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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF TRACY FABIAN,

APPELLANT

APPELLATE CASE NO. 2022-001302

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1 State of South Carolina) In the Court Of Common Pleas
 2 County of Dorchester) Case No.: 2021-CP-18-00680
 3 State of South Carolina,)
 4 Plaintiff,)
 5 vs.) Transcript of Proceedings
 6 Tracy Allan Fabian,)
 7 Defendant.)
 8 _____)

9 August 29, 2022

10 St. George, South Carolina

11
12 BEFORE:

13 The Honorable Diane S. Goodstein, Judge, and a
14 Jury.

15
16 APPEARANCES:

17
18 Suzanne J. Shaw, Assistant Attorney General
19 Attorney for the State/Plaintiff

20 James Kristian Falk, Esquire
21 Attorney for the Defendant

22 ALSO PRESENT:

23 Tracy Allan Fabian
24
25

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EXHIBITS

NO.	DESCRIPTION	ID	EVDS.
NONE			

1 to tell, I mean, again, that's the truth. He was out on
2 the street, he got picked up per the statute, but he had
3 four months on the street where he was not re-arrested.
4 I don't see how you would think that that's not relevant
5 information for the jury to hear.

6 THE COURT: Well, like I said, when you get to that
7 point, let me know.

8 MR. FALK: Thank you.

9 THE COURT: Yeah.

10 MS. SHAW: Yes, ma'am. That's the only motions that
11 the State has.

12 THE COURT: Okay.

13 MR. FALK: Your Honor, we can, you know, we can
14 either make these on the fly or we can talk about them
15 right now, the motions in limine, of course, it depends
16 on how the testimony comes in, but I would ask --

17 THE COURT: No. No. No. These are only the
18 motions that you're prepared to make. I'm not gonna keep
19 you from making motions as the case goes.

20 MR. FALK: I'm just saying I did not file this ten
21 days ago or two weeks ago. It's in my hand right now.

22 MS. SHAW: And, Your Honor, I don't think I have
23 even seen it if it's written.

24 THE COURT: Let's hear what it is.

25 MS. SHAW: I would have to object to this an unfair

1 surprise. I mean, this is civil court. This is not
2 criminal. We have rules for this.

3 THE COURT: Just tell me what it is.

4 MR. FALK: Hearsay statements contained -- We would
5 ask the Court to limit the State's expert or the State's
6 witness from uttering hearsay statements that were
7 contained in written police charges, incident reports,
8 witness statements, or victim statements. I don't think
9 that's appropriate. I think that is beyond the scope of
10 what 703 allows a expert witness to testify to and I
11 think there's been some recent case law where the courts
12 have recognized that there's a dual purpose that granted
13 some of this information may be relevant to supporting
14 her diagnosis, but by the same token it is highly
15 prejudicial and without any independent confirmation as
16 to the truth of the statements, I mean, I'm not talking -
17 well, there is the Wilson case that was an unpublished
18 opinion, but if you want a published opinion, there's
19 also Jenkins which was a criminal case which addressed
20 this. There's a pretty long discussion in Jenkins and
21 I've got a copy for you where they talk about this dual
22 purpose hearsay testimony that comes in in a way that
23 really needs to take place so, I mean, that's what I'm
24 gonna talk about.

25 THE COURT: Okay. Yes.

1 MS. SHAW: Most respectfully to counsel, Your Honor,
2 I would disagree that any of that information is
3 inappropriate to come in. We have Corley, White and
4 Ettel which the State relies upon and in which our
5 Supreme Court has said that hearsay that an expert relies
6 upon in the course of her evaluation is admissible
7 regardless of how prejudicial it is. I mean, all of the
8 factual information against Mr. Fabian in this matter is
9 highly prejudicial. He molested five children. I mean,
10 whatever the State presents is going to be evidence that
11 the expert relied upon in forming her opinions. The
12 details of those offenses are highly relevant because
13 they go to the pattern of behavior. There's a long
14 standing pattern of behavior with Mr. Fabian that Dr.
15 Gehle needs to be able to discuss those factual
16 allegations regarding to basically make her diagnosis so
17 the jury needs to hear about that.

18 We can certainly, I mean, certain allegations and
19 certain discussions and factual matters certainly have to
20 come out, but specific statements saying I read this
21 report and this child said Mr. Fabian did this. That I
22 would probably not be wanting to go into because it is
23 now court hearsay statements being offered at least for
24 Dr. Gehle having appreciated it as true to the extent
25 that she considered it. But, you know, we're not gonna

1 go into those direct statements. We're gonna go more
2 into the overall factual pattern of Mr. Fabian.

3 He starts a relationship with these children. He
4 gets them alone. He then touches and/or inappropriately
5 fondles them, both male and female victims, and so the
6 jury does need to hear that because that's also relevant
7 to the question of how dangerous he is. And this man has
8 an over 20 year history of sexually assaulting minors
9 about between the ages of eight and I believe 11 so those
10 details are all extremely relevant and the jury does need
11 to hear them because they need to know what this man has
12 done in order to judge what he is likely to do in the
13 future and as you will hear Dr. Gehle testify, future
14 behavior is best predicted by the past.

15 THE COURT: But as I understand it, all of that
16 evidence is coming in through Dr. Gehle?

17 MS. SHAW: Correct.

18 THE COURT: And it is the evidence that Dr. Gehle
19 used to form her opinion, yes?

20 MS. SHAW: Correct. Pursuant to 703 she can rely on
21 hearsay evidence that was, you know, that is otherwise
22 inadmissible as long as it is in, I want to say as long
23 as it comports with her professional standards. As long
24 as this is something that is standardly used in the field
25 for such purposes as we are here to deal with, that kind

1 of information does come in regardless of the prejudicial
2 nature of it.

3 THE COURT: In other words, what you're telling me
4 is that Dr. Gehle, the information that Dr. Gehle would
5 testify to is that she would say I have reviewed the
6 charges and these charges involve five children and there
7 was a pattern of conduct that repeats itself and here is
8 the pattern of conduct that gets repeated.

9 MS. SHAW: That's correct. Yes, ma'am.

10 THE COURT: We have this child and this. We have
11 this child and this. We have this child and this. And
12 we have this child and this. Based upon my review of the
13 statements, based upon my review of the evidence that was
14 presented, based upon medical records, blah, blah, blah,
15 blah, I believe X, Y and Z.

16 MS. SHAW: I don't believe she would say that she
17 believes X, Y and Z about the factual circumstances.

18 THE COURT: No. I didn't mean factual. Sorry. I
19 believe he's a - there are many - there are pedophiles
20 and there are many variations of that. I believe and
21 more likely than not within a reasonable degree of
22 medical certainty that Mr. Fabian suffers from this
23 mental abnormality or this personality defect and as a
24 result I believe that he stands a substantial likelihood
25 to reoffend unless treated.

1 MS. SHAW: Yes. She will speak about the history of
2 each of the charges and the factual circumstances and how
3 they led her to her diagnosis, which is, I mean, that's
4 the hallmark of the 703 Act.

5 MR. FALK: Your Honor.

6 THE COURT: Yes.

7 MR. FALK: First of all, I think if you look at the
8 cases that the State just cited, they're very easy to
9 distinguish from what the fact pattern we're gonna have
10 here. First of all, the White case is totally different
11 because the White case was information that was brought
12 at the probable cause hearing, not at the trial. So, I
13 mean, that's more like, you know, we've all, in a
14 criminal case you could have hearsay, stuff comes in at a
15 preliminary hearing and that's not what's relevant at the
16 trial and in one of the, two of the other ones, the
17 person admitted to the conduct to the witness. I think
18 that's in Manago. The person admitted to the conduct.

19 My client has pled under Alford under, the last two,
20 the last two convictions were under Alford so there's no,
21 he's not admitted to any of this conduct and certainly
22 all those cases all came out before Watson versus Ford
23 Motor Company which really, you are, or the person
24 sitting in your chair, should determine what's relevant
25 in this courtroom. We can't delegate that authority to

1 somebody from DMH to determine what's relevant. I get
2 that from her point of view there's stuff that's
3 relevant, but it's what is relevant in terms of 402 and
4 403 that you've got to be the gatekeeper and if there is
5 any independent confirmation of these facts, that's what
6 the Court looked at, that's what the Court was talking
7 about in Jenkins and that's what the Court's talking
8 about in Wilson. All the cases still talk about, even
9 Bilton, which I've got that one too. I mean, in the
10 Bilton Court the Court said the point of 703 is not to
11 allow unregulated hearsay testimony come in through the
12 expert.

13 So I just, I don't know. I think, again, the Wilson
14 case is gonna be pretty close to factual and granted that
15 it is a unpublished opinion, but I will say that I found
16 a case since then when they talk about the, you know, in
17 that rule for citing unpublished opinions, they talk
18 about, you know, you can use it in the same case but,
19 Your Honor, I found a case where it came up in an
20 insurance litigation type thing where the reviewing Court
21 looked at the fact that this is being offered against,
22 the testimony is being offered against the absolute same
23 defendant or the absolute same party in the case. That's
24 what we have here. This is the State was the party in
25 the Wilson case, the other party in this case. The State

1 chose not to take the case farther up on appeal. They
2 asked for a re-hearing, but they didn't file a petition
3 for cert because, you know, I guess they don't want the
4 precedent out there, but I think the Court still has to
5 be able to. It's relevant. I ask the Court to look at
6 it.

7 THE COURT: Sure.

8 MS. SHAW: Would Your Honor like to hear rebuttal
9 argument?

10 THE COURT: No. I'm just gonna have to handle it as
11 it comes down the pike. I mean, there's no other way for
12 me to do it. I mean, the expert testifies, she didn't
13 make it up out of whole cloth.

14 MS. SHAW: Of course not, Your Honor.

15 THE COURT: And she has a particular expertise. I
16 gather she's been qualified as an expert and I'll hear
17 that and obviously if it is the type of testimony that is
18 relied upon routinely by people in her practice to
19 opine.

20 MS. SHAW: It is, Your Honor.

21 THE COURT: The kind of a hearsay as I understand it
22 that causes concern is the kind of hearsay when you get a
23 particular statement that is coming through that perhaps
24 was in --

25 MS. SHAW: Your Honor, I'm very familiar with the

1 Bilton record and the basis for that opinion and that
2 conduit type hearsay testimony --

3 THE COURT: Right.

4 MS. SHAW: -- that would inflame the jury. That's
5 not what we're seeking to do here.

6 THE COURT: Right.

7 MS. SHAW: I know defense counsel would love to
8 argue that we are because we need these facts in
9 evidence, but that is not the case in this situation and
10 this is easily factually distinguishable from Bilton as
11 well as Wilson as well as the auto liability. That was a
12 case where, I can't remember the name of it off the top
13 of my head, but I believe it was where one of the parties
14 was seeking to introduce extremely questionable expert
15 testimony. Is that the one I'm talking about?

16 MR. FALK: I don't know what you're --

17 MS. SHAW: You just cited it. The auto liability
18 case.

19 THE COURT: You're talking about Watson versus Ford?

20 MR. FALK: No. I'm not talking about Watson versus
21 Ford. I'm talking about Hodge versus United Health Care
22 Acute Care of Bamberg, LLC.

23 THE COURT: Pass them up and I'll read them tonight,
24 or give me the cites and I'll look them up.

25 MR. FALK: I didn't give you the whole one here. I

1 just gave you the cover page and the paragraphs about the
2 discussion on the unpublished opinion.

3 THE COURT: Okay. Got it. Oh, okay. Got it.

4 MS. SHAW: And, Your Honor, just to --

5 THE COURT: All right. So give me the --

6 MR. FALK: Do you need a copy of Wilson?

7 MS. SHAW: Well, yeah. If you're gonna cite it,
8 you've got to provide me with a copy.

9 THE COURT: -- cites so I can pull them up tonight.

10 MS. SHAW: Your Honor, I have not been provided with
11 a copy of these decisions that Mr. Falk is relying on.
12 If he intends to rely on them, I would submit to the
13 Court that I am entitled to a copy of the decision before
14 it gets brought out.

15 THE COURT: Right now I'm more worried about me than
16 you, so I want the citations, I want your cites, the
17 three you were talking about because I'm gonna pull them
18 tonight and just take a look at it.

19 MS. SHAW: So you want Corley, White and Ettel?

20 THE COURT: Yes.

21 MS. SHAW: Okay. I'll be happy to send you those
22 cites. Can I send them in an email once we get back to
23 our - or would you like me to write them down?

24 THE COURT: If you don't have them now, that would
25 be fine. Corley, White and?

1 MS. SHAW: Ettl, E-t-t-e-l.

2 THE COURT: I can get it from that. I can get it
3 from that. No worries. I got it.

4 MS. SHAW: I'm happy to write down the citations.

5 THE COURT: It's okay. I got it.

6 MR. FALK: A good way to do it would be to look at
7 the Wilson case where they distinguish Corley, White and
8 Ettl. But I've got a copy of, I have a copy of Jenkins
9 for you which is 872 Southeast Second 620. Wilson is an
10 unpublished opinion so I'm gonna hand you a copy of that.

11 MS. SHAW: And, Your Honor, I'm going to object to
12 that even being considered. This is not precedential. I
13 mean, it says at the very top of the opinion, this has no
14 precedential value and should not be considered. I mean,
15 Mr. Falk does this every time and it just, this is
16 inappropriate. You cannot rely on unpublished cases to
17 support your position. It's just unacceptable.

18 MR. FALK: But this is still your discretionary call
19 of whether or not it's more probative than prejudicial or
20 vice versa so the fact that the cases that the Wilson
21 Court cites certainly we can't close our eyes and pretend
22 like they never happened. I mean, I'm not saying it's a
23 binding precedent. It's just, I think it's persuasive.

24 THE COURT: Interestingly enough, this is, right
25 here, this is the debate when they decided which to

1 publish and unpublish decisions. I got it. I got what I
2 need and I'm gonna certainly look at it. I've got
3 Westlaw. I got it. I'm gonna look at it. Unpublished,
4 it's got it on here.

5 MR. FALK: So the one that talks about the
6 unpublished opinion, if you want to see it, is 422 South
7 Carolina 544.

8 THE COURT: Got it. All right. I'll take a look at
9 it.

10 MS. SHAW: Thank you, Your Honor. Nothing further
11 from the State.

12 THE COURT: Okay. Anything further, Mr. Falk?
13 Motions in limine? I don't know that there's much more
14 that we can do in limine. Do you know what I mean? The
15 jurors are just gonna --

16 MR. FALK: Well, we could maybe just get some kind
17 of understanding about --

18 THE COURT: Sure. All right.

19 MR. FALK: -- you know, and I think she addressed it
20 to the Court, that we're not planning on going into this.
21 First of all, I don't want Dr. Gehle to refer to any
22 criminal convictions that she did not mention in her
23 report because the criminal cases that are cited in the
24 petition, some of them are inaccurate and I just want to
25 make sure that Dr. Gehle is only going to refer to, or

1 there will only be testimony or questions about criminal
2 cases that she based her report on.

3 MS. SHAW: Your Honor, one of the diagnoses for Mr.
4 Fabian is narcissistic personality disorder with
5 antisocial features. That non sexual criminal history
6 that Dr. Gehle did consider which she cites in her report
7 based on her own investigation into the criminal
8 background is highly relevant to the question of whether
9 Mr. Fabian, A, has a personality disorder and, B, is
10 likely to reoffend. I mean, the long standing pattern of
11 criminal behavior of this man is relevant to disqualifier
12 of antisocial features that is attached to the
13 narcissistic personality disorder diagnosis and that
14 behavior in the past has been exploitive of others, it's
15 been reckless in terms of his regard for the safety and
16 health and welfare of other people, so it is directly
17 relevant to the diagnosis itself which is part of our
18 case so we absolutely do need to refer to it. We will
19 not be going into it in great detail because it's just
20 like that particular conduct is only one part of a much
21 larger picture and a much larger constellation of issues
22 that relate to this individual. So we're not going to go
23 into the nitty-gritty and the very minutia of that
24 conduct, but it has to be discussed. And more
25 importantly, it's admissible because she considered it in

1 the finding of her opinions regarding his mental
2 abnormalities.

3 MR. FALK: Your Honor, where I started this is
4 saying that I didn't want her to discuss or any testimony
5 about convictions that were not in her report. That was
6 the only thing I said.

7 MS. SHAW: Your Honor, I'm not quite sure what he's
8 referring to because all of the convictions that we have
9 records for Dr. Gehle mentions in her report.

10 MR. FALK: That is incorrect. Well, certainly the
11 petition is not accurate. He was never charged --

12 MS. SHAW: Well, so says your client. Your client
13 says it's not accurate. The petition is based on the
14 NCIC and all of the records we are able to obtain presuit
15 from the various agencies and so we have to go with the
16 records that we are provided with.

17 THE COURT: What do you think is in error?

18 MR. FALK: Well, first of all, the State hasn't
19 provided me a full NCIC. The only thing I have, the
20 NCIC, was the one that was provided as part of the MDT
21 and there are cases on that piece of the NCIC that don't
22 show the disposition of these cases, so there's just a
23 charge without a disposition.

24 MS. SHAW: And, Your Honor, we are legally
25 prohibited from disseminating the NCIC and what Mr. Falk

1 is not telling you is that he can order one himself
2 directly from SLED. I believe the cost is 25 bucks and
3 OID pays for it. I cannot give it to him without
4 violating Federal law. I'm sorry. I can't. I know Mr.
5 Falk would like it, but he needs to go through other
6 channels to get it.

7 MR. FALK: They're showing convictions for offenses
8 where I can walk up here with the SCDC records and show
9 you that he was in custody at the time.

10 THE COURT: Well, that in and of itself is not
11 sufficient as is you know crimes can be committed in the
12 walls of SCDC and are all the time so...

13 MR. FALK: And the State can then provide something,
14 provide me with --

15 THE COURT: So if you can share with Ms. Shaw what
16 you have concerns about, and she can just go back and
17 double check to make sure that they're comfortable to in
18 fact rely on what's in the NCIC record.

19 MS. SHAW: And, Your Honor, just some vague
20 assertion that it's wrong, I can't fix that, if, in fact,
21 it is incorrect, you know, unless you give me specifics
22 or unless Mr. Falk does.

23 MR. FALK: I don't know how to prove a negative. I
24 mean, I pulled --

25 THE COURT: The beginning part is to say that he has

1 never been convicted of murder and that's - you just -
2 and y'all have got it in the petition and she goes and
3 checks the NCIC and murder's not on there. That's pretty
4 easy, right? Yeah. It just might be easy. It may not
5 be hard.

6 MS. SHAW: And, Your Honor, also at this stage, the
7 petition is only to get us to a probable cause hearing
8 and an order for evaluation. At this stage the State is
9 relying on the certified criminal conviction records
10 which I'll be asking to have marked by the court reporter
11 probably tomorrow morning and Dr. Gehle's testimony.
12 We're not relying on the allegations in the petition
13 because that's what they are, they're allegations at this
14 point regarding the conviction.

15 MR. FALK: But they should have some support.

16 THE COURT: What? Yeah.

17 MR. FALK: I mean, they're saying they're just
18 allegations.

19 THE COURT: Tell me what you're concerned about?
20 What are the convictions that you worry about? Tell me
21 the ones you're concerned about.

22 MR. FALK: Well, I can tell you that I can't find a
23 disposition on the 1987 DUS, the 1988 simple possession,
24 the 1988 disorderly conduct, the 1990 pointing and
25 presenting, the 1992 CDV.

1 MS. SHAW: Your Honor, first of all, Mr. Fabian
2 admitted he was charged with CDV in connection with, I
3 believe the relationship with either Barbara or Yvonne.
4 One of his female paramours from back in the early '90's.
5 I can look at the NCIC right now and just because there's
6 no disposition listed, doesn't mean it didn't happen. It
7 doesn't mean he wasn't charged with it. It just means
8 there's no disposition in the NCIC and records that old
9 we frequently are not able to obtain. We would have
10 tried. I certainly would have because I personally ask
11 for all of the records in each one of my cases so if we
12 had gotten it, we would have provided all of that
13 information to Mr. Falk. We maintain an open file.
14 We're not hiding anything and I'm sure that's been a
15 question he's had to answer.

16 THE COURT: So, yeah, yeah, yeah, yeah. So the
17 question is, Dr. Gehle would have relied on the NCIC?
18 Yes?

19 MS. SHAW: In part. Yes.

20 THE COURT: Okay. And in addition to relying on the
21 NCIC for convictions, what else would she have relied on
22 to indicate convictions or charges, I gather, or charges?

23 MS. SHAW: Your Honor, I will pull up her report
24 because on page 2 out of 30 she lists every single
25 document that she reviewed, had access to or requested

1 from either our office or from other outside agencies so
2 that is all right there. It's in black and white. We
3 know what she considered. Would you like me to read?

4 THE COURT: Yeah. Just the charges.

5 MS. SHAW: She has, well, she met with Mr. Fabian
6 for over ten hours which is one of the longest interviews
7 she's ever done according to her. She reviewed the
8 petition. She reviewed the sexual predator form
9 synopsis, records related to the '09 review by the multi
10 disciplinary team because this is not the first time Mr.
11 Fabian has been reviewed. Records related from SCDC,
12 Health Services record, NCIC criminal report, Dorchester
13 County Public Index records, Berkeley, Colleton, and
14 Charleston County Public Search Index records, SCDMH
15 episode inquiry, a bylink search which is, I believe it's
16 akin to NCIC. It's something very similar. A particular
17 article because Mr. Fabian reported he was doing
18 mescaline at one point when he was engaging in certain
19 behaviors. There were DJJ records that were requested
20 that were not received. They were destroyed in
21 accordance with agency policy. Records from South
22 Carolina PPP, and sex offender treatment records from
23 Healthy Minds which is the place where he reported he was
24 attending, but they did not reply with any records at all
25 so there's no evidence that he even went there. That is

1 what she considered in terms of the written materials
2 that we were able to provide to her and that she
3 requested.

4 THE COURT: All right. On the - and so, does she go
5 on to talk about the crime that she considered?

6 MS. SHAW: She considered all of the crimes to the
7 extent that she had available information about them.

8 THE COURT: Okay.

9 MS. SHAW: So, I mean, the driving under suspension,
10 the disorderly conduct, all of that stuff from 1987 she
11 would have considered that but it would have been a very
12 minor part and that's also a subject for cross
13 examination for Mr. Falk to ask her how much weight she
14 placed on these things. We try cases with Dr. Gehle all
15 the time. We know that she routinely does not consider
16 unconvicted conduct and she does not in particular
17 consider non sexual conduct when it comes to anything
18 other than diagnosing a personality disorder so for the
19 pedophilia, those DUS and disorderly conduct, not
20 necessarily particularly relevant, but with a personality
21 disorder, they're highly relevant to show he was at least
22 charged even if he was not ultimately convicted so that,
23 I mean, it did factor into her opinion and it will be
24 mentioned albeit not in detail.

25 THE COURT: Okay. I don't know where we are.

1 MR. FALK: I know. I do want to bring up one more
2 point.

3 THE COURT: Okay.

4 MR. FALK: His conviction in 2015 for assault and
5 battery first, that is not a sexually violent offense
6 because I can't see on the sentencing sheet where there
7 was a finding that this was considered a sexually violent
8 offense. I'm just saying, I don't see it on the
9 sentencing sheet.

10 MS. SHAW: And, Your Honor, I have the certified
11 records from that and while the sentencing Judge
12 unfortunately did not mention that, the indictment which
13 I intend to move into evidence says specifically in
14 Dorchester County on or about March 13th, 2014, defendant
15 Tracy Allan - defendant on March 13th, 2014, did engage
16 in sexual battery upon a minor who was less than 11 years
17 of age in that he did digitally penetrate the victim WV,
18 this offense being in violation of Section 16-3-655.

19 These are felonies committed against minors,
20 therefore they are considered sexually violent offenses
21 per sub section 30. Regardless of whether they're
22 designated as such on the sentencing sheet, these were
23 sexual offenses committed against two prepubescent
24 females in the back of Mr. Fabian's SUV with his
25 girlfriend at the time. They are highly relevant to the

1 pattern of behavior. They do need to be discussed and
2 they absolutely qualify as sexually violent offenses so I
3 respect the argument, but I must say I don't believe it
4 has any merit.

5 MR. FALK: Your Honor --

6 THE COURT: Yeah.

7 MR. FALK: -- there's case law. You know, what I'm
8 saying, if we want to bring that Judge in here or if we
9 want to have a separate hearing on whether or not that
10 was sexually motivated. You have to appreciate, he is,
11 first of all, charged with something that probably could
12 have been a capital offense at one time because he had a
13 prior and he pled guilty under Alford and got a time
14 served sentence. So I don't care what the affidavit
15 said, I'm not sure that they were ever accurate and
16 unless Dr. Gehle has independently confirmed any of the
17 facts in the affidavit, it's highly prejudicial and we
18 don't know what happened and my client never admitted to
19 it happening. It's not a sexual - and the statute says a
20 sexually violent offense, they refer to, I'm referring
21 to, you know, a sexually violent offense means, and I'm
22 referring down to part "O" where any offense where the
23 person says that it's sexually motivated, I mean, that's
24 a sexually violent allegation, but that's not a sexually
25 violent conviction. That's not an admission to a

1 sexually violent offense.

2 MS. SHAW: Your Honor, under Alford, I mean, the
3 defendant would have had to admit that there was enough
4 evidence that he would be convicted even if he doesn't
5 personally admit the offense and there is no suggestion
6 that these assaults on two minor females were anything
7 but sexual. Every single piece of evidence associated
8 with that particular case indicates that Mr. Fabian and
9 his girlfriend took two acquaintance prepubescent
10 females, the children of their friends, to McDonald's
11 where they then molested them in the back of Mr. Fabian's
12 SUV. That is the facts.

13 And more importantly, we're not here to relitigate
14 those underlying facts. Mr. Fabian pled guilty, he would
15 have been allocuted and/or voir dired by the sentencing
16 Judge who -- I can't read the handwriting unfortunately
17 but, I mean, these are established facts, Your Honor. He
18 has been convicted of assault and battery first degree.
19 It was pled down after he had spent a significant time in
20 jail. There are any number of reasons that could have
21 happened, but it doesn't mean that the conduct is
22 unconvicted and the basis for the conduct is that sexual
23 offense so I will leave it at that. Your Honor is more
24 than able to decide.

25 MR. FALK: He's got a conviction for assault and

1 battery. The other stuff, there's no independent
2 confirmation. Maybe it was they let him plead guilty
3 because they didn't think they could make their case
4 because maybe they have a bad case. I don't know. But
5 the only thing I know is my client pled under Alford and
6 he has never admitted to the conduct. If the State wants
7 to bring in some of their own other witnesses to
8 corroborate some of the allegations, they were able to do
9 that, but absent that, you know that's gonna be highly
10 prejudicial. My guy walked out on - my guy walked out on
11 something that he could have been in prison for the rest
12 of his life, could have possibly, if he still did it, you
13 know, had it been a capital sentence, and he got a 551
14 days, 551 day credit for time served. So, to then let
15 the State explode that up to saying that this is a fact,
16 that it happened, there's no proof of that fact that it
17 happened. There's an allegation that it happened.

18 THE COURT: Well, it's an allegation that lies in an
19 indictment that your client has been convicted of. I
20 mean, I get that he pled to Alford and, but he certainly
21 had to tell the Judge that there were two things that had
22 to occur. Number 1; that he believed based on his view
23 of the evidence and his understanding, he believed that
24 he would be convicted and he wanted to take advantage of
25 the deal, but he did not want to straight up admit it.

1 And the Judge would go on and tell him, do you understand
2 that you're going to have a conviction for assault and
3 battery in the first degree and it has to be supported by
4 a factual basis. It has to be or a Judge can't take it
5 and that was the factual basis. So, hence, the
6 indictment. I mean, they can't, you can't not have an
7 indictment. An indictment is the basis for the --

8 MR. FALK: But the standard of proof.

9 THE COURT: -- offense. The fact that, you know,
10 the fact that he was allowed to plead to assault and
11 battery in the first degree as opposed to, you know,
12 criminal sexual conduct with a minor, you and I can't
13 create the negotiations that went on for that, but
14 clearly it could have been something else other than
15 assault and battery in the first degree. That was just
16 part of the deal.

17 MR. FALK: The State's got certified copies of --

18 THE COURT: Of the indictment?

19 MR. FALK: -- the sentencing sheets for that one for
20 which - so it's not a sexually violent offense that she
21 is entering.

22 MS. SHAW: Your Honor, it is under the felonies with
23 minors catch all position. That's why that exists
24 because when Solicitors plead these things down,
25 sometimes the sentencing Judge will not even know to

1 write SVP review or this qualifies as a sexual violent
2 offense and requires review. But this one was a
3 negotiated sentence with a recommendation as I understand
4 it by the State based on this. So, Mr. Fabian took a
5 deal. It's that simple. He can't relitigate those
6 underlying facts now.

7 THE COURT: And I don't even remember where we began
8 at this point. I mean, I'm not gonna keep it out. I'm
9 not gonna keep it - I'm not gonna limit the doctor's
10 testimony. The doctor is entitled to look at the
11 indictment upon which he pled. It is of a sexual nature.
12 It says what it says, the indictment. He pled to a
13 charge on the basis of the factual recitation set forth
14 in that indictment.

15 MR. FALK: Thank you, Your Honor.

16 THE COURT: Yes, sir. All right. I will see you
17 all in the morning.

18 MS. SHAW: Thank you, Your Honor.

19 THE COURT: Thank you so much.

20 (Whereupon, court was adjourned for the day at 4:30
21 p.m.)

22

23

24

25

1 State of South Carolina) Court of Common Pleas
 2 County of Dorchester) First Judicial Circuit
 3
 4 In Re: The Matter of) Transcript of Record
 5 the Care and Treatment) 2021-CP-18-00680
 6 of Tracy Allan Fabian,)
 7 Respondent.)

8
 9 August 30th & 31st, 2022
 10 St. George, South Carolina

11
 12 B E F O R E:
 13 The Honorable Diane S. Goldstein, Judge; and a Jury.

14
 15 A P P E A R A N C E S:
 16 Suzanne J. Shaw, Assistant Attorney General
 17 On behalf of the State of South Carolina
 18
 19 James K. Falk, Esquire
 20 On behalf of the Respondent

21
 22
 23 Stacy S. Johnson,
 24 Circuit Court Reporter
 25

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
P-1	Guilty Plea	4	53
P-2	Guilty Plea	4	53
P-3	Sentencing Sheet	4	53
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1 (The following proceedings were held August 30,
2 2022, beginning at 11:28 AM.)

3 (Plaintiff's Exhibit Number 1 through 6 were marked
4 for identification.)

5 BAILIFF: All rise.

6 THE COURT: Thank you so much. Please be seated.

7 All right. I do believe we're waiting on one more
8 juror, but I thought I'd come on out and --

9 MS. SHAW: And, Your Honor, before we actually get
10 started with openings, there are some things that Mr. Falk
11 and I --

12 THE COURT: Okay. Well, why don't we -- like what?

13 MS. SHAW: Well, number one would be my certified
14 records that I intend to move into evidence. Mr. Falk
15 indicated he has an objection to them and I'm going to be
16 presenting them to Dr. Gehle to authenticate as part --

17 THE COURT: Sure.

18 MS. SHAW: I mean, they're self-authenticating,
19 but I'm gonna be presenting them to her and I just don't
20 want to disrupt the flow of the trial. If Mr. Falk
21 has an objection, I'd like to get it out of the way
22 beforehand. I think I know what it's going to be.

23 THE COURT: Okay.

24 MS. SHAW: But I have had them marked as P-1
25 through 6.

1 THE COURT: Okay.

2 MS. SHAW: And I have redacted the minor victims'
3 names because as Your Honor knows I'm sure the Court
4 will require that if it's a minor sex assault victim,
5 we must redact the full name from every document, so
6 that's done.

7 And then the other issue is I would like for the
8 Court to make a formal ruling under Subsection (o) of
9 Section 30 of the SVPA, which handles all other felonies
10 concerning minors. I intend to discuss the assault and
11 battery convictions as sexual offenses and sexually
12 violent offenses as defined by the statute, and I'm
13 sure Mr. Falk will want to object to that and rather
14 than have my opening interrupted, I'd just like to get a
15 ruling from the Court that -- whether I can and cannot
16 discuss those as sexually violent offenses prior to
17 starting.

18 THE COURT: Sure.

19 All right. So -- so the State is concerned -- with
20 regards to openings, the State is concerned that -- that
21 you're not gonna be able to mention the assaults and
22 battery in the first degree?

23 MS. SHAW: Well, it's not that I'm concerned I can't
24 mention it.

25 THE COURT: Okay.

1 MS. SHAW: I'm concerned about an objection which
2 will interrupt the flow of the opening and I would like
3 to be able to refer to the assault and batteries as
4 sexually violent offenses under Subsection (o) and I just
5 don't want to have an interruption while we're doing
6 openings.

7 THE COURT: Okay.

8 Yes, sir.

9 MR. FALK: Your Honor, they may be sexually violent
10 accusations or charges, but it is not the conviction
11 for the -- for the offenses. The assault and battery
12 offenses does not fit under this statute in any manner.
13 44-48-30(b), in order to fit in under that Paragraph (o),
14 there's got to be a specific finding by the judge who
15 accepted the plea on the record that this was sexual in
16 nature. There is no specific finding and to that extent
17 I think the fact of even admitting that particular record
18 is highly prejudicial because it's not a sexually violent
19 conviction and I don't see the purpose of admitting, you
20 know, a certified record of something that's not a
21 sexually violent conviction, so that's point one.

22 And then regarding the exhibits that she has -- she
23 would like to enter into exhibits, I have no issue with
24 the indictments, but the affidavits supporting the
25 indictments are hearsay. Granted they're certified

1 hearsay, but they are hearsay statements and they are
2 gonna be highly prejudicial and, you know, if their --
3 if their expert can testify to some of that, that's fine,
4 but it would be highly prejudicial for the jury to read
5 these affidavits that supported the indictments because
6 it's clearly hearsay and I don't see what exception it
7 could fit under.

8 MS. SHAW: Well, Your Honor, the only certified
9 records that actually contain affidavits are P-1 and 2.
10 Those are affidavits for the indictments from 1993. He
11 was convicted as charged and has admitted to engaging
12 in that offense, so those affidavits -- and while there
13 may be hearsay contained in them, they are admissible,
14 they're authenticated, and none of the other ones, the
15 A and B's, both convictions, the CSC with a minor third,
16 and -- I'm sorry. That's it. The assault and battery
17 and the CSC with a minor in the third, none of those
18 have affidavits attached to them. It's strictly the
19 indictments, the sentencing sheets and the other court
20 documents, but no narratives.

21 MR. FALK: There's a narrative on the arrest
22 warrants.

23 MS. SHAW: Where?

24 MR. FALK: I'm looking at the narrative on the
25 arrest warrant -- on the 2014 arrest affidavit. There's

1 a narrative on that that's hearsay.

2 MS. SHAW: Your Honor, that's not part of these
3 documents.

4 Mr. Falk just looked at them. There's no affidavits
5 attached to these four documents. There's nothing.

6 MR. FALK: I didn't --

7 MS. SHAW: Take a look again. The only ones that
8 have affidavits attached are one and two.

9 And, Your Honor, I was just trying to pull up the --
10 (Discussion off the record.)

11 MS. SHAW: All right.

12 MR. FALK: How many do you have?

13 MS. SHAW: Six exhibits.

14 MR. FALK: I guess I'm missing one and two.

15 MS. SHAW: Yes, I've still got them. Those are
16 the only two with the affidavits.

17 And, Your Honor, I will correct myself.

18 (Discussion between counsel.)

19 MR. FALK: Your Honor, with respect to, I guess,
20 it is Exhibit 5 --

21 THE COURT: Okay.

22 MR. FALK: -- and Exhibit 6, I do not have an
23 objection. With respect to Exhibit 4 and 3, I would
24 still object to anything more than the sentence -- well,
25 first of all, I object to the admission of those to

1 start with because that's the assault and battery first
2 charges.

3 THE COURT: Okay.

4 MR. FALK: And so anything more than the sentencing
5 sheet I think is gonna be highly prejudicial because it
6 talks -- it has other information regarding the original
7 offense for which he was indicted. I mean, if you want
8 to give them a sentencing sheet for assault and battery
9 first degree, that's fine, but she wants it to include
10 the information that's attached with the indictment, and
11 I don't think that's appropriate since he didn't plead
12 to those charges.

13 MS. SHAW: And, Your Honor, that's exactly why that
14 information does need to be published to the jury because
15 those were two very serious offense, which he was allowed
16 to pled down, but he was charged with CSC first degree for
17 both of those children and they need to know that's that
18 what he was originally charged with.

19 MR. FALK: No.

20 MS. SHAW: Yes. That is our position, Your Honor,
21 and that has normally been allowed by the courts. If
22 someone pled to a charge that is lower than what they
23 were originally indicted for, the original indictment
24 can come in.

25 MR. FALK: Your Honor, he pled under Alford. We

1 do not know what the allocution was in this case.
2 Obviously the facts that would support a plea for
3 assault and battery first are significantly different
4 than the facts that would support a plea on the greater
5 offense. It is -- in this case, it is highly prejudicial
6 for the jury, first of all, to see the indictments and
7 the language in the indictments since there was in no
8 way an adjudication on the accuracy of the language that
9 was in the indictments.

10 THE COURT: Okay. As I understand it, and let me
11 just be clear, the assault and battery in the first
12 degree, those are not -- the State would not be offering
13 those indictments and convictions for the purpose of
14 element one. Element one, there are other offenses
15 which activate, for lack of a better word, the statutory
16 provisions, but as I understand it, it is the position
17 of the State that -- that those convictions are highly
18 relevant and while it may not be an enumerated statute
19 or offense, particularly in light of Mr. Falk's position
20 because the Court did not make that finding, it doesn't --

21 MS. SHAW: Your Honor --

22 THE COURT: -- it doesn't have to be there because
23 it doesn't have to be -- consider that to be a qualifying
24 -- to activate the statute; however, however, those
25 convictions are, if you will, as relevant as any of the

1 qualifying offenses because of what occurred.

2 MS. SHAW: Your Honor is exactly correct except for
3 one thing --

4 THE COURT: Okay.

5 MS. SHAW: -- and I'm going to correct myself
6 because I cited Subsection (o) of Section 30, it's
7 actually Subsection (l), which is violations of
8 Article 3, Chapter 15, Title 16, which assault and
9 battery in the first degree was in this case, involving
10 a minor when the violations are felonies.

11 I've got the statute right here and it allows the
12 -- so I would submit that the A and B's are, in fact,
13 SVO's because they are covered by Subsection (l), but
14 the CSC first from 1994, as well as the CSC third, are
15 more -- I'll just say clean in terms of the way we handle
16 these things.

17 THE COURT: The application of the statute?

18 MS. SHAW: Correct.

19 THE COURT: Because there are a couple of things
20 that are going on. Number one, you have to -- you have
21 to find yourself within the context of the statute.

22 MS. SHAW: Yes, ma'am.

23 THE COURT: You've got those. As you state, they're
24 unequivocal, here they are statute-wise, but that doesn't
25 end the inquiry with regards to what may or may not be

1 relevant with regards to an expert's testimony.

2 MS. SHAW: Correct.

3 THE COURT: And I gather these -- these particular
4 convictions are probably quite relevant and, again, she
5 will testify with regard to those?

6 MS. SHAW: Yes, Your Honor. Highly relevant to the
7 pattern of behavior which is exactly what we really need
8 to prove here, is an on-going pattern of the inability
9 to stop himself from sexually assaulting young children.

10 So, yes, they're highly relevant; yes, they're
11 highly prejudicial, but that does not mean that they
12 should be excluded and Dr. Gehle did rely, in part, on
13 them in forming her opinions.

14 THE COURT: Sure. So, you know --

15 MR. FALK: Your Honor, may I just comment?

16 THE COURT: Sure. Go right ahead.

17 MR. FALK: The sentencing sheet shows that he was
18 convicted of a violation 16-3-600, so I would assume that
19 that means that it's -- where are we at here -- Article 3,
20 Chapter 3. It's not -- it's not a Chapter 15 offense.

21 I'm looking at --

22 MS. SHAW: Your Honor, it's a Title 16 offense, which
23 is clearly enumerated.

24 MR. FALK: Where does it -- it's right here. It's
25 16-3-600. It's not in Title 16. I don't know what else

1 to say.

