the risk that a sex offender would be arrested or convicted
23 of another sexual crime.

24 Q. Are you a member of or do you hold a membership in
25 any organizations, professional organizations, related to

1 your field?

2 A. I do. I'm a member of the Association for the
3 Treatment of Sexual Offenders. It's the largest
4 international organization devoted to research on sex
5 offenders. I'm a member of the Florida chapter of that
6 organization. I'm a member of the International
7 Association of Forensic Nurses and I'm also a member of
8 the Association of State and Provincial Psychology Boards.

9 Q. Does your work allow you to do or have you doing
10 forensic evaluations of people?

11 A. Yes, it does.

12 Q. Do you also have any experience working directly with
13 sex offenders?

14 A. Yes, I do. I've worked with sex offenders thirty-two
15 years.

16 Q. Approximately how many sex offenders have you
17 evaluated?

18 A. Approximately 1,250.

19 Q. And what types -- in the broad range, looking at all
20 the types you've done, what types of evaluations have you
21 conducted with regard to sex offenders?

22 MS. ZMROCZEK: Your Honor, may we approach?

23 (Proceedings held at the bench; not reported.)

24 BY MR. BOGLE:

25 Q. Okay. The question was what types of evaluations of

1 sex offenders have you done looking at the broad range of
2 all of them?

3 A. I have been doing pre-commitment evaluations such as
4 this one and periodically reviewing individuals afterward,
5 sentencing evaluations when they have been convicted of a
6 sexual crime and they're up for receiving their sentence.
7 I have done child pornography cases and because I serve
8 on the board of psychology, I am involved with doing
9 evaluations of licensed individuals who have engaged in
10 problematic sexual behavior to determine if they're safe
11 to practice and under what conditions.

12 Q. Have you also -- would you please tell the jury about
13 your background with regard to sexually violent predator
14 cases.

15 A. I was the first psychologist hired at the Florida
16 Civil Commitment Center to provide treatment to individuals
17 in 1999 and in the year 2000 I began doing evaluations, so
18 I've been doing the actual evaluations for twenty years.

19 Q. Have you ever been previously recognized by the courts
20 as an expert witness in the field of forensic psychology?

21 A. Yes, well-over a thousand times in states such as
22 Florida, Georgia, Iowa, Missouri, South Carolina, Florida,
23 and in Federal cases as well.

24 Q. Have you also been qualified as an expert witness in
25 specifically sexually violent predator cases in South

1 Carolina prior to this?

2 A. Yes, I have.

3 Q. Okay. And as well as Florida and some of the other
4 states?

5 A. As well as Florida and the other states over 350
6 times.

7 MR. BOGLE: Okay. Your Honor, at this time we'd
8 ask the Court to recognize Dr. Amy Swan as an expert
9 witness in the field of forensic psychology.

10 MS. ZMROCZEK: No voir dire.

11 THE COURT: Without objection.

12 All right. Normally, ladies and gentlemen, a
13 person cannot give opinion testimony. Normally when
14 a person testifies they must testify as to what they
15 either saw, heard, sensed by smell or something of that
16 nature; however, there's an exception when someone is
17 qualified because of education or experience they are
18 permitted to give their opinion in certain areas if the
19 Court qualifies them that way.

20 This witness will be qualified in the area of
21 forensic psychology to give opinion testimony in that
22 area. That does not mean you must accept the opinion,
23 but it is evidence for you to use in any way you see
24 fit.

25 MR. BOGLE: Thank you, Your Honor.

1 BY MR. BOGLE:

2 Q. Now, Dr. Swan, again, how long have you been a
3 practicing psychologist?

4 A. Twenty-two years.

5 Q. In the twenty-two years you've been doing this or
6 been a practicing psychologist, have you ever faced any
7 discipline by a board that licensed you?

8 A. No, I have not.

9 Q. Okay. In those years have you ever also faced a
10 discipline from an organization you were a member of?

11 A. Yes, I have. Six years ago.

12 Q. Six years ago?

13 A. Yes.

14 Q. And what organization was that?

15 A. This was the Association for the Treatment of Sexual
16 Abusers.

17 Q. And you're still a member of that even today?

18 A. Absolutely. I'm still a member in good standing.

19 Q. What is the difference between discipline from a
20 licensing board and discipline from a voluntary
21 organization that you're a member of?

22 A. Well, if you receive discipline from a licensing
23 board, it means that you have broken the law regarding
24 the practice of psychology, and that has never happened.
25 However, each organization has different guidelines that

1 they would like you to observe, so if you violate a
2 guideline from a voluntary organization it means that you
3 have not adhered to their specialized requirements.

4 Q. So in the twenty plus years you've been doing this,
5 there's been discipline one time by an organization you're
6 voluntarily a member of; is that right?

7 A. That is correct.

8 Q. Why did they discipline or why did they have a
9 problem?

10 A. They indicated that I used an outdated interview and
11 I placed too much weight on it in my testimony.

12 Q. Okay. So why did you use that particular test?

13 A. This test was commonly used by psychologists doing
14 sexually violent predator evaluations in Florida.

15 Q. Okay. And what was the disciplinary action, if you
16 want to call it, that was taken by the Association for the
17 Treatment of Sex Abuse -- Sexual Abusers? What did you
18 have to do?

19 A. They indicated that I should stop using that
20 particular interview and they asked me to submit two
21 reports to a colleague for review and that colleague found
22 that I was doing substantial competent interviews and that
23 was the only requirement.

24 Q. Okay. What consequences could you have faced for a
25 violation of one of their rules?

1 A. If it was a serious -- or if they considered it a
2 serious infraction, I could have been kicked out of the
3 organization, but that did not occur. Moreover, the same
4 complaint was submitted to the American Psychological
5 Association and they dismissed it as having no merit.

6 Q. And the requirements that ATSA told you to do to
7 satisfy this issue, did you comply with them?

8 A. Yes. Absolutely.

9 Q. And have you been a member of the ATSA or the American
10 -- sorry -- Association for the Treatment of Sexual Abusers
11 ever since in good standing?

12 A. Absolutely. For approximately twenty-four years.

13 Q. Okay. Now turning to this case involving Mr. Nichols,
14 how did you get involved in this case?

15 A. I conducted an evaluation of Mr. Nichols pursuant to
16 a court order.

17 Q. Were you paid to conduct this evaluation by the
18 Department of Mental Health with a contract you have with
19 them?

20 A. Yes, I was.

21 Q. Okay. Are you paid a flat fee or are you paid by the
22 hour?

23 A. I'm paid a flat fee.

24 Q. Is that fee dependent upon the type of conclusion or
25 outcome that you reach?

1 A. Not at all.

2 Q. Okay. When ordered to do -- when you were directed to
3 do this evaluation, what were you being asked to do?

4 A. I was asked to determine if Mr. Nichols met criteria
5 as a sexually violent predator.

6 Q. Okay. And can you please describe for the jury the
7 protocol, the step-by-step method, you used in conducting
8 these types of evaluations?

9 A. Yes. When I receive a court order to conduct an
10 evaluation, I receive a package of information from the
11 Attorney General's office, I review that information prior
12 to going out to the facility where the individual is
13 being held, and then I conduct an interview that includes
14 essentially everything that's happened from the day he's
15 born until the day he's sitting in front of me, and that
16 includes his early history, his family of origin, his
17 academic history, his occupational history, his medical
18 history, his relationship history and his sexual history.

19 Q. Now as part of this collective information that you
20 do, does that also include any records relating to any
21 criminal convictions he has both sexual and nonsexual?

22 A. Yes, it does. It includes criminal records, such as
23 police reports, the judgment and sentence, it includes any
24 psychological or mental health evaluations that have been
25 done, anything that could possibly impact on whether he

1 meets criteria as a sexually violent predator.

2 Q. Now, Dr. Swan, as part of this evaluation process, did
3 you, of course, meet with and interview James Nichols?

4 A. I did. I met with him on August 30, 2017.

5 Q. Okay. Is the man you met with in the courtroom today?

6 A. Yes, he is. He's sitting beside Ms. Zmroczek.

7 MR. BOGLE: Okay. Let the record reflect she's
8 identified the Respondent.

9 BY MR. BOGLE:

10 Q. Now did you explain the purpose of this evaluation to
11 Mr. Nichols?

12 A. Yes, I did.

13 Q. Did he consent to the evaluation?

14 A. He did. I have a written document that explains his
15 rights and the implications of the evaluation and he has
16 the opportunity to say either yes, he wants to participate
17 or no, he does not, and either way it -- I do not hold it
18 against him. For example, if he declined the interview,
19 I would conduct the interview based on records, but that
20 would not -- I would not hold that against him.

21 Q. Now, Dr. Swan, the information -- the documentary
22 information you talked about a few minutes ago, the stuff
23 that you reviewed and looked at in preparation for doing
24 this evaluation, is this -- is this the type of information
25 that is typically and reasonably relied upon by experts in

1 your field?

2 A. Yes, it is.

3 Q. And did you consider and rely upon that information
4 together with the interview and any scoring you did of him
5 on any testing in reaching an opinion on this case?

6 A. Yes, I did.

7 Q. Now based upon your interview with Mr. Nichols, your
8 review of all the documents, had he been convicted of a
9 sexually violent offense?

10 A. Yes. In fact, he was convicted of three sexually
11 violent offenses.

12 Q. Okay. And what were they?

13 A. Criminal sexual conduct with a minor in the first
14 degree, lewd act on a child under sixteen and criminal
15 solicitation of a minor.

16 Q. Now why is it important for you to review all of the
17 background information, witness statements, police reports,
18 things like that, the background information behind a
19 conviction like these?

20 A. It's important that I determine first if he has a
21 mental abnormality or a personality disorder and then I
22 have to determine if that mental abnormality or personality
23 disorder makes him likely to engage in future acts of
24 sexual violence if not confined in a secure facility for
25 care, control and treatment.

1 Q. Okay. Now, Doctor, I'm gonna hand you or pass up to
2 you what's been marked as State's Exhibit Number 1. It is
3 a Lexington County sentencing sheet and indictment for
4 criminal sexual conduct in the first degree with a minor.
5 Now that particular document -- I'm also gonna hand you up
6 State's Number 2, a conviction also in Lexington County for
7 lewd act on a child under sixteen.

8 A. Yes.

9 Q. Okay. Now are these documents you've looked at
10 before?

11 A. Yes. These were included in my packet of information.

12 Q. And these are certified copies of the convictions; is
13 that correct? The two convictions I talked about; is that
14 right?

15 A. That is correct.

16 Q. Now -- and, again, stuff you looked at, right?

17 A. Yes.

18 Q. And is it -- the type of things you look at commonly
19 relied upon by people in your field?

20 A. Yes, it is.

21 Q. Is it necessary to look at the underlying details
22 behind the offense, what led up to these convictions?

23 A. Yes, it is.

24 Q. Why is that?

25 A. It's important that you determine if there is a

1 pattern to the offenses and if that pattern attests to
2 the fact that he has some type of mental abnormality or
3 personality disorder that would make him likely to engage
4 in future acts of sexual violence.

5 Q. Okay. Now when you're looking at the conviction
6 documents, which I just handed you --

7 A. Yes.

8 Q. -- is it also important to look at charges that were
9 brought where he wasn't convicted?

10 A. It is.

11 Q. And why is that?

12 A. It's important to consider the ones where he was not
13 convicted because the research indicates that even being
14 arrested for a crime or charged with a crime increases risk
15 for another sexual crime even if you were not convicted.

16 Q. So in this particular case what was Mr. Nichols
17 charged with?

18 A. He was charged with criminal sexual conduct with a
19 minor in the first degree, victim under eleven, criminal
20 sexual conduct with a minor in the first degree, criminal
21 sexual conduct with a minor in the first degree, lewd act
22 on a child under twelve, and criminal solicitation of a
23 minor.

24 Q. Okay. So all these charges, the criminal sexual
25 conduct with a minor, included which children -- which

1 child?

2 A. SON.

3 Q. Okay. And what is the relationship between SON and
4 the Respondent?

5 A. SON is Mr. Nichols' son.

6 Q. And this conduct would have occurred prior to SON
7 being eleven years old?

8 A. That is correct.

9 Q. Okay. And you also mentioned there was another
10 criminal sexual conduct first degree. Did that involve his
11 daughter -- or stepdaughter?

12 A. Yes.

13 Q. Okay.

14 A. It involved his daughter, DAUGHTER 1

15 Q. And, again, for this crime -- charge to be brought,
16 criminal sexual conduct with a minor in the first degree,
17 the conduct would have had to have happened before the
18 child turned eleven?

19 A. That is correct.

20 Q. Okay. What about the lewd act? Who was the victim in
21 the lewd act charge?

22 A. That would be his ex-wife's daughter, DAUGHTER 2

23 Q. Okay. And the criminal solicitation of a minor?

24 A. That would be DAUGHTER 1

25 Q. Okay. And that was in Saluda county, right?

1 A. Yes.

2 Q. Another county. And I'll show you that in just a
3 minute, but let's -- now the two crimes you have in front
4 of you, what are the underlying details behind these crimes
5 that you feel were important to you in developing an
6 opinion about whether or not Mr. Nichols has that required
7 mental abnormality or personality disorder we've been
8 talking about this morning?

9 MS. ZMROCZEK: Subject to my previous objection.

10 THE COURT: Okay. Overruled. Thank you.

11 A. Mr. Nichols sexually assaulted SON between the
12 approximate ages of seven and thirteen. He fondled
13 SON and performed oral sex on him. SON was forced
14 to fondle Mr. Nichols and to perform oral sex on him.
15 SON was also forced to fondle DAUGHTER 1's clitoris, put
16 his finger inside her vagina and to touch her breasts.
17 Mr. Nichols forced DAUGHTER 1 to suck SON's penis. The
18 incidents took place in Mr. Nichols' bedroom. On a few
19 occasions when SON was nine or ten, the incidents took
20 place at the house that he resides in with his grandparents
21 and his grandparents were always at work when these acts
22 occurred. SON stopped the abuse when he was twelve or
23 thirteen by punching Mr. Nichols in the face and breaking
24 the windshield of his car. SON witnessed Mr. Nichols
25 fondling and digitally penetrating DAUGHTER 1 on many occasions

1 and Mr. Nichols watched DAUGHTER 1 take showers.

2 Q. Were there also more conduct involving Mr. Nichols and
3 DAUGHTER 2?

4 A. There were. SON witnessed one incident in which
5 Mr. Nichols fondled DAUGHTER 2

6 Q. And how old would SON have been about that time?

7 A. SON would have been twelve at that time.

8 Q. Okay. Now were the kids -- any of the kids shown
9 adult pornography by Mr. Nichols?

10 A. Yes. SON was shown adult pornography for years by
11 Mr. Nichols and the pornography consisted of men and women
12 having sex together, as well as women having sex together.

13 Q. Okay. And what about DAUGHTER 1 then next?

14 A. Mr. Nichols began abusing DAUGHTER 1 when she was
15 approximately seven or eight and it stopped before she
16 entered middle school. He fondled her breasts and vagina
17 on top of her clothes. He digitally penetrated her once
18 or twice. He got on top of her and rubbed her, DAUGHTER 1
19 screamed and he stopped. When asked what Mr. Nichols made
20 her do to him, DAUGHTER 1 began crying because she was not ready
21 to talk about everything that Mr. Nichols had done to her.

22 Q. And the conduct with DAUGHTER 1 began when she was about
23 how old?

24 A. Seven or eight.

25 Q. And continued for a good while?

1 A. Until about middle school.

2 Q. Okay. Okay. Then regarding DAUGHTER 2 -- regarding
3 SON, the conduct with him began at about what age?

4 A. Seven or eight and continued until about twelve or
5 thirteen.

6 Q. Okay. What about DAUGHTER 2?

7 A. DAUGHTER 2 was -- according to Mr. Nichols, DAUGHTER 2 was
8 four or five when it started.

9 Q. Uh-huh. Okay. Now you talked to -- you reviewed all
10 these documents about what happened?

11 A. Yes.

12 Q. You also talked to Mr. Nichols about what he did; is
13 that right?

14 A. Yes.

15 Q. Okay. Regarding his responses, what were his
16 responses to you about? And let's start with DAUGHTER 2

17 A. Okay. Mr. Nichols said that DAUGHTER 2 was four or five
18 when he began assaulting her. He said that he touched her
19 breasts and vagina underneath her clothing. He also said
20 that his nephew participated as well and on one occasion
21 when DAUGHTER 2 was eleven or twelve they both molested her
22 forcing her to perform -- or they -- they both performed
23 oral sex on her.

24 Q. And then what did he -- what did he say regarding the
25 allegations about -- about DAUGHTER 1?

1 A. Well, his account is different from **DAUGHTER 1**'s. She
2 said it began when she was seven or eight and he said that
3 it began when she was nine and he said that it was just
4 touching in private areas. He denied that he stuck his
5 finger in her vagina. When asked -- when I asked him why
6 she would say that that happened if it didn't happen, he
7 said that he didn't know why she said that.

8 Q. And what about **SON**? What did he say in response to
9 the allegations about **SON**?

10 A. Again, his account differed from **SON**'s. **SON** said
11 it began when he was seven or eight and Mr. Nichols said
12 that it began when **SON** was nine or ten. He said they
13 watched pornography together and he only touched **SON** a
14 few times. He denied that he fondled **SON** or performed
15 oral sex on him and he denied performing anal sex on **SON**.
16 He said that perhaps his ex-wife's parents put **SON** up to
17 saying that he did those things because he never got along
18 with them. He denied forcing **SON** to fondle **DAUGHTER 1**'s
19 breasts or to digitally penetrate her. He said that **SON**
20 did, in fact, do those things, but he didn't force him to.
21 He denied that he made **DAUGHTER 1** perform oral sex on him, on
22 **SON**, while he watched and he denied that **SON** hit him in
23 the face or broke his windshield. Mr. Nichols denied that
24 **SON** saw him fondling or digitally penetrating **DAUGHTER 1**'s
25 vagina on many occasions and he said that **SON** did see him

1 touching **DAUGHTER 2** and he admitted that he showed **SON** porn.
2 He also admitted that he has herpes, but he did not know if
3 he transmitted it to the children or not.

4 Q. When asked about why this happened or why he did it,
5 did he give a response?

6 A. He did. He said that he has a hard time knowing why
7 he did it.

8 Q. Did he indicate he knew why he did these things?

9 A. He did not. He said that he -- he still did not know.
10 After these years he still did not know why he did it.

11 Q. Okay. If I could see the two exhibits again.

12 A. Sure.

13 Q. Now the first one, State's Exhibit 1, criminal
14 solicitation with a minor -- or sexual -- I'm sorry --
15 criminal sexual conduct with a minor victim under eleven
16 years of age, first degree, what was the date of the
17 sentencing? Lower right-hand corner of the page.

18 A. The date of the sentencing was July 29, 2010.

19 Q. And the amount of time -- the sentence he got in the
20 middle of the page?

21 A. It was tens years in SCDC for each charge to run
22 concurrently to one another, the two charges, and -- yes.

23 Q. Okay. And Exhibit Number 2, the lewd act on a person
24 under sixteen, was that the same sentencing date in 2010?

25 A. Yes, it was.

1 Q. And what was the -- the sentence he got for that?

2 A. He also got ten years for that.

3 Q. All right. Turn back to Exhibit Number 1 and look at
4 the indictment, the second page of the two that are
5 stapled. In the indictment, what's the name of the victim
6 who's identified?

7 A. In the indictment -- I don't see that.

8 Q. Let's see.

9 A. Oh, it's on the other page. I'm sorry.

10 Q. Here we go. I'm sorry. The back of the page.

11 A. The first indictment is **SON**.

12 Q. Okay. And the second indictment with the same
13 sentencing date, what's the victim identified on that
14 indictment?

15 A. **DAUGHTER 1**

16 Q. Okay.

17 MR. BOGLE: Your Honor, at this time we'd like
18 to introduce into evidence Exhibits 1 and 2, the two
19 indictments and sentencing sheets that I've been
20 talking about.

21 THE COURT: Without objection, right?

22 MS. ZMROCZEK: No objection.

23 THE COURT: All right. State's Exhibits 1 and 2
24 will be admitted into evidence.

25 (State's Exhibit Number 1, a Lexington County

1 Certified Conviction, and State's Exhibit Number 2, a
2 Lexington County Certified Conviction, were admitted
3 into evidence.)

4 BY MR. BOGLE:

5 Q. Now the next thing I'd like to pass up, State's
6 Exhibit Number 3, a Saluda county conviction for criminal
7 solicitation of a minor, but before I do let me back up
8 and ask you this question. The two documents you've got,
9 Exhibits 1 and 2, criminal sexual conduct with a minor in
10 the first degree and lewd act, are these two crimes both
11 classified as sexually violent crimes under our South
12 Carolina law?

13 A. Yes, they are.

14 Q. Okay. Let me hand you what's been marked as State's
15 Exhibit Number 3, and that's the criminal solicitation of
16 a minor charge; is that correct?