2 THE COURT: Well, I don't have it.

3 MS. SHAW: Your Honor, I think the Court can make
4 a ruling based on the argument so far that these are
5 felonies involving minors that are sexual in nature.
6 They must come in.

7 And while Mr. Falk certainly is zealously
8 representing his client, I mean, they're admissible as
9 the -- well, the information is admissible hearsay.
10 They're certified court records. I'm not sure what else
11 we need here.

12 THE COURT: Sure.

13 MS. SHAW: Thank you.

14 THE COURT: Anything else, Mr. Falk?

15 MR. FALK: Yes.

16 THE COURT: Okay. Go ahead.

17 MR. FALK: I'm looking at the South Carolina code --

18 THE COURT: Okay.

19 MR. FALK: -- and Title 16, Chapter 15 are offenses
20 -- the broad heading is offenses against morality and
21 decency, and Chapter 16 is the computer crime act. So
22 I get how something that is not one of the enumerated
23 offenses could fit under there if it's related to a
24 child, but assault fits under Chapter 3, so it is not a
25 Title 16 offense, which is a computer -- I mean, it's

1 not a Chapter 16 offense, nor is it a Chapter 15 offense,
2 it's a Chapter 3 offense. It does not fit. The fact
3 that he pled guilty to the charge, I mean, granted
4 they're accusations, my client pled to assault and
5 battery first, not assault and battery with intent to
6 commit sexually violent -- you know, to commit assault.
7 He pled, that was the deal, and it would be highly
8 prejudicial to allow the jury to see this.

9 THE COURT: You're talking about the indictments?

10 MR. FALK: The indictments.

11 THE COURT: Okay. It goes along with it.

12 MR. FALK: I beg your pardon?

13 THE COURT: The indictments, that was a part of the
14 plea to the assault and battery in the first degree?

15 MR. FALK: Uh-huh. Yes.

16 THE COURT: Got it.

17 MR. FALK: And for her to refer to this assault and
18 battery as a criminal sexual assault would also not be
19 supported by the facts and if she says it we're gonna
20 have to object during the opening statement.

21 THE COURT: Yeah, and that's quite all right. Do
22 whatever you need to do. Again, you'd have to -- even
23 if I rule now, I think you've got to do it in any event,
24 it -- it's not gonna be excluded if it is the type of
25 information upon which she relies on, and I am confident

1 that it is.

2 MS. SHAW: Thank you.

3 THE COURT: It's admissible and I don't mind telling
4 you that In re: Snow is pretty instructive about the
5 extent to where other -- other offenses can be considered
6 and I think Dr. Gehle, interestingly enough, happened to
7 be the expert that is discussed a lot in that particular
8 decision and the concern wasn't even directed towards the
9 number of different offenses that Mr. Snow had committed,
10 to include -- let's see. Let me just get to it.

11 Here it is. In the Snow decision, the Court says,
12 and I'm just going to quote it, Snow has an extensive
13 criminal record, including convictions for disorderly
14 conduct, reckless driving, hindering an officer,
15 simple assault, pointing a firearm, malicious injury
16 to property, kidnapping, ill-treatment of a child,
17 criminal domestic violence, criminal domestic violence
18 of a high and aggravated nature. His record also
19 includes his qualifying convictions under Section
20 44-48-31(a) of the act, the 1996 conviction for assault
21 with intent to commit sexual conduct, and a 2006
22 conviction for lewd act upon a minor, and then they
23 -- and there's even reference to the disciplinary
24 infractions while the gentleman was in SCDC, he was
25 disciplined twice for sexually related offenses, which

1 included one infraction for masturbating in the
2 recreation yard and another for striking an employee
3 after inappropriately grabbing a female staff member.
4 All that was contained within the SCDC records.

5 So if the information is the type of information
6 on which the -- Dr. Gehle testifies is reasonably and
7 normally relied upon by like members of her profession
8 when giving and opining expert testimony, it's
9 admissible. Clearly though it cannot be used as a
10 simple conduit for hearsay, but my sense is that -- that
11 she considered these matters in opining on the elements
12 of whether there's a mental abnormality or personality
13 disorder and whether or not there is a likelihood to
14 re-offend, so.

15 All right.

16 MS. SHAW: Thank you, Your Honor.

17 THE COURT: Yes.

18 MS. SHAW: So 1 through 6 when I do offer them up,
19 Your Honor will permit me to introduce all of them in
20 their entirety?

21 THE COURT: I don't know. Let me see. I haven't
22 looked at them yet.

23 But let me tell you, you're not gonna put them in
24 through the opening. If we don't get this jury out --

25 MS. SHAW: Oh, no. I'm not gonna put them at the

1 opening --

2 THE COURT: I know you're not. But go ahead and
3 pass them up because I'll be looking at them while
4 you-all are doing your openings.

5 MS. SHAW: Yes, ma'am.

6 THE COURT: All right. Anything else before we
7 bring the jury out?

8 MS. SHAW: No, ma'am.

9 MR. FALK: No, Your Honor.

10 THE COURT: All right.

11 (Whereupon, the jury enters the courtroom at
12 11:53 AM.)

13 THE COURT: All right, ladies and gentlemen. At
14 last. Ladies and gentlemen, at this time I'm going to
15 ask to you please stand and raise your right hand and
16 be sworn in as the jury in this case.

17 (Whereupon, the jury was duly sworn by the Clerk
18 of Court.)

19 THE COURT: And I was watching and if there's anyone
20 who did not take the oath, I'm gonna ask you to please
21 stand, but I think I was paying attention and everyone
22 took the oath.

23 Wonderful. I find no one standing.

24 Now you're now the jury in this case and I want to
25 make some preliminary remarks to you and -- and these

1 remarks are not intended to be the charge on the law.
2 I'm gonna give that to you at the end of -- at the end
3 of the case after you've heard all of the evidence and
4 the arguments of counsel before you retire to -- to
5 render your verdict, your decision.

6 Now -- but I do want you to understand the process
7 and I want to talk about what some of the things you're
8 going to -- to hear so you will understand, and that's
9 the purpose of my going over some of these things with
10 you.

11 And I also want to talk to you a little bit about
12 the duties that you have, the duties that I have because
13 we have different duties to perform over the course of
14 this trial, and I want to begin by saying thank you again
15 and I want to briefly tell you that -- and I want to do
16 it briefly.

17 You know, we get suggestions for things to tell
18 juries and over time some make more sense to you than
19 others and -- and a few years ago we came out with a
20 charge that's called the professionalism charge, I don't
21 know why it's called that, and it was just a reminder
22 and I think perhaps it was a reminder to juries because
23 there's so many shows that stream now on -- on so many
24 different places and platforms that as we began there
25 was a suggestion from my bosses at the Supreme Court to

1 remind jurors that this trial is probably going to be
2 different than perhaps trials you may have seen on
3 television, read -- or read about in books or seen in
4 movies and the like, and the reason for that is that
5 when productions obviously are made on television,
6 they're made for entertainment. This is obviously not
7 for entertainment, but they are orchestrated to be full
8 of high drama and riveting circumstances, and then what
9 is it, there's a break every twelve minutes to sell
10 something unless, of course, you stream it, and so this
11 really wonderful charge came out or instruction to
12 remind all of us that a trial, while they certainly
13 can be riveting and full of quite a lot of emotionally
14 charged information from time to time, to remind all of
15 us that a trial is not for entertainment. It really is
16 where the rubber meets the road in a democracy and it
17 is, I would submit to you, the absolute heart of what
18 I believe to be the greatest system of justice that
19 people have ever come up with and, quite frankly,
20 that's because of you, because of juries.

21 And also this wonderful charge talks about the fact
22 that the lawyers who are appearing before you, it gives
23 us just an opportunity to talk to you about them, and
24 I'll be doing that a little bit more as I give you these
25 preliminary remarks, but these lawyers are advocates

1 for the parties that they represent, but it gave us an
2 opportunity to just explain to jurors that before these
3 lawyers were allowed to represent even the first client
4 they swore an oath and are officers of the court. And
5 while they are advocates and fine advocates for the
6 parties they represent, they are officers of the court
7 and they are sworn to uphold the dignity and the system
8 of justice as officers of the court, and I love for our
9 jurors also to know that.

10 And then we talk in the -- the professionalism
11 charge also talks about the fact that this courthouse,
12 this courtroom, is a place of honor and dignity and
13 it is absolutely devoted to the rights of all of our
14 citizens and then, you know, it reminds all of us to
15 thank you and appreciate you and let you know that we
16 know that you will come to your duties with dignity and
17 professionalism, and -- and just to remember to thank
18 you for that, and so I certainly do that at this point.
19 And I'll do it a lot because you-all ought to be thanked
20 a lot.

21 So I'm gonna shift now a little bit because I want
22 to -- I want to explain to you about what's going to be
23 happening and then I want to explain to you a little
24 bit about this particular matter and then a little bit
25 about our process and the burden of proof. I want you

1 to understand these things.

2 The first thing that will happen is that you will
3 hear what's called an opening statement. An opening
4 statement. You're first gonna hear the opening
5 statement from Ms. Shaw. Ms. Shaw is an assistant
6 attorney general as you learned yesterday. She
7 represents the State of South Carolina. You're going
8 to hear from her in her opening statement and then
9 you're going to hear from Mr. Falk in his opening
10 statement on behalf of Mr. Fabian.

11 What are opening statements? We'll, I'm gonna
12 tell you what they are and what they are not. What they
13 are is an opportunity for the attorneys to introduce
14 themselves, and Mr. Falk's gonna introduce his client
15 to you, and to talk to you a little bit about what they
16 believe the issues are in this case.

17 What opening statements are not are true arguments.
18 Those come at the conclusion of the case before you hear
19 the jury charge from me and then retire to consider your
20 verdict. So that's what the opening statements are and
21 what they are not.

22 Once we've heard the opening statements, then each
23 side will have an opportunity to present evidence to
24 you. They may be sworn -- sworn testimony, documents,
25 and the like. I will tell you that it is your duty,

1 and I'm gonna talk a little bit more about that,
2 but it is your duty to listen very carefully to the
3 witnesses in this case and to give to these matters
4 you're undivided attention, so I'm gonna ask that you
5 do that; that you listen carefully to the witnesses and
6 you will receive the evidence in this case.

7 Now, ladies and gentlemen, once each side has had
8 an opportunity to present evidence to you, then the
9 attorneys will return and they will then deliver to you
10 their closing arguments. Those are true arguments.
11 What do I mean by that? Well, no doubt each side will
12 emphasize certain portions of what you have heard,
13 perhaps what you have seen from the documents and the
14 like, and try to convince you to agree with their version
15 of the facts.

16 Now once the closing arguments are finished, each
17 side will make closing arguments to you, then I will
18 explain to you the law that is applicable to this case.

19 Now that segues into our duties. You and I have
20 different duties to perform. You are the sole and the
21 only and the exclusive finders of the facts in this
22 case. No one else is going to be the finders of the
23 facts in this case but you, and it's your duty. How
24 will you do that? You will do that by listening to the
25 witnesses, you will receive the evidence and you will

1 make any inferences which you feel may reasonably be
2 drawn from the evidence and you're going to weigh the
3 evidence and you'll make those determination of the
4 facts. You're the sole judges of the facts so much so
5 I'm gonna ask you at this moment if I do or say anything
6 with regards to the facts and you think I'm commenting
7 or making any indication with regards to my opinion or
8 thought about the facts, I'm gonna ask you to disregard
9 it right now, and I will tell you why. Our law does
10 not allow me to have an opinion regarding the facts,
11 to intimate to you about any feeling about the facts.
12 I want you to know I don't have an opinion. I don't
13 have any feelings with regards to the facts presented.
14 That's a matter solely for you to determine.

15 So if I do something or say something and you
16 think that's a comment on the facts, please disregard
17 it. Maybe I had too much lunch or something because I
18 can assure you I have no opinion regarding the facts.
19 That is a matter solely for you to determine.

20 So what am I doing here? I'm the judge of the law
21 and the law as given to you by the Court, by me, that's
22 the only law that you may consider, and if you believe
23 as you listen to the law, if you have a preconceived
24 idea about what you think the law is or what it ought
25 to be and after you listen to what I tell you the law

1 is you're like no way, well, for our system to work
2 correctly you must accept and apply the law exactly as
3 I give it to you, then when we finish here and you've
4 been discharged if you want to go call your legislators
5 and you want to have a conversation, that is absolutely
6 your prerogative as a citizen, but for our system to
7 work correctly you must accept and apply the law exactly
8 as I state it to you even though you may disagree with
9 it. I cannot tell you what the facts are and you can't
10 disagree with me about what the law is, and that's how
11 we serve out our duties in this case.

12 Now a couple of other things that I want you to
13 know about because I want you to understand what's
14 happening. I don't want it to occur and you're like oh,
15 what was that. Ladies and gentlemen, you have learned
16 now over the course of the last about fourteen, fifteen
17 hours that a trial, like business or sports, you're
18 learning that trial is a very regulated and structured
19 activity and as in sports or business or other structured
20 activities, there's certain rules that both sides must
21 obey when presenting evidence.

22 Wait for it. These rules are called the rules of
23 evidence. Our law places upon these attorneys the
24 responsibility, the duty, to their clients to call a
25 possible violation of the rules of evidence to my

1 attention, and you -- let me tell you what that's gonna
2 look like. You will hear them say something like
3 objection and they will stand, they will have volume,
4 and the reason for that is that they want everything to
5 stop, so they're gonna have a strong voice when they do
6 that because they intend for, number one, to make sure
7 I hear them, and I'm behind like two fish tanks up here.
8 And, number two, they want you to stop, so everything
9 needs to stop when they make that objection.

10 Now -- and the reason that they do that is they
11 have a duty to bring a possible violation of the rules
12 of evidence to my attention. It is my duty to rule on
13 the admissibility of evidence, but once it's admitted
14 whether you believe it, the weight you give to it, any
15 inferences you draw from it, that's solely for you to
16 determine. Whether evidence is admissible at all or not
17 is a matter of law for me.

18 So if I -- if I say that the objection is sustained,
19 that means that piece of evidence cannot be received in
20 that form or at all. If I say that the objection is
21 overruled, that means I don't think there's been a
22 violation of the rules and that bit of evidence can be
23 received.

24 Now because it is these lawyers' duty, you must not
25 hold an attorney's objection against her or his client,

1 nor should you conclude from my ruling on the objection
2 that I favor one side or the other because I don't. It's
3 just my duty to rule. It's their duty to raise it and
4 my duty to rule. I've got to call balls and strikes like
5 an umpire and so you must not draw any inference that I
6 favor one side or the other because I do not.

7 Now when I rule on matters of evidence, I'm gonna
8 do it one of three ways. It may be that they'll stand
9 and they'll say objection, hearsay. Well, I'll have that
10 and I'll make a ruling and then we'll move on. It may
11 be that I ask the lawyers to approach and you're gonna
12 hear this. You go to the beach. Work with me, okay?
13 And, yes, we're doing that -- that little sound is being
14 played absolutely so you can't hear a thing I'm saying
15 and a thing they're saying. Why? Well, let me tell you
16 exactly why that's happening because it also applies to
17 the third instance and there may come a time when I need
18 to ask you to leave the courtroom. Now why would I do
19 that? Let me tell you why. I might need to have the
20 lawyers approach, I might need to hear a word or two of
21 explanation. If I need you to leave the courtroom, that
22 means I need a little bit more conversation, a little
23 more argument to help me make a determination and,
24 clearly, I would not want anything that I might say in
25 ruling on the admissibility of evidence to be considered

1 by you as a comment on the facts, so that's the reason
2 I play we go to the beach, you-all go to the beach, or
3 I'll ask you to leave the courtroom. I'll do that as
4 little as possible, but that's what is going on. It
5 just allows me the space to do what I must do. Now --
6 so that's objections and I wanted you to understand
7 about that.

8 Now, ladies and gentlemen, I want to now shift
9 and to talk a little bit about what your -- what this
10 case is in terms of what you are going to need to
11 determine.

12 Ladies and gentlemen, the State has made allegations
13 with regards to Mr. Fabian and this action has been
14 brought pursuant to a statute, and it's 44-48-10 et seq.
15 Now you know about all the Latin I know. And under this
16 statute, the State, the State, must prove three things.
17 And these are the three elements that you'll make a
18 determination whether the State has met its burden of
19 proof, and I'm gonna talk about that in just a moment.

20 Here are these three elements. I'm going to go
21 into it in much greater detail when I give you the
22 concluding instruction, but I did want to give you a
23 preview. Number one, you will make a determination
24 whether the State has met its burden of proof of the
25 following three elements. The first element. Mr. Fabian

1 must have been convicted of at least one qualifying
2 sexually violent offense as defined, and then there's
3 a South Carolina code section, which, again, means a
4 statute, a law. That's the first element. And that
5 statutory provision is 44-48-32(a) through (p).

6 And, secondly, the State must prove beyond -- and
7 I'll talk about the proof and the burden of proof in
8 just a second. The State must prove that Mr. Fabian has
9 a mental abnormality and/or a personality disorder which
10 makes him likely to engage in acts of sexual violence,
11 here's the third element, if not confined in a secure
12 facility for long-term control, care and management. It
13 is a commitment for secure long-term control, care and
14 management.

15 Now we're going to go into much more about that when
16 I give you the concluding instructions. The State must
17 meet it's burden of proof by beyond a reasonable doubt.
18 Beyond a reasonable doubt. I will define that for you
19 when I give you the concluding instructions, but one of
20 the definitions of beyond a reasonable doubt is that a
21 reasonable doubt is the kind of doubt that would cause
22 a reasonable person to hesitate to act. Now it will be
23 your duty to determine whether the State has met its
24 burden of proof with regards to each of these three
25 elements.

1 Now, ladies and gentlemen, I'm going to ask a favor,
2 but I'm gonna tell you a story so it makes sense to you.
3 When I was a little girl and we would go to services,
4 and I have two older brothers who are brothers, and I
5 was always the person that had to sit next to my momma
6 because she probably thought if anybody's gonna act
7 up it's gonna be me. Well, inevitably my mom at some
8 point would do like this. I thought she was sleeping.
9 I would start squirming or I'd grab something and then
10 inevitably that hand would come out and I'd get pinched.
11 Yeah. Well, that was a preview of things to come
12 later, right? Well, I did not realize that my momma
13 was concentrating with her eyes shut. I thought she
14 was sleeping. I mean, she was my momma, so I knew her
15 pretty well, right? I'm gonna ask you as a favor to me,
16 please do not concentrate with your eyes closed because
17 if I can't tell if my own momma's awake or sleeping,
18 and we've just met, I'd surely mess that up, so please
19 concentrate with your eyes open for me so I don't mess
20 up like that and think you're sleeping.

21 Now, ladies and gentlemen, because you are the
22 finders of fact and because you will make the factual
23 determination in this matter and take the law as I give
24 it to you and then apply it to the facts as you find
25 them to be, and that's how you're going to reach a

1 verdict. And because under our law there is ordinarily
2 no way to correct an erroneous determination of facts by
3 a trial jury, there's a way -- if I mess up, there's a
4 way to fix that. If there's an erroneous determination
5 of the facts by a trial jury, ordinarily there's no way
6 to change that. It is so important that you give to
7 these matters your undivided attention, and I'm going to
8 ask you to do that.

9 Now, ladies and gentlemen, in order to preserve
10 everyone's rights, it is necessary that I ask if there
11 are any additions or exceptions from the parties.

12 From the State?

13 MS. SHAW: No, Your Honor. The State's prepared.

14 THE COURT: All right. Yes, sir.

15 MR. FALK: No, Your Honor.

16 THE COURT: Very well. Ladies and gentlemen, at
17 this time I'm going to ask that you'd please draw close
18 and -- you know what you know what? You know what I
19 didn't mention? But, again, I wanted to explain to you
20 the why part.

21 Ladies and gentlemen, there's a debate that goes
22 on about note-taking. I think both sides -- there are
23 really good reasons for both sides and here they are.
24 There is a criticism of note-taking by jurors because
25 you can miss something as it's coming from the witness

1 stand while you're taking notes and the argument for
2 note-taking is that it allows a juror to refresh that
3 juror's memory before deliberations. I think both of
4 those are such good reasons, but this is what I've
5 come down to after a long time and a lot of thought.
6 When trials are anticipated to be of relatively short
7 duration, I ask the jurors to just trust their memory,
8 pay attention and not take notes. When they're going to
9 be of longer duration, we have notepads, paper and pens
10 and pencils and we give those to jurors so they can take
11 notes. Now I'm gonna ask you not to take notes.

12 Now I've commented on the anticipated duration of
13 this matter, but I want you to understand that it is of
14 the utmost -- it is of the utmost importance to these
15 parties and to our system. The only reason that I made
16 any reference was I just didn't want you to be concerned
17 about my instruction not to take notes and I want you to
18 understand why.

19 Ladies and gentlemen, please draw close as we listen
20 to the opening statements.

21 Ms. Shaw.

22 MS. SHAW: Thank you, Your Honor. May it please
23 the Court?

24 THE COURT: Yes, ma'am.

25 MS. SHAW: Good morning, ladies and gentlemen. The

1 much anticipated beginning of the trial has started and
2 I've got say Judge Goodstein stole my fire. Usually I
3 go into a full discussion of stuff, but I'm gonna keep
4 it relatively short today because as she said this is
5 gonna be a relatively short trial. Hopefully we will
6 not be proceeding past tomorrow morning.

7 So anyway, I will introduce myself again. My name
8 is Suzanne Shaw. I am an assistant attorney general
9 from Columbia. I am one of two attorneys in the sexually
10 violent predator unit at our office and I have been
11 tasked with trying this case to you people.

12 So why are we here? The State has filed a petition
13 pursuant to the Sexually Violent Predator Act alleging
14 that Mr. Fabian is a sexually violent predator as defined
15 by our statute, and as Judge Goodstein just told you,
16 he has to have three elements and I have to prove those
17 three elements to you beyond a reasonable doubt, and I
18 really welcome that burden and I want to explain to you
19 why.

20 Because Mr. Fabian, while a convicted sex offender,
21 he is still a U.S. citizen. He has maxed out his
22 sentence. He has served his debt to society for the
23 crimes that he has committed and he is entitled to be a
24 free man on probation at this point.

25 We are requesting, the State of South Carolina,

1 that you civilly commit him for an indeterminate period
2 in a secure facility so that he can receive long-term
3 control, care and treatment pursuant to this act.

4 Now I'm gonna back you up just a moment because
5 the Sexually Violent Predator Act, you'll hear us refer
6 to it as the SVPA, this was a statute enacted in 1998
7 and it is designed to identify a very, very small and
8 extraordinarily dangerous subset of sex offender who
9 not only has committed a qualifying offense, which are
10 statutorily defined, he also has to have what's called
11 a mental abnormality or personality disorder that makes
12 it likely that he will re-offend, and that's your third
13 element. You must consider whether you think at the
14 end of the day and under this burden another definition
15 of meeting it is that you must be firmly convinced
16 that Mr. Fabian meets criteria before you commit him.

17 So what are mental abnormalities and personality
18 disorders? Well, they are what they appear to be. A
19 personality disorder is a way of thinking and interacting
20 with the world. A mental abnormality, perhaps a
21 paraphilia, perhaps pedophilia, perhaps something else.
22 They are statutorily -- well, I'm sorry, they are defined
23 in the DSM-5 and you will be hearing testimony today
24 from Dr. Marie Gehle, of the Department of Mental Health,
25 who conducted a psychosexual evaluation of Mr. Fabian.

1 She will be testifying concerning what she believes are
2 his relevant diagnoses, why she thinks that he is likely
3 to re-offend if he is not confined, and I ask that you
4 listen to her very carefully.

5 She reviewed a variety of records, she conducted
6 an extensive clinical interview and she also scored
7 various actuarial tools, as well as do a risk assessment,
8 so it's a very thorough evaluation. And her testimony
9 will be relatively short, so hopefully a couple of hours
10 and you'll have the picture.

11 So getting back to why it's so important that we
12 have this burden of proof, which is actually a criminal
13 standard even though it's a civil case, he's a U.S.
14 citizen. He has the right to be free at this point and,
15 like I said, we are asking for a significant deprivation
16 of his liberty so the public can be protected and so that
17 he can get the treatment that he needs.

18 And I want to emphasize this to you because you're
19 gonna hear some very hard facts, you're gonna hear some
20 very unpleasant stories and things that Mr. Fabian has
21 done, and you probably won't like him very much, but just
22 the fact that you may not like him cannot drive your
23 judgment. We are not here to punish Mr. Fabian. This
24 is not a punitive scheme. This is not a punitive
25 statute. He's done. He's served his time.

1 So I ask you to very carefully and thoroughly
2 consider the evidence you're going to hear and I ask
3 you to render a verdict of, number one, that Mr. Fabian
4 does, in fact, suffer from a mental abnormality or
5 personality disorder and, two, that he is likely to
6 re-offend if he is not confined for long-term control,
7 care and treatment.

8 Thank you.

9 THE COURT: Thank you.

10 Mr. Falk.

11 MR. FALK: May it please the Court?

12 THE COURT: Absolutely. Thank you.

13 MR. FALK: Hi, I'm Jim Falk. I'm a lawyer from
14 Charleston. I'm representing Mr. Fabian in this case.
15 I'm gonna have a lot more to say about this case at the
16 end. You know, it's gonna be a quick trial, but the one
17 thing I want you to keep in mind while we go sort of
18 speedily along through this trial is that you-all have
19 a tremendous amount of power today and you may be making
20 one of the most impactful decisions at the end of this
21 trial because your decision is gonna determine whether
22 or not Mr. Fabian goes home, goes back on probation or
23 whether or not he is confined in a facility. And a term
24 that was used was "indeterminant", and I think it's fair
25 to say that if you go -- if you go for something that's

1 an indeterminant period of time, what that means is when
2 you are put into the facility on that day you do not
3 know when you're gonna get out of the facility.

4 You know, I'm sure everybody knows that most people
5 when they, you know -- that they've heard about, people
6 who have gone to a prison or they get a sentence from
7 a --

8 MS. SHAW: Objection, Your Honor. Sidebar.

9 THE COURT: Okay.

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

11 MR. FALK: All I'm saying is that this is gonna be
12 a situation where that if he gets committed he's gonna
13 go some place and he's gonna not know when he's gonna
14 get out on the day that he goes in.

15 And the other thing I want you to keep in mind, and
16 this is really important, is the fact that the State's
17 burden today is to prove whether or not he is -- he meets
18 the definition of a sexually violent predator today.

19 Now I expect that the State's gonna put in a lot of
20 information about the past and some of this information
21 goes back almost thirty years in the past, but the issue
22 for you-all is gonna be whether or not today he meets
23 the definition of a sexually violent predator. So that
24 when you're, you know, listening to the testimony and
25 you hear stuff that is, you know, taking place thirty

1 years ago, whereas if you hear about something that is
2 something more current, that's probably more relevant
3 to your decision, I just want you to keep that in mind
4 is that what you're looking for is whether or not he
5 meets the definition today of a sexually violent predator,
6 not whether or not he met it thirty years ago.

7 Again, this is an important decision. I want
8 you-all to pay attention. And, you know, when we were
9 picking this jury, we asked a lot of questions at the
10 beginning and, you know, some people came up and said I
11 just don't think I can be fair and then those people are
12 not sitting with you twelve. So you-all are the ones
13 that we've agreed that -- have said that they can be
14 fair, and I'm just asking you-all to stick to that,
15 stick to your oath, and be fair. Don't make a decision
16 on this case until the end of the case once you've heard
17 all of the evidence.

18 Thank you.

19 THE COURT: Thank you.

20 Yes, ma'am. On behalf of the State, please call
21 your first witness.

22 MS. SHAW: Yes, ma'am.

23 Your Honor, the State calls Dr. Marie Gehle of the
24 Department of Mental Health.

25 THE WITNESS: Can you-all hear me? I'm actually

1 pretty soft-spoken, so I'm trying to keep my voice up.

2 If you can't hear me, please let the judge know.

3 THE CLERK: If you can raise your right hand and
4 state your name for the record.

5 THE WITNESS: Marie Gehle, G-E-H-L-E.

6 (Whereupon, Marie Gehle was duly sworn by the Clerk
7 of Court.)

8 THE COURT: Your witness.

9 MS. SHAW: Thank you, Your Honor.

10 MARIE GEHLE,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. SHAW:

14 Q. Good morning, Dr. Gehle.

15 A. Good morning.

16 Q. How are you doing today?

17 A. Excuse me?

18 Q. How are you doing today?

19 A. I'm doing okay.

20 MS. SHAW: So, Your Honor, I would first like to
21 voir dire the witness.

22 THE COURT: I'm sorry?

23 MS. SHAW: Your Honor, I'd first like to voir dire
24 the witness as to her qualifications.

25 THE COURT: Sure.

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VOIR DIRE EXAMINATION

BY MS. SHAW:

Q. All right. So, Dr. Gehle, please spell your last name for the record?

A. It's G-E-H-L-E.

Q. Okay. And by whom are you employed and in what capacity?

A. I'm employed by the South Carolina Department of Mental Health. I work in the forensic evaluation service there and I'm a -- I do sexually violent predator evaluations for commitment, what we call pre-commitment evaluations, there.

Q. Okay. Thank you. And have you ever been employed by any other agencies or private institutions prior to your employment with DMH?

A. Sure. Yeah, I worked a number of jobs, but as a licensed psychologist I've worked at the Department of Mental Health and I do some private practice on the side.

Q. Okay. And how long have you been with DMH?

A. For a little over twelve years, going on thirteen years.

Q. Okay. And for the majority of that time, have pre-commitment evaluations been the majority of your work?

A. Yes, for at least the last nine years.

Q. Okay. Now approximately how many of them have you

1 done?

2 A. I've completed about 225 or so pre-commitment
3 evaluations.

4 Q. Okay. And approximately just how many do you do per
5 year? What's that average?

6 A. It averages to twenty to twenty-five.

7 Q. Okay. So in order to be employed to do your job,
8 do you have to have certain background, education and
9 experience?

10 A. Typically people who do my job are licensed mental
11 health professionals, typically a psychiatrist or a
12 psychologist.

13 Q. Okay. And that requires an undergraduate and
14 graduate degree, correct?

15 A. Yes. To be a psychologist, you have a doctorate in
16 psychology and then your license, which you go through a
17 process. It depends on the state what the process is to
18 become licensed. And psychiatrists, they go to medical
19 school and then train specifically in psychiatry.

20 Q. Okay. So where did you do your undergraduate work and
21 what degree did you obtain?

22 A. I went to two undergraduate schools. I went to
23 Wright State University and then I graduated from Ohio
24 Northern University in Ada, Ohio, with a BA, a bachelor
25 of arts, in psychology.

1 Q. Okay. And what about your graduate work?

2 A. I went to Xavier University in Cincinnati, Ohio. I
3 got a master of arts in clinical psychology and a doctorate
4 in clinical psychology.

5 Q. And did you pursue any further specialized training
6 after you obtained your doctorate?

7 A. Well, I did a predoctoral internship, which is
8 required for the -- to get your doctorate and then I did
9 a postdoctoral fellowship in forensic psychology and then
10 became a licensed psychologist.

11 Q. Okay. And you're licensed in the state of South
12 Carolina?

13 A. Yes.

14 Q. And are you licensed in any other state?

15 A. I'm also licensed to practice in Georgia.

16 Q. Okay. When did you get licensed in South Carolina?

17 A. 2010.

18 Q. Okay. And so since you were licensed in 2010, you've
19 been continuously performing sex offender evaluations?

20 A. Yes.

21 Q. Okay. And do you currently participate in any
22 studies, publications or other peer-reviewed articles or
23 books that you're working on?

24 A. Do I write those? Is that what you're asking?

25 Q. No, are you participating in any sort of scholarly

1 studies at this point?

2 A. I'm not exactly sure what you mean by participating,
3 but every year I work with the -- with the forensic
4 psychiatry fellowship at the University of South Carolina
5 Medical School and I usually write an article with them.
6 We get assigned a legal case and we write a summary and
7 it's published in a journal that is, I guess, marketed
8 towards forensic psychiatrists, so it's something that --
9 it's a journal that they typically read, so I publish
10 usually one or two of those every year most years, the
11 last probably six or seven years.

12 Q. Okay. And have you ever been a presenter at a
13 professional development seminar or symposium?

14 A. Yes, I've presented in the past.

15 Q. Okay. Are you currently a member of any professional
16 organizations?

17 A. I'm a member of the American Psychology and Law
18 Society and I'm a member of the Sex Offender Civil
19 Commitment Program Network. It's a group of professionals
20 who deal with sexually violent predator programs.

21 Q. Okay. And in the course of your duties with DMH, you
22 teach and oversee fellows, correct?

23 A. Yes.

24 Q. Okay. Now in terms of forensics, can you just
25 describe your specific education?

1 A. In terms of forensics?

2 Q. Yeah, in terms of your forensic background, just I
3 need to know your specific education and additional courses
4 you've taken and taught.

5 A. Well, I'm not exactly sure how to answer your question
6 the way that you're asking it. I have a doctorate in
7 psychology. I did specialized training in forensics. I
8 took one forensic psychology class in graduate school. It
9 was the only one offered that was at my graduate school.

10 Q. Okay.

11 MS. SHAW: Your Honor, at this point I would like
12 to offer Dr. Gehle as an expert in clinical forensic
13 psychology, specifically as an expert in sex offender
14 evaluations.

15 THE COURT: Is there any voir dire?

16 MR. FALK: Without objection.

17 THE COURT: Very well.

18 Let me just explain to the jury.

19 Ladies and gentlemen, ordinarily under our rules
20 witnesses are not allowed to testify regarding their
21 opinions or the reasons for those opinions. There is
22 an exception and that is when by virtue of someone's
23 knowledge or training or experience or education they
24 have become an expert in some field, typically it's
25 a field of science, it could be a field of art, and

1 when so determined to be an expert those witnesses are
2 allowed to testify regarding their opinions and the
3 reasons for those opinions within that expertise.

4 Now, ladies and gentlemen, I will give you some
5 further instruction about expert testimony when I give
6 you the concluding instruction, but for purposes of --
7 of this moment I would tell you that experts, their
8 testimony is to be evaluated as you would evaluate any
9 other witness's testimony and are not to control your
10 judgment by virtue of the fact that a witness is someone
11 who has been deemed to be an expert.

12 All right. You may proceed.

13 MS. SHAW: Thank you, Your Honor.

14 CONTINUED DIRECT EXAMINATION

15 BY MS. SHAW:

16 Q. So, Dr. Gehle, are you familiar with Tracy Allan
17 Fabian?

18 A. Yes.

19 Q. Is he present in the courtroom today?

20 A. Yes, it is.

21 Q. Can you please point him out?

22 A. He's over there. Or he just stood up. Thank you.

23 MS. SHAW: And, Your Honor, let the record reflect
24 that the witness has accurately identified the respondent.

25 THE COURT: Very well.

1 MS. SHAW: Thank you, Your Honor.

2 BY MS. SHAW:

3 Q. So you conducted a pre-commitment evaluation of
4 Mr. Fabian, correct?

5 A. That's correct.

6 Q. Okay. And so describe what you do when you're
7 requested to do one of these evaluations. Describe your
8 process.

9 A. Well, when I receive an order to do an evaluation, I
10 receive a file of information and I'll go through that
11 information and look for any missing records and organize
12 it and read it, read thoroughly through it, and I will then
13 schedule an interview with the person. I conduct a pretty
14 standard interview, ask them all about their background,
15 about, you know, their childhood history, adolescent
16 history, juvenile history, medical history, mental health,
17 substance use, their sexual history. I will go through
18 their legal history, get an account of the incidents that
19 are in their criminal history from them. We'll go through
20 any treatment that they've had, we'll talk about what their
21 plans are for the future, so that's one element of it is
22 the interview.

23 I'll take that information and combine that with the
24 records and I'll write a report that will summarize my
25 opinions and give all the information that I considered in

1 coming to an opinion, but what I'm really asked to do is to
2 give an opinion to the Court as to whether the person has a
3 mental abnormality or a personality disorder that makes
4 them likely to commit acts of sexual violence. So I'm
5 being asked if he has a mental health problem that
6 predisposes him to commit sexually violent offenses and
7 whether he's likely to do it again if he was released into
8 the community.

9 Q. Thank you. So in addition to the clinical interview,
10 the records review and formulating your summary in a
11 report, do you also do a risk assessment?

12 A. Yes, that's integrated into that. So I -- I score
13 two actuarial risk assessments. Those are things that are
14 commonly used in these types of evaluations. I also look
15 through a list of risk factors that have been found in
16 multiple research studies to be related to increased
17 recidivism. Recidivism just means that they'd go out and
18 do it again.

19 So I look at those two elements; the actuarial risk
20 assessment and then what we call dynamic risk factors. So
21 the dynamic risk factors are things that can be changed and
22 things that can be important targets in treatment and the
23 actuarial risk assessment are things that are typically
24 static, meaning they're not changeable; once they've
25 happened they're gonna always be something that contributes

1 to their risk to re-offend.

2 Q. Okay. So describe the information you were provided
3 with in this case in anticipation or in advance of meeting
4 with Mr. Fabian.

5 A. Well, the primary records I received were records
6 like from law enforcement, so investigative records and
7 his criminal history records, that official report, and
8 things like, you know, witness statements and warrants,
9 indictments, sentencing sheets, so things that were related
10 to the -- to the charges that he had.

11 Then I requested some additional records and some of
12 those I received like some school records and things like
13 that, but primarily it was legal records.

14 Q. Okay. And --

15 MS. SHAW: Your Honor, may I approach?

16 THE COURT: (Nods head.)

17 MS. SHAW: Thank you. May I just retrieve those
18 records?

19 THE COURT: Sure.

20 BY MS. SHAW:

21 Q. Dr. Gehle, I'm gonna hand you records that have been
22 premarked as P-1 through 6. I'm gonna ask you to look
23 through them and identify what they are.

24 A. Do you want me to identify them now?

25 Q. Yes. If you could please just tell the Court and the

1 jury what they are.

2 A. Okay. So Exhibit 1 is a sentence sheet for a charge
3 of criminal sexual conduct in the first degree. It's dated
4 February 2, 1994. It's stapled to a true billed grand jury
5 indictment for criminal sexual conduct with a minor in the
6 first degree. There is an arrest warrant for criminal
7 sexual conduct with a minor and an affidavit for criminal
8 sexual conduct with a minor, and that's dated July 27,
9 1993. These are all about a charge that happened in 1993.

10 Exhibit 2 is a sentence sheet for kidnapping, dated
11 February 2, 1994. It's a true billed grand jury indictment
12 for kidnapping, an arrest warrant and affidavit for
13 kidnapping, dated July 25, 1993.

14 Exhibit 3 is a sentence sheet for assault and
15 battery in the first degree dated September 16, 2015. An
16 indictment --

17 MR. FALK: Your Honor, may I? I object. May I be
18 heard?

19 My objection's on the relevance of this next page
20 that she's gonna refer to.

21 THE COURT: Very well. Thank you. Overruled.

22 THE WITNESS: It's an indictment for criminal
23 sexual conduct with a minor victim under eleven years of
24 age, first degree. It looks like it's a second copy of
25 that same indictment with a guilty plea.

1 MR. FALK: I guess I renew my objection. This is --
2 are you on Exhibit 4?

3 MS. SHAW: No, she's on 3.

4 MR. FALK: Oh, I apologize.

5 THE WITNESS: But there's two copies of the
6 indictment there and there's a --

7 MR. FALK: Then I renew my objection if this is a
8 separate indictment.

9 THE COURT: I don't know that it is a separate
10 indictment. If it is a duplication, it will be removed.

11 MR. FALK: Thank you.

12 THE COURT: There should be only one indictment
13 that would -- that would accompany if it is a duplication
14 of the indictment.

15 Is it a duplication?

16 MS. SHAW: I don't believe so, Your Honor, because
17 that has the indication of a guilty plea on it, whereas
18 the other indictment copy does not. It's not the same
19 document. I believe it's the third or fourth page.

20 THE WITNESS: I was looking at the number being the
21 same.

22 THE COURT: Got it. Right. Yes.

23 MS. SHAW: Thank you.

24 THE COURT: Yes, it's overruled.

25 MR. FALK: Thank you, Your Honor.

1 THE COURT: Overruled. Thank you.

2 THE WITNESS: Okay. So it's -- it's two copies
3 of the same indictment. One of them has a signature
4 from Mr. Fabian that he was pleading guilty to assault
5 and battery in the first degree.

6 BY MS. SHAW:

7 Q. And Number 4?

8 A. Number 4, is a sentence sheet for assault and battery
9 in the first degree, dated September 16, 2015. An
10 indictment for criminal sexual conduct --

11 MR. FALK: I renew my objection.

12 THE COURT: Overruled.

13 THE WITNESS: -- an indictment for criminal
14 sexual conduct with a minor victim under eleven years
15 of age, first degree. And there are two copies of that
16 indictment. One of the copies has a guilty plea for
17 assault and battery in the first degree and a signature
18 from Mr. Fabian.

19 BY MS. SHAW:

20 Q. Thank you. And --

21 A. Number 5?

22 Q. -- Number 5, please.

23 A. Number 5 is a sentence sheet for criminal sexual
24 conduct with a minor in the third degree. It's dated
25 March 14, 2019, and it's an indictment for criminal sexual

1 conduct with a minor in the third degree.

2 Q. And Number 6?

3 A. Number 6 is a general sessions tracking sheet for
4 indictment -- well, I guess the -- the warrant number is
5 up here more clearly, but for Warrant 2016A1810300936. It
6 shows that the charge was dismissed or nol-prossed because
7 he pled to another charge. There is a true billed grand
8 jury indictment for criminal sexual conduct with a minor
9 victim under eleven years of age in the first degree.

10 Q. What was the date of that indictment?

11 A. The indictment is August 31, 2017.

12 Q. Thank you. Go ahead.

13 A. It looks like there's two copies of the indictment.
14 I'm not sure exactly what's different about them.

15 Q. Okay. These documents, have you seen them before?
16 The sentencing sheets specifically.

17 A. Yes, I've seen these. Like copies of these.

18 Q. Okay. And were they considered in the formulation of
19 your opinion?

20 A. Yes.

21 Q. Okay.

22 MS. SHAW: Your Honor, at this point in time I
23 would move P-1 through 6 into evidence.

24 MR. FALK: I object, Your Honor. Can I be heard
25 now or --

1 THE COURT: Consistent with?

2 MR. FALK: Well, there's some other issues provided
3 they're not gonna get published to the jury right now.

4 THE COURT: Okay.

5 All right. Let me see you at the sidebar.

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

7 THE COURT: Overruled.

8 BY MS. SHAW:

9 Q. Dr. Gehle, I just have one or two more questions for
10 you about those documents. So, Dr. Gehle, you said that
11 you relied on those in forming your opinion?

12 A. Yes.

13 Q. Okay. And are those the type of documents that are
14 typically obtained during the course of one of these
15 evaluations?

16 A. Yes.

17 Q. And is that information that you considered in those
18 documents of the type that is typically relied upon by
19 experts who conduct evaluations like you do?

20 A. Yes.

21 MS. SHAW: Your Honor, I believe that would satisfy
22 the foundation.

23 THE COURT: Very well.

24 MS. SHAW: Thank you. So are the documents admitted
25 or are we reserving --

1 THE COURT: Oh, they are.

2 MS. SHAW: Thank you.

3 (Plaintiff's Exhibit Number 1 through 6, sentencing
4 sheets and indictments, were admitted into evidence.)

5 BY MS. SHAW:

6 Q. So those documents -- well, actually let me back up.
7 You were able to review that information before you met
8 with Mr. Fabian, right?

9 A. Correct.

10 Q. Okay. And were you able to review the other
11 documentary information before you met with him?

12 A. Yes.

13 Q. Okay. And how many times did you actually meet with
14 Mr. Fabian?

15 A. I met with him five times and did the interview on
16 four dates. The first date I explained to him the process
17 of the evaluation and he asked to speak to his attorney.
18 We tried to call his attorney, we couldn't get ahold of
19 him that day, so we -- so we stopped for that day. So the
20 first one was more of a meeting. I didn't really take
21 information from him, I just gave him information, and he
22 requested to speak with his attorney like he's entitled to
23 do. So then I met with him in person on one day. We were
24 not able to finish the entire interview that day and then I
25 met with him actually on a telehealth platform. He was at,

1 I think, the prison, I was at my office, and that was at
2 the request of -- he might have been at the jail at that
3 point. I think he was at the jail. So the jail had
4 requested that -- that we meet that way because the jail's
5 been having lots of problems with transportation and --

6 Q. And COVID protocols?

7 A. Yes, things like that. So I met with him on three
8 separate occasions. Those had to be short interviews just
9 because they didn't have long periods of time when the
10 equipment was accessible because they do court hearings
11 and things like that with the equipment, so I could only
12 schedule it in like two-hour blocks. I interviewed him
13 for over ten and a half hours.

14 Q. Okay. And is that -- is a ten and a half hour
15 interview typical for an evaluation like this?

16 A. I think it was actually the longest interview I've
17 ever done. I've done some pretty long interviews, but this
18 was the longest or one of the longest. Usually they're
19 around six or seven hours, so they're very long interviews,
20 they're very extensive, but this was very long, and I don't
21 have to -- usually have to meet with them on that many
22 occasions, but just that was the circumstances of the
23 process.

24 Q. And can you just tell the jury what was the timeframe
25 where you met with Mr. Fabian just so we have a rough idea

1 of when you were evaluating him?

2 A. Yeah. So I met with him for the first time August 31,
3 2021, I met with him for the second time on October 28,
4 2021, and then the third, fourth and fifth meetings were
5 November 18th, November 19th, and November 23, 2021.

6 Q. Okay. Now has -- to the best of your knowledge, has
7 Mr. Fabian been convicted of any sexually violent offenses?

8 A. Yes.

9 Q. Okay. And what are those?

10 A. He's been convicted of two sexually violent offenses;
11 that is, one criminal sexual conduct with a minor in the
12 first degree and one criminal sexual conduct with a minor
13 in the third degree.

14 Q. Okay. And does he have any other sexually related
15 convictions that may not be actually as defined sexually
16 violent offenses?

17 MR. FALK: Objection, Your Honor.

18 THE COURT: Overruled.

19 THE WITNESS: He was convicted of a kidnapping
20 along with the sexually violent offense, so he was
21 convicted of kidnapping along with criminal sexual
22 conduct with a minor in the third degree related to
23 a 1993 incident. That was the same victim, it was the
24 same series of -- of behavior, so I consider those to be,
25 you know, a sexually violent offense and a sexually

1 related offense. He was also charged with criminal
2 sexual conduct that was pled down to assault and battery
3 in the first degree.

4 BY MS. SHAW:

5 Q. Okay. Can you just clarify about the criminal sexual
6 conduct that was pled down? What was the degree of that
7 one or were there any specifiers?

8 A. One second here. So he was charged with two counts of
9 criminal sexual conduct with a minor in the first degree
10 and he pleaded to two counts of assault and battery in the
11 first degree.

12 Q. Okay. And but the allegations in those offenses were
13 sexual in nature?

14 A. They were and so I considered them sexual offenses,
15 although they're not classified as sexually violent
16 offenses.

17 Q. Okay. Thank you. So let's go through Mr. Fabian's
18 criminal history beginning in 1993. That's when he
19 incurred his first CSC first and kidnapping charge. Do
20 you recall those offenses?

21 A. Yes.

22 Q. Okay. Can you tell the jury about what the nature of
23 them was, what happened? According to your interview and
24 the records.

25 A. Yes. So the -- the victim was an eight-year-old

1 female, somebody that Mr. Fabian knew, they knew each
2 other. He was friends with her family and he knew her
3 because she had lived at his house with family previously.
4 He went to her house where she was just visiting.

5 MR. FALK: Objection, Your Honor. Hearsay and
6 relevance.

7 THE COURT: Yes. Overruled.

8 MS. SHAW: Your Honor, just for the record, there
9 are also admissions that Dr. Gehle will discuss concerning
10 this particular offense, so the hearsay objection will be
11 overruled by any admissions Mr. Fabian's made.

12 THE COURT: All right. You may proceed.

13 MS. SHAW: Thank you.

14 BY MS. SHAW:

15 Q. Go ahead.

16 A. So he went to her -- to the house where she was
17 staying for the weekend, she had moved out of town, she
18 was back in town to visit some family, she was there with
19 a -- I believe her uncle. He went over to the house on
20 Sunday morning, 9:00. Everybody was sleeping and he went
21 in, picked her up and took her to his house and sexually
22 assaulted her there.

23 Q. Okay. And you spoke to him about this offense?

24 A. Yes.

25 Q. Okay. And what did he admit to you regarding this

1 particular offense and what he actually did to this child?

2 A. Well, what he said to me is that he -- he believed
3 that she was gonna be -- that she was supposed to be
4 leaving on Saturday or Sunday morning. He went over there
5 on Sunday morning, she was there, everybody was still
6 asleep, and so he thought that she was being neglected,
7 she was dirty, she looked unkempt, and he decided, you
8 know, she needed bathed and stuff like that, so he took
9 her to his house. He said he left a note and he spoke to
10 the woman of the house, who was his friend, and --

11 Q. Not to cut you short, but is there any indication in
12 the records that he actually did that?

13 A. Not that I saw, no.

14 Q. Okay. Thank you. Please continue.

15 A. Okay. He said that when he got her to his house he
16 put her in the shower and she just stood there, so he
17 thought she didn't know how to do it and so he proceeded
18 to wash her body and that he wanted to wash her clothes,
19 but he needed the -- the hot water, which had been depleted
20 from the shower, he needed it to, you know, replenish
21 before he could wash her clothes and that, you know, he
22 went to take a nap and she crawled into bed with him and
23 started kissing him and that he performed oral sex on her,
24 digitally penetrated her anus and simulated intercourse,
25 meaning he put his penis between her legs, didn't

1 penetrate, but proceeded to move until he ejaculated.

2 That's what his account of it was.

3 Q. And to the --

4 A. And said that she initiated it. He was very clear
5 about that. He said that she said things like this is fun.

6 MR. FALK: Objection, Your Honor. This is hearsay
7 from --

8 THE COURT: Sustained. Sustained.

9 BY MS. SHAW:

10 Q. So, Dr. Gehle, let's -- let's focus on what the
11 records indicated what Mr. Fabian indicated about this
12 particular offense. So Mr. Fabian in the interview
13 actually blames the child?

14 A. Yes.

15 Q. Okay. What does that tell you about his attitude
16 toward this particular offense and -- and his general mode
17 of thinking?

18 A. Well, when I see somebody who blames a child,
19 especially eight years old, somebody whose prepubescent,
20 so she's not sexually developed, typically kids of that
21 age are not highly sexually aroused. They can be sexually
22 aroused, but it's not something that's on their mind.
23 It's just not the way that they're thinking yet. When
24 they -- when their hormones come and they start puberty,
25 then sex becomes on their mind, like something that would

1 be more typical. So when I see somebody who is saying
2 an eight-year-old initiated it and enjoyed it, I think
3 of somebody who's sexualizing children and they're
4 misinterpreting things that kids are doing and they're
5 fantasizing about children and fantasizing about how
6 children typically are. It's possible that a child of
7 that age could initiate sex with an adult and could enjoy
8 it, it's possible, but very highly unlikely, so I look at
9 it as it's really related to a dynamic risk factor about
10 sexualizing children.

11 Q. Okay. Thank you. And can you tell the jury what
12 type of sentence Mr. Fabian received for those offenses,
13 the kidnapping, as well as the CSC first?

14 A. Yes, so he was sentenced to thirty years of prison.
15 At the same time he was also sentenced to some probation
16 violations that were -- that he was sentenced to
17 consecutively. Those were shorter duration. Like just
18 three years, one year and six months.

19 Q. Okay. So he had been on probation at the time he was
20 charged with offending this child?

21 A. Yes.

22 Q. Okay. And is that information in any way relevant to
23 your own inquiry about whether he was able to complete
24 probation successfully or not?

25 A. Well, that can be related to risk. If somebody

1 violates probation, it -- it makes them more likely to
2 re-offend sexually. That's one of the risk factors that
3 have been found in the research, so that's a -- of concern.
4 He was on probation for charges that I wouldn't consider
5 very serious, so the level of probation, like the level of
6 monitoring I would say would be -- it probably was not that
7 significant, although I don't have evidence of that. I
8 don't know exactly what it was. That's just anecdotal.

9 Q. Okay. But he was still violated?

10 A. That's correct.

11 Q. And you considered that?

12 A. Yes.

13 Q. Okay. Now let's fast-forward -- well, actually do
14 you recall when Mr. Fabian was actually released from
15 prison for that first sex offense?

16 A. He was released 2010.

17 Q. Okay. Great. Now let's fast-forward to 2014. Can
18 you describe the allegations in that offense pattern? I'll
19 represent to you that those are the assault and battery
20 convictions. If you need to refer to your records, please
21 do so.

22 THE COURT: Volume.

23 MS. SHAW: I'm sorry.

24 BY MS. SHAW:

25 Q. So can you tell the jury what the nature of those

1 allegations is and what happened in that offense?

2 MR. FALK: Just preserving my objection, Your Honor.

3 THE COURT: Thank you.

4 MR. FALK: This is hearsay and I think it's
5 relevance. 403.

6 THE COURT: Thank you. Overruled.

7 You may proceed.

8 BY MS. SHAW:

9 Q. Okay.

10 A. So those offenses involved a five-year-old girl and
11 a six-year-old girl. He sexually offended against the
12 five-year-old girl on one occasion and the six-year-old
13 girl on at least two occasions. They were daughters of
14 friends of his. One of the -- of the incidents occurred
15 in the back seat of his SUV with his girlfriend at the time
16 and those two girls and he removed the six-year-old girl's
17 pants and underwear and digitally penetrated her vagina
18 while his girlfriend watched and touched the five-year-old
19 girl. On another occasion, he had the six-year-old girl
20 lie between him and his girlfriend in bed. They both
21 fondled her and digitally penetrated her vagina and then
22 they engaged in sexual activities with each other and
23 he masterbated to ejaculation and rubbed -- rubbed the
24 ejaculate on the six-year-old's legs.

25 Q. Okay. Now he was convicted for that offense, correct?

1 A. He was convicted for two assault and batteries in the
2 first degree.

3 Q. Okay. And on that sentencing sheet, does that
4 indicate there was a negotiated plea?

5 A. It does say that it was a negotiated sentence.

6 Q. Okay. And what was the sentence?

7 A. He was sentenced to time served and he had already
8 spent -- he was given credit for 551 days of time he had
9 served and he was sentenced to time served.

10 Q. Okay. And so when was he released from jail at that
11 point?

12 A. I would assume that that would be at the time of
13 sentencing, which was September 16, 2015.

14 Q. Okay. Now let's fast-forward a year and a half to
15 2017 when Mr. Fabian was yet again charged with criminal
16 sexual conduct. Can you describe the offenses in that
17 situation? And actually the information contained in the
18 police reports indicating what Mr. Fabian had done in the
19 assault and battery conviction, that was information you
20 reasonably relied upon?

21 A. Yes.

22 Q. Okay. And that's standard for individuals who conduct
23 sex offender evaluations to rely on that?

24 A. Yes.

25 Q. So let's go to 2017. What was Mr. Fabian charged with

1 in 2017?

2 A. He was charged with one count of criminal sexual
3 conduct with a minor in the first degree and one count of
4 criminal sexual conduct with a minor in the third degree.

5 Q. Okay. And can you talk about the specifics of those
6 offenses, please?

7 MR. FALK: I renew my objections.

8 THE COURT: Yes. Overruled.

9 THE WITNESS: So these offenses in terms of
10 the charges involved two individuals; one was an
11 eight-year-old boy whom he knew and one was a
12 five-year-old boy who he knew. They were the -- the
13 sons of a woman that he had a friendship and a sexual
14 relationship and he was -- like he met her through her
15 cousin who he was dating previously.

16 So he pleaded to a crime against the eight-year-old
17 boy and he fondled that boy's penis, and then the charge
18 involving oral sex on the five-year-old boy, that was
19 dismissed.

20 BY MS. SHAW:

21 Q. Okay. And specifically the charge with the younger
22 child, is there anything important about that one in terms
23 of the timeline of Mr. Fabian's release from jail to when
24 he offended that child or was reported to have offended
25 him?

1 A. That happened in September 2015 per the -- per the
2 victim's disclosure in the records.

3 Q. Okay. So approximately less than thirty days after
4 he was released?

5 A. Well, his conviction was on September 16, 2015, and
6 this is supposed to happen in September of 2015, so it had
7 to be in the two weeks after his release.

8 Q. Is that significant to your evaluation in any way that
9 he's offending and getting caught that quickly after being
10 released on a prior sex charge?

11 A. Yeah, that -- that's showing impulsivity, a lack of
12 control. He's not able to do what's in his best interest.
13 He just got out of jail and got a time served on a -- you
14 know, what was originally charged as two sex offenses. He
15 could have, you know, potentially went to prison for a long
16 time. He gets a time served sentence and he's out there,
17 you know, doing it again very quickly.

18 Q. Okay. And so sometimes you do collateral interviews
19 in these types of cases, correct?

20 A. Sometimes.

21 Q. Okay. With the available information and with the
22 amount of time you spent with Mr. Fabian, did you consider
23 any necessary in this particular instance?

24 A. Collateral interviews are something that I don't do
25 very often because the people that I would often be talking

1 to would be victims and it's been my policy that I will
2 talk to a victim if they want to talk to me, but I don't go
3 out of my way to talk to them, so that's -- I don't -- this
4 is often like many years later. I don't want to, you know,
5 re-traumatize anybody. I don't want to bring it up if
6 they're not wanting to talk about it. I know that many
7 victims are notified about these proceedings, and the
8 attorney general's office, the victims advocates knows that
9 if they provide me the information and they want to talk to
10 me, I'll talk to them, but I did not talk to any collateral
11 sources in this evaluation.

12 Q. Okay. And is that typical and standard practice for
13 professionals in your field doing this type of evaluation?

14 A. I would say so. Some people approach it a little bit
15 differently. This is how I've approached it throughout my
16 time doing these evaluations.

17 Q. Okay. And for that last set of offenses, the CSC
18 first and third against the two boys, is the fact that
19 those victims were male of any moment to you?

20 A. Yes.

21 Q. And why is that?

22 A. Because it increases recidivism to have a male victim.
23 That's just what the research shows. So in the actuarial
24 risk assessments having a male victim gets you another
25 point on the instruments.

1 Q. Okay. Now with respect to that last set of offenses,
2 was there anything else significant in terms of the ability
3 to serve Mr. Fabian with the arrest warrants after the
4 children had reported the offenses?

5 A. Yeah, I think that they had trouble locating --

6 MR. FALK: Objection. Relevance.

7 THE COURT: All right. Let me hear the question
8 again. Your voice dropped a little bit.

9 MS. SHAW: The question was is there anything else
10 significant about the sheriff's officers' ability to
11 serve Mr. Fabian with those most recent offenses? So,
12 for example, they were reported in, I believe, 2016, but
13 he was only actually served in 2017. There's a reason
14 for that, Your Honor, and it's highly relevant to the
15 risk --

16 THE COURT: And so your -- now ask your question.
17 Now that I can hear you, ask the whole question again.

18 MS. SHAW: All right.

19 BY MS. SHAW:

20 Q. Dr. Gehle, is there anything significant about the
21 time it took from when the children reported these offenses
22 in 2015 and '16 to when Mr. Fabian was actually served and
23 arrested for any of these offenses?

24 MR. FALK: And I will renew my objection on hearsay
25 and relevance.

1 THE COURT: Sure. Overruled.

2 MS. SHAW: Thank you, Your Honor.

3 BY MS. SHAW:

4 Q. Go ahead, Dr. Gehle. You can answer.

5 A. It was my understanding that they had trouble locating
6 him.

7 Q. Okay. And he was, in fact, charged with a sex
8 offender registry violation; was he not?

9 A. Yes.

10 Q. Okay. Thank you. Is that significant to your
11 inquiry?

12 A. It -- it is and it isn't. It's not something that's
13 super important to me. It doesn't necessarily load onto a
14 risk factor cleanly. It can be concerning if somebody --
15 it can be like evidence of guilt if they're hiding out, but
16 it's not something that's super important to me.

17 Q. Okay. But it is one of the things you considered?

18 A. Yes.

19 Q. Okay. Now describe Mr. Fabian's overall appearance
20 and affect when you were able to meet with him on these
21 five occasions.

22 A. Yeah, he was -- he was somebody who was difficult to
23 interview. He -- he wanted to talk a lot. Now I've seen
24 this, especially during COVID because a lot of people were
25 really locked down and not interacting much, so people --

1 the people I've evaluated since the pandemic started are --
2 are kind of different in the way -- in their demeanor than
3 people were prior to, but he wanted to take control of the
4 interview, he questioned me a lot. He didn't think I knew
5 how to do my job from comments that he made. He was trying
6 to tell me how I should consider information. He spoke a
7 lot. And I take notes on a computer just to help with
8 report writing while I'm -- and it's easier for my hand
9 because these are very long interviews, so I -- I take
10 typed notes and I ask, you know, out of courtesy if you can
11 just slow down a little bit or take some natural pauses so
12 I can catch up, but he didn't do that, so it was -- he gave
13 very overly detailed, long, tangential, meaning there was
14 lot of details in -- in his stories that were irrelevant.
15 I asked him to be concise, you know, answer the questions
16 that I was asking. He said that all of the information was
17 important.

18 No. I mean, he was telling me details like he changed
19 the battery in the car and it didn't have anything to do
20 with anything I was asking, so some of the -- some of the
21 information in the long detailed answers he gave they
22 provided some context, but they weren't really important.
23 But that's part of the reason that the interview -- that's
24 probably, you know, a good majority of the reason that the
25 interview was so long was his -- his -- his responses were

1 so lengthy.

2 Q. Okay.

3 A. He was very -- he was overly familiar. Even though
4 the evaluation process is formal, he asked me a lot of
5 personal questions. He made comments on -- that he liked
6 that I was wearing a dress on one of the interview dates,
7 he said he liked women to wear dresses and have long hair.
8 He asked me very personal questions about how I approach
9 work, about my relationships. He asked a lot of questions
10 as to whether I was friends with Ms. Shaw, whether we had
11 lunch together was one specific question that he asked, you
12 know, and I -- I addressed those like this is not relevant,
13 this is not important, these are questions that I'm not
14 gonna answer, but he felt very entitled to -- to continue
15 asking those.

16 He -- he lectured a lot. He lectured about the
17 criminal justice system, about how it actually operated.
18 He -- he just gave the impression that I didn't know how
19 to do my job and he was gonna tell me how to do my job,
20 how to consider certain information and how I should look
21 at things and how I should understand the criminal justice
22 system and just the whole legal process.

23 Q. Okay. And why is that -- the specific behavior
24 important to your diagnostic process?

25 A. Well, one of the things that I'm looking for is

1 whether the person has a personality disorder and you see
2 that in the room. A personality disorder is just the way
3 they view the world, so it colors all their responses,
4 their interactions, their attitudes, the way that they
5 explain things, where they put responsibility for things
6 that happened, and so I saw this evidence of narcissistic
7 personality disorder very clearly.

8 Q. Okay. And you have the DSM-5-TR up there?

9 A. I do.

10 Q. Okay. And can you tell me -- actually, don't tell me.
11 Tell the jury, what is that book?

12 A. So this is the Diagnostic and Statistical Manual of
13 Mental Disorders. It's the fifth edition and it's a text
14 revision. It just came out in February. It's a book that
15 is full of all of the mental disorders and personality
16 disorders that mental health professionals diagnose. It's
17 published by the American Psychiatric Association. It
18 just really -- it lists all the mental disorders and their
19 symptoms and some information research about each one. So
20 it's really like a book that you use and you reference it
21 in order to make diagnoses.

22 Q. Okay. And did you use that book and reference it in
23 making your own diagnoses?

24 A. Yes.

25 Q. Okay. So can you describe -- well, actually can you

1 please tell the jury what narcissistic personality disorder
2 is, but start first with, you know, what are the specifics
3 of personality disorder and how does it affect the way an
4 individual interacts with the world?

5 A. Okay. So the DSM-5-TR, it defines a general
6 personality disorder and so it's an enduring pattern of
7 inter-experience and behavior that deviates markedly from
8 the expectations of the individual's culture. This pattern
9 is manifested in two or more of the following areas. So
10 the first one is cognition. So the way that they perceive
11 and interpret themselves, other people and events. The
12 second one is affectivity. That's the range, intensity,
13 lability and appropriateness of emotional response. The
14 third one is interpersonal functioning. The way they
15 interact with other people. Four is impulse control.
16 That's self-explanatory. And this pattern is inflexible
17 and it's pervasive across a broad range of personal and
18 social situations. So you have to see it in -- in more
19 than one situation. That's the general thing, so it's --
20 it's something that is abnormal to the person's culture
21 and it's the way they experience things internally and it's
22 also the way that they behave, and it can be in, you know,
23 any of those four areas.

24 Q. Okay. And the other thing you're looking for in these
25 types of evaluations is a mental abnormality. Can you

1 explain to the jury what that is?

2 A. Well, a mental abnormality, that's a legal term. We
3 think of it as a mental illness, but I believe that a
4 mental abnormality is a mental illness that applies to
5 the thing that we're questioning, so a mental abnormality
6 would be a mental illness that predisposes somebody to
7 commit acts of sexual violence.

8 Q. Okay. And in the contest of a sex offender
9 evaluation, what type of mental illness are you looking
10 at specifically?

11 A. The mental illness -- mental illnesses that are
12 typically associated with sexual offending are the
13 paraphilic disorders and that is deviant sexual interests
14 over at least a six-month period of time, either fantasies
15 or behaviors.

16 Q. And that's also in the DSM?

17 A. That's correct.

18 Q. Okay. Thank you. Go ahead, please.

19 A. And it's something that they've either acted on to
20 harm another person or it causes them, you know, personal
21 distress, so they're stressed by it.

22 Q. Okay. So bearing those definitions in mind, his
23 presentation, you said that indicated narcissistic
24 personality disorder?

25 A. Yes.

1 Q. Okay. So can you describe what the criteria are for
2 narcissistic personality disorder?

3 A. Yes.

4 Q. Okay.

5 A. So it's a longstanding pattern of grandiosity, either
6 in fantasy or in the way that they behave. So grandiose
7 means that, you know, they're bigger than other people,
8 very over the top. It's a need for admiration, a lack of
9 empathy, and it begins by early adulthood, it's present in
10 a variety of contexts, and there's a number of symptoms
11 that are associated with that I can go into.

12 Q. Yes, please.

13 A. So in order to meet criteria for the disorder, you
14 have to have five out of these nine criteria. So a person
15 has a grandiose sense of self-importance. They exaggerate
16 their achievements and talents. They expect to be
17 recognized as superior without commensurate achievements.
18 Number two is they're preoccupied with fantasies of
19 unlimited success, power, brilliance, beauty or ideal love.
20 Number three, they believe that he or she is special and
21 unique and can only be understood by or should associate
22 with other special or high status people or institutions.
23 Number four is they require excessive admiration. Number
24 five is they have a sense of entitlement, so they have
25 unreasonable expectations of especially favorable treatment

1 or automatic compliance with their expectations. Number
2 six is they're interpersonally exploitative, meaning they
3 take advantage of other people to achieve whatever it is
4 that they want. Number seven is they lack empathy and
5 so they're unwilling to recognize or identify with the
6 feelings and the needs of other people. Number eight is
7 they're often envious of others or believe that others
8 are envious of him or her. And number nine is they show
9 arrogant, haughty behaviors or attitudes.

10 Q. And how many of those criteria did you observe in
11 Mr. Fabian's overt presentation with you?

12 A. I don't know if I -- if I counted them up, but I
13 believe that he had most all of them.

14 Q. Okay.

15 A. And I saw that pattern go back -- from his account,
16 back to his childhood. He said like when he was a kid
17 people always said that he acted like he was smarter than
18 everybody else. That was a problem that he had with his
19 peers. He thought he was smarter than everybody else. He
20 said that happened back then and it happens now. I saw
21 that in the interview. He told me things like, you know,
22 he was really smart, that he took advanced placement
23 classes, things like that, but he had a really low GPA
24 in school, so I -- I saw those even going back and I
25 definitely saw it in the interview, and I think that he

1 had probably most -- most of the criteria.

2 Q. Okay. So the interview itself and just the direct
3 presentation of the individual, that's not all you
4 consider, right? I mean, you consider the records as well?

5 A. Yes.

6 Q. Okay. And I was about to ask you what in the records
7 would indicate that there is support for your diagnosis in
8 Mr. Fabian's past?

9 A. So some of that was his account of things in the
10 school records, so I'm looking at his interpretation of
11 the facts. So the facts would be coming from the records
12 and then I'm looking at his interpretation of that. I
13 think that school records are -- those are sometimes the
14 only records that I can get from a person's childhood and
15 schools keep records forever, but there are other agencies
16 they have retention policies where they destroy records
17 after, you know, a certain number of years, but schools
18 they tend to keep everything forever, so that's one thing
19 where I can definitely get records. Even if the person is
20 seventy years old, I can often get school records. So for
21 him that was all that I had from his childhood and so that
22 was the one thing that I could compare, you know, some
23 facts in terms of -- in terms of that earlier behavior.

24 Q. Okay. And Mr. Fabian, in fact, reported that his
25 first arrest was at school, correct?

1 A. Yes.

2 Q. Okay. Were you able to receive any records about that
3 particular arrest or did he tell you anything about it?

4 A. He told me about that arrest, that he was, I think,
5 caught doing drugs at school.

6 Q. Okay. Anything else in his employment or personal
7 history that would give you pause or concern?

8 A. In terms of the personality disorder or just in terms
9 of risk?

10 Q. In terms of both the personality disorder and the
11 overall risk in his personal history.

12 A. I think -- there was a couple of things that would
13 give me -- that would give me pause or that I thought were
14 related to risk. First off, he was adopted as a child and
15 his parents divorced when he was twelve. He really talked
16 in the interview about life changing when his parents
17 divorced because he believed that his mother didn't want
18 to have children and that she really didn't like being a
19 mother and she was neglectful, but she had primary custody.
20 He and his sister stopped going to visit with dad because
21 they didn't like dad's new girlfriend and she treated them
22 very differently than she treated her own children, so when
23 I'm hearing interpretation of those things there was some
24 indication that -- that could have some like narcissistic
25 viewpoints in there; thinking that, you know, his -- his

1 mom was really neglectful and that she was to blame for
2 things. He said that now when he looks back, it wasn't
3 her fault, he was a difficult kid. She doing the best she
4 could. That sort of stuff.

5 Q. In fact, Mr. Fabian blamed his female companions for
6 most of his troubles; isn't that accurate?

7 A. Yes. So as we went on, probably the most -- probably
8 the most risk-relevant thing in his history was his
9 relationship history and his relationships were a mess.
10 There was lots of conflict, there was lots of overlapping
11 cheating. He did things like he went out on a double date
12 with his boss, his boss's girlfriend and another woman, and
13 he was I like my boss's girlfriend, so they just left and
14 went to her house to have sex. He did things like that
15 that just brought a lot of chaos into his life and a lot of
16 problems into his life. He was in a long-term relationship
17 with a woman and he started having sex with her cousin and
18 he didn't see a problem, and I asked him multiple ways, you
19 know, like don't you -- don't you see how that's a problem,
20 like how your girlfriend's gonna be mad about this or how
21 she could even feel betrayed by this, and he didn't see it
22 that way. He didn't think that that was anything that
23 should bother her. In contrast, if a girlfriend came home
24 with a hickey on her neck, he was really upset with her.
25 He had relationships where apparently his girlfriend's

1 sister stabbed him. He just -- he had lots of chaos. He
2 was involved in partner swapping, so having sex with -- you
3 know, swapping partners, people that he even lived in the
4 house with. Just bringing a lot of chaos, drama, a lot of
5 stress into his life, and I -- and I don't even think that
6 he saw it that way.

7 Q. Okay. And how does that behavior relate to either his
8 dynamic risk factors or his overall risk in terms of the
9 likelihood to re-offend?

10 A. Well, it loads onto one risk factor in particular.

11 Q. Okay.

12 A. So there's a risk factor called lack of emotionally
13 intimate relationships with adults, so that's whether you
14 have stable, healthy relationships, and when you don't
15 have healthy, stable relationships, that increases your
16 likelihood that you'll sexually re-offend, and for him his
17 relationships were just full of infidelity, poor
18 boundaries, betrayal, lots of conflict. He -- he really
19 described no history of any healthy relationships, so he
20 definitely has that risk factor which puts him at, you
21 know, increased risk to sexually recidivate.

22 Q. And would these behaviors also be indicative of
23 possibly sexual preoccupation?

24 A. Yes. So you're totally right. Yes, they are.

25 Sexual preoccupation is another risk factor and that's --

1 it's a little bit, I think, poorly labeled as sexual
2 preoccupation. It's really people who are having sex for
3 reasons other than intimacy, so they're having superficial
4 sexual relationships, they're having sex as stress relief,
5 as coping. They're having kind of maybe lots of sex, but
6 also sex that's very impersonal, and so he was engaging in
7 those behaviors with -- in his relationships and in the
8 sexual relationships that he had.

9 Q. Okay. In his sexual relationships with adults?

10 A. Yes.

11 Q. And according to the information you had available to
12 you, was he also engaging in that kind of behavior with the
13 minors?

14 A. Yes. I -- he said that he had sex with the
15 eight-year-old girl in 1993. In part, his explanation was
16 he was horny, he wanted to have sex with his partner where
17 the girl was staying, he wanted to have sex with her the
18 day before but she had company over, she had her -- she had
19 the victim over at her house and the victim's uncle and so
20 he said he wasn't able to have sex with her because they
21 were over at her house and so that was one way that he
22 dealt with that -- with that sexual arousal that he had
23 the day before was he had sex with the eight-year-old.

24 Q. And, in fact, he -- he characterized it as just
25 getting the horniness out, correct?

1 A. Yes.

2 Q. Okay. Does that lack of carrying for what he did to
3 that child, does that concern you in any way? Is that
4 relevant to your inquiry?

5 A. Yeah, I mean, it -- it really shows like he doesn't
6 understand the harm that he caused. I don't think that he
7 sees it as a big deal, that it -- I mean, he characterizes
8 it as she initiated it and that it was just, you know, to
9 satisfy an urge that he had.

10 Q. Okay.

11 A. So I don't think that he understands how serious it
12 was, how harmful it was, how it can reshape a person's
13 life.

14 Q. Okay. Now when Mr. Fabian was in prison the first
15 time, from 1994 to 2010, did he have sex offender treatment
16 while he was incarcerated?

17 A. Yes.

18 Q. And he re-offended after that?

19 A. That's correct.

20 Q. And then did he have it again in his second and third
21 stints at SCDC if you're aware?

22 A. I remember listing quite a few periods of treatment,
23 so -- so he had several periods of treatment prior to his
24 release in 2010 and then when he was released in 2021, he
25 went to treatment for several months while he was out in

1 the community.

2 Q. Okay. Were you able to verify that he actually went
3 or obtain any records?

4 A. No, I requested those records and didn't receive a
5 response.

6 Q. Okay. Thank you. So does the fact that Mr. Fabian
7 had prior sex offender treatment while he was in SCDC and
8 then re-offended twice, is that significant to your
9 inquiry?

10 A. Now what it -- what it says to me is that treatment
11 didn't help him not re-offend. That's what the treatment's
12 meant to do and if it's successful they don't re-offend, so
13 it didn't work.

14 Q. Okay. Was there anything in the records that you
15 received from SCDC that gave you any insight into
16 Mr. Fabian's behavior in the program or how he addressed
17 the treatment he did receive?

18 A. Yeah, there were -- there were some labels on his
19 level of participation. So his first period of treatment
20 in 1994 he completed that with what they characterize as
21 excellent participation. He completed a period of
22 treatment in 2007 with average participation. He completed
23 a period of treatment between 2007 and 2009 with average
24 participation and then there was a treatment summary that
25 was written by the sex offender program coordinator from

1 the Department of Corrections that I -- that I looked at.

2 Q. Okay. Thank you. So in addition to the five child
3 victims and the narcissistic personality disorder, did you
4 identify any substance abuse disorders for Mr. Fabian?

5 A. Yes. Substance use disorders are based on the
6 person's self-report. You go through a list of symptoms
7 for every substance that they said they had problems using,
8 and so based on his self-report he met criteria for severe
9 alcohol use disorder and he said that his last use was in
10 the 1990's, but once you get one of those disorders it
11 stays with you for basically a lifetime, although it can be
12 in -- be in remission.

13 Q. Okay. And, in fact, Mr. Fabian admitted he got caught
14 with illegal alcohol in prison, correct?

15 A. I believe so, yes.

16 Q. That was one of his disciplinaries?

17 A. Yes.

18 Q. Okay. So how does alcohol relate to sexual offending,
19 if at all?

20 A. For some people it relates. I don't believe that it
21 was a big factor for Mr. Fabian, if it was a factor at all.
22 He didn't say that it was a factor. So for some people it
23 -- you know, alcohol lowers their inhibitions and you can
24 make poor choices when you're, you know, drinking.

25 Q. Okay. But in Mr. Fabian's case, there's no indication

1 that the alcohol directly caused or contributed to his
2 offending behaviors?

3 A. That's correct.

4 Q. Okay. Thank you. Now does Mr. Fabian have a
5 nonsexual offending history?

6 THE COURT: I'm gonna stop you right there for
7 lunch.

8 Ladies and gentlemen, I think is the -- your lunch
9 has arrived and so in just a moment I'm going to ask you
10 to step to your jury room. Do not discuss this matter
11 or allow anyone to discuss it with you and we will take
12 about an hour for lunch. We're gonna start back at a
13 quarter -- we'll start back at about a quarter till three.

14 Yes.

15 UNKNOWN JUROR: Just to be clear, we're not to
16 discuss anything during lunch?

17 THE COURT: Well, like you can --

18 UNKNOWN JUROR: Anything in the testimony? I'm just
19 making sure I understood that.

20 THE COURT: That is absolutely correct. You do not
21 discuss anything with regards to this matter or anyone
22 that has anything to do with it. You can talk about the
23 weather, you can talk about what you're gonna do over the
24 Labor Day weekend, but you cannot discuss this matter or
25 anyone that has anything to do with it.

1 Thank you so much. Please step to your jury room.

2 (Whereupon, the jury was excused for lunch at
3 1:44 PM.)

4 THE COURT: And, of course, Dr. Gehle, during lunch
5 do not discuss your testimony with anyone.

6 Thank you-all. See you in about an hour.

7 MS. SHAW: Thank you, Your Honor.

8 (Whereupon, a luncheon recess was taken at 1:45 PM.)

9 (Back on the record at 2:50 PM.)

10 BAILIFF: All rise. Court is back in session.

11 THE COURT: All right. Anything before I bring the
12 jury out from the State?

13 MS. SHAW: No, Your Honor.

14 MR. FALK: Could we approach on a scheduling thing?

15 THE COURT: Sure.

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

17 THE COURT: Let us have the jury.

18 (Whereupon, the jury returns to the courtroom at
19 2:53 PM.)

20 THE COURT: All right. Ladies and gentlemen, how
21 was the pizza? Awesome.

22 And at this time we are going to continue the
23 State's case and the direct examination of Dr. Gehle.

24 Yes, ma'am.

25 MS. SHAW: Thank you, Your Honor. May it please

1 the Court?

2 THE COURT: Yes.

3 CONTINUED DIRECT EXAMINATION

4 BY MS. SHAW:

5 Q. All right. So, Dr. Gehle, we left off at the lunch
6 break when I had asked you about Mr. Fabian's nonsexual
7 offending history. Can you tell me what you know about
8 that and why it's relevant to your inquiry?

9 A. Well, I looked through his entire criminal history
10 and asked him about those things, so it's relevant in a
11 couple of ways. One, it's something that's considered
12 in the actuarial risk assessment, and then it also was
13 informative about his -- just the way he views things, the
14 way he talked about those charges and things like that.

15 Q. Okay. It's relative to his perceptions of -- or I'm
16 sorry -- relevant to his perceptions and it's relevant to
17 your personality disorder inquiry?

18 A. Yes.

19 Q. Okay. Thank you.

20 MS. SHAW: You-all can still hear me, right?

21 THE COURT: I can't.

22 MS. SHAW: I'm sorry, Judge.

23 THE COURT: I'm behind the fish tank.

24 BY MS. SHAW:

25 Q. So does the inquiry into the nonsexual offenses also

1 have any bearing on Mr. -- or on any offender's ability to
2 control their behavior and conform their behavior to the
3 law?