17 A. That is correct.

18 Q. Okay. Have you seen that document before as part of
19 your research into Mr. Nichols?

20 A. Yes.

21 Q. And did you review it as part of your research into
22 what he did and what happened with this guy?

23 A. Yes, I did.

24 Q. And is this part of the basis of your opinion about
25 Mr. Nichols?

1 A. Yes, it is.

2 Q. And, again, is this the type of document like the
3 others that is typically and reasonably relied upon by
4 other experts in your field?

5 A. Yes.

6 Q. Is criminal solicitation of a minor a sexually violent
7 crime under South Carolina law?

8 A. Yes, it is.

9 Q. Now this -- what's the sentencing date in the lower
10 right-hand corner of the sheet?

11 A. This was July 23, 2008.

12 Q. Okay. And if you'd look at the indictment itself and
13 read me the name of the victim.

14 A. The victim in this case was DAUGHTER 1

15 Q. Okay. Now is it necessary, again, to review the
16 underlying details behind the crime like you did for the
17 other two we've talked about so far?

18 A. Yes, it is.

19 Q. Would you please describe the facts and circumstances
20 relating to this 2008 conviction for criminal solicitation
21 of a minor.

22 A. Yes. In this case, Mr. Nichols contacted DAUGHTER 1
23 through text messaging in an attempt to persuade her to
24 participate in sexual acts with him.

25 Q. Okay. What was he asking her to do?

1 A. Mr. Nichols said that he asked her to send pictures of
2 herself and to do sexual stuff.

3 Q. Okay. And in this particular case, what was the
4 sentence of the Court?

5 A. The sentence of the Court was ten years suspended to
6 two years of probation.

7 Q. And that was in 2008?

8 A. Yes, it was.

9 Q. Okay.

10 A. And that's important to remember because you'll
11 remember that he was -- received his sentence in 2010 for
12 the other crimes, July 29, 2010, and that will be important
13 later.

14 Q. Okay. Okay. Now is it important to consider sexual
15 matters that did not result in a conviction?

16 A. Yes.

17 Q. Was there any other information -- now why is that?
18 Why is it important to look at things that didn't result --
19 charges that did not result in a conviction?

20 A. As I said, the research indicates that being arrested
21 or charged with a crime, even if you're not convicted,
22 increases your risk for committing another sexual -- or
23 increases your risk of being arrested or convicted of
24 another sexual crime.

25 Q. Now earlier you mentioned that there are four or five

1 total charges --

2 A. Yes.

3 Q. -- that led to the -- the two indictments in Lexington
4 county that we talked about a few minutes ago, as well as
5 the one in Saluda.

6 A. Yes.

7 Q. What information about these other charges did you
8 find significant in reaching an opinion about Mr. Nichols?

9 A. So there was another criminal sexual conduct with
10 a minor where the victim was eleven to fourteen and
11 Mr. Nichols was charged with sexually assaulting SON
12 on July 31, 2007, by forcing him to perform oral sex on
13 Mr. Nichols and by performing oral sex on SON and these
14 assaults took place in Lexington and Saluda counties.

15 Q. What did he say when you talked to him about these
16 assaults?

17 A. Well, he denied that he performed oral sex on SON
18 and he also denied that he forced SON to perform oral
19 sex on him.

20 Q. Has he taken any responsibility for these offenses?

21 A. Partial responsibility, but not full responsibility.

22 Q. Okay. Now did you rely solely upon his past criminal
23 history in making your ultimate conclusion?

24 A. No, I did not.

25 Q. Okay. Would that be acceptable to do?

1 A. No, it would not.

2 Q. Okay. Now what did Mr. Nichols tell you during the
3 interviews about his sexual interests? Is that one of the
4 questions you go over with a guy in these types of cases?

5 A. Yes. He denied that he had any deviant sexual
6 fantasies, urges or arousal to children. He denied any
7 current fantasies about males or females under the age of
8 eighteen. He said that he did obviously have fantasies
9 about his children during the time that he was molesting
10 them. He denied that he has any fantasies about them now
11 and he said that he masturbated -- the last time that he
12 masturbated to fantasies of children was during the time
13 that he was molesting them.

14 Q. Could he account for why he did this to these kids?

15 A. He could not.

16 Q. Is it also necessary in this line of work to look at
17 any prior sex offender treatment a person has like while
18 he's in prison, for example?

19 A. Yes, it's very important because if he had sufficient
20 sex offender treatment, then it would lower his risk to
21 commit another sexual crime, and Mr. Nichols had
22 approximately a year of treatment, but the fact that he
23 still does not know after that year of treatment why he
24 did this seems to indicate that he didn't benefit from
25 treatment.

1 Q. Let me hand you what's been marked -- or at this time
2 let me back up.

3 MR. BOGLE: Your Honor, we'd move to formally
4 introduce into evidence as State's Exhibit Number 3
5 the Saluda County conviction for criminal solicitation
6 of a minor.

7 MS. ZMROCZEK: I thought we agreed to all these
8 already.

9 THE COURT: Let's do it for --

10 MS. ZMROCZEK: Certainly.

11 THE COURT: Without objection State's Exhibit 3
12 will be admitted.

13 MR. BOGLE: Thank you.

14 (State's Exhibit Number 3, a Saluda County
15 Certified Conviction, was admitted into evidence.)

16 BY MR. BOGLE:

17 Q. Let me hand you what's been marked as State's Exhibit
18 Number 4. Is this a document you ran across in the course
19 of your investigation of Mr. Nichols?

20 A. Yes.

21 Q. Okay. Basically what does that document constitute?
22 What is that?

23 A. This document is a letter from Dr. William Burke,
24 who's a psychologist, and it indicated that Mr. Nichols had
25 some treatment with him and --

1 Q. Okay. And -- go ahead.

2 A. -- it actually says that he had been seen twice at the
3 time that this letter was written on April 23, 2009.

4 Q. Who's the letter addressed to?

5 A. It is addressed to Lisa Baker in the Lexington County
6 Department Probation, Parole and Pardon Services.

7 Q. And what's the date of that letter again?

8 A. April 23, 2009. So this would be after the criminal
9 solicitation.

10 Q. Okay. But before the convictions in Lexington county?

11 A. That is correct.

12 Q. Does the letter indicate that Mr. Nichols had some
13 issues, doing something improperly?

14 A. It did. It said that he had been violating his
15 probation by viewing pornography on cable television.

16 Q. Now you're looking for prior sex offender treatment?

17 A. Yes.

18 Q. And you found that apparently he had some on the
19 outside from Dr. Burke?

20 A. Yes.

21 Q. And that would have been after his 2008 criminal
22 solicitation conviction, but before he was convicted in
23 2010?

24 A. Yes.

25 Q. Was there any record of him -- let's talk about --

1 let's talk about 2010 when he got convicted here forward
2 in time. Was there any record of him getting any sexual
3 offender treatment while he was at the Department of
4 Corrections?

5 A. No.

6 Q. Is it also -- now the sex offender treatment he got
7 from Dr. Burke, according to that letter it's like two
8 times?

9 A. Well, he saw him two times and he intended to continue
10 to see him; however, that was April 23, 2009, and he was
11 arrested for the other sexual crimes against **SON** and
12 **DAUGHTER 1** that occurred years before, but he was not arrested
13 for them until after he had the criminal solicitation
14 charge, which was his most recent sexual crime.

15 Q. Okay. So he pleads to the criminal solicitation of a
16 minor?

17 A. Yes.

18 Q. Gets a probationary sentence?

19 A. Yes.

20 Q. Sees Dr. Burke twice?

21 A. Yes.

22 Q. Has a problem with something he did about his
23 probation about watching porn?

24 A. Yes.

25 Q. Burke notifies probation?

1 A. Yes.

2 Q. Then before he can get any more sex offender
3 treatment on the outside, he's arrested for this stuff
4 that eventually led to the guilty pleas in 2010?

5 A. Yes. The children had not revealed that they'd been
6 sexually abused until after he was arrested for the
7 criminal solicitation. That's not uncommon for children
8 not to reveal, especially when they've been abused by a
9 parent, and so they did not reveal it until after he was
10 arrested for the criminal solicitation.

11 Q. Did you talk to Mr. Nichols about what -- whether he
12 thought he needed sex offender treatment?

13 A. I asked him if he needed it, if he thought he had a
14 problem with children, and he said well, I'd be willing to
15 take it on the street if I could, and then I pressed him,
16 I said, but I asked if you thought you needed it and he
17 said well, it will probably help, but I only offended
18 against my own children as if that was somehow less than
19 offending against someone who was a stranger.

20 Q. Well, let's talk about that for a minute. Well, I'll
21 get to that -- I'll get to that later on. Let me hold that
22 for a minute and I'll get to it later on.

23 Now the discipline history at the South Carolina
24 Department of Corrections, do you also look to see if
25 whether or not he's had any discipline problems while he's

1 been locked up at SCDC?

2 A. I do.

3 Q. And what did you find?

4 A. So in his records I found that he was -- that he was
5 identified as exposing his penis to a female staff member,
6 and that's pretty common in prisons; however, there was one
7 on April 16, 2011, and that was dismissed, and there was
8 also a notation that there was one on March 2, 2016, and I
9 could not find any additional information on that.

10 Q. Okay.

11 A. Now those are really important if, indeed, they
12 occurred because if you are arrested for sexual charges
13 and then you continue to engage in deviant sexual
14 behavior in the jail or the prison, that essentially says
15 that you can't control your behavior and that makes you
16 a higher risk, so because one was dismissed and one was
17 -- I couldn't find any additional information about it, I
18 had to not consider those because I only deal with things
19 that I know, but they could have been potentially important
20 because that would be considered their most recent sexual
21 crime. In this case, I did not count it as that because I
22 didn't have enough information.

23 Q. Uh-huh. Now based upon your examination of
24 Mr. Nichols, your review of the records we've talked about
25 and all the other factors we've been discussing, were you

1 able to diagnose him with a mental abnormality?

2 A. Yes. I diagnosed Mr. Nichols with pedophilic
3 disorder, sexually attracted to both, nonexclusive type.
4 So the sexually attracted to both means that he's attracted
5 to male and female children who do not have any secondary
6 sexual characteristics.

7 Q. In other words, prepubescent?

8 A. Prepubescent. And the nonexclusive means that he also
9 has sex with adult partners as well.

10 Q. And was a -- was there a second diagnosis you also
11 made of a mental abnormality?

12 A. Yes. I diagnosed him with other specified paraphilic
13 disorder, and the qualifier is hebephilia, and what that
14 means is that he is sexually aroused by children who have
15 just entered puberty, so they do not have full secondary
16 sexual characteristics. So they don't look like an adult,
17 but they are what we call a Tanner stage 2 and 3.

18 Q. Now let's back up a second. When you say Tanner, are
19 there Tanner stages that recognize different degrees of
20 sexual development?

21 A. There are. There are five Tanner stages. Stage 1 is
22 prepubescent, that's children that don't have any secondary
23 sexual characteristics, and 5 is adult with full secondary
24 sexual characteristics. Stage 2 and 3 is when a male or
25 female child is just entering puberty. So for females they

1 would have breast buds, but not full breasts, they'd have
2 peach fuzz for pubic hair. For a male, it would be the
3 peach fuzz and the scrotal volume would be increased a
4 slight degree, but certainly not as much as an adult male.

5 Q. Now let's go back and talk about the pedophilic
6 disorder you arrived at. What are the criteria for someone
7 to be diagnosed with pedophilic disorder?

8 A. The criteria are that over a period of at least six
9 months the person has recurrent intense sexual arousal and
10 the reason that you know that they have recurrent intense
11 sexual arousal is that either they've had fantasies, urges
12 or behaviors involving sex with children.

13 Q. And how did Mr. Nichols meet the criteria for
14 pedophilic disorder attracted to both?

15 A. Mr. Nichols assaulted his children sexually over a
16 period of eight years. He sexually assaulted **DAUGHTER 2**
17 between kindergarten and sometime in elementary school.
18 He sexually assaulted **SON** between the ages of seven or
19 eight and twelve or thirteen and possibly fifteen, **SON**
20 was unclear about the timeframe, but he sexually assaulted
21 **DAUGHTER 1** between the ages of seven and eight and before she
22 entered middle school.

23 Q. Now the other diagnosis you gave was something called
24 other specified paraphilic disorder, hebephilia?

25 A. Yes.

1 Q. Now in the -- there's a book called the Diagnostic
2 and Statistical Manual of Mental Disorders, and the Fifth
3 Edition, which I'm holding --

4 A. Yes.

5 Q. -- is this the most -- is this the latest?

6 A. It is the latest.

7 Q. Okay. And what is this book with regard to your
8 profession?

9 A. So that is an 800-page book that catalogs all the
10 possible mental illnesses or conditions that you could
11 have and the criteria for diagnosing them.

12 Q. Okay. Now there's a category on page 705, which I'm
13 gonna hand up to you right now -- here we go.

14 A. Yes.

15 MR. BOGLE: And, Judge, for the record I think
16 I moved to introduce Exhibit 3, the Saluda County
17 conviction, and also Exhibit 4, the letter from
18 Dr. Burke.

19 THE COURT: State's Exhibit 4 will be admitted
20 into evidence without objection.

21 (State's Exhibit Number 4, a 4/23/09 Letter, was
22 admitted into evidence.)

23 BY MR. BOGLE:

24 Q. Now, Dr. Swan, the book you're looking at, the
25 category of other specified paraphilic disorder, would

1 you read the relevant language there that talks about what
2 that's supposed to mean?

3 A. Yes. This category applies to presentations in which
4 symptoms characteristic of a paraphilic disorder that
5 causes clinically significant distress or impairment
6 in social, occupational or other important areas of
7 functioning predominate, but do not meet the criteria
8 for any of the disorders in the paraphilic disorders
9 diagnostic class.

10 Q. Now before you go on, when you say paraphilic
11 disorder, what does the word "paraphilic" mean?

12 A. Paraphilic is a term that we use to -- it's the
13 psychological term for sexual deviance and --

14 Q. Okay. So going back -- go ahead. I'm sorry.

15 A. Okay. Sexual deviance is any condition that we
16 consider sexually deviant and, that is, it's considered
17 abnormal because it's statistically rare, that is most
18 people don't want to engage in those acts, or it has a
19 high possibility of harming the victim of those acts. So,
20 for example, pedophilic disorder is sexual interest in
21 children. Most people don't want to have sex with children
22 and there's a high potential that children will be harmed
23 if an adult has sex with them.

24 Q. Now, Dr. Swan, what does it say in the book then
25 about other specified paraphilic disorders that gets you

1 to hebephilia? How does it describe that in the book?

2 A. Okay. This other specified paraphilic disorder
3 applies to conditions or examples of presentations that
4 can be specified using the other specified designation
5 included, but not limited to, and gives a list of seven
6 different disorders as possible diagnoses. Now in the
7 DSM-5 there are eight conditions listed that are fully
8 delineated, that means it discusses what they are, the
9 criteria for diagnosing them, and these conditions are
10 such things as voyeuristic disorder, exhibitionistic
11 disorder, which is exposing your penis to someone who
12 doesn't want to see it. Voyeuristic disorder is secretly
13 watching someone engage in sex or disrobing. These are the
14 conditions that we have the most research about, that are
15 the most common, that we know the most about. There have
16 been 547 different paraphilias that have been identified
17 and that's 547 different areas of sexual deviance that
18 people could be aroused to. Eight of them are specifically
19 delineated in this book as the most common and the most
20 research about. The other 539 would fall under other
21 specified paraphilic disorder.

22 Q. Because the book says including, but not limited to,
23 and that gives you access to the other five hundred and
24 some odd diagnoses?

25 A. That's correct.

1 Q. And hebephilia is one of them?

2 A. That is correct.

3 Q. Okay. Is there some controversy -- well, let me back
4 up a second. To meet the criteria for hebephilia, what did
5 Mr. Nichols have to do?

6 A. Well, you have to meet the same criteria for a
7 paraphilic disorder. That means over period of at least
8 six months that you have recurrent intense sexual interests
9 as manifested by either fantasies, urges or behaviors
10 involving having sex with that particular focus of sexual
11 deviance.

12 Q. So because his crimes with SON and DAUGHTER 1 extended
13 beyond puberty to the early teens, twelve or thirteen years
14 old, that's the area where we get into hebephilia; is that
15 right?

16 A. That is correct.

17 Q. Is there some controversy about hebephilia?

18 A. Well, hebephilia was first identified in the early
19 1950's and there was no controversy until around 2002
20 when the states began adopting sexually violent predator
21 legislation and the controversy really came into full force
22 in 2009 when we did have the DSM-IV Text Revision and when
23 they were considering proposals for inclusions for new
24 disorders in DSM-5, a disorder was submitted based on
25 substantial research of pedo-hebephilic disorder and there

1 were three subtypes; the pedophilic subtype which is only
2 sexual arousal to prepubescent children, there would be
3 the -- both where you would have the pedophilic and the
4 hebephilic interest in children, and then the third type
5 would be if you were only interested in the young pubertal
6 teens.

7 Q. Okay. But this combination didn't get in?

8 A. It did not get in.

9 Q. But the DSM did not specifically reject hebephilia,
10 right?

11 A. It did not.

12 Q. So when it says --

13 A. It rejected pedo-hebephilic disorder.

14 Q. Okay. So when it says including, but not limited to,
15 does that give you access to the other deviant sexual
16 behaviors which are not specifically listed in the book?

17 A. That is correct.

18 Q. Now did you also -- one moment, Your Honor.

19 Now when doing these assessments do you also do
20 something to measure a person's risk to re-offend?

21 A. Yes.

22 Q. Okay. How do you -- what factors do you look at that
23 have been identified in the research as correlated with
24 risk to re-offend? What are you looking at here? What
25 categories?

1 A. So I look at factors that have been identified in
2 the research on sex offenders as being correlated with
3 increased risk for being arrested or convicted of another
4 sexual crime, and let me make that distinction. The
5 reason that I'm saying that it is correlated with being
6 arrested or convicted of a new sexual crime is because we
7 do not know how many sexual crimes individuals actually
8 commit because the only way we would know that would be
9 if they told us and the fraction that result in arrest
10 or conviction are a fraction of the true crimes that are
11 committed and so we only have research that tell us the
12 ones that are -- that the person's been arrested or
13 convicted for. So under the statute we want to know if
14 the individual will commit another sexual crime in his
15 lifetime, but what the research tells us is only if he will
16 be arrested or convicted in five years and so as you can
17 see what we know from the research is an underestimate of
18 what actually occurs.

19 Q. Well, let's talk about risk factors for a second.
20 There's something called static risk factors and dynamic
21 risk factors.

22 A. Yes.

23 Q. You look at both of those?

24 A. Yes.

25 Q. What is a static risk factor by definition?

1 A. The static risk factors are historical information or
2 factors that don't change like deviant sexual interests.
3 There are ten different factors that we look at. One is
4 has the individual ever lived in a relationship for as long
5 as two years, whether they committed their crimes against
6 strangers or related people, whether they ever had a crime
7 involving a male, those types of things because those have
8 been identified in the research as being -- telling us
9 whether the person has an increased risk to be arrested or
10 convicted in the future.

11 Q. Okay. What is Mr. Nichols' most important static,
12 unchangeable if you will, risk factor?

13 A. It would be the deviant sexual interests or the
14 pedophilic disorder and the other specified hebephilia.

15 Q. How are static risk factors measured?

16 A. The static risk factors are answered using the
17 Static-99R.

18 Q. Okay. Would you tell the jury what the Static-99R is
19 and give us an example of what it is?

20 A. Yes. The Static-99 is an actuarial instrument and
21 what we mean by actuarial instrument is that it's similar
22 to the tables used in the insurance industry. So it's an
23 actuarial instrument --

24 Q. Okay. Let's back up a second. You keep saying
25 actuarial instrument.

1 A. Yes.

2 Q. Could you give us an every day example that we run
3 into in our ordinary lives outside of this courtroom?

4 A. Yes. So we know that males under the age of
5 twenty-five have a higher risk of having an accident and,
6 therefore, if you go to insure a female under the age of
7 twenty-five and a male under the age twenty-five, the
8 male's insurance premiums are going to be higher. Each
9 time they have an accident, their rates increase and the
10 next accident their rates go up more.

11 Q. So that doesn't mean that my twenty-four-year-old son
12 is going to have an accident, it means he's more likely to
13 have one based on research?

14 A. That is correct.

15 Q. Okay. So is that what the -- how the static measures
16 sex offenders?

17 A. So the Static-99 looks at what happens after the
18 person is either arrested or convicted of a sexual crime.
19 So most people don't re-offend after they've been arrested
20 or convicted of a sexual crime, but for those that do their
21 risk increases every time they have a new sexual crime.

22 Q. Now the score you can get -- when you give him a score
23 on the Static-99 score sheet, what's the lowest score you
24 can get and what's the highest score you can get?

25 A. The lowest score is a minus three and the highest

1 score is a twelve.

2 Q. What did the Static-99 scoring sheet you did on
3 Mr. Nichols in preparing your evaluation by estimate of
4 risk, what score did he get?

5 A. So the score that he got was a zero, and there's a
6 reason for that. So if you recall, he was a -- he was
7 convicted of his last crime in 2009. When that last
8 crime -- when he was arrested for that last crime,
9 then the children revealed all the previous abuse and he
10 was convicted of the earlier sexual crimes, and that's
11 considered pseudo-recidivism. So what that serves to do
12 is that the Static-99 will be an underestimate of his risk
13 because we count the crimes in order and because those
14 crimes were not revealed until he'd been convicted of his
15 last crime we did not get to count them on the Static-99.

16 Q. So let me -- let me back up a second.

17 A. Yes.

18 Q. So these crimes were not revealed until after the
19 conviction in Saluda county in 2008 for criminal -- for
20 solicitation of a minor -- of criminal solicitation?

21 A. That is correct.

22 Q. And then the other crimes came forward, then he got
23 convicted in 2010 for them?

24 A. That's correct.

25 Q. Okay. A score of zero -- again, it's minus three to

1 positive twelve?

2 A. Yes.

3 Q. A score of zero, where does that place him on
4 likelihood to re-offend?

5 A. That places him in the eighteenth -- 18.7th
6 percentile.

7 Q. Is that offending within the next five years?

8 A. Yes.

9 Q. Okay. Go ahead.

10 A. Okay. So --

11 Q. That means --

12 A. And that falls in the low risk range; however, as we
13 noted because of the pseudo-recidivism, that is not a true
14 estimate of his score.

15 Q. Okay. So the static underestimates his risk?

16 A. Yes.

17 Q. Now he's about fifty-three or so now?

18 A. Yes.

19 Q. Okay. When a person turns sixty, does that cause a
20 major drop in their scoring on the Static-99R?

21 A. For most individuals achieving the age of sixty causes
22 your risk to decrease.

23 Q. Okay. But he's got like seven more years before he
24 turns sixty?

25 A. Yes, he does.

1 Q. Okay. Do pedophiles sometimes re-offend even in
2 later years?

3 A. They do. The oldest I've personally had was
4 eighty-nine.

5 Q. Now what about the fact that the victims were his own
6 kids or step-kids as opposed to being total strangers? How
7 does that factor into -- and he had access to them --

8 A. Yes.

9 Q. -- as opposed to just grabbing someone off the street,
10 how does that factor into your opinion?

11 A. So obviously the betrayal of trust from abusing your
12 own children is significant, but that is not a risk factor.
13 What we know is that abusing your own children, the risk
14 for those individuals is typically lower than, for example,
15 snatching a child off the street who's a stranger.

16 Q. Now what about religion? If in a case like this a
17 person is more religious now than they were when they were
18 offending, would that factor into your opinion?

19 A. There have been no research articles indicating that
20 having a religious conversion lowers your risk. Clearly
21 we hope that that will happen for all of our individuals
22 and that that would be a protective factor, but there's no
23 research substantiating that.

24 Q. When you interviewed him, at page 18 in your report,
25 one of the questions you asked him was about his future

1 plans.

2 A. Yes.

3 Q. I believe he told you that if released he would live
4 with his dad and start a landscaping -- get into the
5 landscaping business or something like that?

6 A. Yes.

7 Q. Is who you live with a protective factor from
8 re-offending again?

9 A. No.

10 Q. Why not?

11 A. Because it's all about you and so the individual is
12 the one responsible for sex offending and so that would
13 not necessarily cause you not to re-offend and living with
14 another person doesn't protect you necessarily either.

15 Q. Now you mentioned a minute ago there were static risk
16 factors, and we've talked about them, the unchangeable
17 things about the guy.

18 A. Yes.

19 Q. There's also something called dynamic risk factors?

20 A. Yes.

21 Q. What are dynamic risk factors by definition?

22 A. So dynamic risk factors are changeable factors
23 that were present in the individual at the time that he
24 offended and these are the things that we target in
25 treatment so that we can provide them with strategies so

1 that they don't re-offend. And let me just make clear
2 that you cannot cure someone of pedophilic disorder. If
3 they have it when they're seventeen, they'll still have it
4 when they are seventy, so what we can do is teach them
5 strategies so that they don't continue to act out on it.

6 Q. Strategies like, say, doing your grocery shopping at
7 nighttime when there's -- no kids are at the stores?

8 A. Exactly.

9 Q. Okay. Now you mentioned earlier looking at his
10 offending while he was in prison. After being released
11 from prison and being confined at the Lexington county
12 jail until this trial, has there been any record of him
13 offending at the jail to your knowledge?

14 A. Well --

15 Q. As far as you know?

16 A. No.

17 Q. Okay. Now let's go back to dynamic risk factors.
18 What dynamic risk factors did you find were present in
19 Mr. Nichols?

20 A. So the first one would be lack of emotionally
21 intimate relationships with adults and if you are in an
22 intimate relationship, you anticipate that the individual
23 will be faithful, that there will be appropriate
24 communication regarding problems between the adults;
25 however, I determined that Mr. Nichols did not seem to

1 have that. He did not have a relationship with an adult
2 female for many, many years and he was sexually abusing
3 children and using escort services during the time that he
4 was involved in a relationship with the children's mother.

5 Q. And then the next thing, the next dynamic -- just go
6 through the different dynamic risk factors you found.

7 A. Okay. The next one would be lifestyle impulsiveness
8 and this refers to low self-control, chronic instability
9 in employment, housing, irresponsible decisions or limited
10 or unrealistic long-term goals, and so this is a major
11 determinant of criminal behavior and Mr. Nichols clearly
12 demonstrated low self-control, and he made irresponsible
13 decisions with regard to abusing his children. Poor
14 problem-solving, and this is also a -- a major factor and
15 this usually involves an inability to recognize your
16 problems, to think clearly about cause and effect, like
17 what's gonna happen if I do this, and not being able to
18 generate other options for a behavior that's problematic.
19 And then, you know, once you've engaged in a behavior
20 that's problematic, not being able to look at it and saying
21 man, I didn't like going to prison, maybe I shouldn't do
22 that anymore, so he definitely had difficulties with poor
23 problem-solving. And the next one is lack of concern
24 for others or callousness and men with this profile are
25 described as selfish, cynical and willing to be cruel to

1 other people to meet their own needs, and I think it's
2 pretty clear that he was extremely callus to the pain that
3 he was inflicting on his own children by forcing them to
4 engage in sexual acts. The next one is dysfunctional
5 coping and this is defined as the ways in which sexual
6 offenders deal with negative emotions, such as anger,
7 anxiety, rejection, humiliation, and there are two ways
8 that this is manifested; either by externalizing behaviors,
9 and that would be engaging in crimes and/or engaging in
10 sexual behaviors, and in this case clearly Mr. Nichols
11 engaged in sexual behaviors. And it's important to note
12 that in my evaluation of Mr. Nichols he appeared socially
13 inept. He had a speech impediment and it was very clear
14 that he was extremely self-conscious and so that may
15 have been a factor as well in his selection of children,
16 especially his own children because children don't have the
17 ability to reject you, whereas adult women might reject you
18 and humiliate you.

19 Q. Now, Doctor, why it is important -- to wrap this up,
20 why is it important to look at both static and dynamic or
21 changeable risk factors?

22 A. So we need to look at factors identified in the
23 research that either increase the risk or decrease the risk
24 so that you can get a comprehensive evaluation of this
25 individual's risk.

1 Q. Now, Dr. Swan, do you have an opinion to a reasonable
2 degree of psychological certainty as to whether or not
3 Mr. Nichols suffers from a mental abnormality?

4 A. Yes, I do.

5 Q. Okay.

6 A. He suffers from pedophilic disorder, sexually
7 attracted to both, nonexclusive type, and other specified
8 paraphilic disorder, hebephilia.

9 Q. Now, Dr. Swan, again, to a reasonable degree of
10 psychological certainty, do you have an opinion as to
11 whether these mental abnormalities affect Mr. Nichols'
12 emotional or volitional control -- capacity to the extent
13 that he is predisposed to commit future sexually violent
14 offenses?

15 A. Yes, I believe that his disorders do impact his
16 emotional and volitional capacity. And let me just say
17 volitional capacity simply means the ability to make
18 choices.

19 Q. Do you also have an opinion, again, to a reasonable
20 degree of psychological certainty as to whether Mr. Nichols
21 has the propensity to be dangerous and commit future
22 sexually violent offenses?

23 A. Yes, I do.

24 Q. Do you also have an opinion, again, to a reasonable
25 degree of psychological certainty as to whether this

1 propensity that he has to commit future sexually violent
2 offenses, is it of such a degree it poses a menace to the
3 health and safety of others?

4 A. Yes.

5 Q. Do you also have an opinion, again, to a reasonable
6 degree of psychological certainty, does Mr. Nichols have
7 serious difficulty in controlling his behavior and these
8 propensities to be dangerous?

9 A. Yes.

10 Q. And what is the serious difficulty you're seeing?

11 A. The serious difficulty is that he -- his inability to
12 control his sexual -- he's either unable or unwilling to
13 control his sexual behavior.

14 Q. Do you also have an opinion, again, to a reasonable
15 degree of psychological certainty, does Mr. Nichols'
16 diagnoses you told us about a minute go, the pedophilic
17 disorder and the hebephilia, do they make him likely to
18 engage in acts of sexual violence if not confined to a
19 secure facility for long-term control, care and treatment?

20 A. Yes, they do.

21 Q. And do you have an opinion, again, to a reasonable
22 degree of psychological certainty, as to whether or not
23 Mr. Nichols meets the legal criteria to be found by this
24 jury to be a sexually violent predator?

25 A. Yes.

1 Q. Is he facing any probation now? The crime was back in
2 2008 where he got probation.

3 A. No, he is not.

4 Q. Okay. Do you know of anything on the outside that
5 could get him the sex offender treatment that he needs?

6 A. No, that would be totally within his desire to engage
7 in sex offender treatment, but we know that most sex
8 offenders do not get treatment unless they are mandated by
9 some outside source such as the court or probation.

10 Q. So is this a guy that would be a good candidate for
11 outpatient sex offender treatment as opposed to being
12 confined in a secure facility?

13 A. No, because it's unlikely that he would get it
14 voluntarily.

15 MR. BOGLE: Okay. Thank you, Dr. Swan. Please
16 answer any questions that counsel may have or the Court
17 may have.

18 THE COURT: All right. Ladies and gentlemen, we're
19 gonna take our morning break at this point. I'm going
20 to send you back to the jury rooms. Please don't discuss
21 the case in any way. You can discuss the weather or
22 football, but just don't discuss the case. We'll get you
23 back in here shortly. Refresh yourselves and we'll see
24 you in a few minutes. Thank you.

25 (Whereupon, the jury retires to the jury room at

1 11:14 AM.)

2 THE COURT: You can refresh yourself as well.

3 THE WITNESS: Thank you.

4 THE COURT: Please don't discuss your testimony
5 with anyone.

6 All right. Let's take ten minutes, folks, and
7 we'll see you shortly.

8 MR. BOGLE: Thank you, Your Honor.

9 (Recess taken at 11:15 AM.)

10 (Back on the record at 11:30 AM.)

11 BAILIFF: Keep your seats. Court's back in
12 session.

13 THE COURT: All right. Are we ready to proceed
14 with cross?

15 MS. ZMROCZEK: Yes.

16 MR. BOGLE: Yes, Your Honor.

17 THE COURT: Let's go ahead and bring them back
18 up, please.

19 (Whereupon, the jury returns to the courtroom at
20 11:34 AM.)

21 THE COURT: All right. Ladies and gentlemen,
22 welcome back. I hope you had a chance to refresh
23 yourselves.

24 At this point we'll begin with cross-examination.

25 MS. ZMROCZEK: May it please the Court?

1 THE COURT: Yes, ma'am.

2 MS. ZMROCZEK: Thank you.

3 CROSS-EXAMINATION

4 BY MS. ZMROCZEK:

5 Q. Dr. Swan, you talked about how you got paid to do this
6 evaluation.

7 A. Yes.

8 Q. Okay. And, in fact, you have said -- you do not deny
9 that you've made an excellent living doing this work,
10 right?

11 A. That is correct.

12 Q. In fact, you're licensed in Missouri. You don't treat
13 in Missouri, right?

14 A. I don't treat anywhere anymore.

15 Q. All you do are these evaluations?

16 A. That's correct.

17 Q. So you just go to these different states and give your
18 opinion?

19 A. Yes.

20 Q. And how much are you paid under your contract?

21 A. Well, it depends. In Florida, I receive \$110 an hour.
22 In Missouri, I believe it was \$7,000 per case, and that
23 involves travelling and all the other things that go along
24 with a case. And in South Carolina, I earn \$4,000 per
25 case.

1 Q. Okay. Do you recall testifying at a previous hearing
2 where you said it was \$4,500?

3 A. Well, if I'm hired by the Attorney General's office
4 it's forty-five hundred, but when I work for the Department
5 of Mental Health as I did in this case, it's four thousand.

6 Q. Okay. And how many of these have you done?

7 A. I think that I've done about thirty-six pre-commitment
8 cases in South Carolina over the last seven years and so --
9 I don't know how many I've done in Florida or Missouri.

10 Q. And of those thirty-six, every time you've recommended
11 that someone be committed, correct?

12 A. That's not correct.

13 Q. Okay. How many times have you recommended that they
14 not be committed?

15 A. I believe it's about eight.

16 Q. Okay. Do you have the names of those cases?

17 A. I do not.

18 Q. Okay. In fact, have those ever been provided -- have
19 those names ever been provided? They've been requested
20 before, right?

21 A. I don't think so.

22 Q. Okay. I want to talk to you about -- you were asked a
23 little bit about the ethics violation, right?

24 A. Yes.

25 Q. And that you explained that you received that from the

1 ATSA society, right?

2 A. Association for the Treatment of Sexual Abusers.

3 Q. And, in fact, they published that you were found to be
4 in violation of Practice Standard 18.06, 18.07, 18.09 and
5 23.05 pursuant to an evaluation?

6 A. That is correct.

7 Q. Okay. And then you said that you've had no other
8 trouble. Is that what you testified to?

9 A. No, I said I'm a member -- I continue to be a member
10 in good standing of ATSA. I said I've never had a
11 disciplinary infraction involving a board complaint.

12 Q. Okay. And, in fact, when you were in Florida with
13 regard to the Santiago case, you were found to have engaged
14 in reckless behavior but not criminal, correct?

15 A. Absolutely not. This document says that I did not
16 engage in reckless behavior because I depended on
17 information by the Association of State and Provincial
18 Psychology Boards and even if I had engaged in reckless
19 behavior, that does not make it a criminal charge.

20 Q. Right. So what it actually says is however,
21 reckless behavior is not the standard to prove this
22 criminal charge?

23 A. That is correct, but it says I did not engage in
24 reckless behavior because I depended on a statement from
25 the Association of State and Psychology Boards.

1 Q. And where does that say that on this form?

2 A. It says the transcript and the exhibits indicate
3 that at the time the statement was made the Defendant
4 believed the statement to be true based on what she was
5 informed by the Association of State and Provincial
6 Psychology Boards and, in fact, it was true.

7 Q. Okay. So it -- it just says that you relied upon
8 what somebody else told you --

9 A. And it was accurate information because the statement
10 that I made under oath was true.

11 Q. Okay. And so the -- this is what you do though. You
12 go around and you testify in these kinds of cases, right?

13 A. Well, I do evaluations.

14 Q. Right.

15 A. If I determine that the individual meets criteria,
16 then I testify. If I determine that they don't, then
17 they're released.

18 Q. Okay. So I want to talk a little bit about that,
19 too. I want to talk a little bit about a couple of
20 different things. The first thing I want to talk about
21 is your diagnoses, right?

22 A. Yes.

23 Q. Okay. So you talked about hebephilia -- pedophilia
24 and then hebephilia. Am I saying that correctly?

25 A. That is correct.

1 Q. Okay. And I believe -- is your testimony today that
2 hebephilia was not specifically rejected by the DSM-5?

3 A. Peda -- pedo-hebephilic disorder was rejected.

4 Q. Do you recall testifying in a previous hearing
5 regarding this case about this very same subject back in
6 August of 2019?

7 A. Not specifically. If you can refresh my memory.

8 Q. Sure. And this is just the cover sheet to refresh
9 your recollection and then I'll ask you about the page,
10 but just read them over.

11 A. Okay. So, yes, I testified that hebephilic disorder
12 was rejected, but, in fact, that was an error because it
13 was the pedo-hebephilic disorder that was rejected.

14 Q. Right. But this testimony was given under oath, but
15 you're saying it was given in error now?

16 A. That was an error. I didn't include the full
17 diagnosis, but it was pedo-hebephilic disorder that was
18 rejected by the DSM-5.

19 Q. Okay. So you talked about that there's some
20 discussion out there on whether or not it is a diagnosis
21 or a disorder and then you said that for sure Mr. Nichols
22 has these problems, right?

23 A. Without a doubt.

24 Q. Okay. And then you relied on certain tools, right, to
25 help you -- I'm sorry.

1 A. I know. There's a bar right in front of Ms. Zmroczek,
2 so I can't see her.

3 Q. So when I'm like zooming up and down it's because I
4 can't see you.

5 UNIDENTIFIED JUROR: You need higher heels.

6 MS. ZMROCZEK: The challenges that we have. I
7 have higher heels in the car.

8 BY MS. ZMROCZEK:

9 Q. You talked about the Static-99, right?

10 A. Yes.

11 Q. And that's one of the diagnostic tools that you use,
12 right?

13 A. Yes.

14 Q. And so, in fact, the Static-99 is the most widely used
15 diagnostic tool used in this arena; is that correct?

16 A. That is correct.

17 Q. And even though it is the most widely used tool, it's
18 still only moderately predictive, right?

19 A. That is correct.

20 Q. So tell the jury when Mr. Nichols is gonna re-offend?

21 A. Well, no one can determine when an individual will
22 re-offend.

23 Q. Or even if they will, right?

24 A. Or if they will. With child molesters in particular,
25 there are two particular times at risk and these are when

1 they have their own children and then when they have
2 grandchildren.

3 Q. Okay. And so -- so the answer is you don't know,
4 right?

5 A. No one can determine when someone will re-offend.

6 Q. Or if?

7 A. Or if.

8 Q. But this most -- the most widely used moderately
9 predictive tool gives him a zero, right?

10 A. That's correct. And as you recall, I told you that
11 it was an underestimate because he wasn't charged for his
12 prior crimes until after he was charged with his last
13 crime, and if you'll remember I told you also that the
14 Static-99R only tells us his risk to be arrested or
15 convicted in five years, but what the statute wants us to
16 determine is if he will commit another sexual crime in his
17 lifetime.

18 Q. And I think that you said that, you know, we -- we
19 don't -- you know, we don't know -- you don't have any
20 information on whether or not people just commit without
21 being caught, right? You don't have that information?

22 A. Oh, absolutely we do.

23 Q. Where is that published?

24 A. Abel -- Gene Abel in Atlanta did a study and it was
25 titled -- let me think if I can remember the title. It was

1 Self-Reported Crimes of Non-Incarcerated Paraphiliacs and
2 that particular study indicated that for every crime that
3 we know about in a child molester there were thirty-three
4 other offenses and for every crime that we know about in a
5 rapist there were six other offenses.

6 Q. And how many of those happened in South Carolina?

7 A. I can't tell you. These studies are national studies.

8 Q. And they're based on a whole bunch of things that are
9 generalized, right?

10 A. Well, they're based on actual information from sex
11 offenders all over the country and in some cases all over
12 the world.

13 Q. Okay. And now you said that -- you gave a percentage
14 of a predictive when he would -- or how he would re-offend,
15 but you can't say that that applies to, Mr. Nichols, right?

16 A. Well, I can't. The Static-99 tells us that
17 individuals who have characteristics like Mr. Nichols
18 re-offended at such and such a rate, but that does not tell
19 us anything about Mr. Nichols in particular.

20 Q. Okay. And what's that such and such a rate?

21 A. It was in the 18.6th percentile and if you'll wait a
22 minute, I'll just give you the rate. And that means that
23 13.6 percent of sexual offenders scored below Mr. Nichols
24 and 10 percent received the same score and 76 percent
25 scored higher.

1 Q. Okay.

2 (Respondent's Exhibit Number 1 was marked for
3 identification.)

4 Q. So I'm gonna show you what's been marked as
5 Respondent's 1 and ask if you recognize this document?

6 A. I do.

7 Q. Okay. And what is that?

8 A. This is the estimates for -- the estimated five years
9 sexual recidivism rates or the rate at which someone is
10 estimated to re-offend.

11 Q. And a zero -- a score of zero, what does -- is it
12 estimated at?

13 A. The estimated rate is 2.8 percent, but there's a
14 strong qualification.

15 Q. Okay. What's that qualification?

16 A. Karl Hanson, the developer of the Static-99R and
17 Leslie Helmus, the person who did the re-norming or
18 updating the risk estimates, have indicated that we should
19 not use the absolute recidivism rates because they are
20 unstable and not a good estimate of a person's actual
21 offending, that we should instead use the relative risk,
22 which I just gave you, and the percentile ranks, which I
23 just gave you.