4 A. Well, I mean, it depends on the person's history, so
5 it depends on what their history is, and in terms of
6 conforming their behavior to the law, in just a general
7 sense, yes, if they have a criminal history that can speak
8 to them having trouble conforming their behavior to the
9 law.

10 Q. Okay. Now Mr. Fabian has spent a significant amount
11 of time in SCDC, and for the jury that's the South Carolina
12 Department of Correction. Does he have any disciplinary
13 infractions? I think we discussed one earlier.

14 A. I believe he only had a couple of disciplinary
15 infractions.

16 Q. Okay. And do you know what they were for?

17 A. Yes. He had two disciplinary infractions during a
18 prior period of incarceration at SCDC. He was convicted
19 of gambling and loansharking and possession of contraband.

20 Q. Okay. And he, in fact, discussed the possession of
21 contraband as he had illegal alcohol, homemade alcohol, in
22 prison?

23 A. I didn't make note of that right here, but I believe
24 that he told me that -- that he had homemade alcohol at
25 one point, yes.

1 Q. Okay. So if Mr. Fabian were to be released today,
2 would he be under any sort of supervision?

3 A. Yes. He has a period of probation that ends in
4 January of 2023.

5 Q. Okay. Does he have GPS monitoring?

6 A. He should be subject to GPS monitoring.

7 Q. Okay. Now let's go back. We've discussed the
8 narcissistic personality disorder and the various
9 paraphilias. Talk to me about pedophilic disorder. What
10 is it and how do you diagnose something like that?

11 A. A pedophilic disorder is a paraphilia. It's -- it
12 is a deviant sexual interest in prepubescent children, so
13 it's a sexual attraction to prepubescent children, and it
14 can be fantasies, urges or behaviors. So when -- when I
15 ask questions about this in the interview, if they are
16 not admitting to having those kind of urges or fantasies
17 or attraction, then I look at their behavior that's
18 documented in the records. So what I'm looking for is
19 there data points that go across at least six months
20 because that's what the criteria is. You have to have
21 evidence of this deviant sexual interest at least six
22 months. A prepubescent child is somebody who has no level
23 of sexual development yet, so a girl would have a flat
24 chest, no pubic hair. It's puberty -- it's before puberty.
25 It's not early puberty, it's before puberty. If you have

1 kids, you've, you know, seen when that happens, and by the
2 time somebody has breast budding or pubic hair or if they
3 are able to ejaculate for a boy or if they have breast
4 budding for a girl or their period for a girl, if they
5 menstruate, then they are in the heart of puberty, so I'm
6 talking about, you know, much earlier, much younger than
7 that. Usually like around age ten.

8 So with him I looked at his behavior and I had
9 evidence of that behavior from 1993, the eight-year-old,
10 from 2014 with the five and six-year-old, and then from
11 2016 with -- with the boy, and that well exceeds six
12 months.

13 Q. Okay. So just to recap, in terms of your diagnosis,
14 what -- you provided three different diagnoses for
15 Mr. Fabian. Can you tell the jury what exactly those were?

16 A. So I diagnosed him with narcissistic personality
17 disorder with antisocial traits. I diagnosed him with
18 pedophilic disorder -- pedophilic disorder sexually
19 attracted to both male and females, nonexclusive type.
20 Nonexclusive type means that there's also evidence that
21 he's attracted to adults. So if there was only evidence
22 that he was attracted to prepubescent children, then it
23 would be exclusive type, but for him it's nonexclusive
24 type. And then I diagnosed him with severe alcohol
25 use disorder in sustained remission in a controlled

1 environment. So sustained remission means that he's
2 gone many years without using per his report and he's
3 in a controlled environment meaning he's currently in
4 an environment that he has limited access to alcohol or
5 that he doesn't just have free range access as he would
6 in, you know, just the general community.

7 Q. Okay. Thank you. So those are your diagnoses.
8 Would you consider those to be both either a personality
9 disorder or a mental abnormality or both?

10 A. I believe he has both. So he has the pedophilic
11 disorder, which I would consider the mental abnormality,
12 and then the narcissistic personality disorder with
13 antisocial traits would be a personality disorder that
14 would be relevant to sexual offending.

15 Q. Okay. And can you just briefly go into those
16 antisocial traits. You added that specifier. Can you
17 tell us what behaviors, attitudes or evidence you found
18 that would suggest that that was an appropriate specifier
19 for that diagnosis?

20 A. Just in a general sense, antisocial personality
21 disorder is a pattern of disregard for and violation of
22 rights of others. That's people that use, manipulate,
23 take advantage. It's typically thought of like people
24 in prison often have this disorder. It's people who just
25 take advantage and violate others.

1 So he had a -- he has many -- many criminal offenses,
2 repeated criminal offenses, he was often in trouble and
3 he's not taking responsibility, he blames others, and he
4 does that by really disparaging, besmirching the character
5 of those people.

6 Those were the traits that I saw that were indicative
7 of antisocial personality. He did not have enough of
8 those characteristics to make a diagnosis of antisocial
9 personality disorder, so the way that we handle it by this
10 book is you can add antisocial traits to make sure that
11 you're characterizing the person fully.

12 Q. Thank you. All right. So in addition to your record
13 review, your diagnoses and your clinical interview, you
14 also conducted a risk assessment. We talked about that
15 briefly earlier, correct?

16 A. Yes.

17 Q. Can you tell me what the -- what is entailed in
18 performing a risk assessment and why is it important to
19 your evaluation?

20 A. Well, a risk assessment is the way that I answer the
21 question for the Court when they're asking me whether
22 he's likely to do it again. I do that by doing a risk
23 assessment. So in sexual violent predator evaluations,
24 I look at the types of assessment tools that are used
25 specifically and designed specifically for sex offenders.

1 There are no tools that are designed specifically for
2 sexually violent predators, so it is more of a general
3 kind of sex offender, but the two most commonly used
4 instruments are two actuarial assessments.

5 One is called the Static-99R and the other one is
6 called the Static-2002R. They were made by the same
7 research group out of Canada with some Americans and some
8 other like researchers from other countries involved, but
9 they are very separate instruments even though they sound
10 like they would be just an update of one another because
11 of the name, but they are very separate instruments. They
12 look at the information very differently.

13 So the 99R has ten questions and I have to go through
14 and look at the information that I got from the interview
15 and from the records and to answer those questions. The
16 questions will come -- like I score the questions, so one
17 question is whether he -- whether he's had four sentencing
18 dates prior to his most recent sex offense. So if I count
19 up he has four sentencing dates, he gets a point for that.
20 So the higher the score is the more risk they have to
21 re-offend.

22 So the way that they've developed these tools is they
23 looked at large groups of sex offenders and they looked at
24 can we figure out the factors that differentiate the ones
25 who went out and did it again, what makes these two groups

1 different, what makes this group more risky, and so they
2 came up with -- because it's a hard question to answer,
3 but they came up with -- one instrument came up with ten
4 questions. The other one has several more questions. Some
5 of the questions overlap.

6 So what I do is I score that and then I have tables
7 that I go to and these tables -- I look at the -- the
8 score that they get and it will tell me what percentage
9 of people with that score re-offended within a certain
10 period of time. So I can look at -- one of the instruments
11 provides like five years and ten years and one of them just
12 provides five years, so that's what I'm doing with the risk
13 assessment that way.

14 And then the dynamic risk factors, there was --

15 Q. I think, Dr. Gehle, I'm gonna ask you to hold up for
16 just one second.

17 A. Fair enough.

18 Q. I have a couple more questions about the Statics.

19 A. Okay.

20 Q. Now the creators of the Statics recommend that they
21 be used together, correct?

22 A. They recommend that in high stakes evaluations,
23 which this is one, that they be used together because they
24 add a little bit more accuracy to your estimations.

25 Q. Okay. And what's the score range of the 99R and

1 2002R? Because it is a little different from my
2 understanding than just zero to ten.

3 A. That's correct. So the score range on the 99R is
4 negative 3 to 12, and the average score is 2. And the
5 score range on the Static-2002R is negative 2 to 13, and
6 the average score is 3.

7 Q. Okay. Great. And the last thing, and our jury may
8 already be familiar with this, but I'll ask you to explain
9 it anyway, so in terms of the actuarial assessment itself
10 can you give any real world examples of what these two
11 instruments provide you in terms of information about
12 the likelihood to re-offend and how it relates to the
13 individual's risk?

14 A. Okay. There's a couple of real world examples. The
15 example I like to give is if you had a heart attack and
16 you go to your doctor after you get out of the hospital
17 and he's gonna look at a number of factors to tell you what
18 your risk is and will probably tell you like how aggressive
19 you need to be treated and how many lifestyle changes you
20 need to make. If you are a smoker, they'll tell you to
21 stop smoking because it puts you at higher risk. If you
22 are overweight, they'll always tell you to lose weight
23 because you're at higher risk. They'll tell you to get
24 exercise. They'll tell you to do all the things. If
25 you're already doing those things, there's less that you're

1 at risk. Like you're probably not very likely to have
2 another heart attack because they looked at people who've
3 had a heart attack who went onto have a second heart
4 attack, what factors make them different, and it would be
5 smoking, probably high stress, overweight, diet, things
6 like that.

7 Another example is, unfortunately, like insurance
8 premiums. So they'll gather information about you and
9 decide how risky you are to get into a car accident and
10 set your rates, you know, depending on how risky you are,
11 right? So if you are young, male, if you have prior
12 accidents, if you have prior speeding tickets, you're gonna
13 pay a lot more for car insurance because you are riskier
14 based on your behavior, right?

15 So that's a similar example to what I'm doing in these
16 risk assessment measures.

17 Q. Okay. Thank you, Dr. Gehle. So are the Static-99
18 and the 2002R generally considered reliable tests in your
19 field?

20 A. Yes. The 99R is used by almost every evaluator in
21 this context and the 2002R is a newer instrument and so
22 it's been more accepted in the last few years, and
23 especially since they made that recommendation that
24 both of them be used, but they are used by almost every
25 evaluator in this context that I've ever seen and that's

1 what the research also says when they survey evaluators.

2 Q. Okay. And they're pretty much the gold standard?

3 A. Yes. They're the most accurate that have been
4 published.

5 Q. Okay. Now specifically with respect to Mr. Fabian,
6 what was his score on the Static-99R?

7 A. The Static-99R, he had a score of 6.

8 Q. Okay. And what about on the 2002R?

9 A. He had a score of 7.

10 Q. Okay. And what risk categories does that place
11 Mr. Fabian into?

12 A. On both instruments, it placed him into the well above
13 average risk category.

14 Q. Okay. And in terms of the percentage of likelihood to
15 re-offend, what does that well above average designation
16 mean like in terms of the numbers?

17 A. So the -- well, the well above average designation,
18 that was something that was come up by -- like those labels
19 were developed by a government organization to be more fair
20 in labeling. Instead of using like low, medium and high
21 risk, they came up with the risk levels of very low risk,
22 below average risk, average risk, above average risk and
23 well above average risk, so that -- the level that he's at
24 is the highest category.

25 And when I look at the actuarial tables, a score of

1 6 on the Static-99R, 17.6 percent of people with that score
2 re-offended within five years, and 25 percent re-offended
3 within ten years with a sexual offense, so they re-offended
4 sexually.

5 Q. Okay. Great. What about on the 2002R? What are the
6 statistics for that?

7 A. So for that one I did the five-year recidivism
8 estimate and that is people with score of 5, 26 percent
9 of them re-offended within five years sexually.

10 Q. Okay. And what is the 20-year recidivism rate?

11 A. The 20-year recidivism rate is an estimate or a
12 projection, so it's the 20-year projected estimate, and
13 for a score of 7 it is 44.5 percent.

14 Q. Okay. So approximately 44 and a half percent of
15 individuals with this particular score re-offend within a
16 20-year period?

17 A. It's a projection, it's an estimate, so that's not
18 based on -- on actual observed cases.

19 Q. Okay. Thank you for that.

20 A. They extrapolate to get there.

21 Q. All right. So based on this information, what is
22 Mr. Fabian's individualized risk as compared to the average
23 sex offender, someone with a score of 2 or 3 say? Like how
24 many --

25 A. So another data -- piece of information that I get

1 from this is they tell me if you have -- if you have this
2 score, so if you have a score of 6 on the Static-99R, you
3 are 3.77 times -- you have -- your risk is 3.77 times the
4 expected recidivism rate of the average sex offender. So
5 I use that piece of information to help me make a decision
6 about whether this person that I'm evaluating is part of
7 the extremely dangerous group of sex offenders that's
8 addressed in the statute.

9 Q. And your conclusions just using the Statics as one
10 of your data points were that Mr. Fabian is high risk or
11 medium or low risk?

12 A. I don't -- I don't make a -- I don't think of it in
13 terms of that. I think of it in terms of likely or not,
14 so I don't make that judgment call.

15 Q. Okay. But in your opinion based on this information
16 he's likely to re-offend at this time?

17 A. Yes. These are high Static scores, they're higher
18 than many people I evaluate. Even though the range of
19 scores can go up -- like on the 99, it can go up to 12,
20 hardly anybody scores above a 7 or 8, so it's almost all
21 of them are low, and I don't know that I've ever seen
22 anybody score a 12.

23 Q. Okay. So let's go into dynamic risk factors. That's
24 your other half of your risk assessment. So can you tell
25 the jury what those are?

1 A. So dynamic risk factors are things that have been
2 seen in people's character and their psychology and their
3 behavior that lead them to have increased risk of sexual
4 recidivism, so it makes them more likely to re-offend
5 sexually and the way that they determined this was, again,
6 they looked at a large set of sex offenders and they looked
7 at who didn't re-offended and who re-offended and what
8 factors differentiate those, like what characteristics did
9 people have who are in the group that re-offended, and
10 basically what I'm looking at is a large metaanalysis of
11 risk factors, so they pulled hundreds of research studies
12 and they combined all that data to find -- like let's give
13 you the definitive list of risk factors related to sexual
14 offending and so that's the -- that's the risk that I rely
15 on and that's the one that I look at, consider each of
16 those risk factors to see if it applies to the person I'm
17 evaluating or not.

18 Q. Okay. And approximately how -- well, some of the risk
19 factors that have been identified in that study, some are
20 what are considered empirically supported and others are
21 correlated. Could you explain the difference between those
22 and how many of each there are?

23 A. If empirically supported or correlated?

24 Q. Well, the twelve factors that are typically cited and
25 then those that are --

1 A. I only look at the twelve factors that had strong
2 research support. I know other evaluators will look at the
3 ones that had -- like they were promising or emerging, so
4 there were some studies that supported them as valid risk
5 factors. Some of my colleagues will look at those. I -- I
6 only look at the twelve that had strong research support.

7 Q. Okay. Great. So of those twelve factors, how many
8 did Mr. Fabian exhibit?

9 A. He had nine.

10 Q. Okay. And can you go through each one of those? And
11 I know we've covered some of them earlier in the testimony,
12 but I'd just like to tie that together. So could you go
13 through each one and describe the behaviors you saw and why
14 you believe it applies to Mr. Fabian?

15 A. So the first one that I saw was sexual preoccupation,
16 so -- I think I talked about this one earlier, but he had
17 many superficial sexual relationships, he traded sexual
18 partners with close friends, this caused problems. He
19 engaged in sexual activities with an eight-year-old
20 prepubescent girl because he said, in part, he was unable
21 to have sex with his adult friend the day before, and he
22 seems to use sex to cope with stress, boost his ego, and
23 used it as a way to define himself.

24 The second one I saw was he has a sexual preference
25 for prepubescent or pubescent children. I'm giving you the

1 technical name that they list in the research study, but
2 -- but for him he has a sexual preference for prepubescent
3 children. So he was convicted of three cycles of offenses
4 and one thing that I'm really keyed into is did they
5 re-offend after they've been punished? Did they learn
6 their lesson or did they go and do it again? Because
7 that indicates like they're willing to accept a lot of
8 consequences to engage in this behavior and that -- that
9 means you can't control yourself, you are so compelled to
10 do something that, you know, thirty years in prison doesn't
11 matter. You know, that's a big consequence. If you do it
12 again when you get out, that's -- that's meaningful.

13 So he was convicted of those three cycles of offending
14 prepubescent children. Two of those offense cycles
15 occurred after he was released from a long period of
16 prison. He indicated that he was sexually aroused and
17 ejaculated during the encounter with that first girl and
18 he also meets criteria for pedophilic disorder. That's
19 the evidence for that one.

20 The next one is offense supportive attitudes. That's
21 whether the person holds attitudes that help him deal with
22 the offending so he doesn't feel guilty, doesn't feel
23 shame. It helps him promote that -- that offending. So
24 in support of that, he indicated that the eight-year-old
25 victim initiated sex with him and that she said it was

1 fun. This suggests that he had a romanticized view of the
2 encounter, that he believes that a prepubescent child would
3 enjoy engaging in sexual acts with a full grown man, and
4 that's when I look at what -- what the definition of that
5 risk factor is, that's one of the examples. You know, are
6 they -- do they think that kids enjoy sex.

7 The next one is a lack of emotionally intimate
8 relationships with adults, and this is conflicting,
9 unstable, unhealthy relationships, which -- which is
10 what really characterized his past. So he had lots of
11 infidelity, boundary violations, betrayal, lots of
12 conflicts, and really no history of healthy relationships
13 that he described.

14 The next one is lifestyle impulsiveness. So with
15 this one, I'm looking at whether he's impulsive, substance
16 use, stuff like that. So he described to me being very
17 impulsive. So a couple examples were he went with his
18 girlfriend and another woman, like they -- they drove
19 together to the liquor store and his girlfriend goes into
20 the liquor store and he tells the other woman to like drive
21 off and they just drive off and leave her there and go and
22 have some -- go have sex and stuff like that. He was in
23 fear for his life from her boyfriend, who he said was
24 affiliated with Hells Angels and dangerous, and so he
25 bought a gun, thought he needed to protect himself and --

1 you know, but still engaged in this very impulsive behavior
2 that was putting himself at a lot of risk, and after he --
3 after they had their couple of nights away, even drops her
4 off, goes on and then they meet up and do the same thing
5 like a couple of weeks later, and -- and he was really in
6 fear of his life. It was things like that where he was
7 just making really impulsive decisions that were absolutely
8 gonna destroy his relationships, that they were not gonna
9 be easy to fix, put himself in a lot of danger, put himself
10 and others into a lot of danger, just by acting on that
11 impulse. He did that with not just that one woman, but
12 also, you know, with another woman. Like he was, you know,
13 on a double date with his boss and his boss's girlfriend
14 and another woman and he just was attracted to the boss's
15 girlfriend, so they just left, and, you know, that's
16 probably not gonna end well as you can imagine.

17 So he did a lot of that stuff. He lived a pretty
18 unstable life. He was -- his housing was unstable, he had
19 to live with people, he was moving around a lot, he had to
20 stay with friends and family a lot of the time, so those
21 were the factors that related to lifestyle impulsiveness.

22 The next one is poor problem-solving and in that one
23 I'm looking at can they identify problems, do they address
24 problems, can they find solutions that are workable, things
25 like that. Just general problem-solving skills.

1 And so when I looked at his history and his
2 perceptions, I was seeing that he was having lots of
3 problems identifying the source of his problems. So he
4 didn't know why there was so much drama and chaos and
5 strife in his life, but it was things that he was creating
6 with -- with those impulsive decisions. He wasn't
7 anticipating the likely outcomes of those poor decisions
8 and the way that he was like making choices did not respect
9 relationships or, you know, how people felt. He repeated
10 those mistakes, did it more than once, and what I wrote --
11 wrote in my report and what really characterized to me is
12 he essentially was dropping bombs in the middle of his life
13 and then he wasn't understanding why, you know, his life
14 was destroyed, but it was decisions that he was making and
15 causing himself just a ton of stress I would imagine.

16 He also, you know, inadequately failed to address
17 his problems and he fails to adjust to circumstances and
18 wants people to adjust to him instead of adjusting to the
19 circumstances that he's in.

20 The next one is resistance to rules and supervision
21 and for that I'm looking at how he complies with authority,
22 how he looks at authority, whether he complies with
23 supervision. So, first off, he had some probation
24 violations that is evidence of that. He appeared to very
25 much mistrust authority, mistrust this whole system,

1 mistrust me, lots of mistrust with the criminal justice
2 system and he being treated fairly, violating sex offender
3 registry, things like that.

4 The next one is grievance and hostility. In this one,
5 I'm looking at their attitude in terms of, you know, are
6 they upset with people, do they think that people are out
7 to get them, do they think that they need to get revenge,
8 and he does. He thinks people are out to get him, thinks
9 he won't be treated fairly. He said that he was falsely
10 accused of several of the sex offenses for just minor
11 transgressions. So he said that for the girls that he
12 abused in the back seat of his SUV, he said that he did
13 not offer to take -- he offered to take the girls to
14 McDonald's, but he didn't offer to take their parents to
15 McDonald and because of that they were really upset and
16 so they made the girls falsely accuse him of sexual abuse
17 because he didn't take them to McDonald's, so things that
18 really don't make sense.

19 The last one is negative social influences and that's
20 who he surrounds himself with. Is he -- is he spending
21 time with people who promote his criminal behavior, that
22 make it more likely that he's gonna be engaging in that
23 or is he hanging out with people who are, you know, not
24 criminals, not drug abusers and are promoting like better
25 behavior from him. So with him from what he was describing

1 he's surrounding himself with lots of people that are
2 engaging in criminal behaviors, they're promoting that,
3 and he had that repeated pattern in his relationships, so
4 those were the nine that I found.

5 Q. All right. Thank you. Now that's a longstanding
6 pattern of behavior, correct?

7 A. Yeah, those were longstanding patterns of behavior,
8 yes.

9 Q. Okay. And in your profession, isn't it true that past
10 behavior is one of the best predictors of future behavior?

11 A. That is true, yes.

12 Q. All right. Thank you. When you asked Mr. Fabian
13 about does he have any plan not to re-offend, what did he
14 tell you?

15 A. I think he told me that there were -- there were no
16 situations that -- there were no situations that he would
17 be at risk to re-offend. I mean, he really stuck by his
18 claim that he didn't commit these things. He said he
19 committed the one in 1993 with the eight-year-old that
20 he took to his house. He admitted to that one, but he
21 said the rest of them, those were not true, he didn't
22 do anything wrong, he didn't touch anybody, didn't do
23 anything, so in part he was saying like I had treatment
24 after that one offense that I committed and so I'm good. I
25 -- I need to avoid people so I don't get falsely accused

1 again, but I really don't have a problem.

2 Q. So he indicated to you he does not believe he has any
3 problem with his sexual behavior even though he's been
4 convicted of having sexually assaulted -- well, he's been
5 charged with having sexually assaulted five different
6 minors and convicted of assaulting two; is that correct?

7 A. Well, he's been convicted of assaulting more than two.
8 I mean, it's --

9 Q. Well, I'm sorry. Sexually violent offenses.

10 A. Okay. I think he's been convicted of offending four,
11 but, yes. To answer your question, yes.

12 Q. Okay. And every single one of those children was
13 under ten years old?

14 A. Yes.

15 Q. Thank you. So with all of that information, ten hours
16 of interview, a thorough record review, meeting and hearing
17 what Mr. Fabian had to say about his own offenses, as well
18 as the actuarial and risk assessments, did you come to any
19 conclusions about whether Mr. Fabian in particular presents
20 a risk to re-offend?

21 A. Yes. I mean, it's -- it's my opinion that he's likely
22 to re-offend, that he meets that like level of risk.

23 Q. Okay. So is it your opinion that this paraphilia and
24 personality disorder affects his volitional control?

25 A. Yes.

1 Q. Meaning he can't control himself?

2 A. That's correct.

3 Q. Okay. And do you believe that his inability to
4 control himself renders him a -- makes him predisposed to
5 committing sexual offenses against minors?

6 A. I -- I think that the mental abnormality and
7 personality disorder predispose him and make him likely to
8 commit acts of sexual violence.

9 Q. Okay. Thank you. And the records review, the
10 interview, the actuarial assessment and the Statics, those
11 are all standard protocols within your industry?

12 A. That's correct.

13 Q. They're all standard and routinely used in the course
14 of this type of evaluation?

15 A. Yes.

16 Q. Okay. Thank you. And did you draw all of your
17 conclusions to a reasonable degree of psychological
18 certainty?

19 A. I did, yes.

20 MS. SHAW: All right. Thank you, Dr. Gehle.
21 Please answer any questions that Mr. Falk may have
22 for you.

23 CROSS-EXAMINATION

24 BY MR. FALK:

25 Q. If I stand here, Dr. Gehle, can you hear me?

1 A. Yes.

2 Q. Okay. If you could kind of walk me through, how do
3 you reach your opinion? I mean, you went through -- you
4 reviewed a bunch of records and you -- and you reviewed
5 your -- and you had an interview, personal interview, with
6 him, right?

7 A. Yes.

8 Q. So how do you decide when there's enough there that
9 he is a sexually violent predator versus that he's not a
10 sexually violent predator? I mean, is there kind of a
11 scoring system? Other than the Static, which is clearly a
12 system, is there some kind of scoring system that you use?

13 A. Well, the first threshold that I -- that I see as
14 important is whether he has a mental abnormality or a
15 personality disorder. If he doesn't have that, regardless
16 of what his risk is, I would not be recommending
17 commitment.

18 Q. Okay.

19 A. Because of the way that the law is written it says
20 that they have to have that mental abnormality and/or
21 personality disorder. So that's like the first decision.
22 And then the second decision is whether they're likely,
23 and that's based on the risk assessment, and then it all
24 kind of merges together in terms of do they have the kind
25 of disorder that would lead to sexually violent offending.

1 Not just sexual offending, but sexually violent offending.

2 So, for example, like indecent exposure is not a
3 sexually violent offense, so the -- the paraphilic
4 disorder that you'd be diagnosed with if you have that
5 sort of arousal to exposing yourself, that would be
6 exhibitionistic disorder. So if somebody is diagnosed
7 with exhibitionistic disorder, even if they had a ten
8 on the Static, I would not recommend them for commitment
9 because that disorder doesn't predispose them to sexually
10 violent offenses. It predisposes them to sexual offenses,
11 but not the ones that are listed in the statute, so I would
12 not recommend commitment in that case.

13 So at the end it's some -- a couple of thresholds that
14 you have to meet and then it all has to be considered
15 together to see if does this disorder and this level risk
16 make this person a sexually violent predator in my opinion.

17 Q. But, I mean, you've spent a lot of time talking about
18 his history?

19 A. That's correct.

20 Q. A lot of that history that you were talking about
21 actually occurred prior to 1993; is that not right?

22 A. I asked him about his history through a long-range of
23 time, so a lot of it did occur to 1993 -- before 1993. I
24 think a good deal of it like occurred afterwards as well.

25 Q. But so when you're going through that history, how

1 did you decide, you know, some of those pieces of the
2 history are gonna support your decision that he's a
3 sexually violent predator? I mean, does he have to have
4 two, three, four kinds of incidents or is this all just a
5 judgment call?

6 A. Well, I guess, I would -- if you're talking in terms
7 of a personality disorder, can you clarify that? Is that
8 what you mean?

9 Q. I guess that's what I'm talking about. Let's talk
10 about the narcissistic personality disorder with antisocial
11 traits.

12 A. Okay.

13 Q. There were six or seven kind of broad sort of
14 characteristics that you look for, but nothing really
15 specific. I mean, how do you decide that this fits in
16 that pocket as meeting this criteria and this conduct
17 doesn't?

18 A. Well, I'm going back to that general personality
19 disorder definition. So does this person view the world
20 and have perceptions and attitudes and interactions and
21 impulse and affectivity? Is that out of the norm? So is
22 it out of the norm and does it cause problems so that it's
23 maladaptive?

24 Q. Well, all right. Out of the norm. So, I mean, are
25 we talking about a bell curve? I mean, is there some kind

1 of data kind of that you're looking at or is it just your
2 opinion on where he might fit on the bell curve?

3 A. So psychologists and psychiatrists, they conceptualize
4 personality disorders like primarily on a spectrum, so any
5 trait you can have. Like normal people can have, you know,
6 personality disorder traits and it's whether they have like
7 a lot of it that they would have that maladaptive trait,
8 so.

9 Q. How many is a lot? I mean, I'm just -- are there
10 specific numbers? Other than the Static, are there
11 specific numbers?

12 A. When I evaluated him, it was every word that he
13 said, every sentence that he spoke was indicative of that
14 personality disorder. It was every -- every way he
15 interpreted events, it was the way he interacted with me
16 over those five interviews. It was all indicative of that
17 personality disorder.

18 Q. Narcissistic personality disorder?

19 A. Yes.

20 Q. Let me just -- a couple of things now. Did you make
21 a recording of those interviews?

22 A. No.

23 Q. And why is there not a recording of the interview?

24 A. For one, I would have no -- no reason to record that.

25 Q. Yeah.

1 A. I -- I don't know how that would be used.

2 THE DEFENDANT: To get to the truth.

3 A. That right there is -- would be my reasoning.

4 Q. I mean, you -- he said stuff to you and then you took,
5 I guess, some notes and wrote it down, but, I mean, if
6 there's a disagreement between you and Mr. Fabian as to
7 what he said, is there a way to resolve that other than you
8 said this and he said that? I mean, there's no record we
9 can look at; is that right?

10 A. There's no video, but I took very extensive notes
11 during the interview.

12 Q. Let me ask you this. When you were -- did you do any
13 independent investigation to see if there's some kind of --
14 to corroborate the allegations that were --

15 MS. SHAW: Objection, Your Honor. We've already
16 discussed this. The criminal convictions are not open
17 to interpretation about what happened. This is where
18 we're going with this. Mr. Fabian wishes to challenge
19 his underlying conviction --

20 MR. FALK: Can we have this off the record?

21 THE COURT: Sure. I mean, yeah.

22 Let me talk to you-all.

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

24 THE COURT: Ladies and gentlemen, I'm gonna ask
25 you to step to your jury room. Do not discuss this

1 matter. Do not allow anyone to discuss it with you,
2 including your fellow jurors. There's a matter that
3 I'm going to take up outside your presence. You might
4 as well take a five-minute comfort break. We won't be
5 long.

6 Thank you.

7 (Whereupon, the jury retires to the jury room at
8 3:41 PM.)

9 THE COURT: Bear with me just a second.

10 Okay. Now let me hear your objection.

11 MS. SHAW: Your Honor, the objection is the same
12 as I had made yesterday when we were arguing our motions
13 in limine is that Mr. Fabian wants to try and relitigate
14 the underlying allegations of his criminal convictions
15 for both assault and battery, as well as criminal sexual
16 conduct with a minor under -- in the third degree.

17 That is inappropriate. Is it convicted conduct,
18 we argued at length about this, and it's -- that kind
19 of attempt by asking that question is not appropriate
20 for this witness. She doesn't have to independently
21 corroborate the allegations. She reasonably relied on
22 documents that were presented to her. I mean, there
23 -- and there is no basis to even indicate other than
24 Mr. Fabian's words that the offenses were anything
25 other than what they have been alleged to be.

1 THE DEFENDANT: I want to know what kind of
2 investigation --

3 MR. FALK: No.

4 THE DEPUTY: Sir.

5 MR. FALK: Do you want -- do you want my response?

6 THE COURT: Yes.

7 MR. FALK: Well, I was trying -- I was not going
8 as far -- I was not planning yet to go as far as what
9 Ms. Shaw was saying.

10 THE COURT: Okay. Sure.

11 MR. FALK: I was trying to make the record because
12 I respectfully disagreed with your opinion about the
13 admissibility of some of that hearsay and I was just
14 trying to make the record to go to a point which appeared
15 to be important to the Jenkins court that when the expert
16 is testifying to hearsay testimony, which is all the
17 stuff that she found in the police reports, absent --
18 and one of the points that they made in here was that
19 there was no independent corroboration, so she does not
20 know if that is true, so she has no information as to
21 whether or not those allegations are true. And the only
22 reason why they're relevant -- they're only relevant
23 because they might be true. If they're not true,
24 they're not relevant. And, again, I think that that is
25 an important inquiry and that's where I was going first,

1 was just to make the point so that, respectfully, Your
2 Honor, you make -- you are the gatekeeper and you're
3 deciding if the probative value is more than prejudicial
4 and the probative value of statements that have not been
5 corroborated would lean one way.

6 THE COURT: Well, here's one of the issues. A
7 couple of things. There are a couple of issues that
8 are on-going with this proceeding as opposed to a
9 criminal -- this is not a criminal proceeding, so
10 everybody really needs to begin in that place. This
11 is not a criminal proceeding and the reason that that
12 becomes extraordinarily important is that that affects
13 things like due process, it affects confrontation, it
14 affects the ability to even proceed if the individual
15 is not competent.

16 MR. FALK: Yes, Your Honor.

17 THE COURT: This is a different matter and -- and
18 so that's -- that's the place to begin and so the hearsay
19 in this instance -- the hearsay in this instance that
20 makes it very different, which is why if you will recall
21 when -- when you objected to the statement of your client,
22 it really is, what, triple hearsay because it would have
23 been something in writing -- well, no, it would have been
24 double hearsay. It would have been your client talking
25 about what -- what the eight-year-old child said. You

1 objected, I sustained it because at that point it does
2 become conduit hearsay. That's the kind of hearsay in
3 this proceeding that the Court has really got to be
4 concerned about.

5 Now what is unusual, what is different, between
6 this kind of proceeding and a criminal proceeding is
7 that in this proceeding, which is, first of all, not
8 a criminal case, it's not a criminal case, it is a
9 commitment. It is very much a different proceeding
10 under the law. Some of the items, some of the concerns
11 about hearsay that would arise in a criminal case simply
12 don't because -- because, for example, it is an element
13 for which expert testimony is required to make a
14 determination with regards to the third element, and --
15 and so she's testifying absolutely to one of the issues
16 that is before the jury and that is, you know, how likely
17 is this -- you know, is this gentleman to re-offend.
18 It's an element. She's allowed to testify regarding
19 that, give expert testimony with regards to that issue,
20 and a number of other places. The kind of hearsay --
21 the kind of hearsay that is -- is to be avoided is the
22 -- strictly the conduit hearsay.

23 For example, there's the case -- I think it's the
24 Bilton case, I think, where the expert is testifying
25 regarding the plethysmograph. It was conducted by

1 Dr. Burke. Dr. Burke maintains the data, Dr. Burke
2 gave the test, and there was another psychologist that
3 was testifying regarding the -- the testing from the
4 plethysmograph and -- and that was -- the Court of
5 Appeals indicated that that was -- that that was the
6 road too far ultimately.

7 There was a lot of discussion about whether or
8 not -- how much the due process clause really applied
9 to a commitment proceeding. There was an interesting
10 discussion about that. And -- but at the end of the
11 day, the concern was -- was that -- that because this
12 expert did not actually perform the test, participate
13 in performing the test or was familiar with any of the
14 -- any of the data to allow the expert to opine with
15 regards to the reliability of the testing, that was
16 found to be in error.

17 But interestingly enough in that case, much like
18 this case, a lot of the testimony was quite similar.
19 It's clear that she can testify as an expert to those
20 items, which are important, what it is about those items
21 that's important, and -- and that's pretty clear to me.
22 You know, when you start doing the balancing, it's not
23 the -- it's not the 403, 404 balancing that happens in
24 a criminal trial. It just is not. And, you know, the
25 kind of hearsay that is considered to be out of bounds

1 in these commitment proceedings is exactly the kind that
2 I just mentioned that -- that is in the Bilton case where
3 the expert testifying didn't do the test, didn't perform
4 the test, didn't have any information about the test,
5 didn't have any data about the test, couldn't explain to
6 the Court why this particular test was reliable and the
7 like, and that was found to be error.

8 But that's -- so she -- this witness -- the question
9 is, and I'll ask this of you, what matter -- what issue
10 that is of consequence to this case does whether or not
11 she went back and did any investigation behind, to go
12 behind the conviction, does it make it more probable or
13 less probable? It doesn't mean she's not qualified to
14 do it.

15 MR. FALK: For my response, I appreciate that as
16 far as the first element, the conviction, is -- he is --
17 we could go forward on just the 2019 conviction. I mean,
18 that's --

19 THE COURT: Right. Sure.

20 MR. FALK: However, if -- the reason why the
21 convictions are important -- I mean, the testimony that
22 she's giving, I mean, if this testimony just stopped at
23 he did this, he pled guilty to CSC with a minor under
24 eleven, and if the conviction is the only thing that
25 mattered, then that's the only testimony that should

1 matter. However, they're going beyond and saying well,
2 no, it's because he did this, he did this. This was
3 alleged and this was alleged. My client wants to
4 testify that he did not do it on the 2014 and the 2017
5 because he pled under Alford and at least under the 2014
6 where he only pled to assault and battery first, he
7 should be able to take the stand and testify, and that's
8 what -- that's where I think it's relevant. I think it's
9 relevant to the last two convictions and certainly the
10 2014 conviction, and that's my point.

11 THE COURT: Sure.

12 MR. FALK: And also the way I read Bilton, it does
13 -- I agree with the Court that the Court of Appeals said
14 that there's no Sixth Amendment confrontation clause
15 right in one of these cases, but it did appear to me
16 that they were sort of anchoring their opinion on the
17 due process right the person still has and there's --
18 and there's also other cases where the courts have
19 recognized the due process right that this person still
20 has, especially since this is a proceeding that could
21 end in a -- obviously a significant deprivation of civil
22 liberties, you know.

23 THE COURT: But it's -- but it's -- and that's not
24 how the -- it's interesting. I found it interesting the
25 way that the liberty interest was discussed to not be

1 the due process, and I really found that fascinating,
2 and then when you back that up and you take a look at
3 cases where folks have found to be not competent and yet
4 this proceeding can continue.

5 You know, it is not a criminal proceeding. They
6 didn't treat it like a criminal proceeding. The
7 constitutional protections that we are used to are
8 different, and they just are. And the reason is, is
9 because at the end of the day it's about commitment
10 for treatment or commitment hopefully for treatment
11 for those who are incompetent. It's an interesting
12 discussion about the community and the protections of
13 the community as opposed -- as it relates to treatment.
14 All of that's very fascinating. Those are fascinating
15 conversations, but -- and then if you go back -- if you
16 go back to what an Alford plea is, an Alford plea, which
17 is probably why so -- when it comes to -- particularly
18 crimes where sexual violence is -- is very much a part
19 of it, Alford pleas are -- and being accepted less and
20 less, and that's because obviously -- it's a two prong.
21 The Court couldn't take away the two prongs.

22 The appeal's gone, so going forward we can -- we
23 can certainly presume that the -- the conviction stands,
24 and there are two elements, and the elements are that
25 the defendant believes the defendant would go -- were

1 to proceed to trial that the defendant would be found
2 guilty and, secondly, he wants to take advantage of the
3 deal, and he's got a conviction, and that's simply where
4 that is.

5 And so -- so the question is whether or not it is
6 to be placed before this jury whether or not this doctor
7 should have, could have reviewed this -- these particular
8 offenses that she made her determination. He has a
9 conviction for those offenses, for the assault and
10 battery --

11 MR. FALK: Yes.

12 THE COURT: -- first degree and he has a conviction
13 on those indictments, and we're not going beyond that.
14 This is not a proceeding to collaterally attack those
15 convictions.

16 Now having said that, if you want to ask her did
17 you -- did you consider that this was an Alford plea,
18 does it have any relevance to your opinion that this
19 plea was an Alford plea, I have absolutely no problem
20 with that because then that's -- I mean, that's what it
21 was. I have absolutely no problem with did you consider
22 this was an Alford plea that yielded this conviction as
23 opposed to a non-Alford plea. I have no problem with
24 that.

25 MR. FALK: Thank you.

1 THE COURT: Absolutely.

2 MR. FALK: I'd just while she's -- either we
3 stipulate that she didn't do it or I make my record that
4 she didn't do the independent on a proffer.

5 THE COURT: Sure. Go ahead and do that.

6 Go ahead.

7 PROFFER (In-Camera)

8 BY MR. FALK:

9 Q. For the purposes of a proffer, Dr. Gehle, did you do
10 any -- did you do any independent investigation in order to
11 corroborate the allegations that were in the police reports
12 for the offenses, the 2000 -- the second and the third
13 offenses?