24 Q. And, in fact, you would admit that more research --
25 more recent research has changed those numbers from 7.2 to

1 12.5, these 18.6 numbers, right?

2 A. No.

3 Q. Okay.

4 A. Those are the most recent estimates.

5 Q. So you --

6 MS. ZMROCZEK: Your Honor, at this time we would
7 move Respondent's 1 into evidence.

8 THE COURT: Without objection?

9 MR. BOGLE: Without objection.

10 THE COURT: All right. Respondent's Exhibit 1 is
11 admitted into evidence without objection.

12 (Respondent's Exhibit Number 1, Recidivism
13 Estimates, was admitted into evidence.)

14 MS. ZMROCZEK: Thank you.

15 BY MS. ZMROCZEK:

16 Q. So you talked about -- in the static you talked
17 about, well, that just measures static things that
18 can't change, but there were dynamic risk factors that
19 you relied upon to say that Mr. Nichols had to be in
20 treatment, right?

21 A. Yes, the dynamic risk factors were extremely
22 pertinent in this case. The only way that an individual's
23 static score can change is if they get older. For
24 example, if they get to the age of sixty, it goes down by
25 two points.

1 Q. So how many dynamic risk factors do you look at?

2 A. There are a whole range of them, and I forget how
3 many there actually are, but I --

4 Q. Would thirteen be -- would that refresh your
5 recollection?

6 A. Probably.

7 Q. Okay.

8 A. I designate that the individuals -- which ones the
9 individual actually has problems with.

10 Q. And you designated how many in this one?

11 A. Let's see. Okay. One --

12 Q. And that was the emotional?

13 A. -- two, three, four, five, six, seven.

14 Q. Okay. And those were all the ones that you testified
15 about?

16 A. Those were the ones that are pertinent to Mr. Nichols.

17 Q. Okay. And you talked about his inability to have an
18 emotional connection, right?

19 A. Well, an emotionally intimate relationship.

20 Q. Okay. And you would agree that typically you're not
21 allowed to date when you're incarcerated, right?

22 A. That's true, but the risk factors apply whether you
23 are incarcerated or not.

24 Q. Right. But in order to --

25 A. For example, if you get arrested and you're sent to

1 prison at eighteen, it still factors in that you've never
2 had a relationship. Those are the coding rules for the --
3 for the item.

4 Q. And you said that church or where you live, none of
5 those things -- none of those things matter, right?

6 A. Well, none of those things have been identified in the
7 research as reducing risk.

8 Q. Right. But you would agree that having a strong
9 support system, including living with your father, having
10 a job, being involved in a church community, having people
11 to support you would be something that is helpful to
12 people, right?

13 A. Well, certainly we want someone to have a strong
14 support system because we know that individuals who are
15 stable are less likely to offend, but the things that you
16 just mentioned don't work the same way for everyone. For
17 example, if you have a conflicted relationship with your
18 father, then that's unlikely to create stability.

19 Q. Well, let me ask you this. Did you interview
20 Mr. Nichols' father?

21 A. I did not.

22 Q. Okay.

23 A. At the time that I evaluated him, let's see, I did not
24 have access to his father.

25 Q. Okay. Did you ask for his -- his number, ask to talk

1 to him even?

2 A. Let me just see. I did not get his number.

3 Q. Okay. So -- and then you talked about these two
4 incidences perhaps at SCDC; one, which you know was
5 dismissed. The other one, did you follow up to see if that
6 was dismissed as well?

7 A. I did not get any additional information on that.

8 Q. Okay. But you said that those kind of things are
9 important because there could be a difference between
10 somebody in a small cell using the bathroom in their
11 cell with the door open versus waving their penis around,
12 right?

13 A. That is correct, but since I didn't have adequate
14 information they were not counted against Mr. Nichols
15 in any way. If I had information that they were
16 substantiated, that would have been his most recent
17 offense and it would have changed the score on his
18 Static-99R to a three.

19 Q. Right, but it didn't because we don't have that
20 information.

21 A. I did not have that information and so I did not
22 count them against him. I gave him the benefit of the
23 doubt.

24 Q. Okay. Let me ask you this. Instead of giving the
25 benefit of the doubt, as a scientist you want to verify

1 things, right?

2 A. Absolutely.

3 Q. So what prevented you from picking up the phone and
4 calling SCDC and just asking that very simple question?

5 A. Well, frankly, they won't give me information about
6 anyone. I have to get it through the state attorney
7 general's office. I can't just pick up the phone and say
8 I'm calling about so and so.

9 Q. Okay. Did you ever ask anyone at the state attorney
10 general's office to do that?

11 A. I don't recall, but, as I said, since there was not
12 enough information to substantiate them, I totally
13 dismissed them.

14 Q. Right. So, in fact, since he's been in then we have
15 no proof of his inability to not control his behavior.
16 He's been able to control his behavior behind bars at SCDC
17 and at Lexington county, right?

18 A. Well, to my knowledge, but most people are.

19 Q. Most people are?

20 A. Able to control their sexual behavior in a controlled
21 setting. For example, in Mr. Nichols' case, he's aroused
22 to children so there are no children in jail or the
23 Department of Corrections.

24 Q. So you did get his SCDC records, right?

25 A. I did.

1 Q. And so you were able to get a list of his visitors?

2 A. I do not know if they included that. Let me check.

3 Q. Sure.

4 A. No. In South Carolina, I don't know that I've ever
5 gotten anything on a visitation list. In Florida, I get
6 that routinely, but I don't think I've ever gotten one in
7 South Carolina.

8 Q. So you didn't receive a copy of all of the people that
9 had been visiting him?

10 A. I do not have a list of any -- of people who had been
11 visiting.

12 Q. Okay. So if you're making a determination on intimate
13 emotional relationships, that would be important to know if
14 somebody had been coming to see Mr. Nichols and visiting
15 him all the time and --

16 A. Well, it's more important in a relationship context
17 like if you've ever lived with someone or married someone.

18 Q. Okay. You talked about Mr. Nichols stuttering and
19 perhaps having some -- a few mental defects. Did you ever
20 -- you got a copy of his SCDC records that had his IQ that
21 was tested, right?

22 A. Yes, and that was he scored an 81, which is in the
23 low average range, but I did not say that he stuttered. I
24 simply said he had a speech impediment.

25 Q. A speech impediment. And where did you get that 81

1 from?

2 A. The records. Hold on. Let me see. I may have
3 misread that. Let me just see.

4 Q. I have it marked if it will reflect your recollection
5 if you don't want to look through all of those.

6 A. So I don't have this form. This one says the Beta IQ
7 was a 70, the one in SCDC that I had said 81.

8 Q. Okay. I'll let you go ahead and find it.

9 A. There's a difference in the different type of tests
10 that you have. The Beta is a screening test and not as
11 accurate. And let me see if I can find which one he
12 actually had. Yeah, estimated IQ in a nonverbal test of
13 intelligence, which is a more accurate estimation because
14 it accommodates for people who don't read well, and that
15 would be 81.

16 Q. Okay. And so the one where he had to read it himself
17 was 70?

18 A. The one where he had to read was 70 and he indicated
19 that he was in special education for reading and math.

20 Q. Okay. And so you said one of the other risk factors
21 is that he doesn't have impulse control or doesn't know
22 when to go out and ask for help; is that correct?

23 A. That's not what I said at all.

24 Q. Okay. Tell me what you said.

25 A. I said lifestyle impulsiveness was one of the

1 dynamic risk factors and that includes things such as
2 low self-control, instability in employment and housing,
3 irresponsible decisions, limited or unrealistic long-term
4 goals.

5 Q. Okay. So let me ask you this. So, again, housing
6 and employment come up. So you said that he plans on
7 living with his father and working in landscaping, right?

8 A. Right.

9 Q. So that would indicate that he has a stable plan,
10 right?

11 A. Yes, but if you'll notice I testified that his
12 lifestyle impulsiveness was in low self-control and
13 irresponsible decisions.

14 Q. Okay. So let me ask you this. If you are worried
15 that something's going on in your mind that doesn't make
16 sense, would it be a responsible decision to go check
17 yourself into the Department of Mental Health and get
18 tested and to get some help? Would that be a responsible
19 decision?

20 A. Well, it depends on what kind of help.

21 Q. Okay. So you got all of his records in this case,
22 right?

23 A. That's correct.

24 Q. Including where he checked himself into the Department
25 of Mental Health, right?

1 A. Yes, for suicidal thoughts --

2 Q. Right.

3 A. -- but not for sex offender treatment.

4 Q. Right. No, but let's talk about sex offender
5 treatment because he did actually get sex offender
6 treatment on -- on the outside, right?

7 A. For less than a year and that is not considered
8 substantial sex offender treatment. Substantial sex
9 offender treatment may take years.

10 Q. You would agree that people can get sex offender
11 treatment on the outside?

12 A. Oh, absolutely. There's some people that are
13 appropriate for outpatient sex offender treatment.

14 Q. And you said that they have studies -- that you --
15 and correct me if I misheard this because I wrote it down,
16 that we don't know -- we know that people don't get
17 outpatient unless it's mandated by the courts. Is that
18 what you said?

19 A. That is correct.

20 Q. And how do you know that?

21 A. The research indicates that virtually no one gets sex
22 offender treatment on their own. The only way that they
23 stay with it is if the Court has mandated it.

24 Q. And what study is that?

25 A. That is research that is published -- hold on. Let

1 me find the book. Hold on. Let me -- and I do not know
2 where my treatment studies are. I had them this morning.
3 I'm not -- okay. Hold on just one moment. If you'll
4 excuse me, I'm gonna get down and get them out of here.
5 I do not know what I did with them. I had them back at
6 my seat back there.

7 Q. Okay. We'll move on. Talking about -- you said that
8 he attended for just under a year, but that wasn't good
9 enough. In fact, the -- the treatment provider said that
10 -- in fact, I'll just let you read it. How did he say he
11 was doing in therapy? That second to the last line.

12 A. He said he has been seen individually twice and has
13 done well.

14 Q. Right.

15 A. Two sessions of doing well says nothing.

16 Q. And there's a study about that as well, I'm sure?

17 A. No, but what I know from doing sex offender treatment
18 at the civil commitment center in Florida is that two
19 sessions means absolutely nothing.

20 Q. And when was at last time you did that treatment?

21 A. 2005 was the last time I did treatment.

22 Q. So fifteen years ago?

23 A. That's correct, but I review treatment every single
24 day.

25 Q. Okay. You talked about it was important that -- that

1 you look at things -- sexual offenses that people weren't
2 convicted of, right?

3 A. That is correct.

4 Q. And sometimes people are not convicted or charges are
5 dropped because the prosecutor believes that they didn't
6 happen or they just don't prove them, right? That's also
7 a reason.

8 A. It could be, but a study by Soothill indicated that
9 for those crimes that an individual was not convicted of
10 they were actually more likely to commit another sexual
11 crime.

12 Q. Okay. And did you talk to the prosecutor in this case
13 about why she dismissed some of those charges?

14 A. I did not. There was one that said after he was
15 convicted of one charge, the others were -- after he
16 received a sentence of ten years, the others were
17 dismissed.

18 Q. Okay. So you didn't follow up on that?

19 A. No. I had the information right in the packet.

20 Q. Okay. And so if that information in the packet
21 were inaccurate, then that may change the way that the
22 information is received, right?

23 A. Well, it could be, but it was straight from the
24 Attorney General's office.

25 Q. Okay. So you said that you've made all of these

1 determinations to a reasonable degree of psychological
2 certainty. That's what you said, right?

3 A. That is correct.

4 Q. Can you define that for me?

5 A. It is what a reasonable psychologist would find given
6 the same information and the same situation.

7 Q. Okay. You talked about poor problem-solving.

8 A. Yes.

9 Q. What -- what were you relying on for your poor
10 problem-solving?

11 A. This is research by Hanson and Mann in 2010 where they
12 reviewed the -- all the data on sex offenders and arrived
13 at these dynamic risk factors and all of them are based on
14 the research. It's in an article about -- entitled On the
15 Nature of Psychologically Meaningful Risk Factors.

16 Q. Okay. And maybe you misunderstood my question or
17 quite possibly I didn't ask it accurately. What evidence
18 of poor problem-solving did you find with Mr. Nichols?

19 A. Well, Mr. Nichols had criminal offenses for which
20 he was arrested in -- in addition to the sex offenses,
21 and he had several of those, so the fact that he
22 continued to commit criminal offenses is evidence of
23 poor problem-solving. The fact that Mr. Nichols sexually
24 assaulted his children over a period of ten years is
25 evidence of poor problem-solving. The information that

1 he did not reach out and say look, I shouldn't be doing
2 this to my children, but yet continued for his sexual
3 gratification is evidence of poor problem-solving.

4 Q. And then when he -- and then when he was arrested,
5 pled before he was even indicted, right? Took that
6 responsibility?

7 A. That's correct.

8 Q. Okay. And you said -- and I don't want to misquote
9 you. How many -- you said you had identified seven
10 dynamic risk factors?

11 A. Yes, I believe so.

12 Q. Okay. Are those all listed in your report or are
13 there some that you relied upon that weren't listed in your
14 report? Do you have your report?

15 A. I do.

16 Q. Okay.

17 A. So I listed offense supportive attitudes, lack of
18 emotionally intimate relationships with adults, lifestyle
19 impulsiveness, poor problem-solving, lack of concern for
20 others, callousness and dysfunctional coping.

21 Q. Okay. And the lack of concern for others slash
22 callousness was listed as one, right?

23 A. Yes.

24 Q. Okay. And you said because he didn't care about his
25 children, right?

1 A. Obviously he infected -- inflicted pain on his
2 children and continued doing it for ten years and did not
3 stop.

4 Q. And then are you aware -- certainly you're aware by
5 now that that relationship has been repaired with his
6 children, right?

7 A. He indicated when I evaluated him that he had sent a
8 letter to one of the children and that he had actually
9 talked with two of them. Let me see if I can tell you what
10 he told me. I believe that he said that he had talked
11 to SON, he had talked to DAUGHTER 1 and DAUGHTER 2 he wrote a
12 letter.

13 Q. Okay. So you haven't followed up on -- on his
14 relationship with his children then?

15 A. No, but it's not unusual for children to want a
16 relationship with their father even though he's abused
17 them because they continue to love their father. What
18 they don't like are the sexually abusive acts.

19 Q. Even when he apologizes for those acts, too, though,
20 right?

21 A. Well, apology goes a long way toward resolving the
22 anger that they might have at their father; however, it
23 does not repair the damage done by the sexual abuse that
24 went on for ten years.

25 Q. And have you talked to them about that damage?

1 A. I have not.

2 Q. Okay.

3 A. I would hope that they've gotten therapy.

4 Q. Right, but you don't know because you haven't talked
5 to them?

6 A. I don't know.

7 Q. All right. I want to go back just very briefly to --
8 to the risk results. Now you said that these were the --
9 which ones were these?

10 A. Those are the absolute rates. We've been advised not
11 to report the absolute rates. That the relative risk and
12 the percentile ranks are the more stable results.

13 Q. Okay. But this was -- this is a page straight from
14 your examiner workbook, right?

15 A. Absolutely, just as the relative risk and the
16 percentile ranks are.

17 Q. Okay. So the percentile ranks and the relative risk,
18 so what you're saying is -- let's use the higher numbers,
19 okay? So 18 -- or 13.6, so that means that 70 some odd
20 percent?

21 A. I believe it was 70 percent scored higher.

22 Q. Right. And what about -- I'm talking about
23 re-offending. What was the percentage of re-offending?

24 A. Well, the relative risk and the percentile ranks don't
25 tell you how many re-offended.

1 Q. Okay. But what does it tell you then?

2 A. It tells you that out of every -- so the percentile
3 ranks tell you that out of every one hundred offenders that
4 Mr. Nichols scored lower than 18, 76 percent scored higher,
5 but as you recall this is an underestimate because of the
6 pseudo-recidivism.

7 Q. Uh-huh. And the recidivism estimates that I know that
8 you say that -- that you're not supposed to rely on, but
9 for some reason they put in your book, they still identify
10 the predictive recidivism rate, right?

11 A. They do, but they're not stable and, therefore, we're
12 instructed not to rely on them.

13 Q. Okay. And it says that in the book, I'm sure?

14 A. No, this was after they published -- well, it's in
15 the article where they published the research, and let me
16 see if I can find that article. I don't have the actual
17 article, but it was published in 2013 and it was by Kelly
18 Babchishin and Leslie Helmus at the same time that the
19 Static-99R was updated. It was the Static-99 and then it
20 became the Static-99R.

21 Q. And so the -- regardless of the percentages, his score
22 puts him at the below average risk, right?

23 A. That's correct.

24 Q. Okay.

25 A. Which is an underestimate because it only tells us his

1 risk to be arrested or convicted in five years and we want
2 to know what his risk is for his entire life.

3 Q. Okay. We want to know that, right?

4 A. We do.

5 Q. How can we know that?

6 A. Well, there is no way of knowing that because sex
7 crimes are underestimated.

8 Q. Right. So we don't know?

9 A. We don't know, but we do know from the research that
10 for every crime that a rapist is identified as having
11 committed, either arrested or convicted, that they've
12 committed six other ones, and for every child molester
13 for every crime that's reported there are approximately
14 thirty-three that aren't.

15 Q. And that's that one study that you cited from Georgia,
16 right?

17 A. That's one of the major studies, yes. There have
18 been numerous studies. One was done by Marshal,
19 M-A-R-S-H-A-L, and he found that the rates of recidivism
20 were underestimated by 147 percent.

21 Q. So we just don't know?

22 A. We don't know.

23 Q. Most people don't re-offend. That's what you said,
24 right?

25 A. After a sanction most people don't re-offend.

1 Q. Okay. After a sanction like going to jail or prison?

2 A. That's correct.

3 MS. ZMROCZEK: I have no further questions,

4 Your Honor.

5 THE COURT: Any redirect?

6 MR. BOGLE: Very briefly.

7 REDIRECT EXAMINATION

8 BY MR. BOGLE:

9 Q. There was a lot of questions about when he's gonna
10 re-offend. Is the issue here his likelihood to re-offend?

11 A. No, the issue is whether he meets criteria as a
12 sexually violent predator.

13 Q. Right. Right. And --

14 MS. ZMROCZEK: Your Honor, I have an objection.
15 I think we have a matter of law.

16 (Proceedings held at the bench; not reported.)

17 BY MR. BOGLE:

18 Q. Okay. Now to establish he's a sexually violent
19 predator, aside from the criminal convictions and all
20 that, the question is, is he likely to re -- commit acts
21 of sexual violence unless he's confined?

22 A. Yes.

23 Q. So you can't determine he will offend on this date
24 or that date or within this year or that year, it's the
25 likelihood, correct?

1 A. That is correct.

2 Q. Okay. Now as far as telephoning his victims and
3 talking to them, is this something that is normally done
4 in these types of evaluations?

5 A. Well, typically I -- well, actually I never contact
6 victims because I don't know if they've had therapy or not
7 and I don't know if they would be re-traumatized by that
8 call. There are times when a victim will contact the
9 attorney general's office and I talk to them, but only
10 if they've made the first move because I don't want to
11 re-traumatize a victim.

12 Q. Now in your course of work, have you also been
13 attendant or present at criminal proceedings?

14 A. Yes.

15 Q. Where a guy was actually convicted of these types of
16 crimes?

17 A. Many times.

18 Q. And you've witnessed cases that resulted from plea
19 agreements; have you not?

20 A. Absolutely.

21 Q. Isn't it true that there's a variety of reasons why
22 the State might offer a plea agreement to somebody?

23 A. That's correct.

24 Q. It could be lack of evidence?

25 A. It could be.

1 Q. It could be trauma to the victim testifying?

2 A. Absolutely.

3 Q. Is there any inherent relationship in a plea agreement
4 versus the determination of whether or not a person is a
5 sexually violent predator?

6 A. None.

7 Q. Okay.

8 MR. BOGLE: Thank you, Your Honor.

9 THE COURT: Recross.

10 MS. ZMROCZEK: Just very briefly.

11 RECROSS EXAMINATION

12 BY MS. ZMROCZEK:

13 Q. You said so there's no result of -- there's no -- the
14 plea agreement doesn't matter?

15 A. Not essentially because often an individual takes a
16 plea agreement so they don't get life in prison.

17 Q. Right, but -- but you said -- but you still rely on
18 unindicted or uncharged behavior?

19 A. So whether they are found guilty by a jury or whether
20 they accept a plea agreement does not matter as far as I'm
21 concerned.

22 Q. Well, it certainly matters if it didn't happen and
23 you're still relying on it, right?

24 A. Well, the point that my job begins is after that
25 conviction because I don't go back and second guess a jury

1 or a plea agreement. If he's been found guilty, then
2 that's where my job starts.

3 Q. Right. But you're kind of missing my point. But you
4 still rely on all this uncharged behavior.

5 A. Well, official records. If he's been arrested or
6 convicted, I review that.

7 Q. Right.

8 A. In cases -- I've had cases where the DNA exonerated
9 an individual of one particular crime. I didn't count it
10 at all.