14 THE COURT: Just so the record is clear, the assault
15 and battery in the first degree.

16 BY MR. FALK:

17 Q. Assault and battery in the first degree.

18 A. No, I did not.

19 MR. FALK: Thank you.

20 THE COURT: Okay.

21 MR. FALK: So we don't have to take another break --

22 THE COURT: Yeah.

23 MR. FALK: -- I'm looking at the Chandler opinion.

24 THE COURT: Sure.

25 MR. FALK: And in Chandler, which was -- you know,

1 it's always difficult when it's a -- I think Chandler
2 was a probable cause and there was -- there's a statement
3 in there, and I can give you the citation. I think it's
4 -- you know, Chandler is 382 South Carolina 250, and I
5 think it's on page 260.

6 THE COURT: Okay. Hold on.

7 All right. And is this a In Re: Chandler or
8 State v. Chandler?

9 MR. FALK: In Re: Care and Treatment.

10 THE COURT: Got it.

11 MS. SHAW: Can you repeat that citation?

12 MR. FALK: Yeah, sure. 382 --

13 THE COURT: Wait a minute. I've got to get there.

14 MR. FALK: 382 South Carolina 250.

15 MS. SHAW: Do you have an extra copy of that?

16 THE COURT: 382 SC and what's the rest of it?

17 MR. FALK: 250.

18 And I can pull it up on Lexis for you if you want
19 to see it.

20 MS. SHAW: I can pull it up, but if you're gonna
21 cite it, then you're gonna have to argue it and you need
22 to give me a copy.

23 THE COURT: Okay. Wait a minute.

24 MS. SHAW: Yes, Your Honor.

25 I would admit this is factually distinguishable.

1 We are at the civil commitment trial level. This is
2 just a probable cause hearing. The standard of -- I
3 mean, the standard of proof is considerably lower.

4 MR. FALK: I just want to draw the Court's attention
5 to one sentence in para --

6 THE COURT: Hang on one second.

7 Okay. Now -- so what? Okay.

8 MR. FALK: All right. So what it seems to me in
9 Chandler is that the person representing Mr. Chandler
10 was trying to challenge the probable cause by asserting
11 that well, he got a YOA sentence, and that sentence that
12 must -- it must start pretty close to the top of the
13 page where it says the severity of punishment imposed
14 in a criminal matter may give rise -- wait, let me --
15 hold on.

16 Excuse me. Moreover, there are a variety of
17 reasons why the State would negotiate a plea with
18 Chandler ranging from the ability of the State to
19 acquire the necessary evidence to the possibility that
20 testifying might be difficult for the victims. The
21 severity of punishment imposed in a criminal matter may
22 give rise to closer scrutiny of the facts, but it is
23 not determinative in this civil proceeding to evaluate
24 whether or not probable cause exists.

25 That's exactly what I'm trying to say.

1 THE COURT: I get it, but you need to keep going
2 because the decision goes on to say as to the circuit
3 court's other considerations, in particular that
4 Chandler's receipt of sentencing under the YOA indicated
5 the sentencing judge and the prosecutor thought that
6 Chandler could be rehabilitated and the provision for
7 probation gave the public adequate protection. These
8 factors are not determinative of the probable cause
9 issue.

10 And then it goes up also and it says that clearly
11 -- and Judge Dennis talks about the fact that clearly
12 -- because he was given a YOA, they clearly believe that
13 these events occurred out of his age and his lack of
14 maturity and that he ought to be held to a different
15 standard because of his youth, which is a thing that
16 certainly repeats itself and ought to repeat itself in
17 the criminal justice context, and it absolutely does,
18 but at the end of the day what the Supreme Court said
19 is having -- having used the fact that this gentleman
20 in Chandler received a YOA has got absolutely nothing
21 to do with whether or not the State met -- had met the
22 probable cause standard and, Judge Dennis, you're
23 reversed, this is going forward, and let's see where
24 you are once he's been evaluated. That's the way this
25 case ended up. So, no, that's got absolutely nothing

1 to do --

2 MR. FALK: No, I appreciate that, Your Honor, but
3 it said that established probable cause.

4 THE COURT: Right.

5 MR. FALK: But here today we're worried about
6 establishing a proof beyond a reasonable doubt.

7 THE COURT: Okay.

8 MR. FALK: And it does say that it could lead to --
9 excuse me -- it does say that it could lead to a closer
10 scrutiny of the facts. That's what I'm just -- it may
11 give rise to a closer scrutiny of the facts. I would
12 think this is the time to scrutinize the facts of the
13 conviction.

14 THE COURT: Let me say this. I told you that
15 you're welcome to ask this expert whether or not the
16 fact that this was an Alford plea in any way entered
17 into her -- I mentioned that you can certainly do that.

18 MR. FALK: Yes.

19 THE COURT: However, this is not a forum for a
20 collateral attack on these convictions, it just is not,
21 and it -- it's not intended to be that. There certainly
22 are proceedings that if this gentleman wanted to
23 collaterally attack his conviction, he absolutely --
24 he could have directly attacked and he could have
25 collaterally attacked, but that's not this forum. And

1 if -- if you wanted to ask this witness did she give any
2 consideration to the fact that this was an Alford plea
3 as opposed to a straight up plea, you know, that is
4 perfectly fine. I have no problem with you doing that
5 and --

6 MR. FALK: I wanted to then ask her about did you
7 draw any conclusion from the fact that he was originally
8 charged with something that could get him twenty-five
9 years and he pled to time served for 551 days.

10 I'll just ask that on a proffer.

11 THE COURT: Ask her on proffer.

12 PROFFER (In-Camera)

13 BY MR. FALK:

14 Q. Judge Gehle -- excuse me.

15 A. No, not today.

16 Q. Dr. Gehle, when you're doing your evaluation, do you
17 ever hold out -- do you ever consider whether or not
18 somebody did not commit the offense that they plead guilty
19 to?

20 A. No.

21 Q. You draw -- I mean, you knew what he was charged with
22 originally; is that correct?

23 A. Yes.

24 Q. And I know that you're a forensic psychologist so you
25 have some understanding of possibly what the sentencing

1 ranges might be?

2 A. Yes.

3 Q. And since he had a prior CSC with a minor, this was
4 actually -- it could have been a capital case had he gotten
5 a second CSC with a minor under eleven?

6 A. Yes.

7 Q. Did you draw any conclusion from the fact that the
8 State was satisfied with allowing him a 551-day time served
9 sentence?

10 A. That's a difficult question. I've grabbed with what
11 that means, and I don't really know what that means, so
12 unless there's some clarification like I can read or have
13 access to, you know, a sentencing hearing transcript or
14 something like that to show that he -- like to explain
15 that or sometimes I will get documents from the solicitor
16 explaining why they made a certain negotiated plea, like
17 what their reasons were, then I don't know what the reasons
18 are. So I have to fall back to it was a sexually related
19 offense that he pled down for reasons that I don't know.

20 Q. And the -- I don't know the best way to say this. The
21 fact that it was an extremely good deal does not weigh into
22 your analysis?

23 MS. SHAW: Your Honor, I would object to --

24 THE COURT: It's a proffer. So you can --

25 MS. SHAW: But, again --

1 THE COURT: Just hold -- you want to put another
2 objection? Go ahead with another objection.

3 MS. SHAW: The objection is, is that it's putting
4 certain information into the record. He's saying a,
5 quote, extremely good deal. We don't know what kind of
6 deal this was and this was -- this was done almost ten
7 years ago with different people in a different court.
8 We don't know why they let him plead down. It's just a
9 simple fact, so characterizing it as --

10 THE COURT: That's why I'm not letting it -- yes,
11 ma'am. That's why it's not coming before the jury.
12 That's why it's a proffer.

13 MS. SHAW: I understand, Your Honor, but it's
14 inappropriate to refer to it that way.

15 BY MR. FALK:

16 Q. I won't say it's an extremely good deal, but he got
17 a deal that in lieu of facing a capital charge he was
18 sentenced to 551 days time served?

19 A. I can say that when I see those kind of deals --
20 I mean, I personally find that interesting. I --
21 professionally in terms of my evaluation, I don't really
22 have a choice but to look at it as a conviction and
23 consider it like I would consider any other conviction.

24 MR. FALK: Thank you.

25 THE COURT: All right.

1 MR. FALK: Well, while we're still off --

2 THE COURT: Okay.

3 MR. FALK: -- and the jury's not here, I want to
4 put my client on and eventually ask him why he plead
5 guilty.

6 MS. SHAW: That was actually gonna be my request
7 to the Court is that Mr. Fabian be admonished and
8 advised he is not to attempt to collaterally attack or
9 question the validity of his convictions when he is on
10 the stand.

11 THE COURT: I'm not gonna try that case. I'm not
12 going to try -- I'm sorry, I'm not gonna try that case.

13 MR. FALK: I understand that. My only point is
14 that she's making an evaluation based on the allegations
15 in the case being true and they are what are supporting
16 her opinion, not just the conviction, but the allegations
17 supporting the conviction are the basis for her opinion.

18 THE COURT: That's right.

19 MR. FALK: And so his testimony that he pled guilty
20 because he was gonna walk out of jail that day --

21 THE COURT: Well, let me say this to you. If that
22 is the reason that he pled, okay, good for him, but
23 that's not where the law lies. He pled guilty. He got
24 to plead guilty under North Carolina versus Alford. I
25 am quite confident that the -- the Court explained to

1 him he was going to have a conviction for assault and
2 battery in the first degree and that the -- that the
3 indictment was the factual basis that supported the
4 conviction for assault and battery in the first degree
5 and at the end of the day -- at the end of the day he
6 has a conviction, a conviction, for assault and battery
7 in the first degree and it is of a sexual nature. We're
8 not going behind it.

9 The fact -- well, you know, the reasons that he
10 chose to do the things that he chose to do, it has --
11 it truly -- that belongs to him. The same way that he
12 chose to plead to any other crime, we're not going behind
13 that either, and I am confident that his -- that his
14 attorney went over all of that with him, and guess what?
15 If she did not, he should have filed a PCR because the
16 reality is, is there was an indictment, there was a plea,
17 he has been convicted of assault and battery in the
18 first degree, it is a lesser included offense of criminal
19 sexual conduct with a minor in the first degree. He got
20 a deal. Just as you said, he got a good deal, but at
21 the end of the day he has a conviction for assault and
22 battery in the first degree on that indictment and that
23 is where he is. I'm not going -- we're not going behind
24 that today.

25 MR. FALK: Thank you, Your Honor. And so we'll

1 take his proffer tomorrow when he takes the stand.

2 THE COURT: Absolutely. Absolutely.

3 Okay. Are you ready?

4 MR. FALK: Let me have a second to sort of --

5 THE COURT: Sure. Sure. Sure.

6 MR. FALK: -- recut my path here.

7 Oh, yeah. I could ask -- okay.

8 THE COURT: Is that with the jury or without the
9 jury?

10 MR. FALK: No, no. I'm sorry. With the jury.

11 THE COURT: Okay.

12 (Whereupon, the jury return to the courtroom at
13 4:18 PM.)

14 THE COURT: All right. Ladies and gentlemen, we'll
15 continue with the cross-examination.

16 You may proceed.

17 CONTINUED CROSS-EXAMINATION

18 BY MR. FALK:

19 Q. Dr. Gehle, you are a forensic psychologist?

20 A. Yes.

21 Q. And just -- so forensic psychology is kind of the
22 intersection between law and psychology, is that a fair
23 summary?

24 A. It's a subspecialty of clinical psychology where we
25 interact with the court system and legal system and, you

1 know, either work with people who are involved in the
2 legal system or answer questions for the legal system.

3 Q. So, I mean, you're familiar with some of the
4 procedures that would happen in a criminal court?

5 A. Yes.

6 Q. Are you aware of what an Alford plea is?

7 A. Yes.

8 Q. And what is your understanding of that?

9 A. It's when somebody pleads saying that they believe
10 that they could be convicted. They're not -- they're
11 accepting responsibility, but not saying that they're
12 guilty. That's my understanding.

13 Q. And what was your understanding of how he pled to the
14 assault and battery case?

15 A. That he entered Alford pleas.

16 Q. And then the next case, the 2017 case?

17 A. Yeah, if I -- if I could look at the exhibits again,
18 then I could say that for certain.

19 Q. I'm showing you Exhibit 5 --

20 A. Okay.

21 Q. -- and I guess I'm showing you Exhibit 5 because
22 that's what it is.

23 A. Okay. So on Exhibit 5 on the sentencing sheet, it
24 says that he pled under North Carolina versus Alford, so
25 he entered an Alford plea, yes.

1 Q. Okay. Thank you.

2 MR. FALK: Your Honor, may I approach briefly?

3 THE COURT: Sure.

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

5 BY MR. FALK:

6 Q. So he pled guilty on that case without really
7 accepting responsibility for it. That's kind of an Alford
8 plea?

9 A. I think, yes.

10 Q. Now the fact that he, you know, was -- never really
11 admitted to those offenses, did that have any impact on
12 your opinion?

13 A. No.

14 Q. Thank you. During your -- during your interview with
15 him, he admitted to the conduct in 1993; is that correct?

16 A. That's correct.

17 Q. But he did not admit to the conduct on the last two
18 offenses; is that correct?

19 A. That's correct.

20 Q. Now let me talk a little bit -- so narcissistic
21 personality disorder, is that alone -- narcissistic
22 personality disorder, could that alone be a sufficient
23 personality disorder to support a sexually violent predator
24 conviction -- I mean, opinion?

25 A. Yes. I understand what you mean. It could in

1 certain cases. I don't believe that I have ever
2 recommended anybody for commitment based solely on that
3 diagnosis without anything else.

4 Q. Okay. So does narcissistic personality disorder say
5 anything about a person's volitional control?

6 A. Well, impulsivity is part of a personality disorder,
7 so it doesn't -- I mean, it -- it doesn't say anything
8 about somebody's volitional control in terms of sexual
9 offending necessarily, but it does speak to impulsivity
10 and it can mean that people lack volitional control for
11 other behaviors.

12 Q. But what we're worried about here is the risk to
13 re-offend by committing another sexually violent offense?

14 A. That's correct.

15 Q. Now it sounded like just from your testimony earlier,
16 and if I'm wrong just tell me I'm wrong, but it sounded
17 like you kind of took a dislike to Mr. Fabian?

18 A. No, I don't think I did. I think that he was pretty
19 interesting. He was a difficult interview, but he was
20 pretty interesting to interview. So I'm not -- I'm not
21 getting upset with people who are challenging. I'm a
22 psychologist. I find that stuff interesting. I find
23 people interesting when they're different.

24 Q. But you were at odds with him at points in the
25 interview; is that correct?

1 A. There were times where I would have liked him to
2 follow my directions better, let me control the interview,
3 let me control the pacing because, you know, I don't have
4 -- I have a job to do, I don't have forever to do it, so
5 it would -- I would have appreciated more compliance from
6 him. It's also hard to take notes when somebody is talking
7 that much and giving a lot of irrelevant details because
8 I don't want to miss things, but I don't know exactly,
9 you know, are you gonna get to a point with this, do I --
10 do I need to be recording this answer. Is this like you
11 changing the battery, does it have anything to do with your
12 explanation and understanding of this sex offense? Like
13 -- like a car battery is what he was talking about in one
14 of the offenses. I mean, he was difficult, but I -- I
15 wouldn't say that I disliked him.

16 Q. You were aware that he was released from SCDC and
17 actually was on the street for four months; is that
18 correct?

19 A. Yes. Yes.

20 Q. How did that play into your opinion?

21 A. Well, it -- four months is not very long, so it
22 doesn't play into my opinion very much, you know, because
23 he didn't go out and get in any trouble that I know of, so
24 it doesn't -- if he would have got out and got in trouble,
25 that would play into my opinion heavily, but for him it

1 didn't play into it much.

2 Q. Did you do any type of investigation that would have
3 made you think that you would have known had he gotten in
4 trouble with the law?

5 MS. SHAW: Objection. Mr. Falk is asking this
6 witness to speculate about whether she thinks she would
7 know if he got in trouble.

8 THE COURT: And I think he -- I thought he asked
9 her did you. What did you ask? Did you or didn't you?
10 Did you do anything?

11 MR. FALK: Did you, yeah.

12 THE COURT: Okay. That's what I thought you asked.

13 Ask your question, hold on, and then I'll make a
14 decision.

15 Ask your question.

16 BY MR. FALK:

17 Q. Did you do any type of investigation to find out
18 whether or not he got in trouble?

19 A. Well, what I did was I looked at the public index to
20 see if there were any, you know, charges and I looked at
21 the public index in four counties, things that were on his
22 record, but to see if there were any subsequent charges, I
23 would find it on the public index.

24 Q. Because that would certainly be something you would
25 include in your report, right?

1 A. Yes. I also requested records from the Department of
2 Probation, Parole and Pardon Services, but didn't receive
3 them.

4 Q. Did you contact the person where -- place where he was
5 getting some treatment while he was on probation?

6 A. I requested records from there. He was getting
7 treatments at Healthy Minds. I requested those, but they
8 were not received.

9 So the process in my office is when I want records,
10 I have to go through a paralegal, so I give the request to
11 a paralegal in my office and then she makes the request
12 externally.

13 Q. In your direct testimony, you didn't mention the fact
14 that in 2010 the State brought one of these proceedings or
15 initiated one of these proceedings against Mr. Fabian.

16 MS. SHAW: Objection, Your Honor. This is --
17 sidebar.

18 THE COURT: Okay.

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

20 MR. FALK: I'm not sure I remember my last question.

21 THE COURT: Do you -- do you need it?

22 MR. FALK: Well, or I could just start over.

23 THE COURT: Yeah, just start over.

24 BY MR. FALK:

25 Q. Were you aware that in 2010 there was a -- one of

1 these proceedings was commenced against Mr. Fabian?

2 A. I'm aware that prior to his release from prison in
3 2010, in November of 2009 his case went before the first
4 step of the SVP Act process, which is the multidisciplinary
5 team where they learn about his history, and they take
6 a yes or no vote to refer his case on, and they voted
7 unanimously to not refer his case for further consideration
8 under the SVP Act.

9 Q. Did that have any impact on your opinion?

10 A. No.

11 Q. One of the dynamic risk factors you talked about was
12 compliance with authority. Compliance with authority?

13 A. Yes. Something similar to that, yes.

14 Q. And you had mentioned the probation violation, but
15 then I thought your testimony earlier was that it wasn't
16 really a significant charge that he was on probation for;
17 is that correct?

18 A. They weren't sexual offenses.

19 Q. Okay. So he had this probation violation. When was
20 that, in 1993? That was prior to his sentencing, wasn't
21 it, the first time; is that correct?

22 A. He was on probation for a conviction in 1992 and then
23 a conviction -- so that -- the first one was February of
24 '92, the second one was a conviction from March of '92.

25 Q. And those were nonsexual charges; is that correct?

1 A. That's correct. I believe that there was a third one
2 as well, but that might have also been in March 1992.

3 Q. But the conduct that led to the probation violation
4 occurred sometime before he went to prison for the first
5 time; is that correct?

6 A. I -- I have to be careful in how I answer that
7 question because I just want to be accurate here. I don't
8 know that I had a violation report. What I found in the
9 public index records was that he was convicted of violating
10 the conditions of probation on June 25, 1993.

11 Q. Okay.

12 A. And then he was convicted of two probation citations
13 in February of '94 and his conviction -- so his conviction
14 on those two citations was -- was around the same time
15 that he was convicted of the criminal sexual conduct with
16 a minor in the first degree and the kidnapping.

17 Q. So the -- I'm just getting to the point that there was
18 no probation violation in the last twenty-five years?

19 A. I believe that's correct.

20 Q. Okay.

21 THE COURT: Let me see you. Let me see you about
22 that. Let me see you shortly.

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

24 THE COURT: Ladies and gentlemen of the jury, the
25 last comment that was made by -- the last question by

1 counsel, you must disregard and disavow it from your
2 minds, and ask what was it.

3 MR. FALK: Let's move on.

4 THE COURT: Uh-huh.

5 BY MR. FALK:

6 Q. So he's obviously spent a considerable amount of
7 time at the Department of Corrections. He had the first
8 sentence and then he had the second sentence?

9 A. Yes, he's had two sentences.

10 Q. And in all that time he only had two disciplinary
11 infractions; is that correct?

12 A. Two convictions of disciplinary infractions, yes.

13 Q. And one was a contraband infraction; is that correct?

14 A. Yes.

15 Q. And did he tell you what that was about?

16 A. I don't have it right here in my notes. I think I
17 have to look it up. And you're gonna have to bear with me
18 because I have a lot of notes. I'm gonna have to just
19 answer I'm not sure.

20 Q. Did he -- he didn't tell you it had something to do
21 with jailhouse wine?

22 A. I mean, that sounds familiar, but I don't have it
23 right here in my notes, so I either have to look it up in
24 the infraction in the records or I have to find it in my
25 notes.

1 Q. Well, I do remember reading in your report I think
2 there was a comment that you -- you mentioned in the
3 report that he said he hadn't been drinking since 1997.
4 Doesn't that sound right?

5 A. I believe so.

6 Q. Okay. And since that time, since '97, there hasn't
7 -- he's never had a contraband infraction for having -- for
8 making jailhouse wine that you saw in his SCDC reports?

9 A. That possession of contraband was in 1996.

10 Q. Okay. In your diagnosis, I mean, you were saying
11 kind of the qualifier on this narcissistic personality
12 diagnosis is the fact that it also carries some antisocial
13 personality traits. Is that accurate?

14 A. For him, yes.

15 Q. Okay. And is kind of one of the notions of antisocial
16 personality sort of disregard of other people's rights or
17 opinions or feelings; isn't that correct?

18 A. Yes, that's -- that's the overall like description of
19 it.

20 Q. Did you find it odd that somebody who you believed had
21 antisocial personality disorder that didn't have any -- had
22 such a minor group of infractions while at --

23 MS. SHAW: Objection, Your Honor. This is not an
24 antisocial personality case. It's mischaracterizing
25 the testimony. He has narcissistic personality disorder

1 with antisocial features. Antisocial personality
2 disorder --

3 THE COURT: This is a speaking objection.

4 MS. SHAW: Sorry.

5 THE COURT: You object.

6 MS. SHAW: I object because it's a
7 mischaracterization of the prior testimony. That's
8 not what she said.

9 THE COURT: Okay.

10 If you can answer it.

11 THE WITNESS: I -- I didn't diagnose him with
12 antisocial personality disorder. I found some of those
13 traits because he had that repeated violation of rights
14 of others, lots of causes for arrests, that criminal --
15 that criminal sort of thinking, but not enough to make
16 that diagnosis.

17 So I've seen a variety of results for people with
18 antisocial personality disorder or antisocial traits in
19 prison. Sometimes they will have a lot of infractions
20 and sometimes they will have few or none. It really
21 depends on probably their -- their hierarchy in the
22 jail, their ability to --

23 BY MR. FALK:

24 Q. Well, I think you're speculating now.

25 A. Yeah, I am speculating. Yes.

1 Q. And you asked him what his risk to re-offend was; is
2 that correct?

3 A. Yes.

4 Q. And didn't you say -- did he say zero?

5 A. He said a one.

6 Q. Okay.

7 A. One on a scale of one to ten.

8 Q. When you were talking about his dynamic risk factors
9 and sort of his problematic behavior with relationships, I
10 mean, I think you related to that -- you talked about the
11 story about him going out with his boss and -- and him
12 going home with the boss's girlfriend?

13 A. Yes.

14 Q. Now that happened -- that happened prior to 1993; did
15 it not?

16 A. Yeah, I -- from what I wrote down, he said that it
17 happened in probably around 1989, 1990.

18 Q. Okay. Let me talk a little bit about the Static.
19 Now the whole thing about the Static -- is it fair to say
20 the whole thing about the Static is that those things --
21 with the exception of the first category never change when
22 you're scoring it, right?

23 A. Well, there's Static risk factors, so it -- it can get
24 worse, so it can change for the worse.

25 Q. If you picked up new offenses?

1 A. Yes. Yes.

2 Q. Okay. But it also -- when somebody reaches the age
3 of sixty, there's a decrease in the risk; is that correct?

4 A. Yes, they -- points are subtracted.

5 Q. And is there any type of sign -- any type of
6 information in the literature to explain why the risk would
7 go down when somebody becomes sixty?

8 A. Well, because in the literature few people after sixty
9 re-offend, so that's something that's, you know, directly
10 observed and that's based on the belief that testosterone
11 decreases and so sex drive decreases and so offending
12 decreases.

13 Q. And does the literature explain that that's sort of
14 a -- somewhat of a -- I mean, it doesn't happen on their
15 sixtieth birthday; is that correct?

16 A. Correct.

17 Q. So it could happen over time?

18 A. It could happen over time, but what the research shows
19 is really that is a -- that's a line.

20 Q. Okay.

21 A. That's how it's talked about in the literature.

22 MR. FALK: One moment, please.

23 THE COURT: All right.

24 BY MR. FALK:

25 Q. Two other things. When you were talking -- what is

1 his actual risk to re-offend?

2 A. What's his actual risk? I'm not sure that I
3 understand your question.

4 Q. Well, I mean, you've given an opinion in this case?

5 A. Yes.

6 Q. Does that -- does that include what his risk to
7 re-offend is?

8 A. Well, what I'm asked to decide and give an opinion
9 about is whether his risk of is such a degree to pose a
10 menace to the health and safety of others. That's the
11 definition of likely in the law and so that's what I
12 give an opinion about. So whether he's likely by that
13 definition.

14 Q. Well, when you were doing the Static and you were
15 comparing it, does the Static not tell you what somebody --
16 I mean, you're making a comparison of the Static to like
17 actuarial tables for cars -- or for auto drivers or
18 something like that. I mean, can you not say what his risk
19 to re-offend would be?

20 A. I can say that individuals with this -- the same score
21 that he has re-offend at a certain rate and he can be
22 compared to that, but that's not a guarantee.

23 Q. And when you were comparing it, you said he's more
24 likely to re-offend than other people who sex offend.

25 What is the -- what is the recidivism rate of those --

1 re-offense rates for average sex offenders?

2 A. Give me one second. So the -- generally the research
3 talks about that average sex offenders re-offend at a
4 rate of about five to ten percent in five years. On the
5 Static-99R, the average score is two, and individuals in
6 the research samples with a score of two, 4.6 re-offended
7 in five years and 7.2 percent re-offended in ten years.

8 Q. When you're making that comparison, you're not
9 comparing it to a group of fifty-eight-year-old convicted
10 sex offenders, are you?

11 A. I'm comparing it to a group of individuals that have
12 the same score as him.

13 Q. Okay. Because we'd already -- I believe you had
14 testified that one of the factors that may be a protective
15 factor would be somebody aging and testosterone levels
16 going down; is that accurate?

17 A. I don't necessarily call that a protective factor --

18 Q. Okay.

19 A. -- but offending after age sixty is less likely. So
20 the way that the Statics handle that is by subtracting
21 points from their overall risk level and the Static-99R
22 there are two places -- or two age groups where they can
23 get subtracted points, so they get points subtracted before
24 age sixty.

25 Let me look at that test specifically to tell you

1 exactly. So he had one point subtracted from his overall
2 risk score because he fell into the age range of forty to
3 59.9, so that corresponds to a negative one on that item,
4 so that --

5 Q. And then when he would turn sixty, you would take off
6 two more points?

7 A. Yes.

8 Q. I'm just saying that when you're making these
9 comparisons to average risk offenders, those comparisons
10 are not taking into account whether or not you're comparing
11 him to a pool of twenty-four-year-old risk offenders or
12 fifty-nine-year-old risk offenders?

13 A. Well, the individuals in the sample who scored the
14 same score as him were comprised of a wide range of aged
15 people, so you're comparing them to people with that same
16 score and not differentiating it in other ways because they
17 were all included in that sample.

18 MR. FALK: Your Honor, might I have a moment with
19 my client?

20 THE COURT: You may.

21 MR. FALK: Your Honor, I have no further questions.

22 THE COURT: Very well.

23 Redirect.

24 MS. SHAW: Briefly, Your Honor, but it is almost
25 5:00. Depending on how the Court would like to handle

1 it. I don't know if we want to let our jury go and I'll
2 start my redirect tomorrow morning or if you would like
3 me to begin now.

4 THE COURT: If you can begin it, that would be great
5 and we'll see where we are.

6 MS. SHAW: Yes, ma'am.

7 REDIRECT EXAMINATION

8 BY MS. SHAW:

9 Q. Dr. Gehle, you were asked several questions about what
10 Mr. Fabian admitted and denied in your interview. Do you
11 recall that on cross-examination?

12 A. Yes.

13 Q. Okay. Now in these types of evaluations, is it
14 commonplace for people not to be forthcoming about their
15 personal histories?

16 A. Yeah, I see a wide variety of responses to the
17 questions.

18 Q. Okay. And is it uncommon for people to actually deny
19 offenses that they've been convicted of?

20 A. It's not uncommon.

21 Q. Okay. Thank you. And Mr. Falk asked you about the
22 2010 MDT lack of referral, the multidisciplinary team at
23 SCDC. You said it did not impact your evaluation; is that
24 correct?

25 A. Yes, but it was 2009.

1 Q. I'm sorry. I wrote down 2010. My bad.

2 So in 2009 -- yet it's true that he's re-offended
3 sexually twice with four different children since that MDT
4 referral, correct?

5 A. He was convicted of offending three children since
6 that referral, yes.

7 Q. And he was charged with offending four?

8 A. That's correct.

9 Q. Okay. And when was the second time he was actually
10 reviewed by the MDT?

11 A. It was the review that got us here today because he
12 was not reviewed after the 2014 incident because he didn't
13 go into the Department of Corrections and that would --
14 that would be what triggers a review.

15 Q. Okay. So the second time Mr. Fabian actually got
16 reviewed after committing at least three, if not four, more
17 offenses, that's when he got referred, right?

18 A. Yes.

19 Q. Okay. Thank you. And you were also asked about
20 disciplinary infractions while in SCDC; do you recall that?

21 A. Yes.

22 Q. Okay. And I'm gonna show you an SCDC record just to
23 refresh your recollection and can you read that highlighted
24 information?

25 A. You want me to just read all of it?

1 Q. No, no. Just read it to yourself.

2 A. Oh, okay.

3 Q. Okay. Does that refresh your recollection about the
4 disciplinaries that Mr. Fabian was charged with as well as
5 convicted of?

6 A. Yes.

7 Q. Okay. He's got two disciplinaries?

8 A. Convictions, yes.

9 Q. Okay. And how many total charges did he have while he
10 was in SCDC? I don't need to know the nature. I just need
11 to know the number.

12 A. Four.

13 Q. Thank you. Now you were also asked about at age
14 sixty. Mr. Fabian is, I believe, fifty-eight at this
15 point. That Mr. Fabian would get points off of his Static
16 score due to age. Do you recall that?

17 A. Yes.

18 Q. Okay. And he would get two points off when he would
19 turn sixty, correct?

20 A. On the 99R, yes.

21 Q. Okay. And that would equate to a score of what or to
22 a risk level of what?

23 A. So that would decrease his score to four and that
24 would -- individuals with a score of four, 9.2 percent
25 re-offend sexually within five years and 13.9 re-offend

1 sexually within ten years.

2 Q. Okay. And that would be the above average risk
3 category?

4 A. I believe so, yes.

5 Q. Okay. So even with points off of his Static for the
6 older age range, he would still be above average risk
7 according to the 99R?

8 A. Yeah. I think he would be above average risk on both
9 instruments even if a reduction for age.

10 Q. Okay. I was about to ask you about the 2002, but you
11 got me there.

12 So he's fifty-eight now. When he was alleged to have
13 performed fellatio on the five-year-old boy in 2015, how
14 old was he approximately?

15 A. You're gonna make me do math.

16 Q. Yeah. I'm sorry. I'm no good at it.

17 A. That was seven years ago, so he was in his early
18 fifties.

19 Q. Okay. And in 2013 when he sexually assaulted the two
20 little girls?

21 A. That was about nine years ago, so he would have been
22 in his late forties.

23 Q. Okay. So is there anything in Mr. Fabian's history
24 that would indicate that his risk has gone down over time?

25 A. No.

1 MS. SHAW: Thank you. I have nothing further.

2 THE COURT: Recross.

3 MR. FALK: No, Your Honor.

4 THE COURT: Very well.

5 And is this witness free to leave? Any objection?

6 MS. SHAW: No, ma'am.

7 MR. FALK: No objection.

8 (Witness excused.)

9 THE COURT: Ladies and gentlemen, it is almost
10 5:00, and so it's a good time for us to stop. We will
11 start in the morning at 9:30. At 9:30. Please remember
12 do not discuss this matter or allow anyone to discuss it
13 with you. Please note that the curiosity is going to be
14 heightened. Put it on the judge. That the judge has
15 told you you cannot discuss this matter. Those of you
16 that would be dashing off to work tonight, unh-unh.
17 nope. Nope.

18 UNKNOWN JUROR: I can't go to work tomorrow?

19 THE COURT: Keep breathing. Just keep breathing.
20 Keep breathing.

21 UNKNOWN JUROR: Okay. I won't go.

22 THE COURT: Put it -- put it on the judge. Put it
23 on the judge. And if I need to talk to somebody, I will
24 talk to somebody.

25 UNKNOWN JUROR: Oh, I done did that already. When

1 it's over, just over give me my paperwork.

2 THE COURT: That's sounds perfect. We -- we might
3 give you two pieces of paperwork. We might do one for
4 Monday, one for Tuesday. How about that? I'm happy to
5 do that. And one for Wednesday, too, if we need to.

6 UNKNOWN JUROR: So you've got to do three.

7 THE COURT: Yeah.

8 Ladies and gentlemen, remember when you go home you
9 have really paid very close attention, and I'm so very
10 grateful. And I know you've been listening. Do not let
11 that little voice start asking all these questions going
12 I can go to the Internet. No, you cannot.

13 Remember it is so important that you receive all of
14 the information from which you will make up your minds
15 here in court while court is in session.

16 The same admonition about cell phones. We went over
17 that.

18 One other thing that I -- I really feel as though
19 I should mention to you, St. George particularly is very
20 small and, you know, there's only -- well, there are
21 couple of ways to come and go from the courthouse, but
22 it's very limited. If you happen to see anyone who's
23 involved in this suit and they don't even say hello and
24 they seem to shirk away from you, I wanted to explain to
25 you that the folks that are participants in this trial

1 know that they're not to communicate with you or interact
2 with you at all. So nobody's being rude, they're just
3 following my directions. In fact, should anyone try to
4 contact you about this case, it would be very important
5 to let me know. If you can get a name, fine. If not,
6 you can get a description and let me know when you
7 return to the courthouse. I don't think that will be a
8 problem, but I mention it in an abundance of caution.

9 Ladies and gentlemen, we are going to --

10 (Discussion off the record.)

11 THE COURT: 9:30 then. Have a great evening. See
12 you in the morning.

13 (Whereupon, the jury was excused for the day at
14 5:03 PM.)

15 THE COURT: I'm beginning probably too early, but
16 I am beginning to look at the charge and so -- and I'll
17 do that. I'll continue to do that some of that this
18 evening. Most of it looks pretty -- other than this
19 that deals with this particular matter, expert witnesses,
20 direct evidence and circumstantial evidence, things like
21 that, but you didn't have -- I'm trying to remember if
22 you had a whole charge.

23 MR. FALK: No, I just was --

24 THE COURT: I didn't think you did, okay, and that's
25 perfectly fine.

1 MR. FALK: There's just some things I wanted. I
2 wanted, you know -- I can't remember what the case is.
3 That reasonable doubt charge, which is what I think you
4 said at the beginning.

5 THE COURT: Yeah. Do you want both or one?

6 MR. FALK: Just that one.

7 THE COURT: Just that one. Okay. Got it.

8 I usually -- you known, I usually charge both, but
9 I'll do one or the other.

10 MS. SHAW: Judge, just for the record, I understand
11 that the Court --

12 THE COURT: And which one do you have? You have
13 the short one?

14 MS. SHAW: We have the short one, but we also never
15 include the criminal reasonable doubt definition in these
16 cases. So, I mean, I would just submit what Mr. Falk is
17 asking for when it comes to that particular section --

18 THE COURT: Yes.

19 MS. SHAW: -- would not be appropriate by our
20 standard, so I would subject to its inclusion.

21 There's also certain language in his proposed
22 sections that he's asking for that we argue about
23 regularly, and which is regularly not included, so we
24 may have to have a discussion on the record about that
25 tomorrow or later -- or today depending on what the

1 Court wants to do.

2 THE COURT: You-all -- you prefer the longer one?

3 You know what, I'll do -- I'll do both. I mean,
4 that's what I typically do in criminal cases, is do
5 both, the shorter one and the longer one, and I don't
6 mind doing both.

7 MS. SHAW: But, Your Honor, this isn't a criminal
8 case.

9 THE COURT: Yeah, but there is like a -- this is a
10 reasonable doubt charge that is used in criminal cases.
11 I give this one every time I try a criminal case, the
12 one that you have included, but I also give the shorter
13 one because it's a reasonable -- it is the most -- it is
14 a more current reasonable doubt charge and I -- you know
15 what I do, I do them both because I like them both, all
16 right?

17 MS. SHAW: Okay.

18 THE COURT: I just think it lets them -- it just
19 -- I think it does a nice job for both, so I'll just do
20 both.

21 MS. SHAW: That's fine, Your Honor. I just needed
22 to make a record.

23 THE COURT: Yeah, for twenty-five years it's worked,
24 so I thought I'd just stay with it.

25 MR. FALK: Your Honor, could I see the State's

1 reasonable doubt charge? I just don't have it.

2 THE COURT: Sure.

3 MS. SHAW: You can borrow mine.

4 THE COURT: It's the other one.

5 MR. FALK: I know it's the other one.

6 THE COURT: Let me tell you that the second
7 paragraph under burden of proof, I am not going to
8 comment on -- I'm not gonna -- I am not going to opine
9 on the burden. I'm just gonna state what it is.

10 MS. SHAW: Okay. So do you want to --

11 THE COURT: If the State fails to meet this high
12 burden, that's got the Court commenting on what I think
13 about the burden. It doesn't matter what I think about
14 the burden. It is what it is.

15 MS. SHAW: Okay. So you want to take that word out?

16 THE COURT: Yes, plaintiff failed to meet its burden
17 of proof.

18 MS. SHAW: Okay.

19 THE COURT: But I'm gonna do both. I'm gonna do
20 both. I always have. No reason to stop now.

21 MR. FALK: Your Honor, my -- I know I added some
22 language to just emphasize that he currently is a
23 sexually violent predator.

24 THE COURT: Say what now?

25 MR. FALK: That their element is that he is

1 currently -- I think it's if you find that he is not
2 currently a sexually violent. I was just trying to --
3 I think in mine I added some language.

4 MS. SHAW: Yes, Your Honor. There's a considerable
5 amount of language in Mr. Falk's proposed charge that does
6 not fall in line with the statute, like the special and
7 serious difficulty. That's not something we ordinarily
8 put in, but it is something that's routinely requested
9 and we fight about.

10 THE COURT: Sure.

11 Do I have those requests to charge?

12 MS. SHAW: I don't know if you have Mr. Falk's. I
13 have a copy of it and I went through it.

14 THE COURT: Sure.

15 Yeah, now's the time to give them to me though.

16 And you may have when you were here in July.

17 MR. FALK: Yeah, it's just that in -- in the second
18 element, you know, when you break it down what a sexually
19 violent predator is, and the second element is that
20 respondent currently suffers from a mental abnormality.

21 THE COURT: Okay.

22 MS. SHAW: And, again, Your Honor, that's just --
23 it's not part of the statutory language, so we would
24 object to the inclusion of currently. I mean, it's
25 understood that he currently needs to have a mental

1 abnormality or personality disorder, but it's -- I
2 would object more to the special and serious difficulty
3 language than his current mental abnormality language.

4 THE COURT: All right. Where are you talking about?
5 Special what?

6 MS. SHAW: If you go to Number 3 on page two of
7 Mr. Falk's proposed --

8 THE COURT: Again, I don't know that I -- wait a
9 minute. I don't know if I've got them. Do I have them?

10 MR. FALK: I've got another one I can look at.

11 THE COURT: Okay.

12 MR. FALK: Just let me get my iPad turned on.

13 THE COURT: Sure.

14 All right.

15 MR. FALK: Just give me a second, please.

16 All right. I'm up.

17 THE COURT: Okay. So -- right. I'm gonna charge
18 the statute. I'm gonna charge the statute and I'm not
19 going to -- I'm not gonna talk about before the
20 respondent can be committed, you, the jury, must find
21 that the respondent suffers from a mental abnormality --
22 that I won't charge obviously, but this is the part
23 that causes the respondent to have a special or serious
24 -- special and serious difficulty in controlling his
25 behavior. The mental abnormality or personality

1 disorder must be sufficient to distinguish him from
2 repeat offenders convicted in ordinary criminal cases.