11 Q. But you also don't follow up to -- let me move on.
12 You talked about the likelihood, right --

13 A. Yes.

14 Q. -- of re-offending?

15 A. Yes.

16 Q. What can you say to the likelihood of re-offending?

17 A. I believe he is likely to commit future acts of sexual
18 violence if not confined in a secure facility for care,
19 control and treatment.

20 Q. And that's based on the static of zero?

21 A. It's based on the static of zero, it's based on --
22 which is an underestimate, it's based on the dynamic
23 risk factors, it's based on the fact that he hasn't had
24 substantial treatment, and that's one of the most important
25 factors in reducing risk for re-offense.

1 Q. And how much is substantial treatment? What do you
2 qualify as substantial treatment?

3 A. Substantial treatment is treatment sufficient that
4 the individual would at the bear minimum know why he
5 committed his crimes. That's one of the first things that
6 we look at. The first couple of things that I look at to
7 see if treatment has been effective is, first of all, if
8 he's able to accept full responsibility for what he did,
9 and Mr. Nichols was not, and if he has come to some
10 conclusion about what needs he was meeting in these crimes
11 that he could not meet in other ways.

12 Q. And you say he hasn't accepted responsibility. How
13 has he not?

14 A. He denied half of the acts that the children reported.

15 Q. And those were the ones that were dismissed, weren't
16 they?

17 A. Not necessarily.

18 Q. But do you know?

19 A. Absolutely.

20 Q. Then -- so then you know that some of them were
21 dismissed?

22 A. Some of the charges were dismissed --

23 Q. Right.

24 A. -- but, for example -- hold on just a minute. So some
25 of the -- he was convicted of some of the crimes that he

1 denied.

2 Q. And that's based on your reading of -- of your
3 records, right?

4 A. No, that's based on the indictment.

5 Q. Okay. And then, lastly, he asked you about the -- in
6 talking about likelihood and commit and re-offend and --
7 you know that he's going to be on a GPS ankle monitor for
8 the rest of his life, right?

9 A. That's correct.

10 MS. ZMROCZEK: No further questions, Your Honor.

11 THE COURT: All right. The witness may step down.

12 THE WITNESS: Thank you.

13 (Witness excused.)

14 MR. BOGLE: Your Honor, we'd like to ask that she
15 be excused.

16 MS. ZMROCZEK: No objection.

17 THE COURT: All right. She's free to go.

18 MR. BOGLE: Your Honor, the State would rest at
19 this point.

20 THE COURT: All right. Ladies and gentlemen, I've
21 got some matters to take up with the attorneys.

22 You-all come up real quick.

23 (Proceedings held at the bench; not reported.)

24 THE COURT: All right. We'll go ahead and just
25 take our lunch break at this point. I'm gonna ask you

1 -- it's 12:30 now. You-all have had a good morning
2 already, so why don't you be back in the jury room at
3 1:45. So an hour and fifteen minutes for lunch. We'll
4 get started shortly thereafter and we'll continue on in
5 the afternoon. Please don't discuss the case with
6 anyone while you're out.

7 Thank you.

8 (Whereupon, the jury was excused for lunch at
9 12:28 AM.)

10 THE COURT: Okay. Motions.

11 MS. ZMROCZEK: Thank you.

12 Your Honor, at this time we would move for the
13 Court to direct a verdict and find that Mr. -- that
14 the State has not proved beyond a reasonable doubt
15 that Mr. Nichols is a sexually violent predator.
16 The testimony is from their expert who, you know,
17 continually said it was underestimated, but yet still
18 relies on the fact that it's a zero on the -- on the
19 Static-99, which is the most predictive tool, and it's
20 also at best moderately predictive.

21 The other information that she provided, for
22 example, saying he didn't have a stable home or didn't
23 have stable employment were things that were just said
24 and not followed up on. You know, we're looking at
25 evidence most favorable to the opposite party and in

1 this case, Your Honor, this law was created for a
2 very specific reason. It says right in there it was
3 created for a limited subclass of individuals and it's
4 our position that -- at this point that Mr. Nichols is
5 certainly not within that limited subclass.

6 THE COURT: All right, Mr. Bogle.

7 MR. BOGLE: Thank you, Your Honor. May it please
8 the Court?

9 THE COURT: Yes, sir.

10 MR. BOGLE: Using the directed verdict standard
11 at this point, which is looking -- weighing the evidence
12 in the light most favorable to the nonmoving party,
13 we've established the sexually violent convictions,
14 we've established two mental abnormalities, and through
15 her combination of reviewing the records, scoring him on
16 the Static-99R and reviewing both his dynamic and static
17 risk factors has issued an opinion that he meets the
18 criteria to be civilly committed.

19 So we would submit that we, again, have more than
20 enough evidence to reach the directed verdict standard
21 at this time, and we would ask that the motion be denied.

22 THE COURT: All right.

23 Anything else, Ms. Zmroczek?

24 MS. ZMROCZEK: Nothing further.

25 THE COURT: All right. I'll -- in light of it

1 all I'm gonna deny the motion for directed verdict at
2 time and we'll do the Respondent's case in chief after
3 the break.

4 I'm working on -- we're working on a jury charge
5 at the moment and we should have something for you in
6 a few minutes or very, very shortly.

7 Anything else for the record?

8 MS. ZMROCZEK: (Shakes head.)

9 THE COURT: All right. We'll be in recess.

10 MR. BOGLE: 1:45?

11 THE COURT: Yeah. Yes.

12 (Whereupon, a luncheon recess was taken at
13 12:31 PM.)

14 (Back on the record at 1:53 PM.)

15 BAILIFF: All rise. Court's back in session.

16 THE COURT: Thank you. Be seated.

17 All right. We took a short break. The State had
18 provided me with proposed jury charges prior to trial
19 and the Respondent has provided me with an additional
20 charge of circumstantial evidence, which I think may
21 be in there already but we'll double-check, but we'll
22 have a charge conference probably at the end of the day
23 once we're done with all the testimony.

24 Before we left we had a discussion in here off the
25 record regarding one of the witnesses who Respondent

1 intends to call today, who I believe was the solicitor
2 assigned to the file from the 2010 conviction; is that
3 correct?

4 MS. ZMROCZEK: (Nods head.)

5 MR. BOGLE: That is correct.

6 THE COURT: And I don't know the subject matter of
7 the testimony, I haven't reviewed the previous trial,
8 but the State provided me a copy of a case In the
9 Matter of the Care and Treatment of Valentine, which
10 is from 2008, which is an appeal from a probable
11 cause hearing where that circuit court found there
12 was no probable cause to find somebody -- or to pursue
13 a sexually violent predator case; is that correct?

14 MR. BOGLE: That's what happened there. The
15 State appealed it and the Court of Appeals, relying
16 on a previous State Supreme Court case called Matter
17 of Beaver, reverses Valentine. The middle of page 5
18 was the language that I was pointing to during our
19 off the record conversation about whether or not plea
20 agreements have anything to do with a sexually violent
21 predator context.

22 Now while this is just a probable cause hearing,
23 the language of the Court is rather expansive explaining
24 the various reasons a plea agreement may be offered or
25 accepted but finding no inherent connection between them

1 and the evaluation of whether Mr. Valentine suffered
2 from criteria to be included as an SVP.

3 So, again, from -- my recollection's vague, but
4 last time there was a lot of talk about she had these
5 cases, she weighed the weight of them, were they
6 truthful, were they not truthful, were they strong or
7 not, and gave the guy a plea agreement for ten years
8 where he could have gotten, like, forty or something
9 like that.

10 THE COURT: Well, okay. He got a plea agreement
11 on the sentence, I suspect, but he pled guilty to CSC
12 first with a minor; did he not?

13 MR. BOGLE: Yes, he did plead guilty, which I
14 cross-examined him about.

15 THE COURT: What's that?

16 MR. BOGLE: And I cross-examined him about that.

17 THE COURT: Okay.

18 MR. BOGLE: I think the point is the reason for
19 deciding to give him a plea agreement and drop other
20 charges we would submit are not relevant in the con --
21 in a sexually violent predator case. It's like an
22 apples and oranges comparison. There's all kinds of
23 reasons that an assistant solicitor or a solicitor may
24 negotiate a plea with lots of pending charges down to
25 one or two versus what we're doing here.

1 THE COURT: Well, the sentence -- I mean, is the
2 sentencing sheet --

3 MR. BOGLE: He got -- he got ten years on both of
4 them to run concurrent.

5 THE COURT: Right, but was that a negotiated
6 sentence or --

7 MR. BOGLE: Look at what blocks they checked.

8 MS. ZMROCZEK: I don't remember.

9 THE COURT: I'd like to see them.

10 MR. BOGLE: On the sentencing sheet, they checked
11 the box that said negotiated sentence and they wrote
12 ten years off to one side. If you could look, this
13 is State's 1 and 2.

14 THE COURT: Okay. So it was a negotiated
15 sentence --

16 MR. BOGLE: And they wrote down the number of
17 years, ten years.

18 THE COURT: All right. I don't know off the top
19 of my head -- CSC with a minor under eleven, isn't
20 that --

21 MS. ZMROCZEK: It carried twenty. At that time
22 it carried twenty-five -- up to twenty-five.

23 THE COURT: Okay. Is that not a mandatory minimum
24 number?

25 MS. ZMROCZEK: Now it is.

1 THE COURT: Okay. So that explains a lot of
2 confusion.

3 MS. ZMROCZEK: But good job.

4 THE COURT: Well, Ms. Zmroczek, what's your
5 response to this?

6 MS. ZMROCZEK: So here's -- here's our position,
7 Your Honor. So Dr. Swan gets up there and talks about
8 all this stuff that wasn't charged, you know, and he
9 wasn't convicted of and, you know, I said sometimes
10 they can do that because there's not enough evidence
11 or whatever and she's like yeah, but, you know, and
12 so it became an issue because of that testimony and
13 so I think that, you know, he has a right to explain
14 or challenge that, especially if she's relying on that
15 to say that even though it's a zero that, you know,
16 that it's not accurate because it's, you know, I don't
17 know, so.

18 THE COURT: Right. Well, I'm not focussing on
19 Dr. Swan, but my issue is where is this solicitor now?
20 Or who is it? Debra?

21 MS. ZMROCZEK: Debra Moore. She's a solicitor in
22 Richland now.

23 THE COURT: Okay.

24 MS. ZMROCZEK: Yeah, so she's just gonna testify
25 as to just her general knowledge about the case. There

1 was also some testimony that said he denied some of the
2 charges, so she combats that. So there were specific
3 reasons that I had to call her in light of Dr. Swan's
4 testimony.

5 THE COURT: Okay.

6 MS. ZMROCZEK: I mean, the jury can believe or not
7 believe whichever -- you know, whomever they want, but
8 I think that I have a duty to present that.

9 THE COURT: No, no, no. I mean, the -- so
10 Dr. Swan interviewed Mr. Nichols, right?

11 MS. ZMROCZEK: And then she said she gleaned --
12 sorry -- she said that she, you know, read the legal
13 paperwork and Debra's the one who did the legal
14 paperwork, so.

15 MR. BOGLE: So Debra was the assistant solicitor
16 who negotiated whatever plea took place or the
17 sentencing recommendation and as part of that plea
18 agreement a number of other arrest warrants, which
19 may or may not have been indicted, were dismissed.

20 THE COURT: But obviously the other arrests were
21 fair game for Dr. Swan.

22 MR. BOGLE: Yes, in the context of this type of
23 eval. That's the apples and oranges issue that we're
24 having trouble with.

25 THE COURT: Yeah.

1 Well, is it your intent to get testimony from the
2 solicitor about why she entered into the plea offer?

3 MS. ZMROCZEK: I'm re-reading it now. I don't
4 know that that --

5 THE COURT: Is this -- I mean, how long was her
6 testimony then?

7 MS. ZMROCZEK: Her testimony isn't very long. So
8 I intend to elicit information just about like the
9 background of the case, how she investigated it. There
10 was a lot of discussion from Dr. Swan about the pain
11 that -- that the victims were caused and Ms. Moore will
12 testify that -- that the victims always stood with the
13 -- with the defense even during sentencing, like they
14 were a part of the -- a part of that.

15 THE COURT: Well, was one of the people -- so you
16 have three witnesses, right?

17 MS. ZMROCZEK: Yeah, I just have three.

18 THE COURT: So your client, the transcript and
19 then -- okay. So -- well, I would think she could
20 testify that she did meet the victims. What the
21 victims told her, I think, is --

22 MS. ZMROCZEK: Okay.

23 THE COURT: I would think that she -- you know,
24 if the testimony were allowed, she could go into I met
25 with the victims, yes.

1 MS. ZMROCZEK: Right.

2 THE COURT: Well, where do you go from there?

3 MS. ZMROCZEK: Just why -- so I'm looking at the
4 page right now and that's not -- if you want to read
5 her -- would it help to read her testimony? Would
6 that --

7 THE COURT: Well, yeah. Sure.

8 MS. ZMROCZEK: Okay.

9 THE COURT: Be at ease while I come down there.

10 (Pause in proceedings.)

11 MS. ZMROCZEK: And, obviously it will change a
12 little bit because of the different testimony and --

13 THE COURT: Sure.

14 Well, when you take it hand-in-hand with the
15 testimony from **SON**, you know, I did read
16 through that briefly, and essentially -- I'm
17 paraphrasing, but they essentially wanted their dad
18 around them. That's a very simplification of it
19 obviously, but to the extent that that's what the
20 family member of the -- the actual victim's testimony
21 was, the solicitor's testimony does bear credence on
22 the fact that it gives the reason for -- it gives the
23 Respondent the opportunity to -- it certainly lends
24 credibility to the victim's testimony --

25 MS. ZMROCZEK: Right.

1 THE COURT: -- that they made a decision in large
2 part based upon the input of the victims themselves.

3 MS. ZMROCZEK: Right.

4 THE COURT: Which to your point, Ms. Zmroczek,
5 that does certainly give another viewpoint from
6 Dr. Swan's testimony of the -- she testified as to
7 the damage that in her opinion Mr. Nichols caused,
8 but, you know, I think under these circumstances we'll
9 allow it again. And I understand the State's objection
10 in light of the Valentine case and while yes, you could
11 distinguish it in that it was a probable cause hearing,
12 I can understand the State's argument, but in light of
13 the overall circumstances we'll allow it subject to the
14 State's objection.

15 MS. ZMROCZEK: And, Your Honor, he's not chained
16 or anything, but I didn't know -- because I was gonna
17 call him, so I just didn't know if they wanted to place
18 themselves in a different --

19 THE COURT: Place themselves in a different what?

20 Sheriff, do you want to sit over -- you're fine
21 or you can sit over here. I mean, frankly, I don't
22 want him to appear -- I think the sheriff should stay
23 there.

24 Mr. Nichols, when you're called to the stand,
25 you're gonna stay at the stand. Do you understand

1 that?

2 MS. ZMROCZEK: He's talking to you.

3 THE COURT: When you get called up to the stand in
4 trial, you'll come to the stand and when the testimony
5 is finished you'll go back to your seat. Any confusion
6 about that?

7 THE DEPUTY: With this defendant I don't think we
8 have any problem.

9 THE COURT: Well, I don't think so either --

10 MS. ZMROCZEK: I just wanted to make sure.

11 THE COURT: -- but I don't want to have the
12 sheriff sitting next to him to create any appearance
13 which is unfair.

14 All right. Anything else on this?

15 MR. BOGLE: Nothing from the State.

16 THE COURT: All right. So the first witness will
17 be who?

18 MS. ZMROCZEK: Mr. Nichols.

19 THE COURT: Okay.

20 All right. Let's go ahead and bring the jury back
21 in.

22 Thank you.

23 (Whereupon, the jury returns to the courtroom at
24 2:11 PM.)

25 THE COURT: Okay. Ladies and gentlemen, welcome

1 back. I hope you had a nice lunch and had a chance to
2 refresh yourself during the break.

3 When we left, we were finishing up -- we finished
4 up the State's case in chief and now we'll have the
5 opportunity to hear from the Respondent.

6 MS. ZMROCZEK: Thank you, Your Honor. May it
7 please the Court? We call James Ronnie Nichols, Jr.

8 THE COURT: Come on up.

9 (Whereupon, James Ronnie Nichols, Jr., was
10 duly sworn by the Clerk of Court.)

11 THE CLERK: If you will have a seat please and
12 state your full name for the record.

13 MS. ZMROCZEK: And you can take your mask off
14 during the testimony.

15 THE WITNESS: My -- my name's James Nichols.

16 MS. ZMROCZEK: And, Your Honor, I'm just gonna
17 move this a little bit closer. There you go. Speak
18 loud enough so we can hear you.

19 JAMES RONNIE NICHOLS, JUNIOR,
20 having been duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MS. ZMROCZEK:

23 Q. Okay. Mr. Nichols, will you tell the jury how old
24 you are.

25 A. Fifty-three.

1 Q. Fifty-three. And you've heard about State's 1, 2
2 and 3, these charges. Were those convictions that you pled
3 to?

4 A. Yes, ma'am.

5 Q. Okay. And you have been asked a lot of questions
6 about why you did these things.

7 A. Yes.

8 Q. Have you been able to come up with an answer?

9 A. No, ma'am.

10 Q. Okay. And is that something that you've received
11 treatment for?

12 A. Yes, ma'am.

13 Q. And when you received treatment, do you remember which
14 doctor you saw?

15 A. Dr. William Burke.

16 Q. Dr. Burke?

17 A. Yes, ma'am.

18 Q. Okay. And you -- you went to him for some period of
19 time and then you got rearrested?

20 A. Yes, ma'am.

21 Q. All right. Let me ask you this. Do you -- can you
22 tell the jury what your plans are for treatment when you
23 get out?

24 A. To follow up with Dr. Burke or any -- any class I
25 could take.

1 Q. So he still does treatment and that's something that
2 you've looked into, right?

3 A. Yes, ma'am.

4 Q. And there were some other things that have changed
5 since you've been arrested for these charges; is that
6 right?

7 A. Yes, ma'am.

8 Q. Tell the jury a little bit about -- so I want to
9 talk a little bit about -- a little bit about your mental
10 history. Tell the jury a little bit about what kinds of
11 things you've been through mentally.

12 A. Mentally?

13 Q. Uh-huh. Let me ask the question better. Did you --
14 have you gone to -- have you gone to seek some mental
15 health help before?

16 A. Yes, ma'am.

17 Q. Okay. And why do you do that?

18 A. To help myself.

19 Q. To help yourself?

20 A. Yes, ma'am.

21 Q. And let me ask you this. And I'm not trying to
22 embarrass you. I don't know that it can get any more
23 embarrassing after all the things that we've talked about,
24 but when you were arrested for these charges, were you --
25 were you the same person that you are now?

1 A. No, ma'am.

2 Q. Okay. Tell the jury how you've changed.

3 A. Well, I've accepted the Lord Jesus Christ into my life
4 and I'm a different man.

5 Q. And in addition to that, have you -- did you used to
6 drink?

7 A. Yes, ma'am. A little bit.

8 Q. Okay. And obviously do you do that any more?

9 A. No, ma'am.

10 Q. All right. When you were incarcerated, did you take
11 different classes?

12 A. Yes, ma'am.

13 Q. What kind of classes did you take?

14 A. I took a victim awareness class in Allendale and I got
15 a certificate for that. I also took a sexual abuse class
16 at Kershaw.

17 Q. Okay. So you were enrolled in a lot of different
18 programs to help yourself?

19 A. Yes, ma'am.

20 Q. When you -- when you -- if you're allowed to get back
21 out, what are your plans to work?

22 A. Doing landscaping.

23 Q. Okay. Where do you want to live?

24 A. With my dad.

25 Q. Okay. Is that the young gentleman here in the back?

1 A. Yes, ma'am.

2 Q. All right. And -- and you have the skills to be able
3 to work in landscaping?

4 A. Yes, ma'am.

5 Q. Okay. Because of your arrests, are you aware of
6 what restrictions will be placed on you with being a sex
7 offender?

8 A. Yes, ma'am.

9 Q. And what are those?

10 A. Being on lifetime GPS monitoring.

11 Q. Lifetime GPS monitoring?

12 A. Yes.

13 Q. And does that affect places that you can go?

14 A. Yes, ma'am.

15 Q. And places you can live?

16 A. Yes, ma'am.

17 Q. And in addition to just being on the -- on the
18 monitor, do you also have to report to the sheriff's
19 office?

20 A. Yes, ma'am.

21 Q. Okay. Do you know how often?

22 A. I think it's every three months.

23 Q. Every three months. And if you move, you have to tell
24 them where you've moved to?

25 A. Yes, ma'am.

1 Q. Okay. Now I know that you won't be ordered to go to
2 counseling, but do you think it's something that needs to
3 be ordered for you to do?

4 A. No, ma'am.

5 Q. Okay. Is it something that helps you?

6 A. Yes, ma'am.

7 Q. Okay. You -- so you did -- when you were in
8 counseling, was it group or individual?

9 A. I had group and I also had individual. I went two
10 times with Dr. Burke individual and he said I didn't need
11 no more individual.