3 I'm not doing that. I've got that -- I'm not going
4 there.

5 MS. SHAW: Your Honor, that was one of my major
6 objections.

7 THE COURT: Do what?

8 MS. SHAW: That was one of my major objections.

9 THE COURT: Okay.

10 Now here's what I'm gonna charge.

11 MS. SHAW: Okay.

12 THE COURT: Under the Sexually Violent Predator
13 Act, in order for an individual to be civilly committed
14 following -- well, no. Under the Sexually Violent
15 Predator Act, in order for an individual to be civilly
16 committed, the State must prove beyond a reasonable
17 doubt the following things. First, the defendant must
18 have been convicted of at least one qualifying sexually
19 violent offense as defined by South Carolina Code
20 Annotated Section bla, bla, bla. Ladies and gentlemen,
21 I charge you that the offense of criminal sexual conduct
22 with a minor in the first, second and third degree are
23 contained within Section 44-48-30(1)(a) and (b), and
24 that he has been convicted of a criminal sexual conduct
25 in the first and third degree.

1 MS. SHAW: That's fine, Your Honor. Would you
2 just clarify that those are defined as sexually violent
3 offenses?

4 THE COURT: Yes.

5 MS. SHAW: It's Section 30, but it's part of the
6 definition, so if you would just say that those are
7 defined as sexually violent offenses I think it would
8 be helpful and clear to the jury.

9 THE COURT: Yeah, yeah, yeah.

10 MS. SHAW: Thank you.

11 THE COURT: Now, second, the offender must have a
12 mental abnormality and/or personality disorder which
13 makes that person likely to engage in acts of sexual
14 violence if not confined to a secure facility for
15 long-term control, care and management.

16 I'm going to define for them mental abnormality,
17 likely to engage in acts of sexual violence, remind
18 them that the State has the burden to prove the elements
19 beyond a reasonable doubt.

20 MS. SHAW: Yes, ma'am. That's perfectly satisfactory
21 to the State.

22 THE COURT: And all of this language, all of this
23 language about the difficulty in controlling behavior,
24 I don't know that I -- I'm gonna stay away from that
25 because I don't know that I agree with that and the

1 reason is I think that there are personality disorders
2 that -- that very well may not be the appropriate way to
3 define why they're likely to re-offend.

4 MS. SHAW: Your Honor, as long as the Court's
5 instruction mirrors the statute, we're satisfied with
6 the words "special" and --

7 THE COURT: I'm going to -- you know, let me tell
8 you what. In my -- in my career, I have found when I
9 go and get creative, I get my papers with all kind of
10 X marks on them when they go up on appeal, so I'm gonna
11 stay really close to the statute.

12 MR. FALK: I was gonna say I wasn't getting creative
13 in my -- in that one. That came right out of Snow that
14 they say it's three elements.

15 THE COURT: Yes. Yeah.

16 MR. FALK: Okay.

17 THE COURT: I'm with you. One of the difficulties
18 that I have -- well, come here. I normally don't do
19 this on the record. I normally do these charge
20 conferences off the record and you-all come here and
21 I'll tell you why.

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

23 (Whereupon, the proceedings were concluded for
24 August 30, 2021, at 5:18 PM.)

25 (The following proceedings were held August 31,

1 2022, beginning at 10:58 AM.)

2 BAILIFF: All rise. Court's in session. The
3 Honorable Judge Goodstein presiding.

4 THE COURT: Thank you so much. Everybody please
5 be seated.

6 And before the jury comes out, do you want to go
7 ahead and rest on the record?

8 MS. SHAW: I can. Sure. Whatever you want.

9 THE COURT: Yeah, just because I don't want to bring
10 them out, you rest and send them out.

11 MR. FALK: Can you note my motion and then I'll make
12 it again at the close?

13 THE COURT: What motion? Which one?

14 MS. SHAW: Directed verdict.

15 MR. FALK: Directed verdict.

16 THE COURT: Oh, yes, of course. That motion.
17 Absolutely. Yes.

18 Or is it an involuntary nonsuit with prejudice?

19 MR. FALK: I --

20 THE COURT: Whichever. Yes, I do. I note. Denied.

21 MS. SHAW: Your Honor, the State rests.

22 THE COURT: Thank you.

23 The motion is denied. The motion -- the involuntary
24 nonsuit with prejudice or directed verdict is denied.

25 MR. FALK: Okay.

1 THE COURT: All right. Let's have the jury in.

2 (Whereupon, the jury enter the courtroom at
3 11:01 PM.)

4 THE COURT: Good morning, ladies and gentlemen,
5 and let me just say I so apologize for keeping you in
6 your jury room. I can assure you we have not been out
7 here telling jokes and whooping it up and having a big
8 time. We've had -- there's been everything from massive
9 traffic to car trouble to some preliminary matters that
10 I needed to attend to this morning, so I do apologize
11 for keeping you in your jury room all this time.

12 But, listen, you-all are gonna keep on and
13 somebody's gonna find out they're related to somebody
14 else, but in any event, ladies and gentlemen, we are
15 now ready to proceed.

16 Yes, ma'am.

17 MS. SHAW: All right. Good morning, Your Honor.
18 May it please the Court? The State has presented its
19 evidence and we rest.

20 THE COURT: Thank you so much. You've now heard
21 the evidence which you will hear from the State in their
22 case in chief. I note for the record that the State
23 was kind of enough to do so before the jury came out
24 and understanding that you would rest in front of the
25 jury, now we've done that, we've argued the motion and

1 that's been ruled on, and we're now going to turn to
2 the Respondent.

3 Yes, sir.

4 MR. FALK: May it please the Court, Your Honor?

5 THE COURT: Yes, sir.

6 MR. FALK: I would like to call Tracy Allan Fabian
7 to the stand.

8 THE COURT: Very well. Yes, sir. If you'd come
9 along forward and be sworn.

10 THE DEFENDANT: Is it okay if I carry my notebook?

11 THE COURT: I'm so sorry, you want to bring your
12 notebook?

13 MR. FALK: He wants to know if he can carry his
14 notes up there with him.

15 THE COURT: Sure.

16 MS. SHAW: Your Honor --

17 THE COURT: Now as long as he understands that the
18 State certainly will be allowed to review anything that
19 he -- that he uses and has to testify.

20 THE DEFENDANT: Thank you. No problem.

21 MS. SHAW: Thank you, Your Honor.

22 THE CLERK: Could you please raise your right hand
23 and state your full name for the record?

24 THE DEFENDANT: Tracy Allan Fabian.

25 (Whereupon, Tracy Allan Fabian was duly sworn by

1 the Clerk of Court.)

2 THE COURT: Your witness, Mr. Falk.

3 TRACY ALLAN FABIAN,

4 having been duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. FALK:

7 Q. Mr. Fabian, why don't you tell the jury a little bit
8 about yourself. Where did you grow up?

9 A. Summerville.

10 Q. Okay.

11 A. From about age six on, Summerville.

12 Q. Okay. Did you go to high school around here?

13 A. Yes, Summerville. Graduated in '82.

14 Q. '82?

15 A. (Nods head.)

16 Q. Now we heard Dr. Gehle's testimony about what she --
17 how she recalled your lifestyle prior to your arrest in
18 '93. Can you sort of describe -- do you think you've
19 changed?

20 A. Yes.

21 Q. Do you think your lifestyle has changed since '93 --
22 or, you know, before 1993?

23 A. Drastically. Yes, sir.

24 Q. Okay. Why don't you tell the jury a little bit about
25 that.

1 A. Well, her -- her record -- Ms. Gehle's record was
2 accurate --

3 Q. No -- oh, I'm sorry. Go ahead.

4 A. -- describing the -- the person I was before. Some --
5 some of the stories were pretty ancient, but I was just a
6 drunken idiot. I cared about no one but myself.

7 Q. You said a drunken idiot?

8 A. That's -- that would -- that would be how I'd describe
9 myself.

10 Q. So you -- did you have a problem with alcohol?

11 A. Yes.

12 Q. Was that your sort of drug of choice?

13 A. Yes, it's the one I've had the most problem with in
14 life.

15 Q. Okay. Is -- is there wine available inside the
16 Department of Corrections?

17 A. Yes, to this day.

18 Q. And you got a citation for contraband when you were at
19 the Department of Corrections; is that right?

20 A. Correct.

21 Q. And what was that for?

22 A. It was for wine.

23 Q. Okay. And when was that about? Was it before 19 --

24 A. Well, the -- actually the SCDC record is wrong on
25 that. It was not '96, it was '97, but I don't want to get

1 into all that.

2 Q. Okay. But it was in --

3 A. These records are wrong, I think.

4 Q. Have you -- but I think -- I recall seeing something
5 in Dr. Gehle's report saying that you said you haven't had
6 a drink since '97?

7 A. December '97.

8 Q. Okay. So do you go meetings or you just have not --
9 so you just have not had a drink since '97?

10 A. No, the -- I have not. The charge itself was supposed
11 to result in severe punishment, loss of my job, go to
12 lockup, lose my State pay for the rest of my time there.

13 For you-all that don't know what that is, that's no
14 matter what job you work you get some kind of money. I was
15 supposed to lose everything and the disciplinary hearing
16 officer, who was a pretty tough woman, she gave me a break.
17 She was like just, you know, I'll give you a counseling
18 statement, go back to your cell, and so I thought to
19 myself, I said here I am in prison still having to have
20 people bail me out because of my drinking. That -- that
21 one single incident changed my habits and that was -- that
22 was the beginning of -- that was the new me. The epiphany.
23 I was like I'm the kind of person I really hate. It was
24 -- you know, so that was -- it was -- it was working up to
25 that, but that was -- that was the apex.

1 Q. So you had no -- you had no problem talking to
2 Dr. Gehle about your offenses in '93; is that right?

3 A. That's right.

4 Q. And so you -- you admitted to those charges; is that
5 correct?

6 A. Yes.

7 Q. And have you had any time to reflect on that since
8 this time -- since that time?

9 A. Twenty-nine years.

10 Q. And what has -- have you reached any conclusions?

11 A. Yes. It was a horrible act. It was -- it's not that
12 I don't feel remorse. I had to -- I had to finally move
13 past it. For a long time I was just depressed all the
14 time, sad, you know, just guilty, shameful, just -- it was
15 just horrible. Aside from talking to counselors about it,
16 I've done much reading. Of course, I've never had any
17 contact with the victim again, but it -- it could have
18 destroyed her life. It could have traumatized her forever,
19 it could affect the way she has relationships, has sexual
20 relationships. It -- it could just ruin her life. So,
21 yes, I've thought about it a lot.

22 Q. Did you have an opportunity when you were in -- and
23 you got some -- you went to C-Star counseling; is that
24 right?

25 A. Yes.

1 Q. Did they give you any kind of tools to help you
2 process, you know, the victim advocacy?

3 A. Yes, some.

4 Q. Okay.

5 A. Yeah, there was cognitive distortions we talked about,
6 which is basically screwed up thinking, you know. You're
7 rationalizing things that -- you know, and not receiving
8 input from other people, thinking that your ideas are
9 correct and theirs are wrong, and there's -- the cognitive
10 distortions can stretch in a lot of directions, but, yeah,
11 well, I definitely had them.

12 Q. Well, with regard to your first victim, what -- what
13 were your cognitive distortions?

14 A. Oh, that -- you know, that she could agree to -- to
15 do that sort of thing, like she could think like an adult.

16 Q. Okay.

17 A. That -- you know, that -- I don't know. That she
18 was a willing participant. Because of her actions I was
19 telling myself that. She was not a willing participant.
20 As the adult, I should never have let it happen. I don't
21 in any way blame her and I never said that I did.

22 Q. Okay. A second ago you talked something about jobs
23 when you were in prison. Why don't we talk a little bit
24 about that. What kind of positions did you have when you
25 were in prison?

1 A. Well, the first time around, seventeen years and
2 four months, I worked predominately in PI, which is
3 Prison Industries, and on eight different occasions at --
4 in four different job descriptions I became supervisor
5 over people --

6 Q. Let me just interrupt you. I'm pretty convinced that
7 not one person on this jury really understands how Prison
8 Industries work, so what is it? What is Prison Industries?

9 A. Oh, you get paid extra. It's -- it's outside jobs.

10 Q. So you get transported from -- from wherever you are?

11 A. No. No, it's -- it's there at the prisons.

12 Q. Okay. So it's a facility on the campus of the prison
13 that you're at?

14 A. Yeah, you go to work every day like it's a job.

15 Q. Okay. Are there non-prisoners working in that same
16 facility?

17 A. Yes.

18 Q. How many non -- so -- so there could be -- all right.
19 Give me an example. When you worked in Prison Industries,
20 what -- what prison were you at?

21 A. Allendale.

22 Q. Okay. So were there people who lived in Allendale
23 county that also worked there at the same time side by
24 side?

25 A. Yes.

1 Q. Okay. All right. And so you were at Prison
2 Industries. What kind of responsibilities did you have?

3 A. Just like it sounds. Just supervising other inmates
4 and that's not always an easy project.

5 Q. So how many inmates would be under your supervision?

6 A. Well, the most ever was twenty-eight. That was at the
7 Appalachian hardwood floors. Scraping. Where you scrape
8 boards. We made new boards look old for a profit. Yeah, I
9 -- I was over two shifts; fourteen people on first shift
10 and fourteen people on the second. So, yeah, that was the
11 most at any one time, twenty-eight.

12 Q. And so what kind of stuff did you-all make? I'm just
13 really asking this for myself. So you-all -- was it mostly
14 this Appalachian scraping boards?

15 A. Uh-huh. A very hard job.

16 Q. Oh, I don't doubt it. All right. Did you have any
17 other employment when you were in prison?

18 A. Yeah.

19 Q. I mean, did you have any -- like a job in the
20 lunchroom or --

21 A. Yeah, at Broad River, I was -- I was there for
22 two years for the Sex Offender Treatment Program and I
23 was -- I worked kitchen maintenance in two kitchens. They
24 had two kitchens there and just I was responsible for
25 predominately the refrigeration, but at -- in prison it

1 means whatever they tell you to do, so it ended up being a
2 lot of plumbing.

3 Q. So the seventeen years that you were in prison, were
4 you working most that time?

5 A. All that time.

6 Q. Okay.

7 A. Unless we were on lockdown.

8 Q. All right. Did you have an opportunity to participate
9 in any types of classes? Any type of rehabilitation
10 classes?

11 A. Well, yes, more so the second time around there was
12 more programs available, but first time around I took the
13 HVAC course, which was eighteen months. I was on IRC,
14 which is Inmate Representative Counsel. You're a liaison
15 between inmates and the staff and it -- it can be a
16 thankless job. Everyone thinks you get some kind of
17 privilege and there -- there isn't any and if the inmates
18 act -- you know, do something wrong, then the staff blames
19 you and vice versa. They come up with some new policy,
20 then it's my fault. So, you know, basically that's what
21 you are, just a buffer between the two groups, staff and
22 the inmates. I did that for two years. I left to go to
23 Broad River, that's why that ended, and when I returned
24 I hadn't been there long enough to qualify to run for
25 election and by the next term I didn't have enough time

1 left to run, so I never got to do it again.

2 Q. So you -- you left Allendale to go to Broad River?

3 A. Yes.

4 Q. And that was to get into the sex offender treatment?

5 A. Yes. It was -- by the way, it was all voluntary.

6 None of the sex offender treatment was court mandated. I
7 had to have wanted it.

8 Q. And that was at Broad River?

9 A. The third time, yes.

10 Q. Yeah. Is Allendale a better place to be housed than
11 Broad River?

12 A. I spent more time in Allendale than the house I grew
13 up in sadly, but, yeah, it was definitely better.

14 Q. Did they have character dorms there when you were
15 there?

16 A. Yeah, the second time. When I went back for the short
17 period, I had nineteen months left when I got there. And
18 they have character dorms at the other prisons. Allendale
19 is a character yard, basically meaning that, you know, if
20 you wanted to do stupid stuff like tattoos and drugs and
21 wine and fighting, you know, you're not gonna stay there.
22 They give you one opportunity and you move to another dorm
23 that's called second chance. After that, you just --
24 you're just shipped off the yard. It's just for people
25 that want, you know, something more out of life. They want

1 to, you know, straighten their self out, make changes.

2 Q. So those seventeen years, do you feel like that
3 changed you? I mean, that's a stupid question, but...

4 A. Well, yes, it did. At -- at first I was doing the
5 same stuff other people were doing, just drinking wine and
6 smoking pot and gambling, all that, and then, like I said,
7 I just -- you know, there were other people there, other
8 people that were older and had more sense than me gave me
9 advice and I didn't listen to them at first, but things --
10 things became obvious, you know.

11 Q. And what things became obvious?

12 A. That I was not a good person. That I was the kind of
13 person that I would, you know, think -- think lowly of. I
14 was like -- it was like the epiphany. I'm like I'm the
15 kind of person I hate. It's time to change.

16 Q. So when you get out -- when you got out -- when you
17 got out after the first time, where did you work?

18 A. When I got out in 2010, I had the HVAC certificate and
19 EPA certification.

20 Q. And what kind of certification?

21 A. Huh?

22 Q. You said you had --

23 A. Oh, EPA certification. It kind of followed the -- the
24 HVAC. It -- it's --

25 Q. Is that to handle the freon?

1 A. Yeah, you have to have a -- a Federal, you know,
2 certificate on how to do that because of the --

3 Q. And HVAC is heating, ventilation and air-conditioning?

4 A. Right.

5 Q. Yeah.

6 A. And I went to many places and had the job until it
7 came to the question about have you ever been convicted of
8 a felony on the application and repeatedly I was back in my
9 truck driving away because it made a big difference. I was
10 simply not hired. So I bought a chain saw for a hundred
11 bucks and borrowed my friend's ladder and started a tree
12 business that really blossomed. I wish I'd started that
13 many decades before. It was -- it was hard work, but very
14 enjoyable.

15 Q. That's cutting trees?

16 A. Exactly like it sounds, yeah. Cut trees down, you
17 know, haul trees off. There's climbing and I'm, you know,
18 kind of too old and too fat for that, but I had someone I
19 would hire. You know, if that was the only option, I would
20 hire someone for \$35 an hour to limb trees. I was -- I was
21 really impressed with myself that, you know, I could just
22 start a business like that and be successful. I was -- I
23 would reinvest money. I had -- when I was arrested in
24 2014, I had three vehicles and four trailers and thousands
25 of dollars' worth of equipment and --

1 Q. So what happened in 2014?

2 A. My girlfriend and I were arrested and charged with
3 the crimes you-all have heard so much about with the two
4 girls and that -- that really -- really ruined my
5 relationship and, you know, screwed my life up. You know,
6 we were -- we were not guilty, but that's -- that's a hard
7 thing to prove, especially -- it ruined -- I -- I still
8 feel guilty about how it affected her because --

9 Q. Who her, your girlfriend?

10 A. Yes. I don't think I want to say her name or anything
11 in court, but, yes, she -- in her whole life, she was
12 thirty then, the only thing she'd ever had was a ticket for
13 not having a tarp on her pick-up truck when she was hauling
14 trash in her whole life.

15 MS. SHAW: Your Honor, I have to object. This is --

16 THE COURT: Sustained.

17 MS. SHAW: Thank you.

18 THE WITNESS: Okay.

19 MR. FALK: What's the grounds?

20 THE DEFENDANT: I don't know.

21 THE COURT: Sustained. The objection is sustained.

22 MR. FALK: For -- for relevance?

23 THE COURT: Yes.

24 MR. FALK: Okay.

25 BY MR. FALK:

1 Q. So you got arrested for these charges?

2 A. Correct.

3 Q. And you pled to these charges?

4 A. Well --

5 Q. Well, how long were you in the Dorchester County
6 Detention Center?

7 A. Seventeen months.

8 Q. All right. So that's 551 days?

9 A. Not by my calculation, but that's what they put down
10 there.

11 Q. Okay. So tell me if you didn't do it why did you
12 plead guilty?

13 MS. SHAW: Objection. There are a number of reasons
14 why anyone might plead guilty. The reason for the guilty
15 plea is irrelevant to the question of whether he's got a
16 conviction.

17 THE COURT: Is irrelevant to?

18 MS. SHAW: The question of whether he's got a
19 conviction under the Alford case or --

20 THE COURT: We're not gonna relitigate it, the -- the
21 Alford plea.

22 MR. FALK: May I approach?

23 THE COURT: Sure.

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

25 BY MR. FALK:

1 Q. So you pled guilty under Alford, is that correct, to
2 the 2014?

3 A. That -- that's correct, on --

4 Q. And what was your understanding of what that meant?

5 A. Well, of that week on September 14th, they offered me
6 probation and I insisted on going to trial. Two days later
7 they called me back to the courthouse and the solicitor
8 said well -- I mean, my lawyer said the solicitor's making
9 you an offer you can't turn down and I said well, don't
10 count on that, and she said well, how about go home today.
11 At that point, I was gonna have to wait about another year
12 for a trial. I figured -- what she was talking about, I
13 didn't know it was a -- a sexually related crime I was
14 pleading to, but I already had felony convictions so that
15 was not gonna affect my life. They couldn't give me the
16 seventeen months back, so when you're offered to go home
17 today after you're facing the death penalty, that -- that
18 has a profound affect on, you know, your motivation, and I
19 said okay, I'll take it.

20 Q. Well, my -- my question is what did you think it meant
21 to plead guilty under Alford?

22 A. Like I just explained. She said --

23 Q. No, no, not -- no.

24 A. Oh, yeah. That what -- what you're saying is that
25 you're not pleading guilty but you feel like if you go to

1 trial you could be found guilty.

2 Q. Okay. All right. And the charges, the most recent
3 ones, you've plead guilty to those charges, too, under
4 Alford; is that correct?

5 A. Yes.

6 Q. Did you commit those offenses?

7 A. No. They had originally spoken about forty years to
8 life and went down to twenty-five and then down to fifteen
9 and down to ten. At ten, I still insisted on going to
10 trial, but my lawyer convinced me that while I may not be
11 guilty, especially with my past, that the jury was gonna
12 sympathize with the alleged victim. They -- what she said
13 exactly was they'll hate the mother, but they'll love the
14 kid, they're gonna listen to whatever he says, so I ended
15 up with a -- a ten suspended to seven with probation.

16 MS. SHAW: Objection.

17 THE COURT: Sustained.

18 MS. SHAW: We're getting way too far into the weeds
19 here.

20 THE COURT: Okay.

21 MS. SHAW: And this is also hearsay.

22 MR. FALK: All right. Well, let's -- let's move
23 along.

24 BY MR. FALK:

25 Q. So you got out of prison on this most recent charge

1 and you were put on probation; is that correct?

2 A. Intensive probation with a curfew and ankle monitor.

3 Q. With those -- okay. So where did -- did you work when
4 you were on intensive probation?

5 A. Yes, I got a job twelve days after release at the
6 Pilgrims Pride chicken plant in Sumter. I intentionally
7 went to Sumter because I wanted nothing more to do with
8 Dorchester County or, you know, the area where I grew up
9 in. I'm trying to make a fresh start. I wanted, you know,
10 no connection at all to Dorchester County. That's -- that
11 was my attitude.

12 So, yeah, the whole thing --

13 Q. So how often would you have to report?

14 A. At first, it was once a week and then it was once
15 every couple of weeks, and by the time I was arrested it
16 was once a month, but I still had the daily curfew and the
17 ankle monitor.

18 Q. Were you ever given a notice that you were in
19 violation?

20 A. Of what?

21 Q. Of your terms of probation?

22 A. Oh, no. My probation officer --

23 Q. And don't -- you can't say what she said. I just want
24 to know if you ever received a write-up?

25 A. No.

1 Q. And how long were you on this -- how long were you on
2 probation?

3 A. Four months. That's all the long I was out.

4 Q. And you get any counseling when you were there?

5 A. Yes.

6 Q. Where was that?

7 A. Healthy Minds in Sumter.

8 Q. And how often would you meet there?

9 A. Well, it was -- it was every week, but once a month it
10 was in person and the other three were virtual.

11 Q. Is that because of COVID?

12 A. Huh?

13 Q. Do you think that was because of COVID or --

14 A. No, at first it was just once a month and they had
15 some change in policy. The first month was just that and
16 then they -- she switched to the -- the every week
17 meetings. Basically it's the same meeting with the same
18 people, you just don't see them. You have to be there on
19 the phone or you're considered not at the meeting.

20 Q. So this was a term of your -- this was a requirement
21 for your probation?

22 A. Yes.

23 Q. And then you got picked up on these charges --

24 A. That's correct.

25 Q. -- or then you got picked up on this?

1 Dr. Gehle talked -- you had said something about your
2 risk to re-offend to Dr. Gehle. I think she asked you that
3 question. What is your risk -- what do you think your risk
4 is to re-offend?

5 A. Mine? What's my actual opinion? People always want
6 -- people say zero is impossible and clearly it wasn't
7 impossible because I haven't re-offended since '93, so I'm
8 still going with zero.

9 Q. And why is that?

10 A. Because I know me better than anyone else. Because I
11 -- I know what I've gone through and, you know, what I've
12 done and how I have changed and, you know, I'm -- I'm
13 certain. There's -- it's -- it's right there with the
14 drinking. It's -- I mean, as far as the chances of it ever
15 happening again is zero.

16 Q. So if you're released today, where are you gonna go?

17 A. Well, the first place I'll go is the probation office
18 because I have to sign back up.

19 Q. And so is it your understanding you'd have to put an
20 ankle monitor back on?

21 A. Yes, that's correct. As -- as long as I live in South
22 Carolina, that's lifetime.

23 Q. Once you get off probation, what are you gonna do?

24 A. Well --

25 Q. I mean, what are your plans for the future?

1 Eventually this is gonna be behind you. What's your plans
2 for the future?

3 A. Yeah, my plans for the future are to leave South
4 Carolina. I may stay with my aunt for a period of time.
5 She's quite elderly and in -- in my youth she was my
6 surrogate mother as, you know, my mother was not very
7 affectionate. She spent a lot of time with me.

8 MS. SHAW: Objection, Your Honor.

9 THE COURT: Sustained.

10 THE WITNESS: So, yeah, I -- I may spend some time
11 with my aunt. She'd asked me to come there.

12 BY MR. FALK:

13 Q. And where does she live? Where does she live?

14 A. Georgia.

15 Q. Okay. Are you gonna move back -- do you have lot of
16 friends in Georgia that you would be relating with?

17 A. No. No. I have some friends in Arkansas and I've
18 been in touch with them in recent times and I really
19 enjoyed my time there and would like to move on there
20 possibly until death. I was really impressed with Arkansas
21 as -- it's just another state, but --

22 MS. SHAW: Your Honor, I --

23 THE COURT: Sustained.

24 MS. SHAW: And, Your Honor, just so I don't keep
25 jumping up and down --

1 THE COURT: Yes.

2 MS. SHAW: -- each time, I'd like the record to
3 reflect that this is a continuing objection.

4 THE COURT: Right. I understand.

5 Please move along, Mr. Falk. It's not relevant.

6 MR. FALK: I have no further questions. Please
7 answer any questions Ms. Shaw has.

8 THE WITNESS: Okay.

9 MS. SHAW: Your Honor, may it please the Court?

10 THE COURT: Yes, ma'am.

11 CROSS-EXAMINATION

12 BY MS. SHAW:

13 Q. Good morning, Mr. Fabian.

14 A. Hey, how are you doing?

15 Q. Very good. Thank you for asking me. Can you hear me?

16 A. Yes.

17 Q. Okay. Good. Because as I'm sure you've heard, I'm
18 pretty soft-spoken. I'll try and keep my voice up. If you
19 can't hear me, just --

20 A. Okay. Also I'm hard of hearing, so I'll quickly alert
21 you.

22 Q. I understand. So you were talking earlier about that,
23 you know, when you committed the 1993 offense, you were a
24 drunken idiot. Those were your words?

25 A. That's correct.

1 Q. Okay. And you, in fact, used those same words to
2 Dr. Gehle, right?

3 A. That's correct.

4 Q. Okay. Now -- and you got busted for having homemade
5 wine when you were in SCDC?

6 A. Un-huh. Yes.

7 Q. Okay. And you said that was 1997?

8 A. Yes, the truth is '97. The records may say '96, but
9 SCDC makes mistakes.

10 Q. Okay. Well, I'm just gonna show you this. This is
11 part of your -- maybe I should have not put that that
12 close.

13 MS. SHAW: May I approach the witness, Your Honor?

14 THE COURT: You may.

15 MS. SHAW: Thank you.

16 BY MS. SHAW:

17 Q. All right. So, Mr. Fabian, so this is your inmate
18 offense history.

19 A. Uh-huh.

20 Q. It's an SCDC record. I'm gonna ask you to just read
21 the date for the possession of contraband infraction.

22 A. Yes. It says December 21st, '96.

23 Q. Okay. So -- but your statement is that's incorrect?

24 A. That's correct.

25 Q. Okay. Now what is this other one?

1 A. Gambling and loansharking.

2 Q. Okay.

3 A. Yes.

4 Q. And you were convicted of that, too?

5 A. That's true.

6 Q. Okay. And you said though that after you were caught
7 with the homemade wine that was sort of your wake up
8 epiphany moment, right?

9 A. Yes.

10 Q. Okay. What was the date of the gambling and
11 loansharking?

12 A. April -- May 20th of '99.

13 Q. Okay. So that is a full two years after the homemade
14 wine charge?

15 A. Yes.

16 Q. Okay.

17 A. Did you want a further description of the charge?

18 Q. No, I don't need it.

19 A. Okay.

20 Q. Now you also talked about that you had done C-Star
21 counseling, right?

22 A. Yes.

23 Q. And you've done, if I'm remembering correctly, four
24 different stints with sex offender treatment while you were
25 in prison, right?

1 A. Three.

2 Q. You only did it three times?

3 A. In prison, yes.

4 Q. Okay. So is it your testimony -- well, actually what
5 is your testimony? When was the most recent time you took
6 sex offender treatment?

7 A. In Sumter?

8 Q. No, I mean in prison. I'm sorry.

9 A. Oh, in prison?

10 Q. Uh-huh.

11 A. In 2009.

12 Q. 2009. Okay. So I'm gonna show you this record.

13 This is an SCDC record. It's a summary of all the prison
14 services you've participated in. Can you read the dates
15 and what you did with each of those, please? Just read
16 that out to the jury. Maybe it will refresh your
17 recollection.

18 A. April 24th, '07. It says C-Star group phase one.

19 This is -- this is the same program.

20 Q. Okay. And the --

21 A. The second -- the second thing listed is not something
22 different. It's the same program.

23 Q. Okay. But that's 2007?

24 A. Yes.

25 Q. Can you tell me the dates of the other two times you

1 took sex offender treatment?

2 A. Yeah, February 16th, '95, and October 11th of '94.

3 Q. Okay. Great. Thank you. And you completed each
4 time, right?

5 A. Yes.

6 Q. All right. Yet having had those four separate courses
7 I'll describe them as, even if you say that one was the
8 same thing, you were charged with four additional offenses
9 against minor children, right?

10 A. Indeed.

11 Q. After taking all of that and having been in prison
12 from 1994 to 2010?

13 A. The sex -- the sex offender treatment program course
14 does not prevent false accusations.

15 Q. Okay. But it's your -- it's your position that you
16 didn't commit the 2013 and the 2017 offenses?

17 A. Well, it's facts.

18 Q. Okay. Now --

19 A. What -- what 2013 offense?

20 Q. Against two little girls.

21 A. Pardon?

22 Q. Against the two little girls in your SUV.

23 A. Oh, that accusation was 2014.

24 Q. Oh, I'm sorry. But you were still convicted of
25 assault and battery in reference to that charge, right,

1 because you pled out?

2 A. Yes, as previously discussed.

3 Q. Okay. In fact, it was two counts of assault and
4 battery you pled to?

5 A. Right.

6 Q. Okay. And do you remember your plea that day?

7 A. Yeah, pretty much.

8 Q. Okay. You remember being in court and you remember
9 talking to the judge and your lawyer? Do you remember all
10 that?

11 A. (Nods head.)

12 Q. Okay. So under Alford, isn't it true that the judge
13 who accepted your plea asked you at least two questions?

14 MR. FALK: Your Honor, I'm gonna object here.

15 I'll -- I'll with -- withhold my objection.

16 THE COURT: Okay.

17 BY MS. SHAW:

18 Q. Did that judge ask you any questions?

19 A. Possibly. I mean, I don't remember like it was
20 yesterday or anything.

21 Q. All right. But isn't it true that under an Alford
22 plea that the judge would have had to ask you if you
23 believed there was overwhelming evidence of your guilt?

24 MR. FALK: Objection, Your Honor. He's not --

25 THE DEFENDANT: He didn't ask that.

1 MR. FALK: I object to that question.

2 THE DEFENDANT: He didn't ask that anyway.

3 THE COURT: Hold on.

4 The nature of the objection is?

5 MR. FALK: You're asking him for a legal conclusion.

6 I mean, she's saying isn't it true that the judge would

7 have asked you this. I mean, he --

8 MS. SHAW: No, I'm asking if he did --

9 THE COURT: Right.

10 MS. SHAW: -- ask, not would have.

11 THE COURT: Correct.

12 MR. FALK: Okay.

13 THE COURT: Yes. You may proceed.

14 MS. SHAW: Thank you.

15 BY MS. SHAW:

16 Q. So, Mr. Fabian, you're saying that the -- the judge
17 that you pled out under did not ask you that question?

18 A. He asked me if I felt that the evidence -- that I
19 could -- that I could become -- that I could be convicted
20 if I went to trial, if the possibility was there.

21 Q. Isn't the question actually that gets asked is do you
22 believe that you would be found guilty at trial? Isn't
23 that, in fact, what the judge asked you?

24 A. No, that is, in fact, not the question. He said do
25 you -- do you agree that the possibility is there. Do you

1 believe it's possible.

2 Q. Okay.

3 A. Not do you believe you will be convicted.

4 Q. And that is your sworn testimony today? You expect
5 this jury to believe that?

6 A. That's what I remember.

7 Q. Okay.

8 MS. SHAW: I don't have anything further.

9 Thank you.

10 THE COURT: All right.

11 MR. FALK: No redirect.

12 THE COURT: Very well. You can come back down, sir.

13 THE WITNESS: All right.

14 (Witness excused.)

15 THE COURT: All right. Mr. Falk, call your next
16 witness.

17 MR. FALK: I will -- at this time we'll rest.

18 THE COURT: Will there be any reply?

19 MS. SHAW: At this point there will be no rebuttal
20 witnesses. I am prepared to close.

21 THE COURT: Very well.

22 All right. Ladies and gentlemen, we have now --
23 you've now received the evidence which you will in this
24 case. What remains for us are the arguments of counsel
25 and then my charge or instruction on the law and now

1 that we have reached this point it signifies to me that
2 there are matters that I must take up outside your
3 presence. It will not take long. So in a moment, I'm
4 going to ask you to step to your jury room remembering
5 do not discuss this matter or allow anyone to discuss it
6 with you.

7 If you'll please step to your jury room.

8 (Whereupon, the jury retires to the jury room at
9 11:36 AM.)

10 THE COURT: All right. Motions.

11 MR. FALK: We'll renew our motion for directed
12 verdict based on the fact that the State hasn't provided
13 sufficient evidence for the jury to reach a guilty
14 verdict.

15 THE COURT: Thank you so much and respectfully
16 denied.

17 MS. SHAW: Thank you, Your Honor.

18 I was gonna make my argument.

19 THE COURT: You don't get one.

20 Now with regards to -- to the charge on the Alford
21 plea?

22 MS. SHAW: Yes, ma'am.

23 THE COURT: You're requesting that?

24 MS. SHAW: I am.

25 THE COURT: All right. And what I'm looking -- you

1 did not provide one.

2 MS. SHAW: I did not, Your Honor.

3 THE COURT: Understandably so, but I'm looking
4 for Mr. Falk's. Do you have Mr. Falk's that you can
5 just review?

6 MS. SHAW: I do, Your Honor. Hold on just a
7 second. Here we are.

8 I can bring it up. Does Your Honor want to see it?

9 THE COURT: Yes.

10 MS. SHAW: May I approach?

11 THE COURT: Yes.

12 MS. SHAW: It's -- it's marked up and there's a
13 couple of things that I redDED out that you said you
14 weren't gonna ask, but...

15 MR. FALK: Your Honor, I guess mine is more of a
16 plea bargain, not an Alford plea.

17 THE COURT: Yes.

18 All right. I have a charge regarding the Alford
19 plea and I'll give it as part of the charge and I have
20 your charges and you-all have been kind enough yesterday
21 to go over it in a fairly -- in a preliminary manner,
22 and I appreciate that so much, and I'll certainly be
23 prepared to deliver the charge when you have finished
24 your argument.

25 You will open in full on behalf of the State --

1 MS. SHAW: Yes, ma'am.

2 THE COURT: -- and then you will reply.

3 And, Mr. Falk, you'll be prepared, of course, to
4 argue after Ms. Shaw and, Ms. Shaw, you will reply.

5 MS. SHAW: Okay. I was going to ask would I be
6 allowed to reply after Mr. Falk is done --

7 THE COURT: Of course.

8 MS. SHAW: -- and the other thing is may I reference
9 that fact that I have asked Your Honor to provide the
10 Alford information as part of the jury charge?

11 THE COURT: Sure.

12 MS. SHAW: Okay. I'm just gonna say and the judge
13 will instruct you on the --

14 THE COURT: The judge is gonna charge you regarding
15 the Alford plea and what that is.

16 MS. SHAW: Yes, what's actually entailed in an
17 Alford plea.

18 THE COURT: Yes.

19 All right. Anything further before I bring the jury
20 out and are you guys ready?

21 THE COURT REPORTER: No. Can I have a break?

22 THE COURT: Take all the time you need.

23 (Recess taken at 11:55 AM.)

24 (Back on the record at 11:59 AM.)

25 THE COURT: All right. Let us have the jury.

1 (Whereupon, the jury return to the courtroom at
2 12:00 PM.)

3 THE COURT: Ladies and gentlemen, let me tell you
4 how we're going to be proceeding. Your first going to
5 hear from Ms. Shaw in her closing argument on behalf
6 of the State and then you're then going to hear from
7 Mr. Falk in his closing argument on behalf of Mr. Fabian,
8 then you're going to hear a reply rebuttal argument
9 from Ms. Shaw. That will then conclude the closing
10 arguments. Then there's gonna be a very, very short
11 break that is self-explanatory, and then I'm going to
12 deliver the charge or the instruction on the law to
13 you. There will be another short break that I'm going
14 to explain to you and then you're going to receive this
15 case for your deliberations.

16 Ladies and gentlemen, I'm going to ask that you
17 please draw close as we listen to the closing arguments.

18 Ms. Shaw.

19 MS. SHAW: Thank you, Your Honor. May it please the
20 Court?

21 THE COURT: Yes, ma'am.

22 MS. SHAW: All right. Good morning again, ladies
23 and gentlemen. We are in the final leg of this horse
24 race and so I'm not going to belabor your time. I've
25 been watching every single one of you very carefully and

1 it's abundantly clear that you-all have been paying close
2 attention, so I'm not gonna take more of your time than
3 I absolutely need, but just I do need to go over the
4 statutory requirements and how I believe that we have met
5 them.

6 So I'll remind you my burden of proof is beyond a
7 reasonable doubt. It's a criminal standard applied to a
8 civil case because this is very important with very real
9 world consequences no matter what you decide.

10 So, number one -- actually, Your Honor, may I get
11 my exhibits for this?

12 THE COURT: Sure.

13 MS. SHAW: And they're right there.

14 THE COURT: And I'm having trouble hearing you.

15 MS. SHAW: Okay. I'm sorry, Your Honor.

16 THE COURT: So I'm gonna ask you to --

17 MS. SHAW: The fishbowl is not my friend.

18 THE COURT: I'm sorry. I know.

19 MS. SHAW: So, ladies and gentlemen, the first
20 element that you may recall is that I must prove to
21 you beyond a reasonable doubt that Mr. Fabian has been
22 convicted of at least one sexually violent offense. You
23 will have in the jury room with you Exhibits 1 through 6.
24 These are the conviction records and the indictments that
25 Mr. -- for all of the criminal charges that Mr. Fabian

1 has been charged with and convicted of, except for one,
2 which nol-prossed. The reason it was nol-prossed is
3 because he pled guilty to criminal sexual conduct third
4 degree in 2019. That's the only reason that other charge
5 was nol-prossed. And he also pled guilty to criminal
6 sexual conduct in the first degree with a minor under
7 eleven back in 1994. Those I will represent to you are
8 by definition sexually violent offenses.

9 But you'll also recall he's been convicted of two
10 counts of assault and battery first degree against two
11 minor females. That was also a sexual charge.

12 So not only does Mr. Fabian have the 1994 conviction
13 for CSC 1st and the 2019 conviction for CSC 3rd, he has
14 two additional convictions for sexually related offenses,
15 so I would submit to you that we have met our burden with
16 respect to that particular issue.

17 The second issue, which is far less than --
18 well, actually far more in question, which you guys
19 have to answer, is does he have a mental abnormality
20 or personality disorder. You've heard the testimony
21 of Dr. Gehle. It's undisputed. You also heard from
22 Mr. Fabian himself this morning and I would submit to
23 you that his own statements confirm her diagnosis. If
24 you listened to him, and I hope you listened carefully,
25 every word out of Mr. Fabian's mouth this morning was me,

1 me, me. It was all about him. He did not utter one word
2 of empathy for his victims. He didn't even acknowledge
3 that -- the four additional charges that he got that were
4 of a sexual nature, he didn't even acknowledge those
5 existed, yet he pled to those charges under Alford, and I
6 have requested that the judge issue to you an instruction
7 on what exactly goes into an Alford plea and you'll hear
8 about that from her when the time comes.

9 But remember that Mr. Fabian has narcissistic
10 personality disorder with antisocial features in addition
11 to pedophilic disorder. The narcissistic personality
12 disorder, this grandiose sense of self-importance,
13 you-all saw that with your own eyes this morning, so I
14 ask that you find that he does, in fact, have a mental
15 abnormality, as well as a personality disorder.

16 And then the last thing that you have to answer is
17 whether you think it's likely he will re-offend. Ladies
18 and gentlemen, he will. He assaulted an eight-year-old
19 female in 1993. He got out in 2010 for that charge for
20 which he was sentenced to thirty years. In 2014, he was
21 accused of having assaulted two additional little girls,
22 ages, I believe, five and eight. He pled out. He got
23 time served, which is a slap on the wrist. Immediately
24 after that, if you recall the testimony, a little boy
25 alleged two years later in September of 2015 that

1 Mr. Fabian sexually assaulted him and also that little
2 boy's brother the following year.

3 This individual has a preference for young children.
4 Whether he'll admit it or not, the history bears it out,
5 and as you heard Dr. Gehle testify, past behavior is the
6 best predictor of future behavior. This individual I
7 believe we have proven to you through undisputed evidence
8 has a mental abnormality and he's likely to re-offend.

9 So with that information in hand, I ask that you
10 carefully consider this matter. I ask that you to think
11 very carefully about it because it's important, and I ask
12 that you find that Mr. Fabian does meet the criteria of
13 a sexually violent predator and that you commit him for
14 long-term control, care and treatment.

15 Thank you very much for your service, your attention,
16 and I appreciate you.

17 THE COURT: Thank you.

18 Mr. Falk.

19 MR. FALK: May it please the Court?

20 THE COURT: Yes.

21 MR. FALK: Mr. Fabian testified that he assaulted
22 that little girl in 1993 and he took responsibility for
23 that and he spent seventeen years in prison and I think
24 he believes that he's sort of come to terms with the
25 harm that he caused that girl. And you also heard that

1 he believes that he's a different man than he was than
2 the day that he entered prison back there and, you know,
3 he spent years in prison, but while he was there, I mean,
4 he wasn't just wasting time. I mean, he picked up another
5 trade, he picked up an HVAC trade, and you also saw that
6 he was given positions of responsibility while he was in
7 the prison. He had a work crew and that he was working
8 all the time.

9 You heard a man talk about that when he was sort of
10 a child or younger -- not really a child, but you know
11 what I'm saying, a young man and sort of wild and that
12 he was a jerk and he was a drunk and he went to prison
13 and he started his first couple of years while he was
14 in prison and was doing what he saw the other people
15 in prison doing and acting like idiots and getting in
16 trouble, but then he realized that, you know, once
17 again, he needed somebody else to bail him out and at
18 that time the lady who was making a decision about his
19 -- what sanctions should apply for the alcohol, she sort
20 of gave him a break and he realized that, you know, it's
21 probably time that he needed to change and sort of take
22 responsibility for his actions.

23 He went to prison. He went to sex offender
24 treatment. He went for almost two years for sex
25 offender treatment and when he got out he realized that

1 he -- you know, he was not going to do it again. Now
2 he -- there's no doubt that he was convicted of another
3 offense in 2014 and he pled guilty under Alford, and I
4 think the judge is going to give you an instruction on
5 what Alford means and that whatever she says is what the
6 law is, but my understanding of it is sort of like I will
7 -- I'll accept a guilty plea, but I didn't do it. You
8 know, sort of a no contest. I'll accept the sanction,
9 but I'm not gonna admit that I did it.

10 And I think this case was interesting because as
11 you heard, I mean, it was a very serious crime that he
12 was convicted of and he spent seventeen months in prison
13 and he wanted his day in court. I mean, he's entitled
14 to his day in court. He's entitled to have the solicitor,
15 you know, prove their case against him. Well, if you're
16 not a man of means and you can't make bond, you spend
17 your time in prison -- I mean, you spend your time in jail.
18 He was there seventeen months. Whether it's seventeen
19 months or 551 days, but if your lawyer comes in -- comes
20 down and says do you want to get out of jail today, you'd
21 probably take that deal.

22 He already knew that he had a felony. He's not --
23 pleading to the felony is not gonna be any worse than
24 the felonies he already has and he's pleading guilty to
25 assault and battery first degree, two counts.

1 He says he was sort of in the same situation again
2 when he was accused. He says that he did not do it. He
3 pled guilty under Alford once again and he wanted -- he
4 was concerned, and I think under Alford, you know, there's
5 a recognition that you know that there is significant
6 testimony against you and, you know, in one of these
7 cases you're gonna have testimony from a child --

8 MS. SHAW: Your Honor, it is very rarely my habit
9 to object during closing, but could we approach the bar?

10 THE COURT: Yes.

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

12 MR. FALK: As you heard him say, he has -- his
13 self-appreciative risk of re-offending, he says it's
14 zero.

15 Now when you're thinking about this case, I want
16 you to sort of think about the testimony from Dr. Gehle
17 and she made a comment when she was talking about that
18 Static score, you know, and what the percentage chance
19 that he would re-offend. I mean, she never could really
20 say what his chances. She sort of said that he fit into
21 a group of people who would offend at this kind of rate
22 and she was comparing it to an actuarial table and she
23 was sort of talking about it like, you know, if you go
24 to a doctor and you've got a heart problem that the
25 doctor can -- you know, if you have these kind of

1 symptoms, then that means that you're kind of going in
2 that direction. The only difference I think when you're
3 listening to a psychologist talk about it and make
4 comparisons to medicine is that there's very little sort
5 of quantitative or objective kind of testing that you can
6 do other than that Static score which she gave and that
7 was the only thing that was kind of analytical, but, you
8 know, when -- when she made the comparison to the doctor,
9 that sort of made me -- to the heart attack, that sort
10 of made me think of an experience that I had in that, you
11 know, I went to -- I was having some -- I was having some
12 numbness in my left arm and I told that to my doctor and
13 he -- he put me on a machine, like an EKG machine, and
14 it read out a tape and there was a printout. There was
15 something that every other medical professional could
16 look at and say yeah, I agree, and then the next step was
17 to go and have some other kind of test done where they
18 inject something in your heart, you know, and then it
19 runs through and you look and see and you've got an x-ray
20 and he could show me on the x-ray that you have blockages
21 on these six arteries and you've got to get that fixed.

22 Unfortunately, in psychology there's really no other
23 kind of thing. I mean, there's no other kind of sort of
24 objective test that the -- the expert can rely on and
25 then so when you're making this comparison, this is not

1 like medicine where there's a certainty. I mean, it's
2 basically she was saying it's her judgment call. I
3 tried to ask her -- I was trying to ask her on
4 cross-examination, you know, kind of how many of this
5 does it take for to you reach that point and it was
6 always -- it really kind of always from what I heard
7 came back to, you know, it was her judgment call and
8 granted that -- and that is her opinion, but you've got
9 to make a decision today about whether or not today he
10 is a sexually violent predator.

11 A lot of what Dr. Gehle was talking about on some
12 of the conduct that she was talking about, she -- you
13 know, she acknowledged this was a lot of his conduct
14 before he went to prison for the first time. I mean,
15 the conduct that he -- you know, since the prison. You
16 know, he had two disciplinary infractions in prison, yet
17 she said he has this sort of antisocial tendency in his
18 behavior, but, I mean, you know, you're in a prison and
19 he had one infraction for loansharking because he said
20 he was gambling and he had on infraction for making
21 homemade wine and that was maybe in the first three
22 years of that sentence and then he had nothing else.

23 I mean, so when she says that he's narcissistic
24 with, you know, these antisocial tendencies, I'm not
25 sure how that is -- how that's convincing that he is a

1 sexually violent predator. I mean, that diagnosis of
2 narcissism, I mean, it doesn't seem to -- to show that
3 that's sort of motivating him to behave in a certain way.

4 And, again, I think you can maybe -- I mean, you've
5 got to make this decision today beyond a reasonable doubt,
6 and that's a similar standard that you have in a criminal
7 case, and you've got to -- you've got to be sure that
8 Dr. Gehle's testimony was enough to convince you.

9 Now I -- I expect that the judge is going to give
10 you an instruction where it's gonna say that you can rely
11 on all of the witness's testimony or none of the witness's
12 testimony or parts of the witness's testimony and you
13 can then think about whether or not Dr. Gehle was really
14 focussing on who he was in '93 when he went to jail for
15 the first time and who that man who was in the jury --
16 who was in the witness stand just there who he was
17 describing. I'd say Dr. Gehle was describing this man
18 from 1993 and not really giving him credit for what he'd
19 done in prison.

20 And you heard from him, you saw him, and I think you
21 saw a man that recognizes that he made mistakes in the
22 past and I think he said, you know, he realized he was
23 the kind of jerk -- he became the kind of person who he
24 hated, and that's when he changed his mind. He said he
25 had an epiphany.

1 At the end of the day, you're gonna have to decide
2 this case beyond a reasonable doubt and that's gonna
3 be -- that's gonna be a difficult -- that's gonna be
4 difficult to assume because you've got to go back there
5 thinking that he does not need to be committed and, you
6 know, you're gonna review the testimony that you heard
7 and, you know, you might have heard something that --
8 that maybe that sounded, you know, troubling to you, but,
9 I mean, just -- just because you heard one thing that
10 was troubling, you've got to be convinced that -- you
11 can really almost have no doubt in your mind that he is
12 going to recommit another sexually violent offense if
13 he's released.

14 I mean, he's a fifty-eight-year-old man you. You
15 heard Dr. Gehle talk about how once people age -- I mean,
16 when men age they certainly do become -- become much more
17 less likely to re-offend, but yet they're compared when
18 -- you know, when she was giving all these statistics,
19 they're compared to -- to a group of men that are
20 twenty-four-year-old men. I mean, this is, you know,
21 much younger people. I mean, he's a -- you know, you
22 would assume that his likelihood to re-offend given his
23 age is gonna be significantly less, and that probably
24 makes sense to most men here.

25 I just really need you-all to have an open mind when

1 you-all walk back there. And it's gonna be really easy
2 to not like him for what -- for the crimes that he was
3 convicted of in the past, but we're not -- this is not
4 really a popularity contest and, you know, if there was
5 one, I'm sure he wouldn't win it, but, I mean, you've got
6 to decide whether or not you -- you think the State's
7 proven their case that he's a sexually violent predator,
8 meaning he's got a personality -- personality defect or
9 mental abnormality and that he's likely to re-offend.

10 He says that he committed one offense in 1993
11 against children and then -- so that goes to her
12 diagnosis that he has a pedophilic disorder and then
13 this other diagnosis of narcissism with, you know,
14 antisocial traits, I mean, you -- you just have to
15 decide for yourself whether or not you think that is
16 the kind of diagnosis that would sort of cause him to
17 commit a sexually violent offense in the future. If
18 that doesn't really make sense to you, then that's
19 doubt. And some of the other testimony that Dr. Gehle
20 gave that doesn't really quite make sense to you, then
21 that's doubt. I just -- I need you-all to think about
22 this fairly and thoughtfully as this is a huge decision
23 for him. It's gonna make the decision whether or not
24 he's gonna go to a facility and not know when he'll be
25 released or whether or not he's gonna go home and if

1 he's gonna go back on probation. And you did get kind
2 of a glimpse because, I mean, he was out for four months
3 and he was complying with his terms of probation. He
4 -- you know, he was doing what he was supposed to do,
5 he was wearing his ankle monitor, and when he gets out
6 again he's gonna wear the ankle monitor for as long as
7 he's required.

8 At the end of the day, I hope that you-all will
9 just really try and separate some of the feelings that
10 you might have about his victims from '93 and that you'll
11 -- that you'll consider that that much time that he spent
12 in prison that he's a different man than he was in '93.

13 He did have sex offender treatment while he was in
14 prison. We also learned that they were going -- after he
15 got out of prison in 2010, they were gonna -- the State
16 started one of these procedures and they didn't find
17 enough evidence to go forward, okay, back in 2010.

18 So I think there's plenty in this record that we've
19 heard for you-all to have doubt that the State's proven
20 its case that this man is a sexually violent predator and
21 that he is likely to commit a crime of sexual violence if
22 he's released.

23 Thank you for your time and attention.

24 THE COURT: Thank you, Mr. Falk.

25 And, Ms. Shaw.

1 MS. SHAW: Thank you, Your Honor. Rebuttal briefly?

2 THE COURT: Yes. Yes.

3 MS. SHAW: All right. Ladies and gentlemen, this
4 is the last time you will have to listen to me talk.

5 So you just heard Mr. Falk's closing and there's
6 a couple of things I need to respond to, and one thing
7 that I actually do want to point out that he's right
8 about, Mr. Falk is right that the narcissistic
9 personality disorder is not driving the offending
10 against children. The pedophilic disorder is what's
11 driving the offending against children. The narcissistic
12 personality disorder simply allows him to justify that
13 he's going to take what he wants when he wants it and he
14 doesn't care who he hurts. He has been convicted of no
15 less than four sexually-related offenses over a period
16 of years spanning 1994 to 2019. That's three years ago,
17 ladies and gentlemen, where he was accused of assaulting
18 two very young boys. He was convicted of one. He would
19 have been convicted of the other had it gone to trial
20 possibly, we don't know because it was nol-prossed. So
21 Mr. Falk is right in that the narcissistic personality
22 disorder is not the primary motivator for Mr. Fabian to
23 offend. It's his sexual preference to prepubescent
24 children.

25 He also spoke about the Statics and that this is

1 kind of a judgment call and there's no objective data
2 which would suggested that Mr. Fabian has an elevated
3 risk to re-offend. That's simply not true. You heard
4 Dr. Gehle talk about her use of the Static-99 and 2002R.
5 You also heard her testify that he scored in the well
6 above average risk range for both tests and even had he
7 been given credit because he's fifty-eight now and he
8 will get two additional points off of his score on the
9 99 in two years when he turns sixty, he would still be
10 in the above average risk category even with that credit
11 for age and declining sex drive.

12 So this individual has a much higher objective risk.
13 In fact, it's 3.77 times higher than the average offender.
14 That's almost four times as likely, ladies and gentlemen.
15 So when it comes to the question of likely, I believe,
16 yes, we have met that burden and Dr. Gehle's testimony
17 bears that out with objective evidence. This is not just
18 a judgment call. She's not just pulling things out of
19 her back pocket because she doesn't like him. She saw
20 and interviewed a man who did everything possible he
21 could to control that process and his own testimony
22 here today has borne it out. You heard it. I'm not
23 gonna go over it again and waste your time.

24 So conduct in prison. Mr. Falk just talked to you
25 about that Mr. Fabian has had relatively good conduct

1 in prison. He's only had two disciplinaries albeit in
2 a very, very long time, but look at the timing of that.
3 Mr. Fabian says his homemade wine charge was in 1997.
4 The records say 1996, but it was December of '96, so
5 maybe there's some misremembering. And he says after he
6 had that situation where the female corrections officer
7 gave him the break and he had this epiphany he needed
8 to change his life and become a better man. When was
9 his next charge? Two years later for gambling and
10 loansharking. This is the exact same person who went
11 into prison in 1993 regardless of the sex offender
12 treatment, and I'll remind you, ladies and gentlemen,
13 the last time he ever had sex offender treatment of any
14 substance was 2007 and when he got out in 2010, he has
15 been accused of four more sexual assaults on prepubescent
16 minors, so I will leave it to your good judgment.

17 Thank you.

18 THE COURT: All right. Thank you so much, Ms. Shaw.

19 That now concludes closing arguments, but first
20 we'll do a little short break. Just stand up just where
21 you and get some oxygen, move around a little bit.

22 Does anybody need to take a comfort break? Because
23 I need you to be able to sit and listen to me for about,
24 I don't know, eight and a half minutes.

25 You do? Everybody gets to go because somebody else

1 it's gonna -- it's gonna ripple through. Here's what
2 we're gonna do. Take your break. Do not discuss this
3 matter or allow anyone to discuss it with you as you're
4 not permitted yet. Take your break and when everybody's
5 had their comfort break, knock on the door and come on
6 back.

7 (Whereupon, the jury retires to the jury room at
8 12:25 PM.)

9 THE COURT: All right. We're gonna be at ease
10 taking a comfort break while we wait for the jury.
11 Don't go far.

12 (Recess taken at 12:26 PM.)

13 (Back on the record at 12:33 PM.)

14 THE COURT: All right. They're ready.
15 Bring them on.

16 (Whereupon, the jury return to the courtroom at
17 12:34 PM.)

18 THE COURT: Now before I begin, Juror Number 34,
19 Ms. Green?

20 JUROR NUMBER 34: Yes, ma'am.

21 THE COURT: I'm going to ask you serve as the
22 presiding juror for this jury. You probably figured
23 that out.

24 JUROR NUMBER 34: I did.

25 THE COURT: And there are three additional tasks.

1 They're real easy. Number one, once the jury has
2 finished its deliberations, somebody's got to write.
3 That would be you. You would be the scrivener.

4 And, number two, and the phrase that's used is that
5 the presiding juror presides during the deliberations,
6 and -- and I think it is an overstatement. In other
7 words, you become the facilitator; meaning -- meaning
8 this. You just want to be sure everybody gets a chance
9 to talk. You don't control it. Your view, your opinion
10 isn't more than anybody else's. You're not supposed
11 to guide, you're not supposed to -- you just make sure
12 everybody gets a chance to talk. And you're the jury's
13 spokesperson here in court and if I -- well, we're
14 gonna have lunch again, so I guess you'll be the jury's
15 spokesperson when you want a Diet Coke or when you need
16 some napkins, more food, that sort of thing. Absolutely.

17 So thank you much for serving in that capacity.

18 JUROR NUMBER 34: Yes, ma'am.

19 THE COURT: Now, ladies and gentlemen, I am -- I'm
20 prepared to deliver the charge or the instruction on the
21 law to you.

22 Ladies and gentlemen, the State of South Carolina
23 has brought this case under a statute. You know, what
24 is a statute? You-all know what statute is. We're
25 gonna revisit very quickly your civics and I think that

1 the Legislature may have even gone into session this
2 week. It's what they do. They pass laws. And they
3 have passed a law and it is a statute and it is called
4 the Sexually Violent Predator Act and the -- this
5 legislative provision, this act, provides for certain
6 procedures and the State has brought this proceeding,
7 brought this case, under the Sexually Violent Predator
8 Act.

9 The State seeks the civil commitment, the civil
10 commitment, of Mr. Tracy Allan Fabian. He's the
11 respondent. He's known as the respondent, so if I
12 speak about respondent as we go through, I'm speaking
13 of Mr. Fabian, but the State is seeking the civil
14 commitment of Mr. Fabian, the respondent, for long-term
15 control, care and treatment of Mr. Fabian in a secure
16 facility, which is administered by the South Carolina
17 Department of Mental Health. This is not a criminal
18 proceeding seeking incarceration, but rather it is a
19 proceeding seeking civil commitment.

20 The State of South Carolina alleges that the
21 respondent, Mr. Fabian, is a sexually violent predator
22 under the law. Mr. Fabian denies that he is a sexually
23 violent predator and the burden of proof, therefore, is
24 on the State to prove by evidence sufficient to satisfy
25 each of you beyond a reasonable doubt that Mr. Fabian is

1 a sexually violent predator.

2 Now, ladies and gentlemen, I'm going to talk about
3 the burden of proof of beyond a reasonable doubt in just
4 a few moments and it will be your duty as jurors to
5 determine whether the State has met its burden of proof.

6 Now during the course of this trial, you and I have
7 had separate duties to perform. As the trial judge, it
8 is my responsibility to preside over this trial and I
9 also have the duty to rule on the admissibility of the
10 evidence offered during the progress of this trial.

11 Ladies and gentlemen, you are to consider only the
12 competent evidence before you and you are to disregard
13 any testimony which -- for which there were objections
14 sustained during the course of this trial.

15 Now what is the evidence in the trial? Well, the
16 evidence is the testimony of the sworn witnesses and
17 any exhibits which have admitted into evidence and, of
18 course, any inferences which you may take and draw from
19 the evidence presented.

20 I have the additional duty to charge you regarding
21 the applicable law of this case and I tell you and
22 charge you that I am the sole judge of the law in this
23 case and the law as given to you by the Court is the
24 only law that you may consider. And if you came into
25 court with a preconceived idea about what the law is

1 or what it ought to be, as we talked earlier you might
2 want to have a conversation with your legislator, but
3 for our process to work correctly you must accept and
4 apply the law exactly as I state it to you and if you
5 had a preconceived idea about what the law is or what
6 it ought to be, you must abandoned your preconceived
7 idea because you are by your oath sworn to accept and
8 apply the law as I state it to you.

9 Now in this trial you are the sole and only and
10 the exclusive judges of the facts. I am the judge of
11 the law and you are the judges of the facts. Please do
12 not think or infer from anything that I may have said or
13 done through the course of this trial in ruling on the
14 admissibility of the evidence or otherwise that I have
15 any opinion regarding these facts. I don't have any
16 opinion regarding these facts. Ladies and gentlemen,
17 that is -- that is a matter solely for you to determine.

18 Now, ladies and gentlemen, I want to speak to you
19 now about the burden of proof. Some of you may have had
20 an opportunity to participate in other civil types of
21 matters where you were told that the burden of proof
22 was by the greater weight or the preponderance of the
23 evidence. Ladies and gentlemen, that is not -- that
24 is not the burden of proof that is applicable to this
25 matter. The burden of proof applicable to this case

1 is beyond a reasonable doubt and it is a higher burden
2 than by the greater weight or the preponderance of the
3 evidence, and I want to define that for you in just a
4 moment.

5 The State, as I've told you, has the burden of
6 proof and must prove each and every allegation of which
7 it will -- and must meet each and every allegation of
8 the elements of this statute beyond a reasonable doubt
9 before you could make a determination that Mr. Fabian
10 is a sexually violent predator.

11 What then is reasonable doubt in the law? Well,
12 ladies and gentlemen, I'm gonna give you two classic,
13 and I think, good definitions of reasonable doubt.
14 The first, reasonable doubt is the kind of doubt that
15 would cause a reasonable person to hesitate to act.
16 The second definition of reasonable doubt is proof
17 that leaves you firmly convinced that the respondent
18 is a sexually violent predator.

19 Ladies and gentlemen, there are very few things in
20 this world that we know with absolute certainty and in
21 this type of case the law does not require proof that
22 overcomes every possible doubt. If, based upon your
23 consideration and your view of the evidence, if you are
24 firmly convinced that Mr. Fabian is a sexually violent
25 predator, then it is your duty to return a verdict

1 indicating that he is a sexually violent predator.

2 If, on the other hand, you think there is a real
3 possibility that he is not a sexually violent predator,
4 you must give him the benefit of the doubt and return a
5 verdict that says he is not a sexually violent predator.

6 Now, ladies and gentlemen, reasonable doubt may
7 arise from evidence that is in this case or from lack of
8 evidence in this case and it is up to you, our jury, to
9 determine whether or not the State has met its burden of
10 proof of beyond a reasonable doubt.

11 Now, ladies and gentlemen, there are two types of
12 evidence that are typically presented in a case. One
13 is direct evidence and the other is circumstantial
14 evidence. I'm going to define them for you and then
15 I'm going to give you an example of each.

16 Direct evidence. That is evidence which is
17 typically testimony by a witness about what the witness
18 personally saw, heard or did, such as an eyewitness.

19 It's evidence that directly proves, if you will, that
20 fact to be proved, and let me give you an example.

21 Oh, and it's gonna be good because today's hot. It's
22 supposed to be real hot today, but let's go within your
23 minds to February and it's cold outside, it's got gray
24 skies, snow forecast. You walk outside and snow hits you
25 square in the eye. Well, you go inside and you say it's

1 snowing outside. Well, you really are an eyewitness
2 because the snow got you in the eye. That's direct
3 evidence. You saw it snow, you felt it snow, and it's
4 February and cold outside, snow's forecast. That is
5 direct evidence. That is evidence that immediately
6 establishes the fact to be proved.

7 Let's talk about circumstantial evidence.
8 Circumstantial evidence is proof of one or more facts
9 that is often, say, collateral facts, that point to the
10 existence of a fact. It is proof that indirectly proves
11 the fact. Let's go back to February. It's February,
12 cold outside, snow is forecast. You're kind of making
13 your plans for your snow day. So before you turn out
14 the lights and go to bed, you take a look outside and
15 all you see is your poor old pitiful brown crunchy grass
16 and it's cold, but it's not snowing, there's no snow.
17 You go to bed. When you awake in the morning, you look
18 outside, the sun is shining and it is beautiful out, but
19 snow covers everything and whatever your weather folk
20 would be, they're telling you it's a snow day, and you
21 walk outside and there is snow everywhere.

22 Well, here's what you know. You know it's February,
23 you know that snow was forecast, you know that when you
24 went to bed there wasn't any snow on the ground and when
25 you woke up there was snow everywhere. What do you know

1 inferentially, circumstantially? You know that it
2 snowed overnight. That is circumstantial evidence.

3 And our law does not determine that there must be
4 more certainty of one type of evidence than the other;
5 meaning that there's got to be more -- either more
6 certainty in the direct or the circumstantial evidence.
7 You should consider all the evidence and the evidence
8 that you should give the most weight to is that which
9 convinces you of its truth regardless of from who or
10 from what source it comes. However, you must not
11 consider sympathy, passion or prejudice for or against
12 either of these parties when weighing the evidence.

13 I also like to tell folks you did not drop your
14 common sense at the courthouse door, but it came right
15 in here with you.

16 Now, ladies and gentlemen, in determining what the
17 facts are in this case, necessarily you must determine
18 the credibility of the witnesses who have testified.
19 Another word for credibility? Believability. And some
20 of the things which you may consider, and these are just
21 examples, it's not exclusive or exhaustive, these are
22 just examples of things which you may consider when
23 deciding whether or not to believe a witness's testimony
24 about a particular matter, include but would not be
25 limited to, the appearance and manner of the witness on

1 the witness stand. Was the witness forthright or
2 hesitant? Was the witness's testimony consistent or
3 inconsistent? What was the ability of the witness to
4 know about the facts and things that the witness
5 testified? Was there a reason that a witness would want
6 to give testimony which would help or hurt one side or
7 the other? In other words, did the witness have a bias
8 or prejudice and was the testimony of the witness
9 reasonable when considered in light of other testimony
10 and evidence?

11 Now, ladies and gentlemen, you can consider as much
12 or as little or none of a witness's testimony as you
13 deem appropriate; however, you do not consider -- you
14 know, make your determination merely by counting the
15 number of witness presented by each side.

16 Now you can believe one witness as opposed to
17 another witness or you can believe a part of a witness's
18 testimony and disregard the remaining part of the -- of
19 that same witness's testimony.

20 Now during the course of this trial, you have
21 heard testimony of an expert witness, and as we talked
22 yesterday, our rules of evidence ordinarily do not permit
23 a witness to testify regarding their opinions or
24 conclusions unless they have been deemed to be an expert
25 witness, meaning that they have become an expert in some

1 field and determined to be an expert by the Court,
2 meaning that they're a witness who have special
3 knowledge, skill, experience, training or education
4 in a particular field, and those folks they may state
5 their opinion or opinions and the reasons for those
6 opinions.

7 Now, ladies and gentlemen, you can believe and
8 you should consider an expert witness's testimony like
9 you do any other witness and you give it the weight that
10 you believe it is entitled. If you do not believe that
11 the witness's test -- that the witness has sufficient
12 education or experience or if you do not believe that
13 the witness's testimony was consistent, then, again,
14 you may give the witness's -- the expert witness's
15 testimony the weight that you believe it is entitled,
16 and you do not have to believe an expert witness's
17 testimony simply because the witness is an expert, and
18 you do not have to believe the expert witness even
19 though that expert testimony may be uncontroverted.
20 Expert witness testimony is given for the purpose of
21 helping you understand evidence and not for the purpose
22 of controlling your judgment.

23 Now, ladies and gentlemen, there has been some
24 discussion about an Alford plea, an Alford plea, and I
25 want to talk about what is that. Ladies and gentlemen,

1 an Alford plea exists obviously as part of our criminal
2 justice system and it is a plea of guilt where a
3 defendant while asserting innocence makes a calculated
4 choice to accept a beneficial plea arrangement rather
5 than face overwhelming evidence of guilt. An Alford plea
6 is a constitutional admission of guilt and the defendant
7 accepts all collateral consequences of that decision.

8 Now I want to talk to you about the elements that
9 the State must prove beyond a reasonable doubt under
10 the Sexually Violent Predator statute. There are three.
11 Number one, that the respondent has been convicted of
12 at least one sexually violent offense. That means pled
13 guilty or adjudicated guilty, found guilty.

14 Number two, that the respondent suffers from a
15 mental abnormality and/or a personality disorder and
16 that mental abnormality or personality disorder makes
17 the respondent likely to engage in acts of sexual
18 violence if not confined in a secure facility for
19 long-term control, care and treatment.

20 The respondent in this case, Mr. Fabian, has been
21 convicted of criminal sexual conduct with a minor in
22 the first degree, which is a sexually violent offense,
23 and the State has met its burden as to that element, so
24 you will make your determination with regards to the
25 other two elements.

1 Inherent in the second and third elements is that
2 the State must prove beyond a reasonable doubt that the
3 respondent, Mr. Fabian, has a mental abnormality and/or
4 personality disorder and that it, and the "it" is the
5 mental abnormality or personality disorder, causes him
6 serious difficulty in controlling his behavior. In
7 other words, the State must prove beyond a reasonable
8 doubt that Mr. Fabian suffers from a mental illness
9 which he cannot sufficiently control without the
10 structure and the care provided by a mental health
11 facility, and that illness -- and that illness, that
12 mental abnormality and/or personality disorder renders
13 him likely to commit a sexually violent offense or
14 offenses.

15 Now in order for you to better understand the
16 elements, I am gonna define for you some of the terms
17 that I've just used now and earlier.

18 Mental abnormality. What do we mean by mental
19 abnormality? Mental abnormality means a mental
20 condition affecting a person's emotional or volitional
21 capacity that predisposes the person to commit sexually
22 violent offenses. This mental abnormality or personality
23 disorder must be such as to cause a respondent serious
24 difficulty in controlling sexual behavior. That's the
25 definition of mental abnormality or personality disorder.

1 Now what do we mean by likely to engage in acts of
2 sexual violence? Well, what we mean by that is we mean
3 -- we're talking about a person's propensity to commit
4 acts of sexual violence, and so that likely to engage in
5 acts of sexual violence means the person's propensity to
6 commit acts of sexual violence is of such a degree as to
7 pose a menace to the health and safety of others so that
8 the person is dangerous to the public.

9 Again, I remind you that the burden of proof is
10 on the State to prove to your satisfaction beyond a
11 reasonable doubt the three elements that I have just
12 instructed you. The two that -- that you will consider,
13 that he also suffers from a mental abnormality or
14 personality disorder that makes him likely to engage in
15 acts of sexual violence if not confined in a secure
16 facility for long-term control, care and treatment.

17 Now, ladies and gentlemen, if you find that the
18 State has met its burden of proof that Mr. Fabian is a
19 sexual violent predator, you will indicate that on the
20 verdict form, which I -- and if you believe that the
21 State has failed to meet its burden of proof of beyond
22 a reasonable doubt, then you would indicate that
23 Mr. Fabian is not a sexually violent predator, and you
24 would indicate that on the verdict form, and we'll go
25 over that now, but there are a couple of things that I

1 want to go over with you before we do that.

2 Now, ladies and gentleman, the first thing that I
3 want to tell you is that your verdict must be unanimous.
4 That means that this is the verdict -- must be the
5 verdict of each and every one of you.

6 Did you notice I skipped over you guys? When the
7 jury leaves me this next time, I want you-all to stay
8 with me.

9 But this is the verdict of each and every one of
10 you. This is not majority rule or any one of you rule.
11 This is the verdict and must be the verdict of each and
12 every one of you.

13 Next, I want to -- before we go over it, I want to
14 tell you this. These two possible verdicts, they're on
15 this piece of paper. One of them is first and one of
16 them is second. Please don't take any hidden meaning
17 from the order which these things have been put on this
18 piece of paper. This is just reality. Something's got
19 to be first, something's got to be second. I could have
20 just as easily put the second one first and the first
21 one second, so please don't take any hidden meaning in
22 the order in which these items have been placed on paper.

23 Now -- so I know you-all can't read it, but you can
24 kind of see what I'm gonna talk about I think. This is
25 known as the caption, the title of the case, and this

1 says verdict form because that's what it is, it's the
2 verdict form. And once you have completed your
3 deliberation, you can check and circle one of these two
4 verdicts which would be the verdict of the jury, Madam
5 Presiding Juror.

6 Now there are two possible verdicts. The first
7 one -- well, let me begin -- let me begin by reading
8 it to you. Has the petitioner, the State of South
9 Carolina, proved beyond a reasonable doubt that Tracy
10 Allan Fabian is a sexually violent predator under the
11 South Carolina Sexually Violent Predator Act?

12 We -- and here we go. We, the jury, unanimously
13 answer the question as follows. The first possible
14 answer: Yes, Tracy Allan Fabian is a sexually violent
15 predator; or the second possible answer: No, Tracy
16 Allan Fabian is not a sexually violent predator.

17 Irrespective of what the unanimous verdict is, I
18 want you to check it or put a little X mark and then
19 circle it so there's no question which of these two
20 possible verdicts is the unanimous verdict of the jury.

21 And then it -- it says foreperson, and you know
22 who you are, so when the jury has completed its
23 deliberations and you have filled it out, you sign and
24 date it. And just for your reference, just for your
25 reference, today is August the 31st.

1 Now when you have completed your deliberations
2 and you've filled out the verdict form, then just knock
3 on the door and you'll return to the courtroom and then
4 you will give your verdict form to one of our bailiffs
5 who will give that to me. You do not publish the
6 verdict. You'll just pass it up.

7 Now there are a couple of other instructions that
8 I need to give you about your deliberations. Lunch is
9 gonna be served in just a few moments for you. It is
10 perfectly fine to eat and then deliberate. Not a
11 problem. However, all twelve of you must be present
12 for you to deliberate, and it makes sense because, you
13 know, that one thing could be said and -- and you might
14 be out of the room. Well, the way that we protect
15 against that occurring is that in the event that you-all
16 need to take a comfort break, that is absolutely not a
17 problem. Stop your deliberation, take your comfort break
18 and then reconvene your deliberations when everybody is
19 together again, so please keep that in mind.

20 Now in just a moment I'm gonna be sending you-all
21 to your jury room with this instruction. Do not discuss
22 this matter or allow anyone to discuss it with you, and
23 at this point you ought to be saying unh-unh, you've
24 been telling us for days this is when we would be
25 deliberating. Well, I'm gonna tell you exactly what's

1 gonna happen. When I send you to your jury room on this
2 next occasion, I'm gonna turn to the lawyers and they're
3 gonna help me because this is my one chance to get this
4 right, to give you all of the law that you may need for
5 your deliberations and to state it for you correctly.
6 Now sometimes I, I, simply fail to give a jury all of
7 the law that they may need to consider or they need to
8 have and these lawyers help me know that and I may need
9 to invite you back out so that I can give you that
10 additional part of the law. In the event that I need
11 to do that, I'm gonna ask you in advance to please don't
12 consider that with any emphasis, just know this is my
13 chance to get this right.

14 Now sometimes, and goodness knows this is
15 unintended, sometimes something will just pop out wrong
16 and these lawyers help me know that. In the event that
17 I need to bring you back out, I'm gonna ask you in
18 advance if I need to bring you back out to correct an
19 error that I have made, please allow me to correct my
20 error in your minds. Now in the event that I do not
21 need to bring you back out, you will be brought the
22 verdict form and any exhibits and an instruction to
23 begin your deliberations.

24 Now let me tell you this. We have been doing this
25 -- I know they look like they're fifteen, but we have

1 been doing this a while together and I am confident that
2 they will deliver also the instruction to begin your
3 deliberations, but you will not have this verdict form
4 unless it is time for you to begin your deliberation.

5 So now, ladies and gentlemen, at this time I'm going
6 to ask you to please step to your jury room. Do not
7 discuss this matter or do not allow anyone to discuss
8 it with you. Except for my alternates. We'll be with
9 you hopefully shortly. If you'll go with our bailiff.

10 (Whereupon, the jury retires to the jury room at
11 1:10 PM.)

12 THE COURT: I need fifteen minutes -- your time is
13 your own after fifteen minutes -- to speak to you before
14 you leave just before you dash out. If you will let
15 Ms. Leone know and she'll come get me.

16 Thank you.

17 (Whereupon, the alternates were dismissed at
18 1:12 PM.)

19 THE COURT: Any objections or additions from the
20 State?

21 MS. SHAW: No, Your Honor.

22 THE COURT: For the defense -- respondent?

23 MR. FALK: Yes, Your Honor.

24 With the part of the Alford, and I understand -- I
25 don't know if that's a standard instruction or what, but

1 the language where you said "and accepts all collateral
2 consequences" I'm afraid is gonna confuse this jury as
3 being he has to accept being a sexually violent predator
4 and I --

5 THE COURT: Well -- yeah, I understand.

6 MR. FALK: I know that we're trying to -- and I've
7 been trying to find and, of course, it's hard to find an
8 Alford, you know, standard plea instruction.

9 THE COURT: Let me tell you where it came from.
10 That is the exact language that came from a case called
11 Zurcher versus Bilton, and that is Justice Toal's
12 language, and it came from a civil case that was
13 addressing the effect of an Alford plea in the civil
14 context.

15 MR. FALK: Like an auto case?

16 THE COURT: No, an assault case.

17 MR. FALK: Oh, okay.

18 THE COURT: And also there is a piece of it that
19 comes -- well, it -- it comes from that case, but it
20 also comes directly from North Carolina versus Alford
21 and the -- the language that constitutionally it is a
22 guilty plea comes directly from North Carolina versus
23 Alford.

24 MR. FALK: No, I get all of that.

25 THE COURT: Yeah.

1 MR. FALK: It was just that last phrase.

2 THE COURT: Well, and the reason for that is that
3 the case talks about the fact that when you plead under
4 North Carolina versus Alford, you're in for a penny, in
5 for a pound. So he is certainly -- and I'll tell you
6 the reason I think it's relevant, particularly in this
7 instance, because he testified that he wasn't -- that
8 he wasn't responsible, that he wasn't guilty. It was
9 important for this jury to understand that he does --
10 under the law he doesn't get to pick. He's in for a
11 penny and in for a pound, which is why he is here even
12 though that was an Alford plea, and I think it was
13 important for the jury to understand that because he
14 entered an Alford plea does not mean that he is not
15 subject to the South Carolina Violent Predator Act as
16 was any other person convicted under the laws of the
17 State of South Carolina.