12 Q. Okay. So but you still went to group?

13 A. Yes, ma'am.

14 Q. Okay. So you actually addressed individual needs, but
15 then as well as -- so when I say groups, so there's groups
16 of people that need this treatment and so they all kind of
17 support each other?

18 A. Yes, ma'am.

19 Q. Okay. And those classes are run by professionals like
20 Dr. Burke and some others, right?

21 A. Yes, ma'am.

22 Q. Do you -- do you take any kind of medications now?

23 A. Yes, ma'am.

24 Q. What kind of medications are you on?

25 A. I'm on blood pressure medication, high cholesterol and

1 asthma, for depression.

2 Q. Okay. And have you been taking those regularly?

3 A. Yes, ma'am.

4 Q. And have they helped kind of maintain your physical
5 body?

6 A. Yes, ma'am.

7 Q. All right. In addition, we heard about the crimes and
8 -- and these were your children, right?

9 A. Yes, ma'am.

10 Q. Have you had an opportunity to reach out to your
11 children?

12 A. Yes, ma'am.

13 Q. And is that something -- have you-all been able to
14 rebuild your relationship?

15 A. Yes, ma'am.

16 Q. Okay.

17 A. I actually had a visit with DAUGHTER 2 about three months
18 ago.

19 Q. Okay.

20 MS. ZMROCZEK: Those are all the questions I
21 have. Please answer any questions Mr. Bogle may have.

22 CROSS-EXAMINATION

23 BY MR. BOGLE:

24 Q. You mentioned earlier, sir, that because of mental
25 health issues you had to seek out counseling from like a

1 mental health place?

2 A. Yes, sir.

3 Q. Okay. But that wasn't sex offender counseling, was
4 it?

5 A. No, sir.

6 Q. It was for other reasons?

7 A. Yes, sir.

8 Q. Okay?

9 MR. BOGLE: Thank you.

10 THE COURT: Any redirect?

11 MS. ZMROCZEK: Nothing further Your Honor.

12 THE COURT: Okay. The witness may step down.

13 (Witness excused.)

14 THE COURT: You-all approach real quick.

15 (Proceedings held at the bench; not reported.)

16 THE COURT: All right. We've got to take a short
17 break.

18 Ladies and gentlemen, as part of our mitigation
19 for health around here we have to take a short break
20 now and just do a little sanitation. I'll get you back
21 in here in hopefully five to ten minutes, okay?

22 We'll send you back down to the jury room briefly
23 and get you back up here as soon as possible.

24 Thank you. Please don't discuss the case.

25 (Whereupon, the jury retires to the jury room at

1 2:19 PM.)

2 THE COURT: All right, folks. We'll take a short
3 break. Don't feel like you have to go far. We just
4 have to let that air out and then we'll have a very
5 short witness, another short break, the last witness,
6 rest, motions, adjourn, come back -- or recess --

7 MS. ZMROCZEK: Yeah.

8 THE COURT: -- and come back Thursday, okay?

9 (Pause in proceedings.)

10 THE COURT: Actually while we're doing this, let's
11 do something for the record real quick.

12 So the next witness is **SON**.

13 This testimony will be presented via transcript from
14 the previous trial in this case involving the same
15 facts, same testimony, same controversy.

16 MR. BOGLE: How are you gonna describe it to the
17 jury?

18 THE COURT: I'm gonna just say our next witness
19 will be -- is not available at trial, however, he has
20 given sworn testimony at a previous --

21 MS. ZMROCZEK: Hearing.

22 THE COURT: -- where he was subject to
23 cross-examination from both parties and we're gonna
24 read that testimony into the record now.

25 MR. BOGLE: Okay. Without saying prior trial on

1 this issue?

2 THE COURT: A prior hearing.

3 MS. ZMROCZEK: Perfect.

4 MR. BOGLE: Thank you.

5 THE COURT: Obviously I'm not gonna get any
6 background.

7 MR. BOGLE: Do I need to put anything on the
8 record about me objecting or not objecting to this?
9 Because I don't, but I just --

10 THE COURT: Well, I think it would be better to
11 just -- I think everyone stipulates that this was
12 sworn testimony presented at a prior trial and it's
13 appropriate for publication here today under these
14 circumstances.

15 MR. BOGLE: Okay.

16 THE COURT: The State agrees?

17 MR. BOGLE: Yes.

18 THE COURT: All right.

19 MS. ZMROCZEK: Thanks.

20 (Recess taken at 2:22 PM.)

21 (Back on the record at 2:25 PM.)

22 BAILIFF: All rise.

23 THE COURT: Thank you. Please be seated.

24 All right. Are we ready to bring them in?

25 MS. ZMROCZEK: Correct.

1 MR. BOGLE: Yes.

2 THE COURT: All right. Let's bring them in.

3 (Whereupon, the jury returns to the courtroom at
4 2:38 AM.)

5 THE COURT: All right. Ladies and gentlemen,
6 we're gonna go on with our next witness.

7 MS. ZMROCZEK: Thank you. Your Honor, we call
8 SON.

9 THE COURT: All right. Ladies and gentlemen of
10 the jury, Mr. SON is not with us today, he's
11 unavailable to be here; however, my law clerk here is
12 standing into the role. SON has already given
13 prior sworn testimony in another hearing in this matter,
14 so what we're gonna do now is simply publish that prior
15 testimony to you. So while it's not physically
16 SON, he will be reading his sworn testimony,
17 okay?

18 Thank you.

19 MS. ZMROCZEK: Thank you.

20 (The following testimony of SON
21 was read into the record.)

22 SON,

23 having been duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MS. ZMROCZEK:

1 Q. Is it okay if I call you SON ?

2 A. That's fine.

3 Q. Okay. SON, how do you know James Nichols?

4 A. He's my father.

5 Q. Okay. And I thank for being here today. I know it's
6 probably -- you haven't been on the stand before and I just
7 have a few questions to ask you. Who did you come here
8 with today?

9 A. My sister.

10 Q. Is that your sister there, DAUGHTER ?

11 A. Yes, ma'am.

12 Q. Okay. Are you-all pretty close?

13 A. Yes, ma'am. Very close.

14 Q. And obviously you know why we're here today. You and
15 your sister were the ones that reached out to make the
16 decision to testify, right?

17 A. Yes, ma'am.

18 Q. Okay. You -- have you spoken with your dad since he
19 was arrested?

20 A. Yes, ma'am.

21 Q. What -- what have been the reasons for those
22 conversations? What was he saying to you?

23 A. He reached out -- he reached out a lot to -- to state
24 -- communicate and was very apologetic for what he's done.
25 He's sent us, you know, cards and, as I stated, all the

1 cards, okay, they were very Godly and --

2 Q. Is that something different than what you had seen?

3 A. Yes. I don't -- me and my sister were talking last
4 night. We didn't see -- not that God -- he was against
5 God, but we didn't see the Lord in him as we've grown to
6 learn over the years talking with him through the phone and
7 seeing him today.

8 Q. Have you seen -- so you've seen changes from his past
9 behavior?

10 A. Yes, ma'am.

11 Q. And you and your sister have talked a lot about this.
12 You know what this hearing is about. What is it that you
13 and DAUGHTER 1 think should happen?

14 A. We'd like to see him out. We would like to see him
15 given a chance to do out-patient, being taken care of
16 outside of here and not locked into confines where we can
17 try and have a relationship with him and where he can try
18 to reestablish himself.

19 MS. ZMROCZEK: Thank you. Please answer any
20 questions the State may have.

21 MR. BOGLE: No questions, Your Honor.

22 THE COURT: All right. The witness may step down.

23 (Whereupon, the testimony was concluded.)

24 THE COURT: All right. Once again, we just
25 finished another witness. Instead of going all the

1 way down to the jury room, I'm just gonna -- let's
2 keep them out in the fourth floor breezeway area.
3 Just stay in the vicinity of the bathrooms and the
4 steps. I don't think you're gonna see anybody, but
5 don't maintain any conversation with anybody, obviously
6 don't discuss the case, and I'll get you back in here
7 in about five minutes, okay?

8 Thank you for your patience. I appreciate it.

9 (Whereupon, the jury steps out of the courtroom at
10 2:33 PM.)

11 THE COURT: All right. We'll take another five.

12 (Recess taken at 2:34 PM.)

13 (Back on the record at 2:38 PM.)

14 THE COURT: Are we ready to bring them back in? One
15 more witness and then --

16 MS. ZMROCZEK: One more and then yes.

17 THE COURT: All right. Let's bring them back in.

18 (Whereupon, the jury returns to the courtroom at
19 2:39 PM.)

20 THE COURT: Okay. Ladies and gentlemen, thank you
21 again for your patience. We'll move along to our next
22 witness.

23 MS. ZMROCZEK: We call Deborah Moore.

24 THE COURT: Very well.

25 (Whereupon, Debra Moore was duly sworn by the

1 Clerk of Court.)

2 THE CLERK: Have a seat and state your full name.

3 THE WITNESS: It's Debra, D-E-B-R-A, Moore.

4 DEBRA MOORE,

5 having been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MS. ZMROCZEK:

8 Q. And, Ms. Moore, will you tell the jury where you are
9 currently employed.

10 A. I'm employed by the Fifth Circuit Solicitor's Office.
11 It's -- that circuit is composed of Richland and Kershaw
12 county.

13 Q. And prior to working there, where else -- did you work
14 at any other solicitor's office?

15 A. Yes, I worked here in the Eleventh Circuit from 2004
16 until 2011.

17 Q. And what kind of cases did you handle when you were
18 here in the solicitor's office?

19 A. Here, I specialized in child abuse, child sexual
20 assault cases, any type of crime against children was my
21 primary focus.

22 Q. And do you receive special training to take these --
23 are these different than other criminal cases that exist?

24 A. Yes, it's a specialized area because you're dealing
25 with children and the dynamics a lot of times involve

1 families and/or close relatives. Just the fact that it
2 occurs with children there's a lot of specialized training
3 courses. There's a week-long course at the -- one of the
4 children's advocacy centers where you learn how to talk
5 to children, but I've gone to numerous trainings, have
6 numerous certifications in that area.

7 Q. And, in fact, now that you're at the Fifth Circuit,
8 do you still do these types of cases?

9 A. Yes.

10 Q. How does a case get to the solicitor's office? Like
11 you're not a law enforcement officer, right?

12 A. No.

13 Q. Okay. How does it come to your office?

14 A. Once law enforcement makes an arrest in a case,
15 warrants are transmitted based on the types of crimes and
16 so the felonies come up to the solicitor's office and it's
17 a -- it's a matter of a supervisor assigning a particular
18 case to a particular solicitor with that kind of training
19 and who also has a caseload that is comprised primarily of
20 those types of crimes.

21 Q. And so when you get a case assigned to you, what do
22 you do? How do you work the case?

23 A. First of all, we -- if he has an attorney, we deal
24 with the attorney, but we also gather all of the documents
25 that pertain to the investigation of the case, any prior

1 history of the defendant, that goes in our file, but then
2 the most important part is meeting the victim, meeting the
3 family members and getting a feel of how to proceed with
4 this case based on how well the children have been able to
5 cope with what has happened to them. I find --

6 Q. Do you -- I'm sorry. Go ahead.

7 A. I find that sometimes when there's a delay in
8 prosecution in cases a lot of times that children -- I
9 guess it can go both ways. Children are less likely to
10 support a parent going to prison in any case, but depending
11 on where they're at emotionally determines how I'm going to
12 proceed with a case, but I always take the children into
13 consideration.

14 Q. In addition to that, do you receive like investigative
15 notes? What kind of documents do you receive?

16 A. I receive everything that law enforcement has
17 created during the investigation. So, yes, we have notes,
18 interviews, forensic interviews, that were taken during
19 the investigation to determine whether or not there was
20 probable cause to arrest Mr. Nichols.

21 Q. And I want to talk to you specifically about this case
22 with Mr. Nichols. I know that it's been a while since you
23 prosecuted it, but is it one -- is it one that you recall?

24 A. Yes, this is a case -- in all my years of prosecuting
25 it's one of the cases that really stands out to me and

1 I've actually referenced these children as an example of
2 how much children love their parents. I did family law
3 for seven years in between all this prosecuting and that
4 was something that I always would tell, you know, the
5 party that I represented, the mother or the father, these
6 children will always love their parents. It doesn't matter
7 what you say about them, what you do to them. Children
8 love their parents unconditionally.

9 Q. When you -- and I want to come back to kind of how
10 we ended up with this plea, but there have been several
11 documents entered and I'm just gonna hand you State's 1
12 and 2, and these are the sentencing sheets. Is that your
13 signature?

14 A. Yes.

15 Q. Okay.

16 A. Yes, it is.

17 Q. On both of them?

18 A. Uh-huh.

19 Q. And it says -- so there are a bunch of boxes, but
20 one of the boxes that's checked says Defendant waives
21 presentment to the grand jury. Why is that box checked?

22 A. That's because these particular charges were not
23 presented to the Lexington County Grand Jury. It means
24 that he has -- he's agreed to plead guilty before going
25 through any further proceedings, so we didn't -- we didn't

1 take the time to present it to the grand jury. That's a
2 panel of jurors much like yourself that hears cases and
3 makes the determination of whether or not that case could
4 go forward to trial, but in this case we didn't need to do
5 that.

6 Q. Now there were cases in Edgefield as -- or, excuse me,
7 Saluda as well, right?

8 A. Yes.

9 Q. Okay. Did you -- and I'm just handing you State's 3
10 now. Did you prosecute -- prosecute -- prosecute those?

11 A. No, I did not.

12 Q. Okay. Were you -- is Saluda within the Eleventh
13 Circuit?

14 A. It is.

15 Q. Okay. Is that something that a coworker would have
16 been assigned to because of the different county?

17 A. Yes.

18 Q. Okay. And is it something that -- did you work with
19 that prosecutor at all or discuss the case at all with that
20 prosecutor?

21 A. No.

22 Q. Okay. When you were -- when he -- he, Mr. Nichols,
23 was originally arrested, there were several other charges
24 that were -- that were brought as well. Do you recall
25 that?

1 A. In Lexington?

2 Q. Yes.

3 A. Yes.

4 Q. Okay. And is there a reason that -- that you didn't
5 go forward to prosecute those?

6 A. Typically when someone pleads guilty or in the -- in
7 the trial preparation, I mean, even though he's standing
8 there pleading guilty to these offenses, these were the
9 only two that I felt like I had -- that I ethically could
10 present as a guilty plea. The other ones I could not
11 prove, so he pled to these two.

12 Q. And I want to -- I think you still have those up
13 there. The sentence that -- the sentence box that's
14 checked on the sheets, were those -- it says negotiated.
15 What does that mean?

16 A. That means that the defense attorney and I have
17 discussed the case, typically wrangle back and forth
18 somewhat about what -- what the best outcome should be in
19 a case like this, but a negotiated sentence means that
20 I've agreed to offer ten years and that's it. He would
21 have no more time other than ten years, but that's also
22 -- a negotiated sentence isn't used as often because the
23 judge cannot sentence the party any more than ten years.

24 Q. And what was the maximum that he could have faced?

25 A. Thirty.

1 Q. Okay. And at the time would have been twenty-five?

2 A. Yes. Sorry.

3 Q. That's okay. Times have changed. When you -- and so
4 when a client pleads guilty, he admits to all of the facts
5 that are on the indictment; is that right?

6 A. Yes.

7 Q. Okay. Did you ever recall ever -- was there a
8 challenge of Mr. Nichols not wanting to admit to what he
9 had done?

10 A. No.

11 Q. Okay.

12 MS. ZMROCZEK: Please answer any questions the
13 State may have.

14 MR. BOGLE: Thank you. May it please the Court?

15 CROSS-EXAMINATION

16 BY MR. BOGLE:

17 Q. Good afternoon.

18 A. Good afternoon.

19 Q. So -- and I'm just gonna talk about the two Lexington
20 county indictments, the ones that you did.

21 A. Yes.

22 Q. In both of those cases you signed the indictments,
23 right?

24 A. Yes.

25 Q. So that meant that you had before you -- your decision

1 to indict, you had the arrest warrants, witness statements,
2 whatever forensic interviews, things like that to decide
3 what to go forward on?

4 A. Right.

5 Q. Okay. And this all happened in 2010 because that's
6 the year the grand jury -- that's the year these were typed
7 up and the year he plead guilty, right?

8 A. Yes.

9 Q. 2010 is the number on the indictments?

10 A. Yes.

11 Q. Okay. And like -- like we've said before, he waived
12 having the grand jury to consider these and agreed to plea
13 to them as they were typed up, right?

14 A. Yes.

15 Q. Okay. So your first involvement with the victims
16 probably would have been about the time you typed up and
17 signed the indictment; is that safe to say?

18 A. I can't recall.

19 Q. Okay. Because in one of the indictments the date of
20 incident on the sentencing sheet is 1999, which is almost
21 eleven years prior to the guilty plea, on the other one
22 is 2007, which is about three years prior, so you were
23 not in contact with these victims that far prior to this
24 indictment and these guilty pleas, were you?

25 A. No.

1 Q. Okay. And, like you said, you reviewed a number of
2 arrest warrants against Mr. Nichols and distilled it down
3 to basically the two you felt best you could prove and
4 that's the ones he pleaded guilty to; is that what you're
5 saying?

6 A. Right. I don't remember there being a lot though.

7 Q. Four or five, I think? Something like that?

8 A. Yes.

9 Q. Okay. And the fact that you felt -- you made a
10 judgment call as an officer of the court that you felt
11 maybe you could -- probably could not prove these didn't
12 necessarily mean they didn't happen, you're weighing the
13 level of proof?

14 A. Right.

15 Q. Okay.

16 A. I'm weighing that and, like I said, also, you know,
17 the impact that it's had on the children. After meeting
18 with them, it was very sad. They were -- they did not want
19 to participate in this process and they were old enough to
20 express that and I felt it best just to work that case out
21 instead of making children testify against a family member
22 when they -- when they love them.

23 Q. Yeah, because there's all kinds of reasons the State
24 enters into a plea agreement. One can be to not have the
25 traumatic exposure to the victim testifying about it?

1 A. Right.

2 Q. One could be the weakness of evidence?

3 A. (Nods head.)

4 Q. All kinds of reasons it can happen, correct?

5 A. Correct.

6 Q. Okay. And, again, you're dealing with these kids in
7 2010 in one case about three years after the thing had
8 happened according to the sentencing sheet and the other
9 about eleven years after it happened?

10 A. (Nods head.)

11 Q. Let's see.

12 MR. BOGLE: Thank you. That's all.

13 THE COURT: Redirect.

14 MS. ZMROCZEK: Just very briefly.

15 REDIRECT EXAMINATION

16 BY MS. ZMROCZEK:

17 Q. He asked you about reasons to enter into pleas and
18 negotiations. Is one of the reasons that you -- what are
19 some of the reasons that you consider the amount of time --
20 like when you negotiate a sentence, what are some of the
21 things that you also try to consider?

22 MR. BOGLE: Objection, Your Honor. Outside the
23 scope of cross-examination.

24 THE COURT: Say the question again, please.

25 MS. ZMROCZEK: He asked -- he asked about the

1 reasons to not go forward with indictments in cases and
2 I said what are some of the reasons that you do -- when
3 you do go forward with the ones that you do go forward
4 with, what are some of the reasons that you consider in
5 negotiating that sentence.

6 THE COURT: All right. Overruled.

7 MS. ZMROCZEK: Thank you.

8 BY MS. ZMROCZEK:

9 Q. It was a poorly worded question. Sorry. Go ahead.

10 A. I think the best way to summarize how we determine
11 this type of negotiated sentence, again, is it's more of
12 -- in this case it was one set of events -- it was a long
13 time, but it was all the same activity, if that makes
14 sense. The -- even the one in Saluda, and I can't answer
15 why that -- that one was a different date, but all of these
16 things are put -- are considered and that's the reason that
17 I negotiated a ten-year sentence for Mr. Nichols. I think
18 that was an appropriate sentence. I still do today.

19 Q. And do you -- do you consider him a danger to the
20 community?

21 A. I feel that --

22 MR. BOGLE: Objection.

23 THE COURT: Sustained.

24 MR. BOGLE: Thank you.

25 MS. ZMROCZEK: Nothing further.

1 THE COURT: All right. The witness may step down.

2 Oh, I'm sorry. Go ahead.

3 MR. BOGLE: Nothing further.

4 THE COURT: You may step down.

5 (Witness excused.)

6 MS. ZMROCZEK: The Respondent rests, Your Honor.

7 THE COURT: You-all approach, please.

8 (Proceedings held at the bench; not reported.)

9 THE COURT: Ladies and gentlemen, the Respondent
10 has now rested their case, and I've got to take several
11 matters up with the attorneys at this time. What
12 we're gonna do here is you-all were here early this
13 morning and on time. I appreciate that. We're gonna
14 go ahead and just break early for the day now. The way
15 we'll work is we'll come back Thursday morning.

16 Now I'll remind you we don't have -- the courthouse
17 is not open tomorrow. You're welcome to come here, but
18 it will be locked. But we'll start back on Thursday.
19 I'd like you to be in your jury room at 9:15 so we can
20 start at 9:30. I anticipate we'll do closing arguments
21 at that time, I'll charge you on the law of the case
22 and then after that you'll receive the case to begin
23 deliberations.

24 However, please don't discuss the case with anyone
25 in the interim today, tomorrow or prior to me telling

1 you you can do so. I hope you have a safe evening and
2 we'll see you back Thursday morning at 9:15 in the jury
3 room.

4 Thank you.

5 (Whereupon, the jury was excused for the day at
6 2:56 PM.)

7 THE COURT: Are there any motions?

8 MS. ZMROCZEK: Yes, Your Honor.

9 At this time we would renew our motions again based
10 on the same set of arguments that were made before.

11 THE COURT: The same basis for previous argument?

12 MR. BOGLE: Yes, Your Honor. It's still the same.
13 It's sufficient for the case to go to the jury.

14 THE COURT: Thank you.

15 I'll renew my denial of the directed verdict motion.

16 Anything else for the record we need to talk about
17 now?

18 All right. Well, then let's just have -- you-all
19 take a few minutes, talk to your client, then come on
20 back to chambers and we'll go ahead with the jury
21 charge, okay?

22 MS. ZMROCZEK: Okay. Thank you.

23 (Whereupon, the proceedings were concluded for
24 November 10, 2020, at 2:57 PM.)

25 (The following proceedings were held November 12,

1 2020, beginning at 9:32 PM.)

2 BAILIFF: All rise. Court is now in session. The
3 Honorable Walton McLeod presiding.

4 THE COURT: All right. Good morning. Please be
5 seated.

6 MR. BOGLE: Good morning, Your Honor.

7 THE COURT: All right. It's Thursday now.
8 Tuesday afternoon we had a charge conference in my
9 chambers where we went over the jury charge, made
10 several modifications. I forwarded the final version
11 to counsel Tuesday night. Both counsel, I believe,
12 are onboard or in agreement with the jury charge; is
13 that correct?

14 MR. BOGLE: For the State, yes.

15 MS. ZMROCZEK: That's correct, Your Honor.

16 THE COURT: Okay. So at this point we're ready to
17 bring the jury in and continue with closing arguments;
18 is that correct?

19 MR. BOGLE: Yes, Your Honor.

20 THE COURT: Anything else we need to discuss before
21 we do that?

22 MR. BOGLE: Not that I can think of, Your Honor.

23 THE COURT: All right. Let's bring them up then.
24 Thank you.

25 (Whereupon, the jury enter the courtroom at

1 9:36 AM.)

2 (Proceedings held at the bench; not reported.)

3 THE COURT: All right. Ladies and gentlemen,
4 welcome back to the courthouse. I appreciate you being
5 here on time today just like you were on Tuesday and on
6 Monday, so I appreciate that very much.

7 Now, ladies and gentlemen, the parties have
8 presented their evidence in this case. It is now time
9 for the attorneys to make their closing arguments.

10 The arguments of attorneys are not evidence in
11 this case. Their statements and arguments are meant
12 to help you understand the evidence and apply the law
13 to the evidence. You should disregard any remark,
14 statement or argument which is not supported by the
15 evidence presented during the trial or the law that I
16 will explain to you after the arguments.

17 At this time please give your complete and undivided
18 attention to the attorneys as they present their closing
19 arguments.

20 MR. BOGLE: Thank you, Your Honor. May it please
21 the Court?

22 THE COURT: Yes, sir.

23 MR. BOGLE: Ms. Zmroczek.

24 First off, I'd like to thank you for your service,
25 especially in these trying times that we have right now.

1 I can see where Lexington County has done a good job
2 as far as separating everybody, but thank you for your
3 service both from the State of South Carolina and from
4 Lexington County.

5 If you remember yesterday or two days ago when we
6 started this thing I talked about what the law was, the
7 law the General Assembly passed where they found that
8 there is a dangerous group of mentally abnormal and
9 extremely dangerous group of sexually violent predators
10 who require involuntary civil commitment, and that's
11 what this case turned out to be.

12 Another thing that I sometimes would have told you
13 at the beginning, and I apologize for not doing, as you
14 know when Dr. Swan testified she had to go into all the
15 underlying details of what the Respondent did to those
16 three children based on the arrest warrants she looked
17 at and the indictments in the cases where he pleaded
18 guilty and was sentenced.

19 Now that was difficult stuff to listen to, but at
20 the same time it was necessary for her to form her
21 diagnosis and tell you how she got to her diagnosis and
22 that's why you had to hear a lot of stuff, which I'm
23 sure when the day was over you probably wish you hadn't
24 had to hear.

25 Again, the burden of proof is did the State prove

1 the case beyond a reasonable doubt. The elements we
2 have to prove is has he been convicted of a sexually
3 violent crime, and there's three of them. In a few
4 minutes, the clerk will bring them up here and you'll
5 have them to take back in the jury room, but if you
6 remember there was a 2008 conviction for criminal
7 solicitation of a minor, trying to solicit someone to
8 do something sexual who was a minor, and there was a
9 criminal sexual conduct with a minor in the first
10 degree, that's a child under eleven, here in Lexington
11 county in 2010, and then the lewd act, the fondling of
12 a child under sixteen, also in 2010. He pleaded guilty
13 the same day here in Lexington County.

14 THE CLERK: (Handing.)

15 MR. BOGLE: Thank you. So you will have all these
16 back in the courtroom. Read them because it sets forth
17 exactly what he did and who he did it to, and I think
18 it's very important to get a -- in addition to hearing
19 all the testimony, read the documents that he pleaded
20 guilty to, that he signed his name to and said yes, I
21 did it. That's important.

22 Now also remember the admissions to Dr. Swan about
23 all the children. I think there was DAUGHTER 2, there was
24 DAUGHTER 1, there was SON, and some of these were arrest
25 warrants that didn't get indicted and some were the

1 indicted charges, so remember all the things you heard
2 here. I'm not gonna repeat them today. Remember what
3 you heard from Dr. Swan about the things he did to
4 these children and bear in mind that he got ten years
5 -- he got probation in 2008 for the solicitation and
6 then he got ten years for the other two, but the time
7 that the crimes happened from when the kids were as
8 young as five or six to when they were old as twelve
9 or fourteen, that's about an eight-year time period
10 this thing went on.

11 You might hear talk about how he got a plea
12 agreement, how he got a cap on his sentence, that he
13 could have gotten a lot more time than he did, but
14 think a minute. Does a plea agreement and the reasons
15 the State has for one really matter here? That's not
16 what we're doing here. What we're doing here is
17 deciding whether or not he's got a mental abnormality
18 that he cannot control to the extent that he needs to
19 be civilly committed for what's called long-term
20 control, care and treatment, not the type of plea
21 agreement he had.

22 If you remember, the assistant solicitor testified,
23 I believe, that while she had a lot of arrest warrants
24 and she focussed on these two that he plead guilty to,
25 at the same time she saw all these documents and just

1 because it didn't distill down to two doesn't mean he
2 didn't do it on all the other arrest warrants she was
3 looking at.

4 She talked about how the children were there at
5 the plea very supportive of their father, which is
6 something that happens in cases like this when the
7 children are the victims, but at the same time what
8 were the children's attitudes back in 1999, eleven
9 years earlier when this happened for one of them and
10 in 2007 for the other? Now where I got those dates
11 was on the upper right-hand corner of the sentencing
12 sheet it says the date of the crime.

13 Now Dr. Swan was designated pursuant to a court
14 order to examine Mr. Nichols and decide whether or not
15 he had this mental abnormality we're talking about.

16 Like everybody said earlier, and you heard this
17 from the judge as well as me, normally a witness can't
18 give opinion testimony. They can testify about facts,
19 things they see, things they hear, but when the witness
20 has the kind of training and expertise they can be
21 declared by the judge to be an expert witness.

22 Now at the same time, you, as the jury, are the
23 ultimate deciders and the ultimate believers of what to
24 believe. You can believe everything Dr. Swan said,
25 you can believe nothing, somewhere in between, that

1 is totally up to you, but I would suggest that with
2 some twenty some odd years of doing this kind of work
3 and even treating sex offenders, not just evaluating,
4 but treating them in a wide variety of cases from
5 sexual predator, as well as licensing cases and criminal
6 cases, that she's a very experienced person, and her
7 job is to assist you. You're the ultimate finders of
8 the facts and one of the facts you have to find is
9 whether or not he's got this mental abnormality or
10 mental abnormalities, which he does. So she's here to
11 help you.

12 She came up with two diagnoses. One was pedophilic
13 disorder, attracted to both, which means boys and girls,
14 nonexclusive, which means he's also attracted to age
15 appropriate women. Now a pedophile is someone who is
16 attracted to prepubescent children and the conduct we
17 had here started well before the kids were eleven for
18 some of them.

19 Her second category of diagnosis -- and the
20 pedophilic diagnosis was never really challenged that
21 I heard. Maybe you heard something different, but I
22 never heard that challenged.

23 The second diagnosis was other specified
24 paraphilic, which means deviant, disorder, hebephilia,
25 and hebephilia is the sexual contact with a small --

1 with a young child that extends after they enter
2 puberty, and that's what she had, particularly with
3 the criminal solicitation and some of the other contact
4 that extended until the kids were twelve or thirteen
5 years of age, so those are the diagnoses.

6 Now the next thing is can he control his behavior.
7 Well, again, the burden of proof is beyond a reasonable
8 doubt, and the judge will tell you what that means. I
9 would suggest it includes two things. One, a reasonable
10 doubt is when a reasonable person would hesitate to act,
11 and the next thing is after you've heard all of the
12 evidence if you're firmly convinced of something, then
13 we've satisfied reasonable doubt. We have almost eight
14 years of offending.

15 This talk about how he -- he has not offended
16 while he was at SCDC and in the jail awaiting this
17 trial. Dr. Swan found some evidence and offenses at
18 SCDC, but one of them got dismissed and she couldn't
19 find information on the another, so she didn't hold
20 them against him. And remember where he is. He's
21 in a prison and he's in jail. There's no small kids
22 in places like that.

23 Also the underlying theme I talked about when I
24 first addressed you a couple of days ago, I don't know.
25 When Dr. Swan asked him more than once why did you do

1 this, I don't know. My recollection is when Ms. Zmroczek
2 had her client on the witness stand, why did you do this
3 to your kids, and the response was I don't know. Well,
4 these crimes happened as early as 1999 or so. If he
5 doesn't know twenty-one years later, then I think he's
6 a candidate for treatment.

7 Has he had treatment? Some. One of the exhibits
8 you'll see is the letter from Dr. William Burke.
9 Dr. Burke is a -- has a master's in social work and is
10 an expert --

11 MS. ZMROCZEK: Objection, Your Honor. He's arguing
12 facts outside of this.

13 THE COURT: Are you basing it off of exhibits?

14 MR. BOGLE: No, it's not on here. It just says --
15 has his name. Well, it says he has a Ph.D.

16 THE COURT: Well, sustained to the extent that
17 it's outside of the record.

18 MR. BOGLE: Okay.

19 Okay. You'll see the letter from Dr. Burke, he's
20 got a Ph.D., about the sex offender treatment he did
21 for Mr. Nichols, he only saw him twice, and despite that
22 there were some violations of the conditions of his
23 probation, he mentions that here in the letter, and he
24 was writing this letter to Mr. Nichols' probation
25 officer telling him what had happened. And, again,

1 this was back in 19 -- in 2009. Well, the following
2 year we had the arrests and the convictions for the
3 Lexington county charges of criminal sexual conduct
4 with a minor in the first degree and lewd act, so I'm
5 not sure what value you can place on the little sex
6 offender treatment that he did have.

7 And I believe there was testimony also that he's
8 not facing probation, so there's nothing that can force
9 him. You know, if he still had a suspended sentence
10 hanging over his head and some probation, then they
11 could force him to go to sex offender treatment and if
12 you violated, then the rest of your sentence gets
13 imposed, but that's not the case here.

14 He talked about wearing a GPS monitor, and that's
15 great, it really is, but what does a GPS do? It tells
16 me where he is, but not what he's doing. It's a fine
17 thing to have and I support it very much, but I'm not
18 sure it's gonna help in a case like this.

19 Now Dr. Swan used different tools in her analysis.
20 One was the Static-99R. It's a checklist. It's
21 moderately predictive, I will grant you that, but it's
22 what they've got in this line of work and she used it
23 in this line of work and it wasn't the only thing her
24 case was based on. Her case was based on his score on
25 the static, as well as the overall interviews with him,

1 the records she looked at, prison records, conviction
2 records and things like that, so it wasn't the only
3 thing she relied on. You can get minus three on the
4 static, you can get a plus twelve or anywhere in between.
5 He got a zero. So the level she got was -- I think she
6 called it an 18.6 percent chance of offending over five
7 years. That's about a one in five chance and I would
8 submit to you that's pretty high. And, again, it's part
9 of a larger evaluation.

10 Remember I talked about how -- she can't say
11 Mr. Nichols will offend. She can say he's likely to
12 re-offend and the likelihood is of such a degree that
13 he can't control it. Why can't he control it? Eight
14 years of offending, ten years in prison, no sex offender
15 treatment to speak of, and still I don't know as to why
16 he did it.

17 So I talked about my son the other day, how when my
18 son was twenty-four it cost a lot of money to insure him
19 to drive that car. Well, that's because the insurance
20 companies weren't saying that Michael was going to have
21 a wreck, but kids his age are so overwhelming likely to
22 have one that's why the insurance is so high, and that's
23 what the static does. It doesn't say you're going to,
24 but it says you're likely to based on other sex
25 offenders who have these characteristics on the list

1 that they use.

2 Now there's -- there was some talk on
3 cross-examination about some other sets of numbers, but
4 remember Dr. Swan talked about the numbers that have
5 been updated, the most recent revisions, the manual she
6 uses, and the number she had was the 18.6 percent over
7 five years, which is almost, like I said, one in five.

8 So what do we have? We have the sexually violent
9 crimes, three of them. We have the mental -- mental
10 abnormalities, two of them, the pedophilic disorder and
11 hebephilic disorder. We also have the lack of control.
12 Nothing to show that this guy can control his behavior
13 if he is released. So I would submit to you that in
14 looking at the State's case and what we have you can
15 be firmly convinced that the State has indeed proven
16 Mr. Nichols is a sexually violent predator.

17 Your Honor.

18 MS. ZMROCZEK: Thank you, Your Honor. May it
19 please the Court?

20 THE COURT: Yes, ma'am.

21 MS. ZMROCZEK: I'm just gonna set this up.

22 Good morning. I do want to thank you. My biggest
23 concern obviously was the tiny little petri dishes that
24 they have you in. I've been practicing law for quite
25 some time now and it's -- I'm still not used to it and

1 this is not my first trial with them and I'm still not
2 used to it, but I also want to thank you, Mr. Nichols
3 wants to thank you.

4 Interestingly, yesterday was Veterans Day and there
5 was a lot of -- not enough, but a lot of recognition for
6 our veterans and -- and it really got me thinking about
7 this closing argument today because what you-all are
8 doing, Winston Churchill said, is the -- is the duty
9 right under going out and fighting and what you're doing
10 is -- is the work and the justice that we need, and so
11 that also is what brings the appreciation.

12 The judge told you at the beginning of this case
13 that this was a civil case. I know you-all were probably
14 sitting there like yeah, somebody got in a car accident
15 or somebody didn't pay somebody or somebody built
16 something wrong. Little did you know that you were
17 gonna have to sit here and listen to penis, vagina,
18 touching, terrible things, and I submit that you keep
19 hearing those things over and over because that's what
20 the government wants you to focus on is just what he's
21 done. Not that he did his time, not that he apologized,
22 not that he sought treatment, still wants to seek
23 treatment, took responsibility before it was even
24 indicted and you have that paperwork, they want you to
25 just focus on the details.

1 But that's not what this is about and even though
2 this is a civil case, the burden of proof is not one
3 that goes with a civil case, it's one that goes with a
4 criminal case, and the judge will explain all that to
5 you.

6 So how I've kind of broken down my closing argument
7 because I don't want to be here all morning, and I know
8 you don't either, but it's important because I want to
9 talk about my fears, I want to talk about the elements
10 a little bit and then I want to talk to you about what
11 I think the case -- the case showed and why we put these
12 people up.

13 Mr. Bogle said I don't know, I don't know, and that
14 -- and that gives him cause for concern. I would submit
15 that's one thing that we agree on today. I don't know
16 gives me cause for concern. Dr. Swan, will he re-offend?
17 Well, I can't say. The same as I don't know. When? I
18 don't know. Those -- those are not the standards that
19 we use when we're involuntarily committing someone,
20 taking their liberty. That's why the burden of proof
21 is so high in this civil case. It's the highest in
22 American jurisprudence because when you do that, when
23 you take someone's liberty, you need to make sure that
24 the State is doing it for the right reasons.

25 Mr. Bogle talked to you about this limited subclass

1 of people. I want to talk to you first about my fears
2 and then we'll come back to that limited subclass. One
3 of the things that Judge McLeod's gonna tell you, and
4 hopefully you can all see, is about -- is about a
5 verdict not being based upon sympathy or passion and I
6 submit that that's why you're going to continue -- and
7 if the State comes up and does rebuttal, you're going
8 to continue to hear oh, read what he did, read what he
9 did. What he did was awful. He even apologized for
10 that. He doesn't know because he has a mental illness
11 and he's addressing it and -- and that doesn't make him
12 the limited subclass, but -- but that's my biggest fear
13 is that people get hung up on the details of past crimes
14 and not what he's done in the future. Oh, well, there
15 wasn't any children. Yes, but that doesn't mean that's
16 the only way he can't control his behavior. He was able
17 to go through all his time at SCDC and while waiting at
18 Lexington County Detention Center and not violate any
19 rules because that's someone that can control their
20 behavior. That's why they look at that information.

21 I want to talk to you a little bit about the
22 Static-99. So -- you'll have this one in there. So
23 Dr. Swan says all of a sudden, even though she couldn't
24 find the cite, that -- that 18 percent of people
25 re-offend. What I understood her saying was that

1 18 percent of sex offenders scored a zero and that
2 76 scored higher, but when I asked her about this, out
3 of her own manual, about the estimated recidivism rate
4 at a zero, these are the very highest numbers that
5 they come up with in their research. That means that
6 97 percent of people that are a zero don't re-offend.
7 That is not a limited subclass of dangerous individuals,
8 that is not, and that's why you'll have this sheet back
9 there with you as well.

10 I want to talk to you lastly about the elements and
11 the judge is gonna read these to you and he's gonna talk
12 to you about some definitions, he's gonna talk to you
13 about -- and let me just -- there are three elements
14 that you have to meet. One, does he have two or more
15 convictions? Check. Yes, okay, he has that. We know
16 this. We don't contest it. Does he have a mental
17 abnormality? Does he a mental abnormality? Sure,
18 check. Pedophilia, you know that we argued about
19 hebephilia, but it's neither here nor there, you know,
20 he has one.

21 But this is the question. Three is the question
22 that you have to answer and that they have to prove
23 beyond a reasonable doubt and that is does this mental
24 abnormality make him likely to engage in acts of sexual
25 violence if not confined in a secure facility for

1 long-term care, control and treatment. This is what
2 they have to prove to you beyond a reasonable doubt,
3 that third element.

4 Don't even worry about one or two. I made it
5 easy for you. Check, check, okay, but what they have
6 to prove to you beyond a reasonable doubt is that he
7 cannot control his behavior. And, of course, there are
8 no children in SCDC. She -- Dr. Swan did not bother
9 to come and -- and check to see about the visitation.
10 That's why we put the testimony of **SON**, the son, up.
11 We put the solicitor up so that she could tell you that,
12 you know, he never denied not doing some things like --
13 like it was suggested, there were things that couldn't
14 be proven.

15 And then -- and then I put him up as well to tell
16 you what his plans are. At fifty-nine years old with
17 these past crimes, you know, he -- he does have a lot
18 of limitations on him in society, but one of the things
19 that he knows that he wants to do is continue treatment.
20 That's the first thing he talked about. He was doing
21 well with Dr. Burke. This is something that happens,
22 people get treatment, he will be monitored, and they
23 haven't proven by any of their testimony that he can't
24 control his behavior and that's the -- that's the --
25 that's the biggest, that's the -- that's the biggest

1 thing they have to prove and they have to prove that
2 beyond a reasonable doubt.

3 There are so many different ways to try to explain
4 it. It's really -- it's such an important term and yet
5 even doing this for so many years I still can't define
6 it in a way because it's an individual decision for
7 each and every one of you and the judge will tell you
8 that when you get all of this, you get these exhibits
9 and you'll get to go back in the back and you'll get
10 to talk about whether or not they've proved that third
11 element that he cannot control his behavior beyond a
12 reasonable doubt.

13 So what that means is, you know, is it's likely.
14 If you think about the football analogy, the fifty yard
15 line, if this is -- you have to get over the fifty yard
16 line for any civil case, but we're here at a criminal
17 burden and you have to get close to that endzone beyond
18 a reasonable doubt that they've proved that he can't
19 control his behavior. And the judge is gonna give you
20 the law and he's gonna tell you if they haven't proved
21 that, then your job is easy and you get to say no, he's
22 not a sexually violent predator, he is not in this
23 limited subclass of individuals, and you'll be proud to
24 say that.

25 Before I sit down, I was reading yesterday in this

1 magazine that we get every month and there was a quote
2 right at the front that said I will assist the
3 defenseless or oppressed by ensuring that justice is
4 available to all citizens. That's an oath that every
5 lawyer in South Carolina -- it's part of the oath that
6 every lawyer in South Carolina has to take and when I
7 was appointed to this case and Mr. Nichols and listening
8 to the zero and talking with his children and listening
9 to his plans, I felt confident, and I feel confident,
10 that you will take the same care when looking at these
11 elements and that you'll be able to come back and find
12 that he is not this limited subclass of people. He is
13 not a sexually violent predator.

14 Thank you.

15 MR. BOGLE: Nothing in response, Your Honor.

16 THE COURT: All right.

17 MR. BOGLE: Thank you.

18 THE COURT: Ladies and gentlemen of the jury, it
19 is now time for me to instruct you on the law that
20 applies to this case. First, you must understand these
21 basic ground rules. You, the jury, are the sole judges
22 of the facts. You will decide all issues of fact, the
23 truth of the evidence, its effect, its value, its
24 weight. You alone will judge the credibility of the
25 witnesses; in other words, whether or not the testimony

1 is believable.

2 In evaluating the testimony of witnesses, including
3 expert witnesses, you may believe all that a witness
4 said, part of it or none of it. You may consider any
5 bias, prejudice or interest you feel the witness has
6 in this case. You may consider the demeanor and
7 appearance of the witness. You're not to exercise
8 these considerations arbitrarily, however, you are to
9 use your common sense, your sense of logic and reason
10 and your good judgment.

11 You are the sole judges of the facts. I am the
12 judge of the law and you must accept and apply the law
13 as I tell it to you. You cannot substitute what you
14 think the law is or should be. Apply the law to the
15 facts and reach your verdict. If I rule something
16 inadmissible or instructed you to disregard something,
17 do not consider those things. Base your verdict only
18 on the competent evidence before you, the witnesses and
19 exhibits admitted in the trial.

20 The rules of evidence allow for witnesses to give
21 opinions under certain -- certain circumstances. One
22 area where opinions are allowed is where a person by
23 virtue of education, training and experience is
24 permitted to testify as an expert witness. Just
25 because someone is permitted to testify as an expert

1 witness does not necessarily require to you accept
2 the opinion given. You may accept or reject the
3 opinions of any expert witness just as you may -- just
4 as you may accept or reject the testimony of any other
5 witness in whole or in part.

6 The evidence from which you are to decide the
7 facts consists of -- in this case are the sworn
8 testimony of witnesses, both direct -- both on direct
9 and on cross-examination, the exhibits which have been
10 admitted into evidence and any facts to which all
11 attorneys have agreed and stipulated.

12 Now the following things are not evidence and you
13 must not consider them as evidence in deciding the
14 facts of this case. One, statements and arguments of
15 the attorneys. Two, questions and objections of the
16 attorneys. Three, testimony that I've instructed you
17 to disregard or questions and answers withdrawn by
18 counsel. While argument of counsel is a beneficial
19 part of every trial, you should remember that the
20 statements made by counsel are not evidence. In
21 presenting arguments, counsel often refer to evidence;
22 however, you should base your verdict on the evidence
23 as you remember it. Therefore, if there are any
24 conflicts between the recollection of counsel about
25 the evidence and your own recollection, you should

1 rely upon your own understanding of the evidence.

2 You've also heard several objections of counsel
3 during this trial. This is a normal event in trials
4 and objections are routinely made by an attorney
5 representing his or her client. In ruling on
6 objections, the judge is performing his role in the
7 trial. In that regard, the jury must not under any
8 circumstances derive any inference from any ruling made
9 by the Court on objections as to any opinion the Court
10 may have on the case. As to any questions which an
11 objection was sustained, you must not speculate as to
12 what the answer might have been or as to the reason for
13 the objection.

14 Now there are two types of evidence that are
15 generally presented during a trial. Direct evidence
16 and circumstantial evidence. Direct evidence is evidence
17 of direct perception, including the testimony of a person
18 who claims to have actual knowledge of a fact, such as
19 an eyewitness. Direct evidence is evidence which
20 immediately establishes the main fact to be proved.
21 Circumstantial evidence is proof of a chain -- it is
22 proof of a chain of facts and circumstances indicating
23 the existence of a fact in issue. Circumstantial
24 evidence is based upon inference and not based upon
25 personal knowledge or observation. It is evidence that

1 asserts or describes something from which you may
2 reasonably infer the fact at issue. For circumstantial
3 evidence to be sufficient, circumstances must lead to
4 the fact at issue with reasonable certainty. The facts
5 and circumstances should be considered in light of
6 ordinary experience and common sense. The existence of
7 a fact cannot be based upon speculation, surmise or
8 conjecture. The law makes absolutely no distinction
9 between the weight or value to be given to either direct
10 or circumstantial evidence. Nor is a greater degree of
11 certainty required of circumstantial evidence than direct
12 evidence. You should weigh all of the evidence in this
13 case. After weighing all of the evidence if you're not
14 convinced that the State has met -- has not met its
15 burden of proof beyond a reasonable doubt, then you must
16 return a verdict for the Respondent.

17 Now let's turn to the specific allegations here.
18 This is not a criminal proceeding seeking incarceration,
19 but rather is a proceeding seeking civil commitment.
20 In this case, the State alleges that the Respondent,
21 Mr. James Nichols, is a sexually violent predator. The
22 State is seeking to have Mr. Nichols committed for
23 long-term control, care and treatment. This means that
24 the State is seeking to commit Mr. Nichols to a secure
25 facility to be held there for treatment. It is basically

1 the State's contention that Mr. Nichols suffers from a
2 mental abnormality or personality disorder to such an
3 extent that he's likely to engage in future acts of
4 sexual violence and is not safe to be at large.

5 Having brought this petition and claim, the State
6 must prove its case beyond a reasonable doubt. The
7 Respondent denies that he's a sexually violent predator,
8 so the burden of proof is, therefore, on the State to
9 prove by evidence sufficient to satisfy you -- satisfy
10 each of you beyond a reasonable doubt that Mr. Nichols
11 is a sexually violent predatory.

12 Proof beyond a reasonable doubt is proof that leaves
13 you firmly convinced. There are few things in the world
14 that we know with absolute certainty and the law does not
15 require the State to present proof that overcomes every
16 possible doubt.

17 Now what is a reasonable doubt in the law? A
18 reasonable doubt is the kind of doubt that would cause
19 a reasonable person to hesitate to act. If, based on
20 your consideration of the evidence, you are firmly
21 convinced that the State has established that Mr. Nichols
22 is a sexually violent predator, and I will define that
23 term for you, then you must return a verdict in favor of
24 the State. If, on the other hand, you think there's
25 a real possibility that the State has failed to prove

1 beyond a reasonable doubt that the Respondent is a
2 sexually violent predator, you must give him the benefit
3 of the doubt and return a verdict for the Respondent.

4 The term sexually violent predator is a defined
5 term. It has certain elements, each of which must be
6 proven by the State beyond a reasonable doubt. The
7 State must prove first that the Respondent, Mr. Nichols,
8 has been convicted of a sexually violent offence. I
9 charge you that, one, criminal sexual conduct with a
10 minor in the first degree, two, lewd act on a child
11 under sixteen and, three, criminal solicitation of a
12 minor, are all sexually violent offenses.

13 Secondly, the Respondent, Mr. Nichols -- that
14 the Respondent, Mr. Nichols, suffers from a mental
15 abnormality or personality disorder that makes him
16 likely to engage in acts of sexual violence if not
17 confined in a secure facility for long-term control,
18 care and treatment. Inherent in these two elements
19 that -- that the State must prove is the requirement
20 that the Respondent has a mental abnormality or
21 personality disorder that causes him serious difficulty
22 in controlling his behavior. A mental abnormality is a
23 defined term. It means a mental condition affecting a
24 person's emotional or volitional capacity that
25 predisposes a person to commit sexually violent

1 offenses. The State must prove that Mr. Nichols
2 suffers from a mental abnormality or personality
3 disorder. And, third, the State must prove that
4 the mental abnormality or personality disorder
5 causes the Respondent, Mr. Nichols, serious difficulty
6 in controlling his behavior as it relates to the
7 commission of acts that are sexually violent offenses.

8 Likely to engage in acts of sexually -- sexual
9 violence is a defined term. It means a person's
10 propensity to commit acts of sexual violence to such a
11 degree as to pose a menace to the health and safety of
12 others so that he is dangerous to others.

13 Again, I remind that you that the burden of proof
14 is upon the State to prove its case beyond a reasonable
15 doubt every essential element. To establish, first,
16 that the Respondent, Mr. Nichols, has been convicted
17 of a sexually violent offense, which is criminal sexual
18 conduct with a minor in the first degree, lewd act on
19 a child under sixteen and criminal solicitation of
20 a minor. Second, that he suffers from a mental
21 abnormality or personality disorder that makes him
22 likely to engage in acts of sexual violence if not
23 confined in a secure facility for long-term control,
24 care and treatment. And, third, that the mental
25 abnormality or personality disorder causes the

1 Respondent, Mr. Nichols, serious difficulty controlling
2 his behavior as it relates to the commission of acts
3 that are sexually violent offenses.

4 In order for the State to be entitled to a verdict,
5 each of you must be convinced beyond a reasonable doubt
6 that the State has proven all of the essential elements
7 as claimed beyond a reasonable doubt.

8 Ladies and gentlemen of the jury, your verdict
9 must be unanimous. If, based on your consideration
10 of the evidence, you're convinced that the State has
11 proven every essential element of its claim and has
12 established that Mr. Nichols is a sexually violent
13 predator as defined by the law, then you are to return
14 a verdict for the State. If on the other hand, you
15 have a reasonable doubt as to whether the State has
16 met its burden of proof, Mr. Nichols is entitled to
17 that doubt and a verdict in his favor finding that the
18 State failed to prove he is a sexual violent predator.

19 Now a verdict in this case cannot be based upon
20 sympathy, passion, prejudice or emotion or some other
21 consideration not found in the evidence. I charge you
22 that as jurors you must decide the issues involved in
23 this proceeding based solely upon the evidence which
24 you hear during the course of this trial. Your verdict
25 must be without bias and without prejudice to any party.

1 You cannot allow yourself to be governed by sympathy,
2 by prejudice, by passion, by public opinion or some
3 other consideration not found in the evidence.

4 When you retire to the jury room, you should
5 discuss this case with your fellow jurors and reach
6 an agreement if you can do so. Your verdict must be
7 unanimous. Each of you must decide the case for
8 yourself, but you should do so only after having
9 impartially considered all the evidence, discussed it
10 fully with other jurors and listened to the views of
11 your fellow jurors. Do not be afraid to change your
12 opinion if the discussion persuades you that you should,
13 but do not come to a decision simply because other
14 jurors think it is right. It is important that you
15 attempt to reach a unanimous verdict, but, of course,
16 only if -- only if you can do so after having made your
17 own decision. Do not change an honest belief about the
18 weight and effect of the evidence simply to reach a
19 verdict. In other words, do not change your -- change
20 your opinion solely for the sake of reaching a unanimous
21 verdict.

22 I ask that you now return to the jury room, but do
23 not begin your deliberations until you are told by the
24 clerk or the bailiff to do so. There are some other
25 matters that must be discussed with the attorneys

1 before you begin your deliberations. I will give you
2 a copy of these instructions in written form. During
3 your deliberations you may refer to the instructions
4 to guide your decisions. You must consider the
5 instructions as a whole and not follow some and ignore
6 others. Please return to the -- please return the
7 instructions along with the verdict form to the Court
8 at the time your verdict is rendered.

9 And now this verdict form that will be with
10 you as you deliberate has two questions to answer.
11 You'll say that you unanimously find Mr. Nichols is a
12 sexually violent predator or that you do not.

13 And, Madam Forelady, I will have a place for you
14 to sign you once you've reached a verdict and when you
15 do you will knock on the door and let the bailiff know
16 you've reached a verdict. But as I said a minute ago,
17 I will send you to your jury room at this time. Do not
18 discuss the case yet. I still have to talk to the
19 attorneys, but we'll let you know when you can begin
20 your deliberations.

21 Thank you.

22 (Whereupon, the jury retires to the jury room at
23 10:13 AM.)

24 THE COURT: Any issues with the charge?

25 MR. BOGLE: None from the State, Your Honor.

1 MS. ZMROCZEK: Nothing from the Respondent.

2 THE COURT: Anything before I let my alternates
3 go?

4 MR. BOGLE: None from the State, Your Honor.

5 MS. ZMROCZEK: No.

6 THE COURT: How about let's keep the alternates
7 up here, if we can. Just bring the alternates back
8 in here.

9 Would you make this a Court exhibit, please?

10 THE COURT REPORTER: Sure.

11 (Court's Exhibit Number 1 was marked for
12 identification.)

13 THE COURT: Okay. Ms. Berdecia -- or, excuse me,
14 Ms. Berdecia and Ms. Wicker, thank you guys for both
15 serving as alternates. Hopefully your experience on
16 jury duty was a good one, but we've reached the point
17 now where we're ready to give the case to the jury for
18 their deliberations and didn't need to use you as an
19 alternate after all, but we certainly thank you for
20 being here. And you're welcome to stay, but you're
21 certainly free to leave if you'd like at this point,
22 okay?

23 Thank you.

24 (Pause in proceedings.)

25 THE COURT: All right. I'm sending back the

1 exhibits and the verdict form and charge. They may
2 begin.

3 (Whereupon, the exhibits, verdict form and copy
4 of the jury instructions were sent back to the jury.)

5 (Recess taken at 10:16 AM.)

6 (Back on the record at 11:13 AM.)

7 BAILIFF: All rise. Court's back in session.

8 THE COURT: All right. Please be seated.

9 I understand we have a verdict.

10 All right. Anything we need to discuss before we
11 bring the jury in?

12 MS. ZMROCZEK: No.

13 MR. BOGLE: Nothing from the State, Your Honor.

14 THE COURT: Let's go get them.

15 (Whereupon, the jury returns to the courtroom at
16 11:18 AM.)

17 THE COURT: All right. Ladies and gentlemen of
18 the jury, welcome back.

19 Madam Forelady, I understand you have a verdict.
20 Is that correct?

21 FOREPERSON: Yes, sir, we do.

22 THE COURT: Is your verdict unanimous?

23 FOREPERSON: Yes, sir.

24 THE COURT: Please hand it to the bailiff.

25 FOREPERSON: (Handing.)

1 THE COURT: Madam Clerk.

2 THE CLERK: 2017-CP-32-02122, in the Matter of
3 the Care and Treatment of James Ronnie Nichols. Has
4 the Petitioner, the State of South Carolina, proved
5 beyond a reasonable doubt James Ronnie Nichols, Jr.,
6 is a sexually violent predator under the South
7 Carolina Sexually Violent Predator Act? We, the jury,
8 unanimously answer the question as follows. Yes, James
9 Ronnie Nichols is a sexually violent predator.

10 It's signed and dated by the foreperson of the jury.

11 THE COURT: Anything else?

12 MS. ZMROCZEK: Individually polled, please.

13 THE COURT: Ma'am?

14 MS. ZMROCZEK: Individually polled, please.

15 THE COURT: Madam clerk.

16 THE CLERK: Robert -- excuse me, no.

17 Elissa Macarin, raise your hand. Is this your
18 verdict?

19 JUROR NUMBER 116: Yes.

20 Is this still your verdict?

21 JUROR NUMBER 116: Yes.

22 THE CLERK: Oscar Arguella. Is this your verdict?

23 JUROR NUMBER 6: Yes.

24 THE CLERK: Is this still your verdict?

25 JUROR NUMBER 6: Yes.

1 THE CLERK: Patricia Brillhart, is this your
2 verdict?

3 JUROR NUMBER 32: Yes.

4 THE CLERK: Is this still your verdict?

5 JUROR NUMBER 32: Yes.

6 THE CLERK: Richard Miles?

7 JUROR NUMBER 130: Yes.

8 THE CLERK: Is this your verdict?

9 JUROR NUMBER 130: Yes.

10 THE CLERK: Is this still your verdict?

11 JUROR NUMBER 130: Yes.

12 THE CLERK: Christopher Near, is this your verdict?

13 JUROR NUMBER 138: Yes.

14 THE CLERK: Is this still your verdict?

15 JUROR NUMBER 138: Yes.

16 THE CLERK: Jason Corley, is this your verdict?

17 JUROR NUMBER 49: Yes.

18 THE CLERK: Is this still your verdict?

19 JUROR NUMBER 49: Yes.

20 THE CLERK: Marcie Leaphart, is this your verdict?

21 JUROR NUMBER 109: Yes.

22 THE CLERK: Is this still your verdict?

23 JUROR NUMBER 109: Yes.

24 THE CLERK: Duane Stevens, is this your verdict?

25 JUROR NUMBER 196: Yes.

1 THE CLERK: Is this still your verdict?

2 JUROR NUMBER 196: Yes.

3 THE CLERK: Jean Sternberg, is this still your
4 verdict?

5 JUROR NUMBER 195: Yes.

6 THE CLERK: Is this still your verdict?

7 JUROR NUMBER 195: Yes.

8 THE CLERK: Joshua Hinton, is this your verdict?

9 JUROR NUMBER 90: Yes.

10 THE CLERK: Is this still your verdict?

11 JUROR NUMBER 90: Yes.

12 THE CLERK: Caleb Jeffries, is this your verdict?

13 JUROR NUMBER 98: Yes.

14 THE CLERK: Is this still your verdict?

15 JUROR NUMBER 98: Yes.

16 THE CLERK: Pamela McPherson, is this your
17 verdict?

18 JUROR NUMBER 128: Yes.

19 THE CLERK: Is this still your verdict?

20 JUROR NUMBER 128: Yes.

21 MS. ZMROCZEK: Nothing further.

22 THE COURT: Anything from the State?

23 MR. BOGLE: No, Your Honor.

24 THE COURT: All right. Ladies and gentlemen,
25 of the jury, once again, thank you for your service

1 this week on this case. Thank you for your time in
2 this. Thank you for being here through an odd week
3 on scheduling as it was. And certainly we recognize
4 in light of current events right now serving as a
5 juror is a bit different even than it normally would
6 be, so we -- we acknowledge that.

7 I hope your term here -- your service here as a
8 juror was -- was a good experience for you. We
9 certainly hope it was and we appreciate -- on behalf
10 of all of us we appreciate your time this week.

11 At this time I'll start you back to your jury room
12 and the bailiffs will take care of you as far as getting
13 you out. And thank you again and we all appreciate your
14 service.

15 (Whereupon, the jury was dismissed at 11:22 AM.)

16 THE COURT: All right. Anything else? Would you
17 like --

18 MR. BOGLE: Nothing from the State.

19 THE COURT: Okay.

20 MS. ZMROCZEK: I think -- do you have an order for
21 James?

22 MR. BOGLE: Yes, I have an order.

23 MS. ZMROCZEK: I need a copy of it to file the
24 appeal.

25 MR. BOGLE: Okay. I've got to get this filed.

1 And what the order says, in the last paragraph,
2 he stays where he is and they've got to call out there
3 and set up a time to bring him. They can't just drive
4 him out and drop him off.

5 THE COURT: Do I need to sign all -- each of these
6 copies?

7 MR. BOGLE: They don't make -- they don't conform
8 downstairs. Would you mind signing all three?

9 THE COURT: There's four up here.

10 MR. BOGLE: Well, three will do.

11 MS. ZMROCZEK: Anyway, if you can just e-mail me a
12 filed copy, Jim, that will be great.

13 MR. BOGLE: I will. I will e-mail you one.

14 THE COURT: All right. Well, you're gonna get
15 two because I wrote the 13th instead of the 12th.

16 MR. BOGLE: Two's fine.

17 THE COURT: All right. I have two signed copies
18 here.

19 MR. BOGLE: Thank you, Your Honor. I'll get them
20 filed downstairs.

21 THE COURT: Thank you. Thank you, Counsel.

22 MR. BOGLE: Thank you, Your Honor.

23 MS. ZMROCZEK: Thank you.

24 (Whereupon, the proceedings were concluded at
25 11:24 AM.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter
for the Eleventh 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 the evidence introduced
in the trial of the captioned case in Circuit Court on
November 10th and 12th, 2020.

This transcript may contain quoted material.
Such material is reproduced as read by the speaker.

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

January 19, 2021

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

Respectfully Submitted,

s/David Alexander

David Alexander

Appellate Defender

RECEIVED

Aug 11 2021

SC Court of Appeals

South Carolina Commission on Indigent Defense

Division of Appellate Defense

PO Box 11589

Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 11th day of August, 2021.