18 So that's the reason why I thought that all of the
19 language of Justice Toal in that case that I thought was
20 relevant obviously, and I note your exception for this
21 record.

22 MR. FALK: My objection. Thank you.

23 THE COURT: Thank you.

24 All right. Now the verdict form, and I'm gonna --
25 you-all come and look at this to see if you're concerned

1 about it because we can just make -- we can white it out
2 and copy it, which is probably what we need to do.

3 When you-all brought that in July, when you-all
4 brought so many helpful documents, I wanted it to go in
5 the file, so I put an F on it for file. So I think what
6 we need to do is white the F out there on the top of the
7 page --

8 MR. FALK: Oh, yeah.

9 THE COURT: I just -- that means file and I wanted
10 Becky to put in the file, that stack of documents that
11 both of you brought. So let's white that out and just
12 copy it again so it's clean.

13 MS. SHAW: No problem.

14 THE COURT: Okay. If you'll give me one moment.

15 MS. SHAW: The exhibits are right here.

16 THE COURT: You've got them?

17 MS. SHAW: Yeah.

18 THE COURT: Okay. Now you-all have got to eyeball
19 them and let me tell you why. There's a story.

20 (Off the record discussion.)

21 (Whereupon, the evidence and verdict form was
22 submitted to the jury at 1:22 PM.)

23 THE COURT: And we will be in recess until we hear
24 from the jury.

25 (Recess taken at 1:22 PM.)

1 (Whereupon, a luncheon recess was taken at
2 1:32 PM.)

3 (Back on the record at 2:04 PM.)

4 THE COURT: All right. Thank you so much. You may
5 be seated.

6 All right. Anything before we bring our jury out?

7 MS. SHAW: No, ma'am.

8 MR. FALK: (Shakes head.)

9 THE COURT: All right. Let's have the jury, please.

10 (Whereupon, the jury return to the courtroom at
11 2:05 PM.)

12 THE COURT: All right. It's my understanding the
13 jury has reached its verdict. If you will pass the
14 verdict form to Ms. Catherine, she'll pass to me.

15 I find that the verdict is in due form.

16 Madam Clerk, if you would please publish the
17 verdict.

18 THE CLERK: In the State of South Carolina, County
19 of Dorchester, in the Matter of the Care and Treatment
20 of Tracy Allan Fabian, in the Court of Common Pleas,
21 Case Number 2021-CP-18-00680, we, the jury, unanimously
22 answer the question as follows: Yes, Tracy Allan Fabian
23 is a sexually violent predator, signed by the Foreperson
24 on August the 31st, 2022.

25 Ladies and gentlemen of the jury, if this is your

1 verdict, if so, please indicate by raising your right
2 hand.

3 THE COURT: Let me observe for the record all our
4 jurors have their hands raised.

5 Thank you.

6 Anything from the State before we dismiss the jury?

7 MS. SHAW: No, Your Honor.

8 THE COURT: Anything from the defense?

9 MR. FALK: No, Your Honor.

10 THE COURT: Very well.

11 Ladies and gentlemen, I want to thank you for your
12 service on this jury and for the service on this panel
13 this week. I am about to dismiss you both for this
14 trial and this case and for the week.

15 I want to thank you so much for all of your time.
16 You've given so much of your dear and precious time to
17 these matters. I hope you have found it informative.
18 I can assure you it has been critical and we are all so
19 truly grateful for your service.

20 Now I do need to talk about a couple of things.
21 First of all, those of you who are dashing off to work
22 and need something for your employer, we are happy to
23 get that for -- we are happy to get that for you
24 downstairs in the clerk's office that is directly below
25 where we are, and we're happy to get that for you.

1 I need to also remind you that you are now not
2 eligible to serve on a jury in a court of record for the
3 balance of 2022. I feel your pain. But there's hope
4 in magistrate's court and municipal court. And please
5 remember you have an exemption for a court of record
6 for 2023 and 2024. If you remember when we were going
7 through the qualifications and exemptions, you have an
8 exemption because you're not required to serve more
9 often than once every three calendar years.

10 Let me also mention this to you. You now at
11 liberty to talk about the case if you want to. It is
12 up to you. And you very well may hear from counsel.
13 Oftentimes counsel will call jurors because, you know,
14 it is called the practice of law for a reason and they
15 want to -- they may want to say all right, what can I
16 do better, what can I improve on. They may and they
17 may not, and I just mention that to you. If you're
18 comfortable talking about it, that's fine. If you don't
19 want to talk about it, just tell them you don't want to
20 talk about it. They are not gonna persist.

21 And now let me tell you that in twenty-five years
22 maybe arguably I've had one instance where someone was
23 a little more persistent, it wasn't a lawyer, but
24 someone doing some research or something on -- on juries,
25 they were a little more persistent and I was delighted

1 that I had told the jury panel what to do in that
2 circumstance and now I'm scared not to tell every jury.
3 Maybe once in twenty-five years. At any rate, should
4 someone be more persistent in talking to you about this
5 case and you say you don't want to talk about it, here's
6 what you do. You call the clerk's office and you tell
7 them and they tell me and I intercede on your behalf.
8 So I don't want you put in that position.

9 I certainly hope so much that you have -- as I say,
10 have found your experience to be informative. It has
11 been essential and it has certainly -- on my behalf let
12 me tell you it's been an honor and a pleasure to serve
13 with you in this capacity.

14 And I had an opportunity to visit for just a few
15 moments with the alternates on the jury. They have sent
16 their contact information. They were like we can't
17 believe we have to leave them.

18 So I'm gonna give it to you, Madam Presiding
19 Juror, and you can disseminate that as you find to be
20 appropriate.

21 Ladies and gentlemen, this is just a policy of
22 mine, if you wish, please don't feel any pressure or
23 stress or whatever, you've given us so much of your
24 time, it is my policy that when I can if jurors have
25 questions or suggestions or just need to chat about

1 whatever, I'm happy to give you some of my time as
2 well, and if -- if you want to chat for a moment, all
3 you need to do is go back into the jury room and let
4 -- one of my bailiffs will let me know, but please note
5 how much we all are grateful for all of the time that
6 you have given to us. I think this is the best system
7 of justice that folks have ever come up with.

8 Enjoy the rest of your week. Have a wonderful and
9 safe Labor Day weekend. It's almost here. And, again,
10 thank you so much. We appreciate you.

11 (Whereupon, the jury was dismissed at 2:11 PM.)

12 THE COURT: All right. Anything further from the
13 State? I know there's some things to sign that you want
14 a copy of, but...

15 MS. SHAW: Yes, Your Honor. I just need a copy
16 of the order clocked preferably if Ms. Stevens has time.

17 THE COURT: Very well.

18 Yes, sir.

19 MR. FALK: Your Honor, just to preserve the record,
20 I'm making a motion for a new trial.

21 THE COURT: Yes.

22 MR. FALK: And because of -- I mean, clearly our
23 strategy in this case was to allow him fully to say that
24 he did not, you know, plead innocent on those charges
25 in '14 and '15, and although when he took the stand he

1 was able to, but some of the other rulings when I --
2 versus when Dr. Gehle was taking the stand, you know,
3 was maybe willing to fully develop our defense and I
4 wasn't able to go as far as I wanted to with him as far
5 as, you know, the reasons why he pled guilty, and so I
6 just -- I needed to protect the record.

7 THE COURT: Thank you so much.

8 And, again, I would cite to you, you know, I
9 did -- I did some research last night and I did some
10 this morning on that precise issue and interestingly
11 enough it is the holding in the -- the Bilton case I
12 mentioned earlier, and the holding is, is that you
13 cannot collaterally attack in a civil proceeding even
14 with an Alford plea.

15 So I note your exception for the record, but as
16 it -- as it was you actually went farther than -- on
17 reflection you probably should have been able to go,
18 but what happened is, is that you had stood and even
19 asked the first question when I found the case, so
20 that's -- and I wasn't gonna stop you and reverse
21 myself. I didn't --

22 MR. FALK: I didn't realize I was -- I didn't
23 realize I did that in Bilton.

24 THE COURT: This case -- no, this is the -- this
25 is a different Bilton case. You had cited a Bilton

1 case that was a sexually violent predator case.

2 MR. FALK: Yes. Yes.

3 THE COURT: This is -- no, this was a civil case
4 that occurred at a car dealership, the Bilton car
5 dealership, and -- and it arose out of an altercation
6 that occurred, I think, with an employee of perhaps of
7 the dealership. A totally different case. No, exactly.
8 A different Bilton, you know, different -- lots of
9 Biltons in this part of the world.

10 MR. FALK: No, I don't doubt that. I'm just saying
11 because of that I thought there was another issue that
12 the Court addressed in that.

13 THE COURT: No.

14 All right. Thank you so much. I respectfully deny
15 the motion and note your exception.

16 Thank you.

17 MR. FALK: I guess I'm also renewing all my other
18 objections.

19 THE COURT: Yes. Absolutely.

20 MR. FALK: Thank you.

21 THE COURT: Thank you so much.

22 And I have signed the order of commitment and I'd
23 like you to see it, Mr. Falk. It is very straightforward.
24 And then I know both of you need a copy of it and Becky
25 will get that for you. And here is a Form 4.

1 All right. We'll be adjourned in this matter.

2 Thank you.

3 MS. SHAW: Thank you, Your Honor.

4 MR. FALK: Thank you.

5 (Whereupon, the proceedings were concluded for

6 August 31, 2022, at 2:16 PM.)

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272

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

STATE VS. TRACEY A. FARLEY

CLERKED COPY
DEFENDANT

INDICTMENT NUMBER: 93-GS-18-965

JUL 21 PM 12:44

COURT REPORTER: CAROL LEFANE

GUILTY PLEA

THE DEFENDANT IS PUT TO THE BAR AND ARRAIGNED AND, UPON HIS/HER
ARRAIGNMENT, WAIVES PRESENTMENT TO THE GRAND JURY AND PLEADS GUILTY IN AT
AS CHARGED CSC 14 ALABAMA
NC

ATTEST:

[Signature]
SIGNATURE OF DEFENDANT

SENTENCE

THE DEFENDANT IS COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS/
COUNTY FOR A TERM OF 30 MONTHS/YEARS AND/OR
TO PAY A FINE OF \$ _____; PROVIDED UPON THE
SERVICE OF _____ MONTHS/YEARS AND/OR PAYMENT OF
\$ _____, PLUS PAY/WAIVE COSTS AND ASSESSMENTS AS
APPLICABLE*, THE BALANCE SUSPENDED WITH PROBATION FOR _____
MONTHS/YEARS.

RESTITUTION

YES/NO

TO BE PAID

FOR PHYSICAL INJURY \$ _____

PROPERTY DAMAGE \$ _____

OTHER CONDITIONS _____

DATE 2-2-94

[Signature]
PRESIDING JUDGE

FINE

*COST AND ASSESSMENTS

NON-WAIVABLE

NOT WAIVED

\$ _____

\$ _____

\$ _____

TOTAL COSTS AND ASSESSMENTS

\$ _____

TOTAL AMOUNT DUE

CLERK OF COURT

** PAY TO VICTIM'S COMPENSATION IF SUBROGATED



COPIED COPY

WITNESSES

Lt. C. W. Henery

ARREST WARRANT #:

D921537

Arrested on July 27, 1993

ACTION OF GRAND JURY

True Bill

Foreman:

By: *[Signature]*
Grand Jury

VERDICT

Foreman:

Petit Jury

Date: _____

DOCKET #: 93GS18-0965

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: September, 1993

THE STATE

vs.

Tracey A. Fabian

INDICTMENT FOR

0159

CRIMINAL SEXUAL CONDUCT WITH MINOR

FIRST DEGREE (16-3-655)

STATE OF SOUTH CAROLINA)
County of Dorchester)

INDICTMENT #93GS18-0965

At a Court of General Sessions, convened on September 15, 1993
the Grand Jurors of Dorchester County present upon their oath:

**COUNT: CRIMINAL SEXUAL CONDUCT WITH MINOR
FIRST DEGREE (16-3-655)**

That Tracey A. Fabian did in Dorchester County on or about July 25, 1993,
wilfully and unlawfully engage in criminal sexual conduct in the first degree
in that Tracy Fabvian engaged in sexual battery, to wit: digital penetration of
the vagina, cunnilingus, attempted to force victim to perform fellatio on him,
and sucked victim's breast, with the victim, _____, a minor who
was eight (8) years of age.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

SOLICITOR B. Hamm Bell

ARREST WARRANT

D-921537

STATE OF SOUTH CAROLINA, County of DORCHESTER

THE STATE against

TRACEY A. FABIAN

Address: [Redacted]

Phone: [Redacted] SSN: [Redacted]

Sex: M Race: W Height: 5'10" Weight: 160

DL State: SC DL #: [Redacted]

DOB: [Redacted] Agency ORI #: DCSD

Prosecuting Agency: LT. C.W. HENEREY

Prosecuting Officer: CRIMINAL SEXUAL CONDUCT WITH A MINOR

Offense: CRIMINAL SEXUAL CONDUCT WITH A MINOR

Code/Ordinance Sec.: 16-3-655 Offense Code:

This warrant is CERTIFIED FOR SERVICE in the County/ Municipality of

is to be arrested and brought before me to be dealt with according to law The accused

Signature of Judge (L.S.)

RETURN

A copy of this arrest warrant was delivered to defendant Tracey E. Fabian on 7-27-93

Signature of Constable/Law Enforcement Officer Col. M. Stender

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA County of DORCHESTER

AFFIDAVIT

Personally appeared before me the affiant LT. C.W. HENEREY-DCSD of South Carolina and says that defendant TRACEY A. FABIAN

in the following particulars: CRIMINAL SEXUAL CONDUCT WITH A MINOR

DESCRIPTION OF OFFENSE: VIOLATION SECTION 16-3-655 OF SC CODE OF LAWS

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

2002 JUL 21 PM 12:44 CERTIFIED COPY

Sworn to and subscribed before me on 7-27-93

Signature of Issuing Judge (L.S.)

Signature of Affiant

Affiant's Address

Affiant's Telephone

STATE OF SOUTH CAROLINA County of DORCHESTER

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY: If appearing from the above affidavit that there are reasonable grounds to believe that did violate the criminal laws of the State of South Carolina (or ordinance of County/ Municipality of) as set forth below:

DESCRIPTION OF OFFENSE: VIOLATION SECTION 16-3-655 OF SC CODE OF LAWS

CRIMINAL SEXUAL CONDUCT WITH A MINOR

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Judge's Address: 133 EAST FIRST NORTH ST. SUMMERVILLE, SC 29483

Judge's Telephone: 873-0781

Signature of Issuing Judge (L.S.)

Issuing Court: Magistrate Municipal Circuit

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

AFFIDAVIT

Personally appeared before me, a magistrate of this County, one LT C.W. HENNERLY who, first being duly sworn, deposes and says that (name of defendant)

TRACEY A FABIAN

did within this County and State on the 25 day of JULY 1993, violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE

CSC WITH MINOR
16-3-655

FILED - RECORDED
33 AUG 6 PM 3 40
CLERK OF COURT
DORCHESTER COUNTY

The Affiant states that there is probable cause to believe that the defendant named above did commit the crime(s) as above and that such probable cause is based on the following facts:
THAT ON OR ABOUT JULY 25, 1993 AT APPROX 10:30 IN THE MORNING AT THE EMBASSY DE SUMMERVILLE COUNTY AND STATE AFORESAID THE DEFENDANT, TRACEY A FABIAN, DID VIOLATE S.C. CODE OF LAWS AS AMENDED 1976: TO WIT SECTION 16-3-655 (CSC WITH A MINOR). AN INVESTIGATION BY THE DORCHESTER COUNTY SHERIFF'S OFFICE REVEALED THAT THE DEFENDANT DID WILLFULLY, FELONIOUSLY AND UNLAWFULLY BRING THE VICTIM INTO HIS RESIDENCE, REMOVE ALL OF HER CLOTHING, SUCKED ON HER BREAST, PERFORMED ORAL SEX ON HER, ATTEMPTED TO FORCE HER TO PERFORM ORAL SEX ON HIM, DID PENETRATE THE VICTIM'S VAGINA WITH HIS FINGER. THE VICTIM WAS LOCATED BY THE DCSD INSIDE THE RESIDENCE AND THE DEFENDANT IS KNOWN BY NAME & SIGHT TO HER. THE VICTIM IDENTIFIED THE DEFENDANT AS THE PARTY THAT ASSAULTED HER. LT C.W. HENNERLY DET. S. RICHARDSON AND MELONKA PATE ARE WITNESS TO PRAVE THE SAME. ALL AGAINST THE LAW, PEACE AND DIGNITY OF THE STATE OF S.C.

C.W. Hennerly
AFFIANT

Sworn to and Subscribed before me
this 27 day JULY, 19 93
[Signature] (L.S.)
SIGNATURE OF JUDGE

Address [Redacted]
Phone [Redacted]

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

THE STATE VS. TRACEY A. FARRIS

CERTIFIED COPY, DEFENDANT

INDICTMENT NUMBER: 93-GS-18-964

2022 JUL 21 PM 12:45

COURT REPORTER: CAROL LIFEBAL

GUILTY PLEA

Carol Lifebal
CLERK OF COURT
DORCHESTER COUNTY

THE DEFENDANT IS PUT TO THE BAR AND ARRAIGNED AND, UPON HIS/HER
ARRAIGNMENT, WAIVES PRESENTMENT TO THE GRAND JURY AND PLEADS GUILTY

*ALFORD
NC*

Kidnapping

ATTEST:

Tracey A. Farris
SIGNATURE OF DEFENDANT

SENTENCE

THE DEFENDANT IS COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS/
COUNTY FOR A TERM OF 30 MONTHS YEARS AND/OR
TO PAY A FINE OF \$ _____; PROVIDED UPON THE
SERVICE OF _____ MONTHS/YEARS AND/OR PAYMENT OF
\$ _____, PLUS PAY/WAIVE COSTS AND ASSESSMENTS AS
APPLICABLE*, THE BALANCE SUSPENDED WITH PROBATION FOR _____
MONTHS/YEARS.

RESTITUTION
YES/NO
TO BE PAID

FOR PHYSICAL INJURY \$ _____
PROPERTY DAMAGE \$ _____

Concoment

OTHER CONDITIONS _____

DATE 2-2-94

Charles W. Whitt
PRESIDING JUDGE

FINE
*COST AND ASSESSMENTS
NON-WAIVABLE
NOT WAIVED

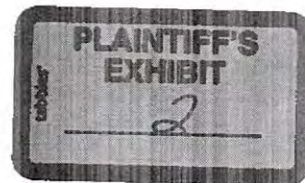
\$ _____
\$ _____
\$ _____
\$ _____
\$ _____

TOTAL COSTS AND ASSESSMENTS

TOTAL AMOUNT DUE

CLERK OF COURT

** PAY TO VICTIM'S COMPENSATION IF SUBROGATED



WITNESSES

Lt. C. W. Henery

CERTIFIED COPY

2022 JUL 21 PM 12:45

Cheryl K. Adams
CLERK OF COURT
DORCHESTER COUNTY

DOCKET #: 93GS18-0964

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: September, 1993

THE STATE

vs.

Tracey A. Fabian

ARREST WARRANT #:

D613440

Arrested on July 27, 1993

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

ACTION OF GRAND JURY

True Bill

Foreman:

By: *[Signature]*
Grand Jury

VERDICT

Foreman:

Petit Jury
Date: _____

93008410

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

AFFIDAVIT

Personally appeared before me, a magistrate of this County, one LT. C.W. HENEREY
who, first being duly sworn, deposes and says that (name of defendant)

TRACEY ALLEN FABIAN

did within this County and State on the 25 day of JULY
19 93, violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE

KIDNAPPING
16-3-910

FILED - RECORDED
93 JUL 6 PM 3 40
MAR. CLERK OF COURT
DORCHESTER COUNTY

The Affiant states that there is probable cause to believe that the defendant named above did commit the crime(s) set forth and that such probable cause is based on the following facts:

THAT ON OR ABOUT JULY 25, 1993 AT APPROX 09:00 IN THE
MORNING AT 120 SCOTCH RANGE KNIGHTSVILLE, COUNTY
AND STATE AFORESAID THE DEFENDANT, TRACEY
ALLEN FABIAN, DID VIOLATE THE S.C. CODE OF LAWS
AS AMENDED 1976, SECTION 16-3-910, KIDNAPPING.
FACTS TO PROVE THE SAME ARE THAT THE DEFENDANT
DID WILLFULLY, UNLAWFULLY AND FELONIOUSLY SEIZE
AND ABOUT ONE AN EIGHT
YEAR OLD FEMALE, DID PULL HER BY HER ARM FROM
HER BED AT THE ABOVE RESIDENCE WITHOUT HER CONSENT
OR ANY AUTHORITY AND CARRY HER TO HIS RESIDENCE
AT WHERE SHE WAS
LOCATED BY THE DORCHESTER COUNTY SHERIFFS OFFICE.
THE DEFENDANT IS KNOWN TO THE VICTIM AND SHE
HAS IDENTIFIED HIM AS HER ASSAILANT. LT C.W
HENEREY AND DET RICHARDSON ARE WITNESS TO
PROVE THE SAME. ALL AGAINST THE LAW DEUCE
AND DISAITY OF THE STATE
OF S.C.

Sworn to and Subscribed before me
this 25th day July, 19 93
Knightsville, S.C. 29472 (L.S.)
Charles W. Dupre
SIGNATURE OF JUDGE

Address DC 50
Phone [REDACTED]

COUNTY OF Dorchester
STATE VS. Tracy Allan Fabian

INDICTMENT/CASE#: 2014GS180531
A/W#: 2014A1810300288
Date of Offense: 3/13/2014
S.C. Code §: 16-3-655(1)
CDR Code #: 0385



AKA:
Race: WHITE Sex: M Age: 31
DOB: 1963 SS#:
Address:
City, State, Zip:
DL#: SID#:

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazardous Yes No
In disposition of the said indictment comes now Defendant who was
TO: Assault / Assault and Battery 1st Degree

Alford
CONVICTED OF or PLEADS

in violation of § 16-3-600(C)(1) of the S.C. Code of Laws, bearing CDR Code # 3412
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC) §17-25-45

The charge is: As Indicted Lesser Included Offense Defendant Waives Presentment to Grand Jury
The plea is: Without Negotiations or Recommendation Negotiated Sentence Recommendation by the State

ATTEST: Mims, Sheila SC Bar# 15784 Defendant
Attorney for Defendant SC Bar# 16947

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 180 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 551 days
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPS

PTUP
days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Table with columns for Recipient, *Fine, and various assessment codes (e.g., § 14-1-206, § 14-1-211(A)(1), etc.) with corresponding dollar amounts.

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Cheryl Graham
Court Reporter: Sharon Wizer
SCCA/217 (03/2011)

Presiding Judge: [Signature]
Judge Code: 2153
Sentence Date: 9/16/15

October 13, 2014 WITNESSES

Ann Reese

DOCKET NO. 2014GS180531

The State of South Carolina
County of DORCHESTER

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Dorchester County Sheriff

14-002637

COURT OF GENERAL SESSIONS

October 13, 2014 TERM

I hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

2014A1810300288

THE STATE

vs.

Tracy Allan Fabian

Defendant

Witness:

CERTIFIED COPY
2022 JUL 21 PM 12:45
CLERK OF COURT
DORCHESTER COUNTY

ACTION OF GRAND JURY

Arrested: April 17, 2014

C.C.C. PLS. AND G.S.

TRIPLE B

Foreperson of Grand Jury

Date: October 9, 2014

Indictment for
Criminal Sexual Conduct with Minor -
Victim Under 11 Yrs of Age - First
Degree

VERDICT

SC Code: 16-3-655(1)

OCT -9 PM 2:27
CLERK OF COURT
DORCHESTER COUNTY

Foreperson of Petit Jury
Date:

October 13, 2014 WITNESSES

Ann Reese

DOCKET NO. 2014GS180531

The State of South Carolina
County of DORCHESTER

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Dorchester County Sheriff

14-002637

COURT OF GENERAL SESSIONS

October 13, 2014 TERM

I Tracy Fabian
hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

2014A1810300288

Result v Betting 1st

Arrested: April 17, 2014

THE STATE

vs.

Tracy Allan Fabian

Tracy Fabian
Defendant

ACTION OF GRAND JURY

Indictment for

Criminal Sexual Conduct with Minor -
Victim Under 11 Yrs of Age - First Degree

Witness: [Signature]
C.C.C. PLS. AND G.S.

VERDICT

Foreperson of Grand Jury
Date: October 9, 2014

DORCHESTER COUNTY
CLERK OF COURT

SC Code: 16-3-655(1)

54:21MD 12 TNR 2202

YAD003 031F11T33

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY: Dorchester
STATE: VS. Tracy Allan Fabian

INDICTMENT/CASE#: 2014GS180532
A/W#: 2014A1810300289
Date of Offense: 3/13/2014
S.C. Code §: 16-3-655(1)
CDR Code #: 0385



AKA: CERTIFIED COPY
Race: WHITE Sex: M Age: 51
DOB: 963 SS#: JUL 21 PM 12:45
Address:
City, State, Zip:
DL#: SID#: Clerk of Court

SENTENCE SHEET

CONVICTED OF or PLEADS

*CDL Yes No CMV Yes No
In disposition of the said indictment comes now the Defendant who was TO: Assault / Assault and Battery 1st Degree

in violation of § 16-3-600(C)(1) of the S.C. Code of Laws, bearing CDR Code # 3412
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Mims, Shajila SC Bar# 15784 Defendant X 22 mg Eubank Attorney for Defendant Michelle R. King SC Bar# 11947

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 150 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 551 days
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

PTUP
days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Recipient:

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114(BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$ 3.90, TOTAL \$ 133.90

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Cheryl Graham
Court Reporter: Sharon Vizer
SCCA/217 (03/2011)

Presiding Judge: [Signature]
Judge Code: 2153
Sentence Date: 9/16/15

October 14, 2014 WITNESSES

Ann Reese

Dorchester County Sheriff

14-002637

ARREST WARRANT NUMBER

2014A1810300289

Arrested: April 17, 2014

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: October 9, 2014

VERDICT

DOCKET NO. 2014GS180532

The State of South Carolina
County of DORCHESTER

COURT OF GENERAL SESSIONS

October 14, 2014 TERM

THE STATE

vs.

Tracy Allan Fabian

Indictment for

Criminal Sexual Conduct with Minor -
Victim Under 11 Yrs of Age - First
Degree

SC Code: 16-3-655(1)

54:21 HD 12 JAN 2002

AD0000181830

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Tracy Fabian

hereby appear in my own proper person and plead guilty to the within indictment or to

Assault + Battery 1st

Tracy Fabian
Defendant

Witness:

[Signature]
C.C.C. PLS. AND G.S.

[Signature]
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

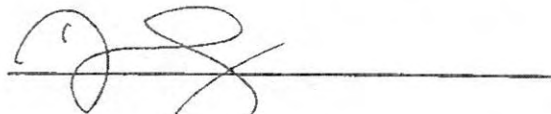
INDICTMENT
2014GS180532

As a Court of General Sessions, convened on October 9, 2014 the Grand Jurors of DORCHESTER County present upon their oath:

**CRIMINAL SEXUAL CONDUCT WITH MINOR - VICTIM UNDER 11 YRS OF AGE -
FIRST DEGREE**

That in Dorchester County, South Carolina, on or about March 13, 2014, the Defendant, Tracy Allan Fabian, did engage in sexual battery upon a minor who was less than eleven (11) years of age in that the defendant did digitally penetrate the victim, This offense being in violation of Section 16-3-655 of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Donald N. Sorenson, Solicitor

October 14, 2014 WITNESSES

Ann Reese

DOCKET NO. 2014GS180532

The State of South Carolina
County of DORCHESTER

Dorchester County Sheriff

14-002637

COURT OF GENERAL SESSIONS

October 14, 2014 TERM

ARREST WARRANT NUMBER

2014A1810300289

THE STATE

vs.

Tracy Allan Fabian

Arrested: April 17, 2014

ACTION OF GRAND JURY

TRIPLE

Handwritten signature

Foreperson of Grand Jury
Date: October 9, 2014

Indictment for

Criminal Sexual Conduct with Minor -
Victim Under 11 Yrs of Age - First
Degree

VERDICT

SC Code: 16-3-655(1)

After being fully advised as to my legal rights, I hereby waive presentation to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

CERTIFIED COPY
2022 JUL 21 PM 12:46
CLERK OF COURT
DORCHESTER COUNTY

Defendant

Witness:

C.C.C. PLS. AND G.S.

CLERK OF COURT
DORCHESTER COUNTY
OCT -9 PM 2:26

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

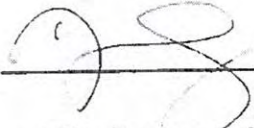
INDICTMENT
2014GS180532

As a Court of General Sessions, convened on October 9, 2014 the Grand Jurors of DORCHESTER County present upon their oath:

**CRIMINAL SEXUAL CONDUCT WITH MINOR - VICTIM UNDER 11 YRS OF AGE -
FIRST DEGREE**

That in Dorchester County, South Carolina, on or about March 13, 2014, the Defendant, Tracy Allan Fabian, did engage in sexual battery upon a minor who was less than eleven (11) years of age in that the defendant did digitally penetrate the victim, This offense being in violation of Section 16-3-655 of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Donald N. Sorenson, Solicitor

10 yrs ²⁹² susp. service of 7yrs and 30 mos. probation w/ credit for T1's'd

0-15 yrs

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Dorchester
STATE VS.

Tracy Allan Fabian

AKA:

Race: WHITE Sex: M Age: 55

DOB: [REDACTED] 963 SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: [REDACTED]

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

CONVICTED OF or PLEADS

TO: Criminal sexual conduct with minor, 3rd Degree - Commit/Attempt Lewd Act (victim under 16 years & actor over 14 years)

in violation of § 16-03-0655 (C) of the S.C. Code of Laws, bearing CDR Code # 3661

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45
(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The pleas: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

[Signature]
Solicitor

15784
SC Bar#

[Signature]
Defendant

[Signature] 16867
Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed — years

and/or to pay a fine of \$ —; provided that upon the service of 7 days/months/years and/or payment

of \$ —; plus costs and assessments as applicable*; the balance is suspended with probation for 30

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the SCDOC.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered

Total: \$ — plus 20% fee: \$ —

Payment Terms: —

Set by SCDPPPS —

Recipient: —

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso (Public Def/Probation)	\$500	\$ 500
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$

3% to County (if paid in installments) \$ 18.75

TOTAL \$ 643.75

Clerk of Court/ Deputy Clerk [Signature]

Court Reporter: [Signature]

SCCA/217 (04/2018)

INDICTMENT/CASE#: 2017GS18-1203

A/W#: 2016A1810300935

CERTIFIED COPY

Date of Offense: 9/17/2015

S.C. Code § : 16-03-0655 (C) JUL 21 PM 12:47

CDR Code #: 3661

SENTENCE SHEET
CLERK OF COURT
DORCHESTER COUNTY

CONVICTED OF or PLEADS

in violation of § 16-03-0655 (C) of the S.C. Code of Laws, bearing CDR Code # 3661

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.

The pleas: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

[Signature] Solicitor

15784 SC Bar#

[Signature] Defendant

[Signature] 16867 Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of 7 days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for 30

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the SCDOC.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso (Public Def/Probation)	\$500	\$ 500
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$

3% to County (if paid in installments) \$ 18.75

TOTAL \$ 643.75

Clerk of Court/ Deputy Clerk [Signature]

Court Reporter: [Signature]

SCCA/217 (04/2018)

PTUP days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge [Signature]

Judge Code: 2153

Sentence Date: 3/14/19



WITNESSES

Melissa L Blanchard

DOCKET NO. 2017GS18-1203

The State of South Carolina
County of DORCHESTER

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Dorchester County Sheriff

16-009678

COURT OF GENERAL SESSIONS

September 5, 2017 TERM

ARREST WARRANT NUMBER

2016A1810300935

THE STATE

vs.

Tracy Allan Fabian

ACTION OF GRAND JURY

Indictment for

Foreperson of Grand Jury
Date: August 31, 2017

Shirley Adams

VERDICT

Criminal sexual conduct with minor, 3rd
Degree - Commit/Attempt Lewd Act
(victim under 16 years & actor over 14
years)

SC Code: 16-03-0655 (C)

Foreperson of Petit Jury
Date:

I hereby appear in my own proper person and plead guilty to the within indictment or to

CERTIFIED COPY
2022 JUL 21 PM 12:47
CLERK OF COURT
DORCHESTER COUNTY

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED - RECORDS
2017 AUG 31 PM 3:38
CHERYL COVANN
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

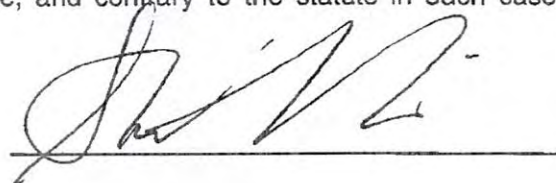
INDICTMENT
2017GS18-1203

As a Court of General Sessions, convened on August 31, 2017 the Grand Jurors of DORCHESTER County present upon their oath:

**CRIMINAL SEXUAL CONDUCT WITH MINOR, 3RD DEGREE - COMMIT/ATTEMPT
LEWD ACT (VICTIM UNDER 16 YEARS & ACTOR OVER 14 YEARS)**

That in Dorchester County, South Carolina, on or about September 17, 2015, the Defendant, Tracy Allan Fabian, did commit a sexual battery upon the victim, _____ who is 8 years old, with the use of force or coercion to accomplish the sexual battery in the absence of aggravating circumstances; or with knowledge or reason to have knowledge that the victim was mentally defective, mentally incapacitated or physically helpless where aggravated force or aggravated coercion was not used in that the defendant did fondle the 8 year old victim's genitals. This offense in violation of Section 16-3-654 of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Sheila Mims, Solicitor

General Sessions Tracking Sheet
Indictment # 0000GS18

Name: Fabian, Tracy Allan

Warrant/Ticket #: 2016A1810300936

AKA:

CERTIFIED COPY

Date of Arrest: 06/14/2017

Addr:

[Redacted Address]

JUL 21 PM 12:46

Date of Offense: 09/17/2015

Date Rcv by Clerk 06/20/2017

SSN#

[Redacted SSN]

Cynthia A. Graham
CLERK OF COURT
DORCHESTER COUNTY

Magistrate: Clerk Of Court C P, G S, And Family Court

Sex: M Race: W

Counts: Code: 0385/Sex / Criminal sexual conduct with minor or Attempt - victim under 11 yrs of age - First degree

DOB: 1963

DL#

[Redacted DL#]

Indictment # ~~0000GS18~~ 2017-1204

Disposition Information

- 1. Transmitted to SOL & SCCA:
- 2. Disp Received by Clerk:
- 3. Date of Disposition: 3/14/19

- | | | | | |
|-------------|-------------------------------------|-----------------------------|----------|-----------------------------|
| Disposition | <input type="checkbox"/> | 1. Guilty plea | Explain: | |
| | <input type="checkbox"/> | 2. Trial -- guilty | Explain: | |
| | <input type="checkbox"/> | 3. Trial -- not guilty | Explain: | |
| | <input checked="" type="checkbox"/> | 4. Dism/Not Pros/Pros Ended | Explain: | <u>Pled to other charge</u> |
| | <input type="checkbox"/> | 5. Judicial Commitment | Explain: | |
| | <input type="checkbox"/> | 6. Judicial Dismissal | Explain: | |
| | <input type="checkbox"/> | 7. Remanded | Explain: | |
| | <input type="checkbox"/> | 8. Dismissed at Prelim | Explain: | |
| | <input type="checkbox"/> | 8. No Bill | Explain: | |
| | <input type="checkbox"/> | 9. Failure to Appear | Explain: | |
| | <input type="checkbox"/> | 10. Other | Explain: | |

Judge: _____

Court Reporter: [Signature]

Defense Atty: _____

Solicitor: _____

Counts: _____ Code: _____

Sentence: _____



WITNESSES

Melissa L Blanchard

Dorchester County Sheriff

16-009678

ARREST WARRANT NUMBER

2016A1810300936

Arrested: June 14, 2017

ACTION OF GRAND JURY

Charles Williams
Foreperson of Grand Jury
Date: August 31, 2017

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2017GS18-1204

**The State of South Carolina
County of DORCHESTER**

COURT OF GENERAL SESSIONS

September 5, 2017 TERM

THE STATE
vs.

Tracy Allan Fabian

Indictment for

Criminal Sexual Conduct with Minor -
Victim Under 11 Yrs of Age - First
Degree

SC Code: 16-3-655(1)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

Charles Williams
CLERK OF COURT
DORCHESTER COUNTY

2017 AUG 31 PM 3:38
CHERYL CASHMAN
CLERK OF COURT
DORCHESTER COUNTY

91:21 PM 12 TOP 2202
CERTIFIED COPY

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

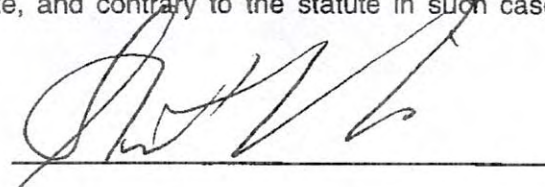
INDICTMENT
2017GS18-1204

As a Court of General Sessions, convened on August 31, 2017 the Grand Jurors of DORCHESTER County present upon their oath:

**CRIMINAL SEXUAL CONDUCT WITH MINOR - VICTIM UNDER 11 YRS OF AGE -
FIRST DEGREE**

That in Dorchester County, South Carolina, on or about September 17, 2015, the Defendant, Tracy Allan Fabian, did engage in sexual battery upon a minor who was less than eleven (11) years of age in that the defendant did perform oral sex upon the victim, This offense in violation of Section 16-3-655 of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Sheila Mims, Solicitor

WITNESSES

Melissa L. Blanchard

DOCKET NO. 2017GS18-1204

The State of South Carolina
County of DORCHESTER

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Dorchester County Sheriff

16-009678

COURT OF GENERAL SESSIONS

September 5, 2017 TERM

I hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

2016A1810300936

THE STATE

vs.

Tracy Allan Fabian

Defendant

CERTIFIED COPY
2022 JUL 21 PM 12:46
CLERK OF COURT
DORCHESTER COUNTY

ACTION OF GRAND JURY

Arrested: June 14, 2017

Witness:

C.C.C. PLS. AND G.S.

Shirley Oberas
Foreperson of Grand Jury
Date: August 31, 2017

Indictment for

Criminal Sexual Conduct with Minor -
Victim Under 11 Yrs of Age - First
Degree

VERDICT

SC Code: 16-3-655(1)

RECORDED
2017 AUG 31 PM 3:30
CLERK OF COURT
DORCHESTER COUNTY

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

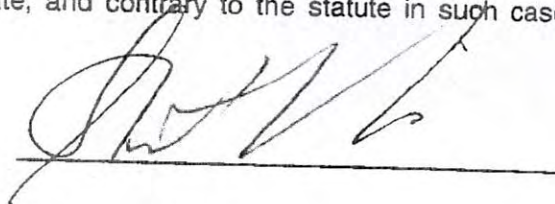
INDICTMENT
2017GS18-1204

As a Court of General Sessions, convened on August 31, 2017 the Grand Jurors of DORCHESTER County present upon their oath:

**CRIMINAL SEXUAL CONDUCT WITH MINOR - VICTIM UNDER 11 YRS OF AGE -
FIRST DEGREE**

That in Dorchester County, South Carolina, on or about September 17, 2015, the Defendant, Tracy Allan Fabian, did engage in sexual battery upon a minor who was less than eleven (11) years of age in that the defendant did perform oral sex upon the victim This offense in violation of Section 16-3-655 of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Sheila Mims, Solicitor

CERTIFICATE OF COUNSEL FOR APPELLANT

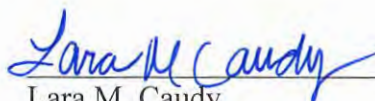
Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

RECEIVED

Mar 01 2024

SC Court of Appeals

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 1st day of March, 2024:

RECEIVED

Mar 01 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

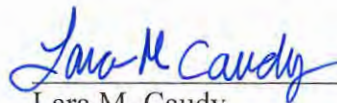
IN THE MATTER OF THE CARE AND
TREATMENT OF TRACY FABIAN,

APPELLANT

APPELLATE CASE NO. 2022-001302

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Record on Appeal in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 1st day of March, 2024.



Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT