

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

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S.C. Supreme Court

DAVID FITCH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212934

A P P E N D I X

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID FITCH,

APPELLANT

RECORD ON APPEAL

ROBERT M. PACHAK
Appellate Defender

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

Attorney for Appellant

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

(803) 734-3727

HAROLD W. GOWDY, III
Solicitor, Seventh Judicial Circuit
Spartanburg County Courthouse
180 Magnolia Street, 3rd Floor
Spartanburg, SC 29306-2335
(864) 596-2575

Attorneys for Respondent

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 3
 4 The State,)
 5 -vs-) TRANSCRIPT OF RECORD
 6 David Fitch,) 2008-GS-42-2533;2771;2775
 7 Defendant.) May 21 - 22, 2008
 8) Spartanburg, South Carolina
 9 B E F O R E:
 10 HONORABLE J. DERHAM COLE, JUDGE; and a jury
 11
 12 A P P E A R A N C E S:
 13 ANTHONY LEIBERT, ESQUIRE
 14 Attorney for the State
 15 DOUGLAS BRANNON, ESQUIRE
 16 Attorney for the Defendant
 17
 18
 19
 20 Linda D. Moffitt
 21 Circuit Court Reporter
 22
 23
 24
 25

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Jury qualification

1 (Proceedings May 21, 2008)

2 THE COURT: Any matters we need to address before the
3 jury panel is brought around?

4 MR. BRANNON: No, Your Honor. Thank you.

5 MR. LEIBERT: No, sir.

6 THE COURT: Okay. Bring them around, please.

7 (The following takes place in the presence of the jury
8 venire.)

9 THE COURT: Good morning, ladies and gentlemen of the
10 jury panel.

11 During the last 48 hours I've developed a sore throat,
12 so y'all please bear with me. For some reason if you don't
13 understand something that I ask, please raise your hand.
14 I'll try to speak as clear as I can.

15 The next case that we have that's going to require
16 some of your participation is the case of the State vs.
17 David Fitch. Mr. Fitch has been accused by the prosecution
18 with having committed three separate and distinct criminal
19 offenses.

20 They are alleged to have arisen over a course or
21 period of time. They are similar allegations. They
22 involve the same alleged victim, but there are three
23 separate and distinct offenses.

24 And by way of the indictments, which I've explained to
25 you previously, the state charges Mr. Fitch with criminal

Jury qualification

1 sexual conduct with a minor in the first degree, criminal
2 sexual conduct with a minor in the second degree and the
3 commission or attempted commission of a lewd act upon a
4 child.

5 Now, the indictment alleging criminal sexual conduct
6 with a minor in the first degree alleges that Mr. Fitch did
7 here in Spartanburg County between the dates of March the
8 20th of the year 2000 and May the 9th of the year 2001
9 commit the crime of criminal sexual conduct with a minor in
10 the first degree in that he did engage in a sexual battery
11 upon the person of V who at that time was under
12 the age of 11 years.

13 A second indictment charges criminal sexual conduct
14 with a minor in the second degree, again, alleging that
15 Mr. Fitch did here in Spartanburg County between the dates
16 of May the 10th of 2001 and March the 1st of 2003 commit
17 the crime of criminal sexual conduct with a minor in the
18 second degree in that he did commit a sexual battery upon
19 V who at that time was less than 14 years of age
20 but was at least 11 years of age.

21 And the remaining indictment alleges that Mr. Fitch
22 did between the dates of March the 20th of 2000 and March
23 the 3rd of 2003, he being over the age of 14 years, did
24 wilfully and lewdly commit or attempt to commit a lewd or
25 lascivious act upon the person of V who was a

Jury qualification

1 minor under the age of 16 years at the time of the event;
2 and that he committed those acts with the intent of
3 arousing, appealing to or gratifying the lusts, passions or
4 sexual desires of himself or of the child, or both for that
5 matter.

6 Now, as to those allegations and as to the charges
7 contained in each of those indictments the defendant has
8 entered a plea of not guilty.

9 And, as you are aware, that plea of not guilty
10 therefore places upon the state the burden of proving the
11 allegations in each indictment, the burden of proving each
12 of the essential elements of the crime alleged in a
13 specific indictment; and therefore the burden is upon the
14 state to establish the defendant's guilt to the
15 satisfaction of 12 jurors beyond a reasonable doubt before
16 any verdict of guilty could be returned as to any of the
17 indictments.

18 And so, again, we're going to be selecting 13 of you
19 to participate. By way of your participation you'll listen
20 to the testimony, you'll consider the evidence. From that
21 evidence you'll decide the facts. After deciding the facts
22 you'll apply the law, and you will arrive at a fair and
23 just decision.

24 Before we begin with that jury selection, as you are
25 aware, I've got some questions I am going to ask you. The

Jury qualification

1 purpose of the questions is to determine whether or not
2 there is some reason why any one of you jurors should not
3 be selected to participate in the trial of this particular
4 case.

5 So as these questions are asked should you need to
6 respond to them, I'll ask that you please stand. And I'll
7 address those matters with you individually.

8 Now, there might be one or two questions that are
9 going to be somewhat personal. And so when I ask those
10 questions if you need to respond to it, in other words, it
11 does apply to you, you don't have to answer the question
12 where you are. You can come down here, and I'll discuss it
13 with you. But you must answer the question if it does
14 apply to you.

15 Now, first of all, as I told you, the defendant, the
16 person who is accused of these offenses, is David Fitch.

17 Mr. Fitch, if you will, stand and face the jury panel,
18 please, sir, so that they can see who you are.

19 (Whereupon, the defendant and Mr. Brannon stood.)

20 THE COURT: Mr. Fitch is the gentleman standing to
21 your left. The other gentleman standing to your right is
22 Doug Brannon. Mr. Brannon is Mr. Fitch's lawyer. He'll be
23 assisting him in the trial of the case. Thank you.

24 The person who is alleged to have been the victim of
25 these particular incidents is : V .

Jury qualification

1 ✓ , if you will, please stand and face the jury
2 panel.

3 (Whereupon, the victim stood.)

4 THE COURT: Thank you. Be seated.

5 In this case Tony Leibert who is an assistant circuit
6 solicitor for the 7th Judicial Circuit will be presenting
7 the case on behalf of the state.

8 Now, in addition to ✓ and Mr. Fitch, other
9 potential witnesses to be called during the trial of the
10 case would include Tabitha Weber with the Children's
11 Advocacy Center; Meredith Thompson-Loftis with the
12 Children's Advocacy Center; Investigator Charity Herlong
13 with the Spartanburg County Sheriff's Department; Angela
14 McGee who is a physician with Barnett Park Family Medicine;
15 Audrey : who is what connection with ✓ ?

16 MR. LEIBERT: She is the mother, Your Honor.

17 THE COURT: She is the mother of ✓

18 And also Sheila Petty with Spartanburg County School
19 District No. 7.

20 Other potential witnesses would include Sara Ivey,
21 Glenda Ivey, Amanda Kelly.

22 Some of these aren't here, but if you think you know
23 somebody or you do know somebody that has the same name,
24 you let me know. And we'll try to narrow down the
25 identification of the witness.

Jury qualification

1 Annette Fitch, Jeanette Fitch, Jim Jones and Jeff
2 Robinson.

3 Are there any other potential witnesses on behalf of
4 the state?

5 MR. LEIBERT: No, sir, Your Honor.

6 THE COURT: The defense?

7 MR. BRANNON: No, sir, Your Honor. Thank you.

8 THE COURT: Now, does any member of the jury panel
9 have any connection, any relationship, and/or do you know
10 any of the persons who have just been identified for your
11 benefit? If so, please stand.

12 All right. I'll start. If you will, give me your
13 name and your number, please.

14 JUROR NO. 180: Juror 180, Joseph Wofford. I know
15 Mr. Brannon.

16 THE COURT: And how do you know Mr. Brannon?

17 JUROR NO. 180: My kids and his go to school together
18 and play ball together.

19 THE COURT: Okay. Would that have any bearing on your
20 decision in this case?

21 JUROR NO. 180: No, sir.

22 THE COURT: Okay. Thank you. Be seated.

23 Yes, sir.

24 JUROR NO. 14: Juror No. 14, Daniel Blackwell. Sara
25 Ivey and Amanda Kelly have been in my youth group in the

Jury qualification

1 past.

2 THE COURT: All right. And would that have any
3 bearing upon your decision in this case?

4 JUROR NO. 14: No, sir.

5 THE COURT: Thank you. Be seated.

6 Anyone else?

7 (No response.)

8 THE COURT: Now, I read to you the allegations that
9 are set forth in the indictment. Those are the allegations
10 that the state has made against the defendant.

11 Is there any juror who believes that you have heard,
12 seen or read about anything that might relate to this
13 particular case? Have you received any information from
14 any source whatsoever that you believe might relate to the
15 case? If so, please stand.

16 (No response.)

17 THE COURT: Is there any member of the jury panel who
18 is now employed or has ever been employed as a law
19 enforcement officer? And also are you related to any
20 person who is now employed or has been employed as a law
21 enforcement officer? If so, please stand.

22 All right. Now, you're Juror 33, I think.

23 JUROR NO. 33: Thirty-three, yes, sir.

24 THE COURT: And your relationship was what?

25 JUROR NO. 33: My son-in-law is a highway patrolman

Jury qualification

1 with the South Carolina department.

2 THE COURT: And would it have any bearing upon your
3 decision?

4 JUROR NO. 33: No, sir.

5 THE COURT: All right. Thank you. Be seated.

6 I forgot your number. Tell me your name and number
7 again, please.

8 JUROR NO. 158: Donald Stepp, 158.

9 THE COURT: 158.

10 JUROR NO. 158: Yes, sir.

11 THE COURT: And your connection is what?

12 JUROR NO. 158: I have a nephew that's on the city
13 police department.

14 THE COURT: Would it have any bearing upon your
15 decision?

16 JUROR NO. 158: No, Your Honor.

17 THE COURT: Thank you. Be seated.

18 Yes, sir.

19 JUROR NO. 169: Juror 169, Anthony Waters. I have a
20 sister that's a sergeant with the Greenville County
21 Sheriff.

22 THE COURT: Would that have any bearing upon your
23 decision?

24 JUROR NO. 169: No, sir.

25 THE COURT: Thank you. Be seated.

Jury qualification

1 Yes, sir.

2 JUROR NO. 76: Seventy-six, David Horton. I have a
3 cousin who is a city police officer.

4 THE COURT: Would it have any bearing upon your
5 decision in this case?

6 JUROR NO. 76: No, sir.

7 THE COURT: Thank you. Be seated.

8 Is there any member of the jury panel who is now
9 employed or has ever been employed as a physician, a nurse,
10 a counselor or a therapist -- physician, nurse, counselor
11 or therapist? If so, please stand.

12 And you're Juror 54?

13 JUROR NO. 54: Fifty-four, Susan Ford. I'm a nurse at
14 Spartanburg Regional.

15 THE COURT: Thank you, ma'am. You may be seated.

16 Yes, ma'am.

17 JUROR NO. 104: 104, Wyndolyn McLyea. I'm a nurse at
18 Spartanburg Regional.

19 THE COURT: All right. Thank you. You may be seated.

20 Yes, ma'am.

21 JUROR NO. 113: Kathy Miller, 113. I'm a nurse at
22 Spartanburg Regional.

23 THE COURT: Thank you. You may be seated.

24 Now, I told you what the allegations are in this case.
25 And so the next question I'm going to ask is one that

Jury qualification

1 perhaps is, might be, asking you to disclose personal
2 information. And you don't have to do it in front of the
3 audience. You can come down here if you need to.

4 But I need to know if there is any member of the jury
5 panel or any member of your immediate family -- and I'm
6 going to define an immediate family member as a parent or a
7 spouse or a child or a sibling -- parent, spouse or
8 sibling.

9 Have you or any member of your immediate family ever
10 been the victim of any type of sexual abuse or sexual
11 battery or sexual offense, and/or have you or one of those
12 family members ever been accused of having committed a
13 crime involving sexual abuse, sexual battery or a sexual
14 offense?

15 So I need to know if you or an immediate family member
16 has ever been the victim of such an offense or ever been
17 accused of having committed such an offense. If so, please
18 stand.

19 All right. Do you want to come down here and tell me
20 about it?

21 (Bench conference held off the record with Juror No.
22 128 and attorneys.)

23 THE COURT: Juror 128 is excused from service in this
24 case.

25 Anyone else need to respond to that question?

Jury qualification

1 Yes, ma'am.

2 (Bench conference held off the record with unidentified
3 juror and attorneys.)

4 THE BAILIFF: Juror No. 149, Your Honor.

5 (Bench conference held off the record with Juror No.
6 149 and attorneys.)

7 THE COURT: Juror 149 is excused from service in the
8 case.

9 Anyone else need to respond to the question?

10 (No response.)

11 THE COURT: All right. Has any juror -- is there any
12 juror who has already made up your mind or formed an
13 opinion as to what you think the outcome of the case ought
14 to be based upon what you've heard up until this point or
15 based upon any other consideration? Simply put, have you
16 already made up your mind? If so, please stand.

17 (No response.)

18 THE COURT: Does any juror know of any reason
19 whatsoever why you could not be fair and impartial if you
20 were called upon to serve as a juror in this case? If you
21 have any reason whatsoever why you could not be fair and
22 impartial, I would ask that you please stand and let me
23 know of that fact.

24 (No response.)

25 THE COURT: None standing.

Jury qualification

1 Any other questions requested by the state?

2 MR. LEIBERT: No, sir, Your Honor.

3 THE COURT: By the defendant?

4 MR. BRANNON: None, Your Honor.

5 THE COURT: Okay. All right. As your names are
6 called, please come forward and just stand in front of the
7 bailiff.

8 Each side, as you are aware, has an opportunity to
9 have you excused from service in the case. Or both may
10 agree to have you seated.

11 If you are to be seated, you'll have a seat in the
12 jury box to your right. Otherwise, if you're excused,
13 you'll just go back and have a seat where you are now.
14 Okay.

15 (Whereupon, a jury was impanelled.)

16 THE COURT: All right. Those who have been selected,
17 I'll ask you to please go with a bailiff to a jury room.
18 And I'll bring you back shortly.

19 (The following takes place outside the presence of the
20 jury.)

21 THE COURT: Are there any matters that need to be
22 addressed regarding jury selection by the state?

23 MR. LEIBERT: No, sir, Your Honor.

24 THE COURT: By the defendant?

25 MR. BRANNON: None.

1 (Whereupon, the remaining members of the jury venire
2 were excused.)

3 THE COURT: All right. Any matters that need to be
4 addressed prior to the jury being sworn?

5 MR. LEIBERT: Not from the state, Your Honor.

6 MR. BRANNON: No, Your Honor. Could we take about
7 five minutes?

8 THE COURT: Well, y'all don't have any motions we need
9 to address?

10 MR. LEIBERT: I don't believe so.

11 THE COURT: Or are they all agreed to?

12 MR. LEIBERT: Yes, sir.

13 MR. BRANNON: That's correct, Your Honor, yes.

14 THE COURT: All right. We'll take five minutes then.

15 MR. BRANNON: Your Honor, we discussed. We're going
16 to sequester witnesses if you want to address that now so
17 that -- I will move to sequester the witnesses, Your Honor.

18 THE COURT: Are y'all in agreement?

19 MR. LEIBERT: Yes, sir, Your Honor.

20 THE COURT: All right. Well, y'all take care of it.
21 Instruct your witnesses not to discuss the case with any
22 other witness.

23 (Whereupon, a recess was taken.)

24 THE COURT: All right. Bring the jury in and ask
25 Mr. Parks -- Mr. Parks -- to take the foreperson's seat.

1 (The following takes place in the presence of the
2 jury.)

3 THE COURT: Ladies and gentlemen, we are ready to
4 begin with the trial of the case for which you have been
5 selected.

6 And, Mr. Parks, I'm going to ask you to serve as the
7 foreperson of the jury. And as the foreperson you'll have
8 three specific duties that the other jurors will not have.

9 Number one, you're going to asked to serve as the
10 spokesperson for the jury. And so if during the trial
11 something arises, you or a fellow juror has any difficulty,
12 problem or question and you need to address that to me,
13 you'll be the person that will do that. You can let the
14 bailiff know. Or if you're here in the courtroom, you let
15 me know. And I'll address any issue that you might have.

16 Secondly, you're going to be called upon to preside
17 over jury deliberations in the jury room when the time
18 comes after all of the evidence has been received and I've
19 instructed you as to the law.

20 When the time comes for deliberations you'll be called
21 upon to preside over that process in the jury room simply
22 to ensure that those deliberations are carried out in some
23 orderly fashion.

24 And, thirdly, you'll be asked to actually write the
25 verdict or the decision of the jury, whatever that decision

1 might be. And you'll do that on verdict forms that I'll
2 provide you at the trial's conclusion on which you will
3 indicate the jury's unanimous decision as to the separate
4 indictments.

5 Now, the foreperson has those specific duties that
6 I've just indicated. That does not however mean that he is
7 any more important than any of you other jurors, because
8 the decision of a jury panel is the unanimous consensus
9 opinion of all 12 jurors. And so all of you are going to
10 have an equal say and an equal vote in what the ultimate
11 decision will be.

12 Someone simply has to be delegated those
13 responsibilities that I have just indicated, and I have
14 delegated those to Mr. Parks in appointing him as the
15 foreperson. But all of you jurors are equally important so
16 far as any decision is concerned, because any decision you
17 reach must be unanimous. All 12 of you must be in
18 agreement.

19 Now, Mr. Roper, you've been selected as an alternate
20 juror. And the function of an alternate is to take the
21 place of one of the original 12 if during the trial one of
22 the original 12 cannot continue to serve for some reason.
23 And if one is called away because of an emergency or an
24 illness or some other reason that prevents them from
25 continuing to serve, then you would be called upon to take

Jury sworn

1 that person's place. And in that event you would become
2 the 12th juror. And if you become the 12th juror, you
3 would participate throughout the trial, including the jury
4 deliberations when that time comes.

5 If however when the time comes for jury deliberations
6 the original 12 are able to participate, your service ends.
7 You can't participate any further because the decision of a
8 jury is that of 12. No more than 12 are permitted to
9 engage in the deliberation process.

10 But it is important that you pay just as careful
11 attention as we ask of all of the jurors in the case,
12 because it does occur from time to time for one reason or
13 another one of these original 12 may be unable to continue.
14 In that event you would become the 12th.

15 So we do appreciate your participation as an alternate
16 juror, just as we appreciate the participation of each of
17 you jurors who have been selected for the purpose of
18 deciding the verdicts in this particular case.

19 You may swear the panel.

20 (Whereupon, the jury was duly sworn.)

21 THE COURT: Now, ladies and gentlemen, as you know,
22 you have been selected to decide the verdicts in the case
23 of the State vs. David Fitch.

24 Mr. Fitch, as I've told you, has been accused of
25 having committed three separate and distinct offenses.

1 Those separate and distinct offenses are set forth in three
2 separate indictments. The indictments are those documents
3 I referred to prior to your selection.

4 The state alleges by way of these indictments that
5 Mr. Fitch did commit the crimes of criminal sexual conduct
6 in the first degree -- that's the commission of a sexual
7 battery upon a person who is less than 11 years of age --
8 criminal sexual conduct with a minor in the second
9 degree -- that's commission of a sexual battery against a
10 person who is at least 11 years of age but less than 14
11 years of age. And he's also charged with commission of a
12 lewd act upon a child, that is the commission of a lewd or
13 lascivious act upon a person who is less than 16 years of
14 age and he's more than 14 years of age.

15 Now, as I told you, as to those allegations and as to
16 each of the indictments the defendant has entered a plea of
17 not guilty.

18 These indictments are not proof of anything. They
19 don't establish anything. They just set forth the charges
20 that the state has brought against the defendant. The
21 state has the burden of proving the allegations and the
22 charges to your satisfaction beyond a reasonable doubt.

23 Every person and any person who is accused of a crime
24 is presumed under the law to be innocent. And that
25 presumption of innocence remains with any person charged

1 with a crime, as it does with Mr. Fitch, from the time that
2 he is placed under arrest and throughout the course of the
3 criminal process and even throughout the course of the
4 actual trial that we are to begin.

5 That presumption of innocence will be with Mr. Fitch
6 even as you go back into the jury room to begin with your
7 deliberations at this trial's conclusion. And that
8 presumption of innocence will be with him in there, and
9 it'll be with him forever unless you 12 jurors determine
10 that he is no longer entitled to that presumption of
11 innocence.

12 That is after you've carefully considered all of the
13 evidence, and from that evidence you've decided the facts,
14 and after deciding those facts you apply the law, if you 12
15 jurors unanimously determine that his guilt as to some
16 indictment has been proven beyond a reasonable doubt, then
17 he would no longer be entitled to the presumption of
18 innocence.

19 But it's only if, unless and until you are satisfied
20 of his guilt beyond a reasonable doubt that the presumption
21 of innocence would no longer be applicable.

22 Now, the way the trial will proceed is that in a
23 moment the lawyers are going to address you in what are
24 called opening statements.

25 There are two occasions in a trial where lawyers can

1 address the jury, and that is at the beginning of the trial
2 before any evidence has been introduced and then again at
3 the conclusion of the trial after all of the evidence has
4 been received. Keep in mind, as I've stated, the evidence
5 comes in between.

6 So the lawyers' statements aren't evidence. The
7 lawyers aren't witnesses to anything. They're not going to
8 be telling you anything they know about this case of their
9 own personal knowledge or perception as witnesses will be.

10 They're not going to be testifying under oath from the
11 witness stand and be subjected to direct and
12 cross-examination as witnesses will be. And therefore what
13 they tell you is not evidence upon which you'll base your
14 decision. But you should listen to what they have to say
15 because those statements do serve a purpose.

16 The opening statements serve to provide you with a
17 basic understanding as to what this case is about from the
18 perspective of the state and of the defense so that you'll
19 have some context in which to place the evidence that we
20 will be receiving shortly thereafter.

21 After all of the evidence has been received the
22 lawyers will again address you in what are called closing
23 statements. And, again, those statements aren't evidence.
24 But it does permit them an opportunity to discuss with you
25 the evidence that you have seen and heard during the trial.

1 And through that discussion each will have an
2 opportunity to try to persuade you or to convince you that
3 that evidence does or does not support a particular
4 decision. That depends upon which lawyer is arguing the
5 case. As I said, between the opening and closing
6 statements of the lawyers we receive the case.

7 The state has the burden of proof, as I've told you.
8 They have to satisfy you beyond a reasonable doubt that the
9 defendant committed one or all of these crimes before you
10 could find him guilty of any crimes. So they have to
11 present evidence. They have that burden.

12 A defendant in a criminal case does not have to
13 testify, does not have to call any witnesses, does not have
14 to provide any evidence.

15 The burden is not upon a defendant to prove that he is
16 not guilty. The burden is on the state to prove that he is
17 guilty.

18 So in a criminal case a defendant doesn't have to
19 testify, doesn't have to call witnesses. And if he
20 doesn't, you can't hold that against him. You have to base
21 your decision upon the evidence that is presented.

22 But, nevertheless, both sides are afforded an
23 opportunity to present evidence should they wish to do so.

24 So after all the evidence has been received and after
25 you've heard from the lawyers in their final summations, I

1 will then instruct you on the law in detail as it relates
2 to these separate charges, and in general. And then you'll
3 be asked to go back and begin your deliberations.

4 Through that process you'll examine the evidence,
5 decide the facts, apply the law and arrive at a fair and
6 just decision.

7 Now, all that we're going to ask for you to do in this
8 case, as in every case, is to pay careful attention. Give
9 every witness the same degree of attention as that witness
10 testifies, because oftentimes there may be a conflict that
11 arises in the testimony. And if that testimony relates to
12 a material fact, you'll be called upon to resolve the
13 conflict.

14 You'll decide what you believe to be the most credible
15 testimony, and that's the testimony you will accept. You
16 will reject any testimony that you find not to be credible
17 or believable. That's how you fulfill your duty in the
18 case.

19 But it's important that you give every witness the
20 same degree of attention as they testify so that you'll be
21 in a proper position at the trial's conclusion to judge
22 each of those witnesses' testimony in light of not just
23 that witness' testimony but in light of all of the
24 testimony and the other evidence received during the trial
25 of the case.

Opening statements

1 It's also important that you keep an open mind
2 throughout the course of the trial. And that simply means
3 you should not begin making up your minds or formulating
4 your opinions as to what you think the ultimate decision in
5 the case ought to be until all of the evidence has been
6 received, until I have instructed you on the law that's
7 applicable in the case and until you've been asked to go
8 back to begin with your deliberations. That is the process
9 that is designed for you 12 jurors to arrive at a fair and
10 just decision in the case.

11 So I do want to thank you in advance for your
12 participation, as well as for your careful attention. I
13 would ask that you please give the lawyers your attention
14 now as they give you their opening statements.

15 Mr. Leibert.

16 MR. LEIBERT: May it please the Court Your Honor.

17 Mr. Brannon.

18 Good morning. In March of 2000 nine-year-old V
19 came to live here in Spartanburg County with her uncle, and
20 that's the defendant.

21 And right after arriving the evidence will show she
22 was out in the back yard making a clubhouse. Her uncle
23 came out there and started rubbing on her sexually.

24 And shortly thereafter the evidence will show he took
25 her to an old car that you couldn't see from the house.

Opening statements

1 And you'll see a picture of that. And he pulled her pants
2 down and he put his penis in her private part at ten years
3 old. And that continued.

4 And then when she turned 11 it happened again, and it
5 happened around riding a go-cart.

6 And I'm sorry. That mic seems to be picking up my
7 voice awfully strong. Can everybody hear me? Raise your
8 hand if you can't. I'm sorry. You can't hear me?

9 And he had been charged as follows, and I want to read
10 it to you: First degree criminal sexual conduct with a
11 minor. And it's just age. Okay. He committed a sexual
12 battery upon a child less than 11.

13 Okay. Second degree is she has to be at least 11. So
14 in the indictment it's her 11th birthday, and she said the
15 last time it happened was when she was just before 13. So
16 it's from age 11 and age 12.

17 Sexual battery, ladies and gentlemen, is defined as
18 follows: Sexual intercourse, cunnilingus, fellatio, anal
19 intercourse -- and this is really important -- or any
20 intrusion, however slight, of any part of a person's body
21 or of any object into the genital and anal openings of
22 another person's body except when it's done by a doctor, of
23 course.

24 So I have to prove to you he intruded, however slight,
25 when she was less than 11, and then after she turned 11,

Opening statements

1 when she was 11 and 12, and 12 and a half, one time each.

2 Also, I have to prove lewd act upon a minor. And that
3 is fondling, essentially. But here's how the law defines
4 it: Unlawful for a person over the age of 14 to wilfully
5 and lewdly commit or attempt a lewd and lascivious act upon
6 or with the body or its parts of a child under the age of
7 16. And, see, she's age nine to 12 -- a person under the
8 age of 16 with the intent of arousing, appealing to or
9 gratifying the lusts or passions or sexual desires of the
10 person or of the child.

11 So I have to prove three things on that case -- he was
12 greater than 14, she was less than 16, and he fondled her
13 or he attempted to fondle her from the time that she was
14 nine years old when she came to live here until she was
15 right before her 13th birthday.

16 You're going to meet V in a couple of minutes.
17 And you saw her stand up. And she's going to hopefully be
18 able to tell you what happened here. If she is able to do
19 that, you'll hear from other witnesses including a forensic
20 interviewer and a medical doctor.

21 And the evidence will show, ladies and gentlemen, that
22 he is guilty as charged. Thank you.

23 THE COURT: Mr. Brannon.

24 MR. BRANNON: May it please the Court. Mr. Solicitor.
25 Ladies and gentlemen, my name is Doug Brannon, and I

Opening statements

1 don't have to ask if you can hear me. I know that you can
2 hear me.

3 My client is David Fitch. And today I have the
4 opportunity to represent an innocent man.

5 Ladies and gentlemen, Mr. Leibert said to you that at
6 some point V came to live in South Carolina with her
7 uncle.

8 What you have to know is that V came from
9 Kentucky not by herself, but she came with her mother and
10 her brother. And they lived with David Fitch and his wife
11 and their daughter. And they all lived in a really small
12 apartment. They were coming to South Carolina and to
13 Spartanburg County to try and earn a better living than
14 they were able to in Kentucky where they came from.

15 What you're going to hear is that V was never
16 alone with David Fitch. Sometime after they moved into
17 that apartment they moved to a house. And you're going to
18 see pictures of the house and the yard. Obviously, they
19 had more room in the house than they did in the apartment.

20 But, again, you're going to hear that V was never
21 alone with David Fitch. There was always at least five
22 people living in that home, and sometimes more than that,
23 because at times during the period of time in question you
24 have grandmothers living there, you had V's mother's
25 boyfriend living there. At one point you may have had

Opening statements

1 Rachel's dad living there.

2 It was a series of people moving in and moving out,
3 not a series of people moving in and out in David Fitch's
4 family but a series of people moving in and out in V's
5 family.

6 Ladies and gentlemen, Mr. Leibert told you that the
7 evidence is going to show, and what I'm going to tell you
8 is the only evidence that will tell you anything about what
9 happened, is V saying what happened and David Fitch
10 telling you it didn't happen.

11 You're going to hear from a forensic interviewer.
12 That's a woman that says V told me this happened.

13 Well, ladies and gentlemen, V is going to get on
14 the witness stand and she's going to say what she alleges
15 happened. I don't know why you need to hear from Tabitha
16 Weber, but they're going to put her up.

17 And you're going to hear from a medical doctor. And
18 what that medical doctor is going to tell you is that in
19 March of 2004 just before V's 14th birthday she went
20 in for her initial female checkup, if you will. She had
21 just started having her menstrual cycle.

22 It was a planned appointment at the doctor's office.
23 And we know it was planned because David Fitch's daughter
24 Annette who is going to testify had an appointment the same
25 day. In fact, when V was walking out of the doctor's

Opening statements

1 office, Annie was walking in. They met and greeted each
2 other at the door of the doctor's office. It was a planned
3 appointment.

4 And in Dr. McGee's office what Dr. McGee found was
5 that V's hymen had been broken. You ladies know what
6 that hymen is. Men, it's just a very thin piece of skin in
7 the vagina of a female.

8 Ladies and gentlemen, you're going to hear that a
9 hymen in some cases just breaks on its own. There has been
10 cases where the hymen has broke when a young child was
11 riding a teeter-totter and slammed down.

12 MR. LEIBERT: Object. This is argument at this point.

13 THE COURT: Well, I sustain the objection.

14 MR. BRANNON: What you're going to hear from Dr. McGee
15 is that the hymen was broken. That's it. That's the
16 state's evidence. That's all there is.

17 Ladies and gentlemen, you heard the judge talk about
18 it, and I believe you heard Mr. Leibert say that the state
19 has the burden of proof.

20 They have to prove beyond a reasonable doubt that
21 David Fitch penetrated his niece, V, ever so slightly,
22 penetrated her. And they have to prove that beyond a
23 reasonable doubt.

24 The judge will define all of the laws in this state as
25 they apply to this case, but he will tell you, I believe,

✓
Direct examination by Mr. Leibert

1 that a reasonable doubt is a doubt that would make a
2 reasonable person hesitate to act.

3 I'm kind of country. And what a reasonable doubt
4 means to me is if it makes me go hum, if I've got to think
5 about it, and, ladies and gentlemen, if you've got to think
6 about it, he's not guilty.

7 The judge told you that the defendant in a case, in a
8 criminal case, never has to take the witness stand. I'm
9 going to tell you that David Fitch is going to get on this
10 witness stand and he's going to tell you it didn't happen.

11 Ladies and gentlemen, I believe at the end of this
12 trial you're going to find that there was a reasonable
13 doubt. You're going to find that it didn't happen. You're
14 going to go hum. And, ladies and gentlemen, if you go hum,
15 he's not guilty. Thank you very much.

16 MR. LEIBERT: May it please the Court, Your Honor.

17 The state would call ✓

18 ✓ _], having been
19 first duly sworn, testified as follows:

20 DIRECT EXAMINATION BY MR. LEIBERT

21 THE COURT: You may need to adjust that microphone,
22 but do whatever you need to do. Just be certain that the
23 jury can hear your testimony.

24 MR. LEIBERT: May it please the Court, Your Honor.

25 THE COURT: Yes, sir.

V
Direct examination by Mr. Leibert

- 1 Q V , please tell the jury your name.
- 2 A My name is V .
- 3 Q You need to get a little closer to the microphone.
- 4 A My name is V .
- 5 Q How old are you V .?
- 6 A Eighteen.
- 7 Q Who is the defendant, David Fitch?
- 8 A My uncle.
- 9 Q Is he in the courtroom today?
- 10 A Yes, sir.
- 11 Q Would you point him out to the jury, please? Is he
- 12 next to the man in the suit with the glasses? Is he
- 13 sitting next to the man in the suit?
- 14 (Whereupon, the witness pointed to the defendant.)
- 15 Q Do you remember whether you ever lived with the
- 16 defendant?
- 17 A Yes, sir.
- 18 Q Do you know how old you were the first time you lived
- 19 with him?
- 20 A About eight or nine.
- 21 Q And who lived there with you?
- 22 A My mama and brother, him, his wife and my cousin.
- 23 Q Did you then move away to another state?
- 24 A Yes, sir.
- 25 Q Did you then come back?

✓
Direct examination by Mr. Leibert

1 A Yes, sir.

2 Q And what type of -- did you live with the defendant
3 again?

4 A Yes, sir.

5 Q And was your mom there as well?

6 A Yes, sir.

7 Q And who else?

8 A And my cousin and my brother and --

9 Q And how old were you then?

10 A I was 11, ten or 11.

11 MR. LEIBERT: Your Honor, may I approach the witness?
12 I think they're having trouble hearing.

13 Q You need to see if you can speak up.

14 THE COURT: Well, if she turns her head away, I know
15 she's talking to the jury. But if she turns her head away,
16 they won't hear it.

17 If you'll bring that podium out here and put it in
18 front of your desk there, and if she looks toward you, I
19 think that microphone works better.

20 We've always had trouble with the microphone in every
21 trial. So we try to do the best we can. We need a new
22 system. We will get one one day.

23 MR. LEIBERT: Thank you, Your Honor.

24 Q What type of place did you live at -- house, a
25 trailer, an apartment?

V
Direct examination by Mr. Leibert

1 A A house.

2 THE COURT: It's still not working.

3 You just -- you're going to need to speak out a little
4 bit louder than you're used to doing just so that we'll be
5 certain to be able to hear you. Okay?

6 THE WITNESS: Okay.

7 Q The microphone's not working, so just talk real loud.
8 All right?

9 A Yes, sir.

10 Q I'm showing you State's Exhibit 2. What is that?

11 A That's the house we used to live in.

12 Q Is that when you lived with the defendant?

13 A Yes, sir.

14 Q Is that when you were ten and 11?

15 A Yes, sir.

16 Q Also show you State's Exhibit 5. What is that?

17 A That's the brown house we used to live in.

18 Q And I show you State's Exhibit 6. What is that?

19 A That's the car that it happened on.

20 Q Did he ever do anything inappropriate to you sexually?

21 A Yes, sir.

22 Q The defendant?

23 A Yes, sir.

24 Q Do you remember the first time?

25 A When I was out in the woods and building a clubhouse.

V

Direct examination by Mr. Leibert

1 He came along and started to rub on me.

2 Q You've got to talk louder, honey.

3 A Can you hear me?

4 Q No.

5 THE COURT: You just speak out loud. I know it's hard
6 to do. You're not used to doing it. But just speak louder
7 and it'll pick up.

8 Q So tell them again the first time.

9 A When I was out in the woods building a clubhouse and
10 he come over and started to rub on me.

11 Q Where were you at, the brown house?

12 A Yes, sir.

13 Q Where is the woods at the brown house?

14 A In the back, in the back yard towards the house.

15 Q Who was with you when you were building the clubhouse?

16 A By myself.

17 Q Can you see the -- could you see the clubhouse from
18 the, from the house?

19 A No, sir.

20 Q All right. Tell the jury what he did to you.

21 A I went over, and we started building a clubhouse. And
22 he come over and started to touch me and rub on me up under
23 my clothes and things like that. He started rubbing on my
24 chest and down below.

25 Q Was it skin on skin?

1. V

Direct examination by Mr. Leibert

1 A Yes, sir.

2 Q All right. Now, you need to tell them specifically.

3 Did he rub your breasts?

4 A He rubbed my breasts and started going down towards my
5 belt line and started rubbing on my half down through here.

6 Q Was it under your pants?

7 A Yes, sir.

8 Q Was it under your underpants?

9 A Yes, sir.

10 Q Did he say anything to you?

11 A Yes, sir.

12 Q What did he say?

13 A He told me not to never tell because they wouldn't
14 nobody believe me.

15 Q Did it ever happen again?

16 A Yes, sir.

17 Q Do you remember another incident in the woods?

18 A Yes, sir.

19 Q All right. Tell the jury about that.

20 A He had a blue car setting out in the woods that he
21 filled up with wood every time. And I was there in the
22 woods. And he told me -- took me by the hand and took me
23 over there and sat me on top of the roof of the car, of the
24 roof, and started rubbing on me and groping on me and
25 started taking off my clothes. And he jerked, pulled down

V

Direct examination by Mr. Leibert

1 my pants and took my underwear off and sat me on top of the
2 car and started touching and rubbing and then he started to
3 rub me and grope me.

4 MR. BRANNON: Your Honor --

5 THE COURT: You'll have to repeat that last portion.

6 Q What was that last thing you said?

7 A He started taking my clothes off and started rubbing
8 and groping, and then he started putting more into than
9 just rubbing and groping.

10 Q When you say he did more than rubbing and groping,
11 what do you mean? It's real important that you tell them
12 what he did.

13 A He started putting his genital area in mine.

14 Q Did he put his penis side your vagina?

15 A Yes, he did.

16 Q What did it feel like?

17 A It hurt real bad.

18 Q Did he say anything to you after that incident?

19 A He told me not to tell.

20 Q State's Exhibit 6, is that where this happened?

21 A Yes, sir.

22 Q Did this happen soon after you came here?

23 A Yes, sir.

24 Q Is that the last time, V ?

25 A No, sir.

V
Direct examination by Mr. Leibert

1 Q Did it happen at more than this residence at the brown
2 house?

3 A Yes, sir.

4 Q Tell the jury. Do you remember the last time it
5 happened?

6 A Yes, sir.

7 Q Tell them about the last time.

8 A I was --

9 Q Where were you?

10 A I was over at his new house that he moved to, and I
11 was outside riding a go-cart. And I was riding a go-cart.
12 And I decided to put it up because, you know, he told me to
13 put it up.

14 I went. I went inside the garage and I put it up.
15 And I was standing there. And he took me over onto a swing
16 set like the thing that you sit on out up under some trees.

17 I was sitting there, and he told me to get behind the
18 swings and pull down my clothing. And he sat me on the
19 ground and started putting his penis and stuff inside of
20 me.

21 Q Where did he put his penis in?

22 A My vagina.

23 Q What did it feel like?

24 A It hurt really bad.

25 Q Did he say anything to you?

V
Direct examination by Mr. Leibert

1 A Yes, sir. He told me that nobody would ever find out
2 about it and nobody would do anything.

3 Q Did it happen more than those three times?

4 A Yes, sir. It happened, excluding when I lived with
5 him, until I moved to come back. It kept happening and
6 happening.

7 Q Were you ever alone with him?

8 A Yes, sir, I was.

9 Q Did this ever happen in front of anybody?

10 A No, sir.

11 Q Was there ever a time that someone came home and
12 almost caught him?

13 MR. BRANNON: Objection to leading.

14 THE COURT: Don't lead her.

15 A Yes, sir.

16 Q Did anybody ever catch you?

17 A No, sir.

18 Q Can you tell the jury about another time?

19 A Another time was when my aunt and my cousin was gone
20 and I was over at their house. And my aunt left me at home
21 with him. And I was in my cousin's room. And he started
22 to rub and grope on my breast and my vagina area.

23 And my aunt and them come back. And he had, you know,
24 like the window area open up to where he could see out the
25 blinds. And then when he seen them come up through the

V

Direct examination by Mr. Leibert

- 1 driveway, he hurried up and got away and went outside to
2 help them unload groceries. And he acted like nothing
3 didn't happen.
- 4 Q Was that at the brown house or what you call the new
5 house?
- 6 A The new house.
- 7 Q I show you State's Exhibit 4. What is that?
- 8 A That's the white van.
- 9 Q All right. Is that the yard?
- 10 A Yes, sir.
- 11 Q To which house?
- 12 A To the new house.
- 13 Q All right. When it happened on the car --
- 14 A Yes, sir.
- 15 Q -- how soon did that happen after you moved here?
- 16 A Not even two months after I moved here it started
17 happening.
- 18 Q Now, is that when you moved here when you were real
19 young, or is that when you moved when --
- 20 A When I was real young.
- 21 Q Was it age six or age nine?
- 22 A Age nine.
- 23 Q Was it in the apartment or in the house?
- 24 A In the house.
- 25 Q And it was how soon after you moved here when you were

V

Cross-examination by Mr. Brannon

1 nine?

2 A Not even two months after I moved here.

3 Q Now, the last time it happened at the new house, how
4 old were you?

5 A Eleven, close to 11.

6 Q And the very last time it happened, how old were you?

7 A Sixteen.

8 Q The very last time it happened.

9 A As I can remember, about 15 or 16.

10 Q Did you go see a doctor?

11 A Yes, sir, I did.

12 Q Thank. Answer any questions Mr. Brannon may have.

13 CROSS-EXAMINATION

14 BY MR. BRANNON

15 Q V , how are you today?

16 A I'm doing just fine.

17 Q When you first moved here, you moved from Kentucky, is
18 that right?

19 A Yes, sir.

20 Q And who did you move with?

21 A My mama and my brother.

22 Q What about your daddy?

23 A My daddy don't live with me, sir.

24 Q Well, didn't he move here from Kentucky with you?

25 A No, sir.

✓
Cross-examination by Mr. Brannon

- 1 Q He didn't, or you don't remember?
- 2 A He didn't move here, sir.
- 3 Q Okay. What's your dad's name?
- 4 A Randy .
- 5 Q All right. Where does he live?
- 6 A In Kentucky.
- 7 Q All right. Who lives with you right now?
- 8 A My mama, my brother and my stepdad.
- 9 Q Your stepdad. What's his name?
- 10 A Jeff Robinson.
- 11 Q Well, is your mom married to him?
- 12 A No, sir. I consider him as my stepdad because they
- 13 been together about 11 years now.
- 14 Q All right. Now, your mom is still married to your
- 15 dad, right?
- 16 MR. LEIBERT: Objection, relevance.
- 17 THE COURT: Sustained.
- 18 MR. LEIBERT: Thank you, Your Honor.
- 19 Q Okay. You moved here from Kentucky with your mom and
- 20 your brother.
- 21 A Yes, sir.
- 22 Q How old is your brother?
- 23 A My brother is 16 now.
- 24 Q Sixteen now. Okay. So he's two years younger than
- 25 you?

V

Cross-examination by Mr. Brannon

- 1 A Yes, sir.
- 2 Q Got you. All right. And when you first moved here,
- 3 you moved into an apartment, correct?
- 4 A No, sir.
- 5 Q You didn't?
- 6 A Not that I can remember.
- 7 Q Didn't you live in an apartment and then move away for
- 8 a while and come back and move into the brown house?
- 9 A I don't remember.
- 10 THE COURT: You need to speak up, please.
- 11 A Not that I can remember.
- 12 Q Okay. Is it possible?
- 13 A I, I don't remember.
- 14 Q You don't remember.
- 15 Okay. Now, did all of this allegedly happen after you
- 16 moved back the second time?
- 17 A It happened both times.
- 18 Q Okay. All right. You didn't tell the doctor that
- 19 though, did you?
- 20 A I told my doctor everything.
- 21 Q Did you? Okay.
- 22 A Yes, I did.
- 23 Q Okay. Now, now, you went to the doctor in March of
- 24 2004, right? You went to see Dr. McGee in March of 2004,
- 25 right?

V

Cross-examination by Mr. Brannon

1 A I don't remember what day it was when I went to the
2 doctor.

3 MR. BRANNON: Just approach the witness, Your Honor.

4 MR. LEIBERT: Your Honor, we'll stipulate that it was
5 March of 2004.

6 Q What's the date written on the top of that?

7 A 3/18/04.

8 Q And what name is written there?

9 A V .

10 Q Okay. And can you read that name down there?

11 A Angela McGee.

12 Q Angela McGee. And who's Angela McGee?

13 A My doctor.

14 Q So she -- you went to the doctor on 3/18/04, correct?

15 A I, I have no clue when I went to the doctor.

16 Q Okay. And, well, but that's the date on here, right?

17 And do you think Dr. McGee got the date wrong?

18 A I have no clue, sir.

19 Q Okay. All right. Now, are you telling me that you're
20 alleging that this man committed a sexual battery upon you
21 after you went to Dr. McGee?

22 A Yes, sir. It kept going on and on and on. It went on
23 until I was about 15 or 16, up until my birthday.

24 Q Well, your mom was at the doctor with you, wasn't she?

25 A Yes, she was.

V

Cross-examination by Mr. Brannon

1 Q And she let you go back?

2 A She didn't -- I didn't tell my mom. I told my mom
3 before I went to the doctor what had happened. And she
4 didn't -- she believed me and everything and stuff like
5 that. And when I finally told my mom what had happened,
6 that's the night that he come over when my aunt was in
7 Kentucky and wanted me to spend the night with him and my
8 cousin. And I told my mom that night what had happened.

9 Q And you were how old then -- 13?

10 A I can't remember my age.

11 Q Okay. Well, you're 18 now, right?

12 A Yes, sir.

13 Q And so four years ago you would have been 14 in March,
14 right?

15 A Uh-huh.

16 Q And your testimony is that this man touched you
17 inappropriately after you told your mom and after you told
18 Dr. McGee?

19 A I told Mr., Ms. McGee.

20 Q Well, you told -- I'm sorry. Just a minute ago didn't
21 you say that you told your mom before you went to
22 Dr. McGee?

23 A Yes, sir. I did.

24 Q So you told your mom when you were 13. When is your
25 birthday?

V

Cross-examination by Mr. Brannon

1 A May.

2 Q May. So in March of 2004 you were not yet 14 years
3 old, right?

4 A Not in March, I wasn't.

5 Q Right: You were three years and nine months old,
6 right?

7 A Uh-huh.

8 Q And you told your mom before you went to the doctor
9 that Uncle David's been messing with me.

10 A I told my mom.

11 Q And your mom let you go back?

12 A No. I don't remember. It's been a long time ago.

13 Q Okay. I'm sorry, baby, but you have to remember.

14 Okay. You have to.

15 MR. LEIBERT: Objection, Your Honor. If she doesn't
16 remember, she doesn't remember. Asked and answered.

17 THE COURT: Sustained.

18 MR. LEIBERT: Thank you, Your Honor.

19 Q Is it your testimony that this man touched you
20 inappropriately after you went to Dr. McGee?

21 MR. LEIBERT: She's answered four times I don't
22 remember, so I object. Asked and answered.

23 THE COURT: Well, I'm not sure that's the case.

24 You may answer that question if you know.

25 Q Is it your testimony that this man touched you

V

Cross-examination by Mr. Brannon

1 inappropriately after you went to Dr. McGee?

2 A I have no clue. I mean, I can't remember if it was
3 after or before.

4 Q Okay. All right. Now, when you -- why did you go to
5 Dr. McGee?

6 A Because I wanted, I went to go get a physical done.

7 Q To go get a physical done, right? You had an
8 appointment with Dr. McGee, right? You didn't go to
9 Dr. McGee because Uncle David was messing with you, did
10 you?

11 A I just went and had a physical done in the past --

12 Q Okay. And that was like your first girl checkup,
13 right?

14 A First time, uh-huh.

15 Q Okay. All right. And Dr. McGee told you that your
16 hymen was broke, right?

17 A Yes, sir.

18 Q And Dr. McGee asked you if you were sexually active,
19 didn't she?

20 A Yes, sir.

21 Q And that's when you told her Uncle Dave touched you,
22 right?

23 A Yes, sir.

24 Q Wasn't until you got busted that you told them it was
25 Uncle Dave, right?

V

Cross-examination by Mr. Brannon

1 MR. LEIBERT: Objection, Your Honor. May we approach?

2 (Bench conference held off the record in the presence
3 of the jury but out of the hearing of the jury.)

4 Q You went to the doctor, Dr. McGee, on March the
5 18th of 2004 for a scheduled appointment, correct?

6 A Yes, sir.

7 Q Dr. McGee told you that your hymen was broken,
8 correct?

9 A Yes, sir.

10 Q And it was at that point that you said Uncle Dave
11 messed with me. And your testimony today is that he's
12 touched you again after that?

13 A I can't remember it.

14 Q All right. You said a minute ago that one of the
15 first times that this allegedly happened was near the blue
16 car, right?

17 A Yes, sir.

18 Q I believe your testimony a minute ago was that he put
19 you on top of the car, right? Is that right?

20 THE COURT: Ma'am, you're going to have to speak up
21 louder and use the microphone.

22 Q You said he put you on the top of the blue car, is
23 that right?

24 A He put me on top of the car, yes.

25 Q Okay. Ma'am, I'm going to show you what is marked as

V

Cross-examination by Mr. Brannon

1 State's Exhibit 6. Is that the blue car that you're
2 saying?

3 A Yes, sir.

4 Q Ma'am, how did he put you on top of that car?

5 A That's an old picture.

6 Q It's an old picture?

7 A That's an old picture. That's what the car looks like
8 now.

9 Q Oh, so you mean it's a new picture.

10 A That's a new picture.

11 Q Okay. It's not an old picture. It's a new picture.

12 A Yes, sir.

13 Q Okay. Well, just point if you would. Where do you
14 think he put you?

15 A On top of the front hood. Right here used to be a
16 path around the top of the car right here. And on the path
17 right here, and that led to the front hood.

18 Q Okay. All right. But the car didn't look like that
19 back then.

20 A No.

21 Q Okay. All right. Do you remember giving a statement
22 a long time ago in this case back on May the 28th of 2004?

23 A Yes, sir.

24 Q You didn't say anything about him putting you on the
25 blue car, did you?

✓

Cross-examination by Mr. Brannon

- 1 A No, sir.
- 2 Q Okay. So the story is different today, right? Ma'am,
- 3 is the story different today?
- 4 A No.
- 5 Q It's not? You didn't say that that, did you? Okay.
- 6 Today some four years later you can remember that he put
- 7 you on the top of the car. But a month after you make this
- 8 allegation you don't remember to say that?
- 9 A I was scared.
- 10 Q Were you?
- 11 A Yes.
- 12 Q Okay. You can remember he put you on top of the car,
- 13 you say, but you can't remember when the last time it was?
- 14 A The reason why I remember the first time is because
- 15 the first time was the time it hurt the most.
- 16 Q But according to your statement that wasn't the first
- 17 time. Remember the first time was around the clubhouse.
- 18 A Yeah.
- 19 Q So it wasn't the first time. Ma'am, you don't
- 20 remember, do you?
- 21 A I do remember.
- 22 Q What you remember is that you went to the doctor on
- 23 March the 18th of 2004 and she said your hymen was busted,
- 24 right?
- 25 A Yeah.

✓
Redirect examination by Mr. Leibert

1 A One.

2 MR. BRANNON: Objection. Outside the scope of my
3 recross.

4 THE COURT: Overruled.

5 MR. LEIBERT: I'd offer this as a state's exhibit,
6 along with all these pictures, Your Honor, the first page
7 of this statement. We redacted the other portion.

8 MR. BRANNON: Your Honor, if he's going to put a
9 portion in, I'd probably want the whole statement to go in.

10 MR. LEIBERT: No objection.

11 THE COURT: So you are introducing the statement?

12 MR. LEIBERT: Yes, sir.

13 MR. BRANNON: Your Honor, I would object to the
14 statement. She hasn't disavowed the statement. I don't
15 think the statement is admissible.

16 THE COURT: I thought you said you agreed to it. Do
17 you object to it?

18 MR. BRANNON: Well, I, I rethought.

19 THE COURT: Do you object to it?

20 MR. BRANNON: I object because I don't believe it's
21 admissible.

22 THE COURT: All right. I sustain the objection.
23 What about the photographs?

24 MR. BRANNON: The photographs are without objection.

25 (Photographs marked State's Exhibits Nos. 1 through 6.)

Tabitha Webber
Direct examination by Mr. Leibert

1 THE COURT: What are they numbered, do you know?

2 THE COURT REPORTER: One through six.

3 THE COURT: One through six. Okay.

4 MR. LEIBERT: Do you want to see them, Your Honor?

5 Q Thank you. Young lady. Come on down.

6 THE COURT: Okay. You can step down.

7 MR. LEIBERT: Please take her upstairs.

8 Please have Tabitha Webber come in.

9 TABITHA WEBBER, having been
10 first duly sworn, testified as follows:

11 DIRECT EXAMINATION BY MR. LEIBERT

12 MR. LEIBERT: May it please the Court, Your Honor.

13 THE COURT: Yes, sir.

14 Q Good morning.

15 A Good morning.

16 Q Ms. Webber, you're going to have to speak up because
17 the microphone is not working. We think there's a short in
18 it.

19 A Okay.

20 Q Please tell the jury your name.

21 A Tabitha Weber.

22 Q And what is your position or occupation?

23 A I'm a forensic interviewer at the Children's Advocacy
24 Center in Spartanburg, and I'm also the clinical director.

25 Q How long have you been employed there?

Tabitha Webber
Direct examination by Mr. Leibert

1 A Eight years.

2 Q Give the jury a very brief background of your
3 educational background.

4 A I have a bachelor's degree in psychology, a master's
5 degree in social work. And I have extensive training in
6 child abuse and child development.

7 THE COURT: Let me ask you to scoot that chair up
8 closer to that microphone. It'll work if you speak loud
9 enough.

10 THE WITNESS: Okay.

11 Q Are you licensed by the state of South Carolina?

12 A I am.

13 Q Licensed as what?

14 A A master social worker.

15 Q And what is that licensure permit you to do?

16 A To diagnose and treat.

17 Q How many forensic interviews have you done over the
18 course of your career?

19 A Over a thousand.

20 Q Have you also provided therapy to children of sexual
21 abuse?

22 A Yes, I have.

23 Q Approximately how many children have you provided
24 therapy to?

25 A Probably over 200.

Tabitha Webber
Direct examination by Mr. Leibert

1 Q Have you ever been qualified by the Court in this
2 state or this county as an expert in forensic interviewing?

3 A Yes, I have.

4 Q Approximately how many times?

5 A Approximately seven to ten.

6 Q In which courts?

7 A Cherokee County, Spartanburg County, Union County,
8 Greenville County.

9 Q Would that be in both family court and general
10 sessions as we are in today?

11 A It included family and general sessions. It's over 50
12 times.

13 MR. LEIBERT: Your Honor, at this time I would offer
14 her as an expert in the field of forensic interviewing and
15 child abuse assessment as a master social worker.

16 MR. BRANNON: Your Honor, I would ask for a more
17 specific -- what exactly is she being qualified as?

18 THE COURT: Well, I understood it was a forensic
19 interviewer.

20 MR. BRANNON: With that limited scope, there would be
21 no objection.

22 THE COURT: Okay.

23 MR. LEIBERT: Thank you, Your Honor.

24 Q Please tell the jury what a forensic interview is.

25 A A forensic interview or a forensic assessment is an

Tabitha Webber
Direct examination by Mr. Leibert

1 assessment where it's non-leading, a neutral environment
2 for a child, very child friendly.

3 It's done at the Children's Advocacy Center. And I'm
4 specifically trained to ask questions that are not leading,
5 that are not suggestive and that are not putting any words
6 in the child's mouth.

7 My job is to try to figure out the truth as best as
8 possible, whether it be that something has happened to the
9 child or that there has been a misunderstanding and
10 something hasn't happened.

11 Q When did you see ✓ ?

12 A I saw . ✓ on three occasions -- June 3rd of 2004,
13 June 9th of 2004 and June 15th of 2004.

14 Q And where did you see her?

15 A At the Children's Advocacy Center.

16 Q Was anyone present besides you and ✓ ?

17 A No.

18 Q Are you familiar with the term delayed reporting or
19 delayed disclosure?

20 A Yes, I am.

21 Q Explain what that means to the jury, please.

22 A Typically children do not disclose immediately when
23 something happens to them. There's a term called delayed
24 disclosure. And that's where -- disclosure is a process.
25 It's not a one-time event. And there are many reasons why

Tabitha Webber
Direct examination by Mr. Leibert

1 children don't tell. There are many reasons why children
2 do tell.

3 However it is not normal usually for children to tell
4 immediately. There may be some kind of trigger; there may
5 be fear; there may be intimidation. There may be a number
6 of things as to why children do not tell.

7 Typically, people do not report that they have been
8 sexually abused until after the age of 18. That's 80
9 percent of the time. So it's very normal when there is a
10 delay in disclosure.

11 THE COURT: Ms. Webber, let me ask that you not turn
12 your back to the court reporter. I know you're talking to
13 the jury, but she needs to see you. So if you'll have your
14 profile -- if you will look toward Mr. Leibert, it will
15 work.

16 THE WITNESS: Okay.

17 Q When you do a forensic interview based on your
18 experience and training, do you expect a complete
19 disclosure in the first interview?

20 A No, I do not.

21 Q Even in two or three interviews?

22 A No, I do not.

23 Q Why is that?

24 A It could be because the abuse has happened on multiple
25 occasions. A child typically doesn't remember every piece

Tabitha Webber
Direct examination by Mr. Leibert

1 of information about the abuse, whether it be that it
2 happened one time or multiple times.

3 Q Do children normally remember the chronological order
4 of events, especially if it's more than once?

5 A A lot of times they get that mixed up, because our
6 brain works very differently when we're trying to remember
7 something that was traumatic. And a lot of times events
8 may be blocked or confused, especially if it's something
9 that's happened a lot.

10 I explain it as if I asked you to describe to me all
11 the events surrounding every time you brushed your teeth in
12 the morning, would be able to do that. No.

13 We're asking children to describe an event that's
14 usually negative. If I was to describe an event that was a
15 positive event such as a vacation, and I had to describe it
16 numerous times, I wouldn't include every detail. And
17 that's a positive event.

18 We're asking children to come in and talk about things
19 that may be negative. And to have every detail every time
20 would not be normal.

21 Q Please tell the jury what type of demeanor V had
22 during your forensics.

23 MR. BRANNON: Objection. That would be, I believe,
24 outside the scope of her expertise.

25 THE COURT: Well, you don't have to have an expertise

Tabitha Webber
Direct examination by Mr. Leibert

1 to describe the demeanor when you're interviewing someone.

2 Overruled.

3 A V was very shy, very sad, withdrawn, tearful.

4 She was very upset. She was visibly shaking.

5 Q Now, the law says you can't give specifics, but the
6 law says I can ask you some limited questions. It's called
7 the time-and-place exception without details. Did V 1
8 report a sexual assault to you?

9 A Yes.

10 Q Did she tell you when it happened?

11 A Yes.

12 Q When did she tell you it happened?

13 A She told me that it happened right before her birthday
14 when she was still ten years old and that there were
15 several incidents that happened between that point and as
16 she was ten, 11 and 12 years old.

17 Q Did she tell you where it happened?

18 A Yes, she did.

19 Q And where did she tell you it happened?

20 A She told me that it happened when they were living at
21 the brown house and then it happened when they were living
22 at Mill Stream.

23 Q Thank you. Answer any questions Mr. Brannon may have.

24

25

Tabitha Webber
Cross-examination by Mr. Brannon

1 CROSS-EXAMINATION

2 BY MR. BRANNON

3 Q Ms. Weber --

4 MR. BRANNON: Your Honor, may I approach the witness?

5 THE COURT: Yes.

6 Q I show you a copy of a report and ask you if it's your
7 report.

8 A It is.

9 Q According to your report, you saw V the first
10 time on June the 3rd of 2004, correct?

11 A Yes, that's correct.

12 Q And then you saw her again on June the 9th of 2004?

13 A Yes.

14 Q And June the 15th was the last time you saw her,
15 correct?

16 A Yes.

17 Q All right. Now, you said that -- would it be fair to
18 say that all forensic interviews are somewhat different
19 than that, than the other ones?

20 A Each case is individual.

21 Q Okay. How many times do you typically meet with a
22 child before they disclose any inappropriate activity?

23 A Do you mean how many times on average?

24 Q Yeah. You know, well, let me withdraw the question
25 and rephrase it.

Tabitha Webber
Cross-examination by Mr. Brannon

1 Do you meet with some children and during the first
2 interview they don't tell you anything wrong?

3 A Yes.

4 Q And do you meet with some that tell you a little bit
5 the first time?

6 A Yes.

7 Q Okay. Is there an average about a disclosure and the
8 length of time it would take you to get a disclosure?

9 A I don't understand.

10 Q Well, do the majority of your -- do you call them
11 patients or clients?

12 A Clients.

13 Q Clients. Do the majority of your clients disclose in
14 your first interview?

15 A I would say the majority, yes.

16 Q Okay. All right. And how long do the interviews
17 typically last?

18 A That depends on the age of the child. If I'm seeing a
19 three-year-old, it may be five or ten minutes. If I'm
20 seeing an older child with a longer attention span, it
21 could be up to an hour.

22 Q You saw her -- what records did you have when you saw
23 V on June the 3rd?

24 A The incident report and the voluntary statements. And
25 I do not recall if I had the medical records at the time at

Tabitha Webber
Cross-examination by Mr. Brannon

1 the point I first saw her or not.

2 Q Okay. I believe you testified earlier that the three
3 times that you saw V, you saw her alone, correct?

4 A Correct.

5 Q But the first day on June the 3rd you talked with her
6 mother first, right?

7 A Correct.

8 Q Okay. All right. Now, you make a note in here,

9 " V disclosed the last incident was about a year ago."

10 Can you find that in your report?

11 A What page?

12 Q Let me see if I can find it. I'm sorry. I read it a
13 minute ago and now I can't find it.

14 You asked her to do a time line, correct?

15 A Correct. Are you on page three?

16 Q No. I'm on the very top line of page four.

17 A Okay.

18 Q V stated the last time this happened was almost a
19 year ago, correct?

20 A Correct.

21 Q And that, so that, would have been sometime in '03,
22 correct?

23 A I have to look back. Correct.

24 Q Okay. And at that point V would have been 12.

25 A I guess.

Tabitha Webber
Cross-examination by Mr. Brannon

1 Q Just turned 13, right?

2 A It just depends on, I guess, what time of year it was,
3 if it was before her birthday or after her birthday.

4 Q Well, in June of '04 she was 14.

5 A Correct.

6 Q So a year before that would have been 13, right?

7 A If it was exactly a year, yes.

8 Q Okay.

9 A Her birthday is in May though.

10 Q Right. Does her mother know what she alleged? Does
11 V 's mother know what allegations she's made against
12 Uncle Dave?

13 A She does know. I don't know how much information she
14 knew at the time I interviewed her as far as the extent of
15 detail.

16 Q But on June the 3rd of 2004 when you talked to Audrey
17 she knew that her daughter was alleging Uncle Dave
18 had violated her some way, right?

19 A Yes.

20 Q You weren't ever present at any of the times or
21 locations that V says Uncle Dave messed with her, were
22 you?

23 A Of course not.

24 MR. BRANNON: I have nothing further.

25 MR. LEIBERT: Just two questions, Your Honor.

Tabitha Webber
Redirect examination by Mr. Leibert

1 REDIRECT EXAMINATION

2 BY MR. LEIBERT

3 Q Was her mother present in any of the actual
4 interviews, or did you talk to them separately?

5 A I talked to them separately.

6 Q And on the bottom of the last sentence on page four at
7 the first paragraph -- and that goes back to time and
8 place -- when did she tell you, how old she was the last
9 time it happened?

10 A Twelve.

11 Q She would have turned 13 May the 10th of 2003.

12 A Correct.

13 Q Thank you.

14 MR. BRANNON: I don't have anything further.

15 THE COURT: You may step down.

16 MR. LEIBERT: May we approach, Your Honor?

17 THE COURT: Yes.

18 (Bench conference held off the record in the presence
19 of the jury but out of the hearing of the jury.)

20 MR. LEIBERT: Call Charity Herlong.

21 CHARITY HERLONG, having been
22 first duly sworn, testified as follows:

23 DIRECT EXAMINATION BY MR. LEIBERT

24 MR. LEIBERT: May it please the Court, Your Honor.

25 THE COURT: Yes, sir.

Charity Herlong
Direct examination by Mr. Leibert

- 1 Q Please state your name.
- 2 A Charity Herlong.
- 3 Q And where are you employed?
- 4 A At the Spartanburg County Sheriff's Office.
- 5 Q And what is your current position there?
- 6 A I am a senior investigator.
- 7 Q In what area?
- 8 A I am part of the major crimes unit.
- 9 Q Were you employed back in '04?
- 10 A Yes, sir, I was.
- 11 Q Were you the lead investigator on the case involving
- 12 David Fitch?
- 13 A Yes, sir, I was.
- 14 Q I just have a couple of areas to cover for you --
- 15 A Okay.
- 16 Q -- to establish his age being greater than 14.
- 17 When you interviewed him on June the 2nd of 2004, how
- 18 old was he?
- 19 A He stated he was 43 years old.
- 20 Q And what did he tell you was his date of birth?
- 21 A Hold on just a second. I have it written down. Let
- 22 me find it.
- 23 Q At the top of his statement. Is that the statement he
- 24 gave you?
- 25 A It is. And he stated his date of birth was 11/26 of

Charity Herlong
Cross-examination by Mr. Brannon

- 1 '60. Thank you.
- 2 Q Did you go to the two physical places where ✓
3 said this occurred?
- 4 A Yes, sir, I did.
- 5 Q The brown house that she spoke about, did you find the
6 brown house?
- 7 A I did, yes, sir.
- 8 Q And where is that located?
- 9 A In Spartanburg County at 3587 Road.
- 10 Q Did you then go to the second house she said it
11 occurred at?
- 12 A Yes, sir; yes, sir, I did.
- 13 Q And where is that located?
- 14 A 190 Street, Clifton, Spartanburg County.
- 15 Q Thank you. Answer any questions Mr. Brannon may have.
- 16 A Yes, sir.
- 17 CROSS-EXAMINATION
- 18 BY MR. BRANNON
- 19 Q Investigator, my client gave you a statement, didn't
20 he?
- 21 A He did give me a statement.
- 22 Q He told you it never happened, didn't he?
- 23 A He denied the allegations, yes, sir.
- 24 Q Nothing further. Thank you.
- 25 A Okay.

1 MR. LEIBERT: Nothing further, Your Honor.

2 THE COURT: You may step down.

3 THE WITNESS: Thank you.

4 THE COURT: Ladies and gentlemen, I've got some other
5 matters I'll need to address that don't relate to this
6 case. So we're going to break for lunch now. We will
7 resume this afternoon at 2:00 o'clock, at 2:00 o'clock this
8 afternoon.

9 Keep in mind during the course of the trial, any
10 trial, and certainly this one, you can't discuss the case
11 until you're involved in jury deliberations.

12 So during the break don't talk about the case with
13 anybody. That includes your fellow jurors. You can only
14 discuss it during deliberations.

15 Also, don't allow anyone to discuss it with you.
16 Don't attempt to conduct any research or do your own
17 investigation into any issue that might arise during the
18 trial.

19 Do have a good lunch, and please report back to your
20 jury room at 2:00 o'clock this afternoon.

21 (The following takes place outside the presence of the
22 jury.)

23 MR. LEIBERT: Your Honor, may we approach and go over
24 this stipulation about the part we are preparing over the
25 lunch hour?

1 (Bench conference held off the record.)

2 THE COURT: All right. Court is in recess until
3 2:00 o'clock.

4 (Whereupon, a recess was taken.)

5 MR. LEIBERT: Your Honor, may I approach as to the
6 stipulation?

7 THE COURT: All right. And we will get that marked,
8 but that's how we typed that up.

9 (Stipulation marked State's Exhibit No. 7.)

10 THE COURT: All right. Are we ready for the jury now?

11 MR. LEIBERT: Yes, sir, Your Honor.

12 THE COURT: Bring them in, please.

13 I notice on this thing it doesn't have any grade
14 beyond the 4th grade. Is that supposed to be like that?

15 MR. LEIBERT: Yes, sir. The date that we were more
16 concerned is March the 20th, when she came back, of 2000.

17 THE COURT: Okay.

18 MR. BRANNON: So I guess she finished the 3rd grade
19 here and did the whole 4th there.

20 MR. LEIBERT: Yes, sir.

21 (The following takes place in the presence of the
22 jury.)

23 THE COURT: Good afternoon, ladies and gentlemen.
24 We're going to continue with the state's presentation of
25 evidence.

Dr. Angela McGee
Direct examination by Mr. Leibert

1 Mr. Leibert.

2 MR. LEIBERT: May it please the Court, Your Honor.

3 The state would call Dr. Angela McGee.

4 DR. ANGELA MCGEE, having been
5 first duly sworn, testified as follows:

6 DIRECT EXAMINATION BY MR. LEIBERT

7 MR. LEIBERT: May it please the Court, Your Honor.

8 THE COURT: Yes, sir.

9 Q Ma'am, please tell us your name.

10 A Dr. Angela McGee.

11 Q What is your occupation?

12 A I am a board certified family medicine doctor, and I
13 practice in Spartanburg, South Carolina.

14 Q Do you have your own practice?

15 A I do.

16 Q And what type of practice do you have?

17 A I mainly do high risk pediatric patients that come
18 from the neonatal intensive care unit.

19 Q Do you also see teenagers?

20 A I do. I follow them out.

21 Q Was V a patient of yours?

22 A She was and is.

23 Q When did she start as your patient?

24 A November of 2003, the end of 2003.

25 Q Did you also see her in March of 2004?

Dr. Angela McGee
Direct examination by Mr. Leibert

1 A I did.

2 Q And May of 2004?

3 A I did.

4 Q Before we get into that I want to ask you about your
5 background.

6 How many years have you been licensed?

7 A I've been licensed since 1999 for nine -- nine plus
8 years.

9 Q And you're licensed as an M. D., a medical doctor.

10 A Medical doctor.

11 Q Where did you receive your medical education?

12 A I received my undergraduate education in Norfolk,
13 Virginia, at Norfolk State University and Old Dominion
14 University.

15 And from there I went to medical college in Wisconsin,
16 in Milwaukee, Wisconsin, for four years in medical school.

17 And then I came here for three years for a residency.

18 Q And tell the jury what a residency is.

19 A That's, that is where you, after you graduate, that's
20 where you go to get experience. And you spend basically
21 three years, 36 months, in the hospital doing inpatient and
22 outpatient work in their clinics.

23 Q And are you board certified?

24 A I am.

25 Q Explain to the jury what that means.

Dr. Angela McGee
Direct examination by Mr. Leibert

1 MR. BRANNON: Your Honor, excuse me. I will stipulate
2 that she is abundantly qualified as an expert in pediatric
3 medicine.

4 THE COURT: Okay.

5 MR. LEIBERT: Thank you, Your Honor.

6 THE COURT: Okay.

7 MR. LEIBERT: We will certainly agree with that. We
8 would therefore offer her as an expert medical doctor in
9 the field of pediatrics and family medicine.

10 THE COURT: She is so qualified.

11 Q Does your practice include sexual abuse cases?

12 A It does.

13 Q Turning your attention to March of 2004, did you see

14 1 V at that time?

15 A Yes, sir.

16 Q And what was the purpose of meeting with her?

17 A The first few visits I try to do on teenagers a full
18 exam. It's completely unclothed.

19 And there was a little bit of difficulty the first
20 couple of times. She was very shy, very apprehensive. And
21 I felt like I needed to bring her back. So it took several
22 visits to get her comfortable enough to agree for me to do
23 a completely unclothed exam. And that's why she was there,
24 for an exam for the lower half of her body.

25 Q How many visits did it take to be able to do that?

Dr. Angela McGee
Direct examination by Mr. Leibert

1 A I want to say it was the third visit if you don't
2 count the sports physical that I did.

3 Q Okay. Did you make some findings from your
4 examination and treatment of her?

5 A I did.

6 Q Please come down in front of the jury.

7 (Whereupon, the witness left the stand.)

8 Q Do you recall how old ✓ was when you saw her?

9 A Rachel was a couple of months shy of 14. She was in
10 the early stages of adulthood. She had developed pubic
11 hair. She had breasts. She, she was well into her way of
12 being a woman.

13 Q Are you right-handed or left-handed?

14 A I am left-handed.

15 Q All right. I want to make sure all of the jurors can
16 see and hear you.

17 THE COURT: Let me remind the witness, now.

18 I know you're speaking to the jury, but the court
19 reporter is behind you.

20 THE WITNESS: Sure.

21 THE COURT: So be sure you speak loudly so she can
22 hear you.

23 THE WITNESS: Yes, sir.

24 A Okay. All right. I think it's, ladies and gentlemen
25 of the jury, important that everybody understand what

Dr. Angela McGee
Direct examination by Mr. Leibert

1 normal anatomy is. If you can understand what normal
2 anatomy is on a young woman, you can understand what
3 happened.

4 Okay. The first thing we'll talk about is the genital
5 area. And we have the mons pubis up at the top. And this
6 would represent a woman, Tanner Stage IV.

7 We grade people, young women, in how far along they
8 are in becoming adults as far as their genitals and their
9 breasts. And she would have been a Tanner Stage IV, which
10 means she had full pubic hair but it did not extend onto
11 her legs.

12 She also during the exam, and this is the normal, the
13 normal exam. Actually, I'll do that first. You will have
14 the mons pubis, the clitoris, the hood of the clitoris, as
15 well as the labia minora, the hymen, which is this area
16 right here, the labia majora, the anas and the urethra.
17 So, again, the hymen, the inside of the vagina, the labia
18 minora, the clitoris, urethra and anas.

19 Q And that's a normal exam.

20 A That's a normal exam.

21 You can look and see in a young lady that the hymen,
22 which is the opening to the vagina, may or may not be
23 shaped perfectly.

24 So you have to really do an exam, which is what I did
25 on √ , in more than one position so you can see every

Dr. Angela McGee
Direct examination by Mr. Leibert

1 bump and layer and every change along the edge, because if
2 you don't you can falsely accuse somebody. So we looked at
3 her like this.

4 MR. BRANNON: Objection, Your Honor. Can we approach,
5 please?

6 THE COURT: Yes.

7 (Bench conference held off the record in the presence
8 of the jury but out of the hearing of the jury.)

9 (Whereupon, the witness returned to the stand.)

10 Q Dr. McGee, would you come on back down here? Do you
11 want this pointer? Would that help you?

12 A That might be better.

13 (Whereupon, the witness left the stand.)

14 A Okay.

15 Q Let me ask you questions so we can probably --

16 A Sure, sure, okay.

17 Q What were your specific findings? First -- strike
18 that. How many positions did you examine her in?

19 A Three.

20 Q And what positions were those?

21 A That would be this position, which is basically
22 anterior up. We also looked at her in the frog-leg
23 position.

24 Q What does that mean?

25 A That means the legs were kind of bent, flexed at the

Dr. Angela McGee
Direct examination by Mr. Leibert

1 hip and at the knees --

2 Q All right.

3 A -- to allow us to get a view of the vaginal opening,
4 the genitals, as well as on the side.

5 Q Tell the jury what your findings were on the
6 examination of V .

7 A Okay. The findings were -- it's kind of hard without
8 kind of explaining.

9 Q All right. Go ahead.

10 A Okay. There's many different types of normal openings
11 to the vagina.

12 You can see here all of these are not abnormal. This
13 is a ring-shaped hymen here; this is a septate; this is a
14 cribriform; and here's somebody that's had a baby. You can
15 see there's a little bit of hymen left up here. But notice
16 down on the bottom, which would be this area right here.
17 Notice how thin it is. There's not much tissue left.

18 And if you were to look at Rachel in comparison, she
19 had all of this. But guess what? She didn't have any of
20 this down here.

21 Q And what does that mean medically?

22 A It means that she was penetrated.

23 Q All right. Have a seat.

24 (Whereupon, the witness returned to the stand.)

25 Q Thank you. I'll just ask you a couple of more

Dr. Angela McGee
Direct examination by Mr. Leibert

1 questions.

2 Do you have an opinion based upon a reasonable degree
3 of medical certainty, based upon your education, your
4 training and your experience, and based upon your
5 examination of 1 V , whether your findings are
6 consistent with a sexual battery or a sexual penetration?

7 A Findings are consistent with sexual battery, slash,
8 penetration.

9 Q Do you have an opinion within a reasonable degree of
10 medical certainty whether those findings are consistent
11 with repeated acts of penetration?

12 A Yes, with repeated acts of penetration.

13 Q What does that mean?

14 A Secondarily to -- no posterior remnant of the hymen is
15 completely obliterated.

16 Q What significance, if any, would puberty play in this,
17 in your findings on this child?

18 A When one enters puberty you would have a much more
19 elastic hymen, a much more easier sexual encounter and
20 probably not have, in fact, 99.99 percent, you would not
21 have the changes V had on the exam. It was very, very
22 obvious. I knew it before she even told me.

23 Q Does that mean it happened prepubertal?

24 A It happened before puberty. At least, at least the
25 first couple of times had to have. You wouldn't have

Dr. Angela McGee
Cross-examination by Mr. Brannon

1 gotten these changes without that.

2 Q Thank you very much. Answer any questions Mr. Brannon
3 may have.

4 MR. LEIBERT: Sir, do you want this?

5 MR. BRANNON: No.

6 MR. LEIBERT: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. BRANNON

9 Q Dr. McGee, as a medical doctor and a pediatrician, you
10 are a mandatory reporter of alleged or cases where you
11 believe that there was sexual abuse, is that correct?

12 A That is correct.

13 Q All right. Who are other mandatory reporters?

14 A Children's Advocacy Center. That's one of the main
15 ones. Doctors, E. R. doctors, psychologists,
16 psychiatrists. These are the type.

17 Q But as a medical doctor and as V 's medical
18 doctor, you are a mandatory reporter, correct?

19 A I am.

20 Q Okay. And I believe that this report is from your
21 office, is that correct?

22 A It is.

23 Q And you saw her on 3/18/04, is that correct?

24 A I did.

25 Q And there's a note down here on this page here. What

Dr. Angela McGee
Cross-examination by Mr. Brannon

1 does zero lesions on the genitals mean?

2 A That means there were no herpetic lesions, no chancres
3 which would be something you would see with syphilis.

4 Q Okay. There was no bruising or anything like that,
5 right?

6 A No, sir.

7 Q Okay. All right. Now, what does mandatory reporting
8 mean?

9 A It means that you should contact the law enforcement
10 officials.

11 Q Okay.

12 A Within a reasonable period of time.

13 Q And what's a reasonable period of time?

14 A Shorter than what I reported it in.

15 Q Okay. So you knew where I was going.

16 A Yes, sir.

17 Q Okay. I'm going to show you an incident report. And
18 the name of the complainant is who?

19 A It is me.

20 Q Okay. All right. And what date does that say?

21 A June 1st of '03.

22 Q Okay.

23 A And that can't be right. It must -- somebody meant to
24 put '04.

25 Q Okay. So can we agree that it's '04?

Dr. Angela McGee
Cross-examination by Mr. Brannon

1 A Yes, sir.

2 Q Okay. But you saw her on -- what's the date on here,
3 again?

4 A March the 18th maybe, something like that.

5 Q And if we agree that you called law enforcement on
6 June the 12th of '04, how long did you wait?

7 A Well, let me explain a little bit.

8 Q No. How long did you wait?

9 A According to my records, about two months since the
10 change.

11 Q About two months.

12 A Yeah.

13 Q All right. Now, there are reasons other than sexual
14 activity that a hymen can tear or disintegrate, correct?

15 A Yes, sir.

16 Q What are some of those other reasons?

17 A They're very rare. You can have accidents, but
18 usually that would involve other parts of the genital
19 tract. It used to be a myth that a person, a girl, could
20 be born without a hymen. And that's pretty much been
21 debunked.

22 Q Pretty much.

23 A Pretty much.

24 Q Well, but a separated hymen is not indicative of
25 sexual activity, is it?

Dr. Angela McGee
Redirect examination by Mr. Leibert

1 A No, not a separated. But that's not what we're
2 talking about here.

3 Q Okay. What your testimony is is that V had been
4 penetrated, correct?

5 A Yes, sir.

6 Q You have no scientific or medical evidence that she
7 was penetrated by David Fitch, do you?

8 A No, sir.

9 Q And the hymen can separate for other reasons other
10 than sexual activity?

11 A Separate but not flatten and obliterate, yes, sir.

12 Q Okay. And there are people that believe people --
13 several humans or female humans are born without a hymen,
14 correct?

15 A P value less than 05, you're talking three in 100,000
16 individuals.

17 Q And we don't know that V isn't one of those, do
18 we?

19 A No, sir.

20 Q Nothing further. Thank you.

21 REDIRECT EXAMINATION

22 BY MR. LEIBERT

23 Q Here is the date that the police were called. What is
24 that date?

25 A May 24th. That's what I have.

Dr. Angela McGee
Redirect examination by Mr. Leibert

1 Q Of 2004. You were trying to explain. Did you see her
2 after March the 18th?

3 A I did. And we also made a report to the Children's
4 Advocacy Center. So there was some mixup there as to who,
5 what and where.

6 And also I wanted to prepare. There was no obvious
7 acute injury at that time. It had been probably a year
8 maybe since she had been violated and so I felt like --

9 MR. BRANNON: Objection. Move to strike.

10 THE COURT: Let me see y'all just a minute.

11 (Bench conference held off the record in the presence
12 of the jury but out of the hearing of the jury.)

13 THE COURT: All right. Overrule the objection.

14 MR. LEIBERT: Thank you, Your Honor.

15 Q Go ahead and answer.

16 A Would you repeat the question?

17 Q You were talking that -- about it had been a year --

18 A Yes.

19 Q -- when you called the Advocacy Center.

20 A Yes, sir.

21 Q Go ahead.

22 A Okay. And I, I really felt like, you know, with her
23 mental state, she was very upset, very upset. And I felt
24 like I really needed to bring her back and talk to her
25 again, spend a little time explaining to her what was going

Dr. Angela McGee
Recross-examination by Mr. Brannon

1 to happen, who was going to talk to her.

2 Q And you then saw her in May of 2004.

3 A Yes, sir.

4 Q And, finally, since -- she didn't have a separated
5 hymen.

6 A She did not. She had a hymen that was torn, flattened
7 and obliterated. You don't see that very often in people
8 that have been penetrated, but this, this was so obvious
9 it, it, it's just unbelievable. It could be nothing else.

10 Q Thank you very much.

11 THE COURT: Wait just a minute.

12 RECROSS-EXAMINATION

13 BY MR. BRANNON

14 Q Doctor, you testified that -- this March 18th of '04,
15 that wasn't the first time you had seen V , correct?

16 A No, sir.

17 Q It took you, I think you said, three times to get her
18 to a comfort level, correct?

19 A Two or three, sir.

20 Q Okay. All right. And you said that she was very
21 nervous and what?

22 A Just apprehensive.

23 Q Okay.

24 A And I should have picked up on that, and I didn't.

25 Q Okay. Maybe she didn't want to find out, want you to

Stipulation

1 find out, she had had sex, right?

2 A Well, we, we talk at every visit about that with my
3 teams. And that was not what was bothering her. I can
4 only tell you from experience that wasn't it. And I just
5 couldn't put my finger on what it was. But it wasn't that,
6 because, you know, I offered to give her the patch, the
7 birth control patch, the pills. She wasn't interested even
8 with her mom outside of the room.

9 Q Thank you.

10 MR. LEIBERT: Thank you, Your Honor. No further
11 questions. May she be excused?

12 THE COURT: She may be.

13 (Whereupon, the witness was excused.)

14 MR. LEIBERT: Your Honor, may I approach as to the
15 stipulation? I believe I offered that. I don't need to
16 publish it. I will just use it in my closing if that's
17 okay with Your Honor. I believe it is without objection.

18 THE COURT: Well, you need to publish it so they will
19 know what it is.

20 MR. LEIBERT: May I publish it at this time?

21 Ladies and gentlemen, we have agreed to a stipulation
22 instead of having school officials come. And you'll have
23 this back there.

24 Our stipulation is as follows. I'll just read it.

25 " V , date of birth, May 10, 1990. Enrolled

Motion

1 Jesse Boyd, 11/11/96, kindergarten. Was there 104 days.
2 Enrolled Jesse Boyd, 8/21/97, first grade. Withdrew
3 February 27th, 1998, and moved to Ohio where she enrolled
4 Hamilton local schools in Columbus, Ohio. Enrolled Jesse
5 Boyd, March 20th, 2000, 3rd grade. Enrolled the last 28
6 days there. Enrolled back in Jesse Boyd at 4th grade and
7 attended 175 days."

8 That is our stipulation, Your Honor, and State's
9 Exhibit 7.

10 THE COURT: Okay.

11 MR. LEIBERT: Your Honor, the state rests.

12 THE COURT: All right. Ladies and gentlemen, that is
13 all of the testimony to be offered by the state, at least
14 in their case in chief.

15 Before we go any further I've got some matters I'll
16 need to address with the lawyers. So I'll ask you to
17 please go to your jury room. Do not yet discuss the case.
18 I'll bring you back in just a few minutes.

19 (The following takes place outside the presence of the
20 jury.)

21 THE COURT: All right. Any motions or other matters
22 to address?

23 MR. BRANNON: Your Honor, I would move for a directed
24 verdict as to all three indictments.

25 Your Honor, I believe the state has failed to prove

Motion

1 all the elements of the crimes, and I would ask that the
2 Court dismiss the charges.

3 THE COURT: All right. Well, I think there is
4 sufficient evidence to support each of the elements if the
5 jury finds them to be credible beyond a reasonable doubt.
6 So your motion for a directed verdict is denied.

7 Any others?

8 MR. BRANNON: No, Your Honor.

9 THE COURT: You've discussed with your client his
10 right to testify?

11 MR. BRANNON: I have, Your Honor.

12 THE COURT: And you've told the jury he was going to.
13 Is that his decision?

14 MR. BRANNON: Yes, Your Honor.

15 THE COURT: All right. Mr. Fitch --

16 THE DEFENDANT: Yes.

17 THE COURT: -- your lawyer has said that you and he
18 have discussed your right to testify, and of course that
19 also means that you have a right not to. You've got a
20 right to remain silent.

21 Do you understand that when you are accused of a crime
22 you have an absolute right to remain silent? Nobody can
23 make you testify or provide a statement or answer any
24 questions that relate to any charges that have been brought
25 against you.

1 Do you understand you have that right to remain
2 silent?

3 THE DEFENDANT: Yes, I do.

4 THE COURT: Now, do you understand that if you choose
5 to testify in this case that you've got to answer not only
6 your lawyer's questions? You've got to answer the
7 prosecutor's questions even if the responses to those
8 questions might tend to prove you guilty of some crime they
9 claim you committed.

10 THE DEFENDANT: Yes. I understand.

11 THE COURT: Do you understand that if you chose not to
12 testify I would instruct the jury they may not hold that
13 against you or consider it in any way in their
14 deliberations or in their determination as to whether or
15 not your guilt has been proven?

16 THE DEFENDANT: I understand that.

17 THE COURT: Have you and Mr. Brannon discussed the
18 advantages and disadvantages of testifying, as well as not
19 testifying?

20 THE DEFENDANT: Yes, we have.

21 THE COURT: And do you appreciate what those
22 advantages and disadvantages are?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: And after having discussed it with your
25 lawyer have you made a decision about whether or not you'll

1 testify?

2 THE DEFENDANT: I'm going to testify.

3 THE COURT: You will testify?

4 THE DEFENDANT: Yes.

5 THE COURT: Is that a decision that you made of your
6 own free will and accord?

7 THE DEFENDANT: Yes, it is.

8 THE COURT: Did anybody force you into it?

9 THE DEFENDANT: No, sir.

10 THE COURT: Pressure you into it?

11 THE DEFENDANT: No, sir.

12 THE COURT: Did anybody suggest that that's the
13 decision that you ought to make?

14 THE DEFENDANT: No.

15 THE COURT: Do you understand that it is your decision
16 and only you can make it?

17 THE DEFENDANT: That's right.

18 THE COURT: And are you satisfied with your decision
19 to testify?

20 THE DEFENDANT: Yes, I am.

21 THE COURT: Okay. You can have a seat.

22 Are we ready for the jury now?

23 MR. BRANNON: Your Honor, there's one matter. It's a
24 logistical matter, Your Honor. Forgive me for preparing
25 inappropriately.

1 I have two witnesses that are under subpoena, but I
2 didn't ask them to be here until 4:00 o'clock or, I mean,
3 excuse me, 9:00 o'clock tomorrow morning. If you would
4 give me a little time, I could probably step out and call
5 them and try and get them here earlier.

6 I've got three witnesses here. And I believe that the
7 only one that will take any time is going to be my client.
8 If you want me to go and call those people --

9 THE COURT: Well, yeah. Why don't you do that? Go
10 call them and tell them to come on down here.

11 MR. BRANNON: Okay. All right. Thank you, Your
12 Honor.

13 THE COURT: We'll take five minutes.

14 (Whereupon, a recess was taken.)

15 THE COURT: All right. Bring the jury in, please,
16 sir.

17 (The following takes place in the presence of the
18 jury.)

19 THE COURT: Ladies and gentlemen, as you know, the
20 state has rested in their presentation. So we'll now
21 proceed with any to be offered by the defense.

22 Mr. Brannon.

23 MR. BRANNON: The defense would call Audrey
24
25

Audrey

Direct examination by Mr. Brannon

1 AUDREY , having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MR. BRANNON

4 | MR. BRANNON: May it please the Court.

5 THE COURT: Yes, sir.

6 Q Ma'am, you are Audrey ?

7 | A Yes, sir.

8 Q V is your daughter, is that correct?

9 | A Yes, sir.

10 THE COURT: Pull the microphone down, please.

11 Q 's your daughter, is that right?

12 | A Yes, sir.

13 Q Okay. Do you have any other children?

14 | A I have one son.

15 Q And how old is your son?

16 | A Turned 16.

17 Q Okay. And where do you live now?

18	A	167 :	Drive.
----	---	-------	--------

19 Q And who lives at 167 | Drive with you?

20 | A Myself and my two kids and my boyfriend.

21 Q And your boyfriend is who?

22 | A Huh?

23 Q Your boyfriend is who? What's his name?

24 | A Harold Robinson.

25 | Q Harold Robinson.

Audrey
Direct examination by Mr. Brannon

- 1 Okay. Now, where is V 's dad?
- 2 A Kentucky.
- 3 Q And are you still married to him?
- 4 A Yes, sir.
- 5 MR. LEIBERT: Objection. Relevance.
- 6 MR. BRANNON: Withdraw the question.
- 7 Q So you live in South Carolina with your boyfriend and
- 8 the dad lives in Kentucky, correct?
- 9 A Yes, sir.
- 10 Q Okay. You moved from Kentucky, I believe, to South
- 11 Carolina, is that right?
- 12 A The first time.
- 13 Q Okay. And when you moved the first time, who moved
- 14 with you?
- 15 A The first time just me and my sister. And three weeks
- 16 later we went back and got our kids.
- 17 Q And who else?
- 18 A My husband and her husband.
- 19 Q Okay. So you and your sister came down. And then
- 20 shortly thereafter you went back and got everybody else,
- 21 right?
- 22 A Uh-huh.
- 23 Q So when you came back it was you and your husband,
- 24 Mr. , right?
- 25 A Yes, sir.

Audrey
Direct examination by Mr. Brannon

- 1 Q And your two kids, right?
- 2 A Yes, sir.
- 3 Q And then Dave Fitch.
- 4 A Yes.
- 5 Q And his wife.
- 6 A Yes.
- 7 Q And his wife is your sister, right?
- 8 A Yes.
- 9 Q Okay. And then at that point they only had one child,
- 10 right?
- 11 A Yes, sir.
- 12 Q Okay. So that's seven people, right?
- 13 A Yes, sir.
- 14 Q Okay. And where did you live?
- 15 A When we first moved down the first time?
- 16 Q Yeah.
- 17 A In an apartment.
- 18 Q In an apartment.
- 19 Okay. And how old was V when you moved from
- 20 Kentucky to South Carolina?
- 21 A The first time?
- 22 Q Yes, ma'am.
- 23 A I'm not for sure. Both of them was real small.
- 24 Q Okay. All right. And then how long did you stay? At
- 25 some point you moved out of South Carolina again, right?

Audrey
Direct examination by Mr. Brannon

- 1 A Yes, sir.
- 2 Q How long were you here before you moved out?
- 3 A Over a year.
- 4 Q Okay. And when you moved, where did you move to?
- 5 A I moved to Kentucky for three weeks, and then from
- 6 Kentucky to Columbus, Ohio.
- 7 Q Okay. And who did you live with in Columbus, Ohio?
- 8 A My boyfriend.
- 9 Q When did your husband leave?
- 10 A We split up before I left down here the first time.
- 11 Q Okay. All right. So you -- Kentucky, South Carolina,
- 12 Kentucky, Ohio.
- 13 A Yes, sir.
- 14 Q And then you moved from Ohio back to South Carolina,
- 15 right?
- 16 A Yes, sir.
- 17 Q Now, that first time that you were in South Carolina,
- 18 did you live in that apartment the whole time?
- 19 A Yes, sir.
- 20 Q And then when you moved back from Ohio to South
- 21 Carolina, is that when you moved into that brown house?
- 22 A Yes, sir.
- 23 Q And so when you moved back from Ohio, who came with
- 24 you?
- 25 A My two kids.

Audrey
Direct examination by Mr. Brannon

- 1 Q How about your boyfriend?
- 2 A We were split up at that time. We had been split up
- 3 for seven months.
- 4 Q Okay. Is it the same boyfriend?
- 5 A Yes, sir.
- 6 Q Okay. All right. Who, who -- that brown house, who
- 7 owned it, do you know?
- 8 A Roland Management.
- 9 Q Okay. So it was a rental property then, right?
- 10 A Yes, sir.
- 11 Q Okay. And who had leased that brown house?
- 12 A My sister.
- 13 Q All right. When you moved back from Ohio, you moved
- 14 back in with your sister and her brother -- and her husband
- 15 and their daughter, right?
- 16 A Yes, sir.
- 17 Q Okay. What did you do for a living when you came back
- 18 from Ohio?
- 19 A I didn't do nothing for about two weeks until I
- 20 started working at Fast Signs.
- 21 Q I am sorry. Fast what?
- 22 A Fast Signs.
- 23 Q Okay. And when you worked for Fast Signs, what shift
- 24 did you work?
- 25 A First.

Audrey
Direct examination by Mr. Brannon

- 1 Q Okay. So you were at home at night.
- 2 A Yes, sir.
- 3 Q Okay. Were you home on the weekends?
- 4 A Most weekends.
- 5 Q Okay. All right. Now, in March, I believe it was
- 6 March the 18th of 2004, you took your daughter to Dr.
- 7 McGee's office, right?
- 8 A Yes, sir.
- 9 Q And that was a preset doctor's appointment, correct?
- 10 A It took a while to get her in, yes, sir.
- 11 Q But you made that appointment, right?
- 12 A Uh-huh.
- 13 Q And that was not the first time she'd been to Dr.
- 14 McGee's office, right?
- 15 A No. We had been to Dr. McGee since we moved down
- 16 here.
- 17 Q Right. So, so she was your doctor and you made an
- 18 appointment for the doctor. Okay. All right. And it was
- 19 at that doctor's appointment that your daughter made the
- 20 allegation about Uncle Dave, right?
- 21 A No.
- 22 Q It was at that doctor's appointment that she made the
- 23 allegation to Dr. McGee, right?
- 24 A To Dr. McGee, yes.
- 25 Q Okay. All right. Ma'am, do you know if your daughter

Audrey
Direct examination by Mr. Brannon

1 has been along with Dave Fitch since that doctor's
2 appointment?

3 A No.

4 Q Okay. Is your answer you don't know, or, no, she has
5 not?

6 A Not to my knowledge, she has not.

7 Q Okay. So from May the, excuse me, March the 18th of
8 2004, it would not be possible for him to have done
9 anything sexually with your daughter then, right?

10 A You mean after that doctor's appointment?

11 Q After that doctor's appointment.

12 A Yes, sir.

13 Q Okay. Yes, it would be possible, or no?

14 A No.

15 Q I'm sorry.

16 A You're having me confused.

17 Q And I'm confusing myself. I'm sorry.

18 Is it -- your testimony is that you don't know of any
19 time that your daughter has been alone with Dave Fitch since
20 she went to Dr. McGee's office, right?

21 A No. She has not been.

22 Q Okay. So it would not be possible for him to have
23 messed with her or had any kind of sexual relations with
24 her since Dr. McGee's office, right?

25 A That's right.

Audrey
Direct examination by Mr. Brannon

1 Q Okay. So when she testified in here today that he was
2 messing with her when she was 15 and 16, that couldn't be
3 possible, could it?

4 A I'm not for sure.

5 Q Well, just a minute ago you said you were sure that he
6 couldn't have.

7 A I know it happened right after we moved down here from
8 Columbus.

9 Q Well, you know that she told you that, right?

10 A Yes.

11 Q Okay.

12 A But as far as how old they were, I'm not for sure on
13 how old she was.

14 Q Okay, all right, now.

15 A Because we moved a lot at that time.

16 Q All right. You still have a relationship with your
17 sister, correct?

18 A Somewhat.

19 Q Okay. And, in fact, your son still has a relationship
20 with your sister and Dave Fitch, doesn't he?

21 A He does with my sister.

22 Q And with Dave.

23 A I don't know about that.

24 Q Now, ma'am, he spends time with Dave. And you do know
25 that, don't you?

Audrey
Direct examination by Mr. Brannon

1 A No, I do not, because it was my understanding --

2 Q Okay. Now, three weeks -- three weeks ago, ma'am, did
3 you get a phone call from your sister --

4 A Uh-huh.

5 Q -- asking for your son to go to Wal-Mart with them?

6 A Yes, sir.

7 Q And did you say -- and did your sister tell you that
8 Dave was going to be there?

9 A Yes. And I told her no.

10 Q And you told her no because you didn't want the state
11 to know that you were letting your son be alone with Dave,
12 didn't you?

13 A No. Because it was underneath the understanding when
14 Jeanette first called and asked if she could take Brandon,
15 she swore to me that Dave was nowhere around, that she
16 would watch Brandon with both eyes.

17 Q Okay, all right.

18 A That he would stay right at her side, because I didn't
19 feel that Brandon -- Jeanette and Brandon had a close
20 relationship.

21 Q Okay.

22 A And as far as going to Wal-Mart, I didn't see no harm
23 in that.

24 Q All right. But Brandon has spent the night with
25 Jeanette since these allegations, right?

Audrey
Direct examination by Mr. Brannon

1 A With her daughter.

2 Q At the house with Jeanette and with Dave, right?

3 A With four or five other children, from my
4 understanding was what she told me, to watch movies.

5 Q Okay. Now, ma'am, when you moved back from Ohio there
6 were six or eight people living in that house, right?

7 A Yes.

8 Q Okay. There was never an opportunity for Dave to be
9 alone with your daughter at any point while you were living
10 with him and his wife, was there?

11 A Yes, there was, because me and my sister did take
12 trips to Wal-Mart and other places and leave all the
13 children at home with Dave.

14 Q Okay. Ma'am, did you just hear your answer to that
15 question? I said was there a chance for him to be alone
16 with her, and you said yes.

17 A You said after that doctor's appointment.

18 Q No, no, no. I'm sorry. I'm not trying to confuse
19 you -- I'm not trying to confuse you.

20 Before the allegations you and your sister would go to
21 Wal-Mart and stuff like that.

22 A Uh-huh.

23 Q That left Annette.

24 A Annette.

25 Q Brandon.

Audrey
Direct examination by Mr. Brannon

1 A Brandon.

2 Q V .

3 A Uh-huh.

4 Q And Dave.

5 A Yes.

6 Q He was never alone, with V alone, was he?

7 A I'm not for sure if he was. I don't know if all the
8 kids stayed together at that point or they was all outside
9 playing, because we had a pool and things.

10 Q Okay. But you left three kids --

11 A Uh-huh.

12 Q -- with at least one adult.

13 A Uh-huh.

14 Q And there were times when your boyfriend was there,
15 right?

16 A No. My boyfriend never stayed there.

17 Q There were times when Mr. was there, right?

18 A At times. Mr. had an alcohol problem.

19 Q Okay. So Mr. , two other children and Dave. You
20 and your sister weren't there. But he wasn't alone, was
21 he?

22 A Well, now, my husband --

23 MR. LEIBERT: Objection, Your Honor. It's been asked
24 and answered. And it's calling for speculation. She
25 wasn't there. There's no way for her to answer.

Audrey
Cross-examination by Mr. Leibert

1 A I don't know if my kids was alone with him when we
2 took trips to Wal-Mart and other places.

3 THE COURT: Sustained.

4 A I can't say that they was because they was other
5 children there. I wasn't there.

6 Q Thank you.

7 After you went to Dr. McGee's office would you leave
8 your daughter alone with Dave?

9 A No, I would not.

10 Q So there's no way he touched her after Dr. McGee's
11 office, right?

12 MR. LEIBERT: Objection. Asked and answered.

13 THE COURT: Sustained.

14 MR. BRANNON: Withdraw the question.

15 A That has been so long ago I don't remember.

16 CROSS-EXAMINATION

17 BY MR. LEIBERT

18 Q Jeanette is your sister, is that correct?

19 A Yes, sir.

20 Q Jeanette is the defendant's wife.

21 A Yes, sir.

22 Q The time that you lived there was the defendant
23 handcuffed to his wife?

24 A No.

25 Q Was he handcuffed to any adult?

Audrey
Cross-examination by Mr. Leibert

1 A No.

2 Q Did you and your sister go shopping on several
3 occasions while you lived there?

4 A Yes. Especially when we got off work at night because
5 we both worked the second shift.

6 Q Show you State's Exhibit 7. The child was enrolled
7 November of '96, is that correct?

8 A Uh-huh.

9 Q You went back to Ohio in '99, is that correct?

10 A Yes, sir.

11 Q Then you came back to Ohio and enrolled her when she
12 was nine years old on March the 20th of 2000. Is that when
13 you moved into the brown house?

14 A Yes, sir.

15 Q I show you State's Exhibit 5, State's Exhibit 2. Is
16 that the brown house y'all lived together in?

17 A Yes, sir.

18 Q Was there woods in that yard, behind that yard?

19 A Yes, sir.

20 Q Was this car back in the woods in State's Exhibit 6?

21 A Yes, sir.

22 Q Could you see it from the back yard?

23 A No. There was a path that led to it.

24 Q Thank you.

25

Audrey
Redirect examination by Mr. Brannon

1 REDIRECT EXAMINATION

2 BY MR. BRANNON

3 Q Was there a rule at the brown house that the kids
4 weren't allowed in the woods by themselves?

5 A No.

6 Q You're not aware of that?

7 A No, because they all played out back.

8 Q Okay. Would you let just one of the children go into
9 the woods by themselves?

10 A They have on several occasions fetching the ball, or
11 because we had a small back yard.

12 Q All right. Ma'am, the question is would you allow one
13 of the children to go into the woods and play, not to fetch
14 a ball but to go into the woods and play, by themselves?

15 A Yes. They was building a treehouse back there also.

16 Q Okay.

17 A There was part of a treehouse, a clubhouse they called
18 it.

19 Q All right. And you testified, I believe, that you and
20 your sister were both working second shift.

21 A Uh-huh.

22 Q Where were you working second shift at?

23 A Springs Industries.

24 Q Okay. And what hours was second shift?

25 A 2:00 to 11:00.

Jeanette Fitch
Direct examination by Mr. Brannon

1 Q 2:00 to 11:00. And your testimony was that you would
2 go to Wal-Mart after you got off work.

3 A Yes, sir.

4 Q So you're talking about going to work -- excuse me --
5 going to Wal-Mart after 11:00 o'clock at night.

6 A Yes.

7 Q Okay.

8 A That's when we done a lot of our shopping, and before
9 we went to work if we had an hour or two.

10 Q Thank you very much.

11 MR. LEIBERT: Nothing further, Your Honor.

12 THE COURT: You may step down.

13 MR. BRANNON: Your Honor, we would call Jeanette
14 Fitch.

15 JEANETTE FITCH, having been
16 first duly sworn, testified as follows:

17 DIRECT EXAMINATION BY MR. BRANNON

18 MR. BRANNON: May it please the Court, Your Honor.

19 THE COURT: Yes, sir.

20 Q Ma'am, you are Jeanette Fitch, is that correct?

21 A Yes, I am.

22 Q You're married to Dave Fitch, right?

23 A Yes, I am.

24 Q How many children do you have?

25 A I have two.

Jeanette Fitch
Direct examination by Mr. Brannon

- 1 Q You have two. What are their names?
- 2 A Annette and Sonya.
- 3 Q Annette and?
- 4 A Sonya.
- 5 Q How old is Annette?
- 6 A Annette is 19.
- 7 Q Okay. And how old is Sonya?
- 8 A Two and a half.
- 9 Q Two and a half. So you've got a big gap between them,
10 right?
- 11 A A big gap.
- 12 Q Okay. Ma'am, where did you -- were you -- are you
13 local to Spartanburg? Were you born here?
- 14 A No.
- 15 Q Okay. When did you come to South Carolina?
- 16 A It's been awhile ago, at least ten or 12 years ago.
- 17 Q Okay. From where?
- 18 A From Kentucky.
- 19 Q When you moved from Kentucky, who came with you?
- 20 A My husband; Annette, my daughter; Audrey is my sister;
21 her husband and their two kids.
- 22 Q Okay. Now, was there a period of time when you and
23 your sister came and then went back and got the rest of the
24 people?
- 25 A Yes.

Jeanette Fitch
Direct examination by Mr. Brannon

- 1 Q Okay. All right. But that was just a short window.
- 2 A Yes.
- 3 Q Okay. And when you moved in, when you moved to
- 4 Spartanburg, where did you move to? What house did you
- 5 move into?
- 6 A We moved into an apartment off Clinton-Glendale Road.
- 7 Q Okay. How many? How big of apartment was that?
- 8 A It was a two-bedroom, one-and-a-half bath.
- 9 Q And there were seven people living in that apartment?
- 10 A Yes.
- 11 Q Kind of tight, huh?
- 12 A Yes.
- 13 Q All right. How long did you live in that apartment?
- 14 A We had a contract for one year. We lived a full year
- 15 in that apartment.
- 16 Q All right. And at some point your sister and her kids
- 17 moved away, right?
- 18 A After the year was up we rented a house, and we all
- 19 moved into the house. And then they moved away.
- 20 Q Okay. Now, that first house that you rented, is that
- 21 the house that everybody has been talking about, the brown
- 22 house?
- 23 A Yes, it is.
- 24 Q Are those pictures of the brown house?
- 25 A Yes. It is.

Jeanette Fitch
Direct examination by Mr. Brannon

- 1 Q Okay. How long did you live in the brown house?
- 2 A I can't even remember. I know it was a year or so.
- 3 Q Okay. So your sister and her kids moved from the
- 4 apartment into the brown house.
- 5 A Yes.
- 6 Q And then moved away.
- 7 A My sister and her husband and their two kids.
- 8 Q Moved away.
- 9 A Moved in the brown house, so.
- 10 Q Okay. So when you went from the apartment to the
- 11 brown house, did Mr. go with you?
- 12 A Yes, he did.
- 13 Q Okay. And then they moved away.
- 14 A Yes.
- 15 Q Okay. All right. And your sister and her kids went
- 16 to Ohio, right?
- 17 A Yes, they did.
- 18 Q And then they came back.
- 19 A Yes, they did.
- 20 Q When they came back were you still living in the brown
- 21 house?
- 22 A Yes, we were.
- 23 Q Okay. And at some point you moved to what's being
- 24 called the new house, right?
- 25 A Yes.

Jeanette Fitch
Direct examination by Mr. Brannon

1 Q And is that the house that you live in right now?

2 A Yes, it is.

3 Q And that's with Dave and your two children, right?

4 A Yes, it is.

5 Q Okay. All right. Now, talk to me about your nephew,

6 Brandon. Just tell the jury about Brandon.

7 A Brandon is a wonderful boy, very nice, very

8 well-behaved. He's really nice. I have --

9 Q Okay. When is the last time you saw Brandon?

10 A About two and a half or three weeks ago.

11 Q Okay. When was the last time Brandon spent the night

12 at your house?

13 A Maybe about four weeks ago.

14 Q Okay. When he spent the night was Dave there?

15 A Yes, he was.

16 Q Did your sister know that Dave was going to be there

17 when Brandon spent the night?

18 A Yes, she did.

19 Q Okay. Ma'am, have you continued to have a

20 relationship with Brandon even after V made these

21 allegations about your husband?

22 A There was a period of time, probably almost a year,

23 that I never got to see Brandon.

24 Brandon and I are very close. And he comes to me if
25 he has problems. And they was probably a period of almost

Jeanette Fitch
Direct examination by Mr. Brannon

1 a year that I did not see him. And then he graduated and
2 he started coming over.

3 Q Okay. And so since that year expired has he been
4 spending the night with you?

5 A Oh, yes.

6 Q Okay.

7 A Every weekend or every-other weekend.

8 Q All right. Now, was there occasion about three weeks
9 ago that you called and asked if Brandon could come over or
10 go to Wal-Mart or something like that?

11 A Brandon called me. He got a little bit of money. He
12 wanted to go to Wal-Mart and get a cell phone.

13 Q Okay.

14 A And I told him that I would have to call and verify it
15 with his mother before we could come over, because that was
16 our -- and so I called her and she said that, yeah, we can
17 go get him and take him.

18 I said, well, it won't just be me. I said Dave will
19 be the one picking him up and taking him to Wal-Mart.
20 She'll wait on him, and then he'll bring him back home.

21 Q Okay.

22 A And then she said, okay, that's fine. And then she
23 said, well, can you do me a favor. And I said, well, if I
24 can. She said will you not tell in court --

25 MR. LEIBERT: I'm going to object. This is all

Jeanette Fitch
Direct examination by Mr. Brannon

1 hearsay, Your Honor.

2 MR. BRANNON: Your Honor, the woman she's quoting has
3 already testified that this --

4 THE COURT: I understand. Let me see y'all just a
5 minute.

6 (Bench conference held off the record in the presence
7 of the jury but out of the hearing of the jury.)

8 THE COURT: I sustain the objection.

9 MR. LEIBERT: Thank you, Your Honor.

10 Q Did she change her mind?

11 A Yes.

12 Q Okay. And that was right before coming to court,
13 right?

14 A Yes.

15 Q All right. Now, I'm going to take you back a while.
16 I'm going to take you back to March the 18th of 2004.

17 Okay? Who, who -- at that point, who was your daughter's
18 doctor?

19 A Dr. McGee.

20 Q Okay. Did your daughter have an appointment at Dr.
21 McGee's on March the 18th of 2004?

22 A I'm not aware of the exact date.

23 Q Was there an occasion that Annie and ✓ were at
24 the doctor's office on the same date?

25 A On the same day, yes, sir.

Jeanette Fitch
Direct examination by Mr. Brannon

1 Q Okay. And why was Annie going to the doctor?

2 A I had made the appointment with Dr. McGee because I
3 thought it was time for her to -- she had started her
4 menstrual cycle. And I thought it was time for her to get
5 checked out and make sure everything was going along the
6 way it should.

7 Q Okay. On that day that both Annie and V had a
8 doctor's appointment, did you and your sister and the girls
9 go together?

10 A Yes. We were all there at the doctor's office
11 together. We rode in separate cars.

12 Q Thank you.

13 So you didn't ride in the same car, but you were there
14 at the same time.

15 A Uh-huh.

16 Q Do you remember who went in first or anything like
17 that?

18 A I believe V went in first.

19 Q Okay. All right. How long after that doctor's
20 appointment were you made aware of these allegations?

21 MR. LEIBERT: Your Honor, I'm going to object.
22 There's not been a date established other than Dr. McGee
23 saying she treated the child over many months. And I
24 believe her answer to it was she wasn't sure of the date.

25 THE COURT: Sustained.

Jeanette Fitch
Direct examination by Mr. Brannon

1 MR. LEIBERT: Thank you, Your Honor.

2 Q When did you become aware of these allegations?

3 A About a week after V and Annie was both at the
4 doctor's office.

5 Q Okay. About a week.

6 A Uh-huh.

7 Q So you don't know the date, but you know it's the same
8 day. The date that they were both there together, about a
9 week later.

10 A About a week later.

11 Q Okay. All right. Ma'am, how long have you been
12 married to Dave?

13 A About nine years the second time.

14 Q Okay. That's where we're going. You've actually been
15 married to Dave twice, right?

16 A I married him when I was 17 in 1983.

17 Q Okay. You got divorced for a while.

18 A Yes.

19 Q And then you got married again, right?

20 A Yes.

21 Q Okay. Now, did you divorce him because he was
22 abusive?

23 A Oh, no.

24 Q Okay. All right. And you've known Dave for a long
25 time.

Jeanette Fitch
Direct examination by Mr. Brannon

1 A Very long.

2 Q Would you say that you know him as well as anyone?

3 A I know him just as well as anyone can.

4 Q Okay. Ma'am, do you believe that he's capable of
5 doing what V alleges he did?

6 MR. LEIBERT: Objection, Your Honor. May we approach?

7 (Bench conference held off the record in the presence
8 of the jury but out of the hearing of the jury.)

9 THE COURT: Overruled.

10 Q Ma'am, I believe the question was do you believe that
11 your husband is capable of committing the acts that V
12 says he did.

13 A I absolutely do not believe he did what V said he
14 did.

15 Q Okay. Thank you.

16 Now, ma'am, when you moved from Kentucky to South
17 Carolina where did you work?

18 A We worked for Phillips Staffing.

19 Q Okay.

20 A We had odd jobs for a couple of months.

21 Q All right. Was there a period of time that you and
22 your sister worked at the same job?

23 A Myself, my sister and my brother-in-law.

24 Q And where was that?

25 A Springs Industries.

Jeanette Fitch
Direct examination by Mr. Brannon

- 1 Q Springs Industries. What shift did you work?
2 A Second shift.
3 Q Who also -- did anyone else of those three, of the
4 other two, did they work second as well?
5 A Yes, they did.
6 Q So all three of you worked second.
7 A Yes, we did.
8 Q Okay. All right. And when was Dave working?
9 A Dave worked first shift.
10 Q Okay. So Dave was gone during the day, and then he
11 got home at night, right?
12 A Uh-huh.
13 Q Okay. Who watched the kids?
14 A My mother and father had moved down, and they were
15 watching the kids by then.
16 Q Okay. How long did your mom and dad stay in South
17 Carolina?
18 A For as long as Audrey did.
19 Q For as long as --
20 A They stayed for almost the entire year.
21 Q Okay. And during that first period of time your mom
22 and dad watched all the kids, is that right?
23 A Yes, they did.
24 Q Okay. When Audrey came back after her trip to Ohio
25 and you were living together again, where did you work?

Jeanette Fitch
Direct examination by Mr. Brannon

1 A I worked first shift with -- where I work now Drexell
2 (sic) Automotive.

3 Q Okay. Where did, where did your sister work?

4 A She didn't.

5 Q She didn't work. So from the time that she came back
6 from Ohio and then moved in with you again in the brown
7 house until you moved out, did your sister work?

8 A Yeah. She worked for a filling station or something
9 for just a little brief short period of time.

10 Q Just a little period of time. Are we talking a month,
11 a year or what?

12 A Maybe two or three months if that.

13 Q Okay. And did she have a set shift or anything like
14 that?

15 A No. It was all --

16 Q Okay. Was Dave the primary babysitter?

17 A No. He worked the first shift too.

18 Q He worked the first shift too. Okay. Who kept the
19 kids?

20 A The kids were in school.

21 Q The kids were in school. Okay. And your baby had not
22 yet been born, is that right?

23 A No. My baby is only two and a half.

24 Q Okay. All right. When your baby was born were you
25 living in the new house?

Jeanette Fitch
Direct examination by Mr. Brannon

1 A Yes.

2 Q So the baby's been born since you and your sister
3 stopped living together, right?

4 A Oh, yeah.

5 Q And since she came back from Ohio the kids were always
6 in school, right?

7 A Yes. My hours at Drexell 5:00 to 1:30.

8 Q 5:00 p.m.

9 A 5:00 a.m. until 1:30 p.m.

10 Q And how long have you been working those hours?

11 A Ever since I've been at Drexell.

12 Q And please tell me how long that is.

13 A It's going to be ten years. It has been ten years
14 April the 29th.

15 Q Okay. And so you worked there during the period of
16 time that you lived in the brown house.

17 A Oh, yes.

18 Q And did you work that same shift?

19 A First shift.

20 Q And that first shift is 5:30 to 1:30.

21 A No. It's 5:00 o'clock until 1:30.

22 Q Okay. 5:00 a.m. until 1:30.

23 A It may vary half an hour.

24 Q Were you always home when Annette got home?

25 A Yes.

Jeanette Fitch
Direct examination by Mr. Brannon

- 1 Q And were you always home when V got home?
- 2 A Yes.
- 3 Q And Brandon too, right?
- 4 A Yes.
- 5 Q Did you take trips to Wal-Mart with your sister?
- 6 A Maybe occasionally.
- 7 Q Okay. Ma'am, can you point to any specific day or
- 8 time that Dave Fitch was alone with your niece V ?
- 9 A I can't remember not one time.
- 10 Q Okay. When you would go with your sister, Brandon was
- 11 there?
- 12 A Brandon was there.
- 13 Q Annette was there?
- 14 A Annette was there.
- 15 Q And V was there.
- 16 A And most of the time my mother and father was there.
- 17 Q Most of the time mama and daddy. Okay. The brown
- 18 house in the back yard, there was some woods, right?
- 19 A Yes.
- 20 Q Did you have any rules about the kids going into the
- 21 woods by themselves?
- 22 A Too snaky.
- 23 Q Too what?
- 24 A Snaky. We found snakes.
- 25 Q Okay. And so what was the rule?

Jeanette Fitch
Cross-examination by Mr. Leibert

1 A Don't go into the woods, stay in the area, stay in the
2 yard.

3 Q Okay. All right. Would your sister be aware of that
4 rule?

5 A I'm sure she was.

6 Q Okay. All right. Now, in a minute Mr. Leibert is
7 going to get up and ask you some questions, ma'am.

8 And Dave Fitch is your husband, right?

9 A Yes, he is.

10 Q Ma'am, are you willing to get on this witness stand
11 and tell a lie to protect him?

12 A No.

13 Q Has this matter caused some distress in your family,
14 in your relations with your sister?

15 A Yes.

16 Q But she continued to let Brandon come to the house,
17 didn't she?

18 A I love Brandon. Yes, she did.

19 Q I have no further questions. Mr. Leibert is going to
20 ask you some.

21 CROSS-EXAMINATION

22 BY MR. LEIBERT

23 Q Is it your testimony that your husband wasn't alone,
24 didn't have an opportunity to be alone, with her the entire
25 time they lived there?

Jeanette Fitch
Cross-examination by Mr. Leibert

- 1 A Not that I'm aware of, no.
- 2 Q What time did you get off work on March the 20th of
3 2004?
- 4 A I have no idea.
- 5 Q What time did you get off work on March the 21st of
6 2004?
- 7 A I always get off work at least by 1:30.
- 8 Q What time on March the 21st of 2004? You don't know,
9 do you, ma'am? What day of the week was March the 21st of
10 2004?
- 11 A I'm sorry?
- 12 Q What day of the week was March the 21st of 2004?
- 13 A I have no idea.
- 14 Q What day was a teacher school-day in March of 2004?
- 15 A I have no idea.
- 16 Q What day did you work March the 20th of 2000?
- 17 A I am sorry?
- 18 Q March 20th of 2000. When you lived in the brown
19 house, what time did you go to work March 20th of 2000?
- 20 A If you're going to let me know what day that falls on.
- 21 Q Was your husband handcuffed to you?
- 22 A No.
- 23 Q No. You weren't with your husband every minute of
24 every day, were you?
- 25 A No.

Jeanette Fitch
Cross-examination by Mr. Leibert

- 1 Q You don't know what time you left or got home on every
2 single day that they lived there, do you?
- 3 A When I'm at work from 5:00 to 1:30 it takes me half an
4 hour to drive, 45 minutes depending on the traffic.
- 5 Q But you don't know March the 21st of 2000, do you?
- 6 A Because I don't know what day that is.
- 7 Q Or April or May or June of 2000, do you?
- 8 A If it's a week day and I did not have a vacation --
- 9 Q And you don't know what your husband worked March,
10 April, May, June, July, August, September, October of 2000,
11 do you?
- 12 A He works every day he can.
- 13 Q You don't know the time he left and the time he got
14 home on each single day, do you, just like you don't know
15 what he wore every one of those days, do you?
- 16 A No.
- 17 Q You don't know what he had for breakfast any of those
18 days, do you?
- 19 A Yes. He eats rice cakes for breakfast every morning.
- 20 Q Do you know what he got for lunch every day?
- 21 A No.
- 22 Q What week was spring break in the year 2000?
- 23 A I have no idea.
- 24 Q When were the teacher work days in school year 2000
25 and 2001?

Jeanette Fitch
Redirect examination by Mr. Brannon

1 A I have no idea for either one.

2 Q Which specific days did you go to Wal-Mart with that
3 lady?

4 A I don't know.

5 MR. LEIBERT: That's all I have, Your Honor. Thank
6 you.

7 REDIRECT EXAMINATION

8 BY MR. BRANNON

9 Q Ms. Fitch, if March the 24th was a Wednesday -- March
10 the 24th of 2004, if it was a Wednesday, what hours were
11 you working?

12 A 5:00 to 1:30.

13 Q Thank you, ma'am.

14 And if March the 24th was a day that you had a vacation
15 would you have gone some place without your husband?

16 A No.

17 Q Would you have gone some place without your children?

18 A No.

19 Q Ma'am, when is the last time you took a vacation and
20 Dave Fitch didn't go with you?

21 A Never.

22 Q Unless you weren't married, right?

23 A Unless we weren't married.

24 Q Okay. Have you taken vacations without your sister?

25 A Yes.

Annette Fitch
Direct examination by Mr. Brannon

1 Q Okay. All right. Let's say that sometime in March of
2 2004 there was a spring break. Where would the kids have
3 been?

4 A They would have been home.

5 Q With who?

6 A With -- if Audrey is not working, then with her. Then
7 with mother or father. And if we didn't have a babysitter,
8 then I would take my vacation.

9 Q Okay. But just because there was spring break in
10 March of '04, that doesn't mean that Dave Fitch took the
11 time off, does it?

12 A No. Dave does not have paid vacation.

13 Q All right. I don't have anything further. Thank you.

14 MR. LEIBERT: Nothing further.

15 THE COURT: You may step down.

16 MR. BRANNON: Annette Fitch.

17 ANNETTE FITCH, having been
18 first duly sworn, testified as follows:

19 DIRECT EXAMINATION BY MR. BRANNON

20 MR. BRANNON: May it please the Court, Your Honor.

21 THE COURT: Yes.

22 Q Ma'am, your name, please.

23 A Annette Fitch.

24 Q Okay. Now, you're going to have to talk loud so these
25 people can hear you. Okay. If you need to pull that

Annette Fitch
Direct examination by Mr. Brannon

- 1 microphone up, just go ahead and do that.
- 2 Okay. Say your name again.
- 3 A Annette Fitch.
- 4 Q Okay. Who's your mama?
- 5 A Jeanette Fitch.
- 6 Q Okay. And who's your daddy?
- 7 A David Fitch.
- 8 Q Okay. Your cousin is ✓ , is that right?
- 9 A Yes, it is.
- 10 Q Okay. You've got another cousin named Brandon.
- 11 A Yes.
- 12 Q And Aunt Audrey.
- 13 A Yes.
- 14 Q Okay. All right. Tell me about your relationship
- 15 with ✓ today.
- 16 A We don't have a relationship. She's normally just
- 17 around.
- 18 Q Just around.
- 19 A Like when I go see my grandma, she may be there, but I
- 20 never talk to her.
- 21 Q Okay. When did you become aware of the allegations
- 22 that ✓ made about your daddy?
- 23 A When -- right when mom did. I'm not exactly sure.
- 24 Q Was it sometime pretty shortly after that doctor's
- 25 appointment?

Annette Fitch

Direct examination by Mr. Brannon

- 1 A Yeah.
- 2 Q Okay. All right. Now, we're going to go back to
- 3 that. Did you go to see Dr. McGee in March of 2004?
- 4 A Yes.
- 5 Q Why did you go to the doctor?
- 6 A I become a teenager and mom wanted me to get checked
- 7 out.
- 8 Q Okay. Do you remember meeting V in the doctor's
- 9 office?
- 10 A Yes.
- 11 Q Where did you meet?
- 12 A In the lobby.
- 13 Q Okay. Were you going in or coming out? How did you
- 14 meet there?
- 15 A She was coming out of her exam as I was going into
- 16 mine.
- 17 Q Was she crying?
- 18 A No.
- 19 Q Was she mad?
- 20 A Uh-uh.
- 21 Q What did she say to you, if anything?
- 22 A She just said that it was really embarrassing and that
- 23 she hated it.
- 24 Q Okay. Wasn't crying.
- 25 A Uh-uh.

Annette Fitch
Direct examination by Mr. Brannon

- 1 Q Wasn't mad. And did she -- was she shy or afraid to
2 talk to you?
- 3 A No.
- 4 Q Just walked up and spoke to you.
- 5 A Yeah.
- 6 Q Okay. All right. Sometime right around that doctor's
7 appointment did you have a slumber party?
- 8 A Yes.
- 9 Q Who was at that slumber party?
- 10 A I had about five or six friends and V .
- 11 Q And V .
- 12 A And V .
- 13 Q Did V . spend the night?
- 14 A No, she did not.
- 15 Q Did she want to?
- 16 A Yes.
- 17 Q Did she beg to stay?
- 18 A Yes.
- 19 Q Okay. But she was there.
- 20 A Yes.
- 21 Q Just didn't spend the night, right?
- 22 A Uh-huh.
- 23 Q And it was right around the time of that doctor's
24 appointment, right?
- 25 A That's correct.

Annette Fitch
Direct examination by Mr. Brannon

1 MR. LEIBERT: I ask that he not lead.

2 THE COURT: Don't lead her.

3 MR. LEIBERT: We can hear the testimony of the
4 witness.

5 Q Was it around the time of the doctor's appointment?

6 A Yes, it was right around the time.

7 Q All right. Before the doctor's appointment and that
8 time right after it when you learned of these allegations,
9 did V ever say anything about your dad to you?

10 A No, she did not.

11 Q Did she ever display any fear to you?

12 A No, she did not.

13 Q When she would be at your home did she look to be
14 happy?

15 A Yes.

16 Q Now, you're about a year older than V, right?

17 A Yes, I am.

18 Q Can you tell this jury that there was ever a time that
19 V was alone with your dad?

20 A No, there was not.

21 Q Okay. Now, were you home sometimes when maybe your
22 mom and your aunt were gone?

23 A Yes.

24 Q Who else would be there?

25 A V and Brandon.

James H. Jones
Direct examination by Mr. Brannon

1 Q Okay. Were there times when ✓ and Brandon and
2 your grandparents were there?

3 A Yes, there was.

4 Q Okay. All right. I don't have anything further.

5 MR. LEIBERT: No questions.

6 THE COURT: You may step down.

7 MR. BRANNON: Your Honor, may I step out and see which
8 witness is here?

9 THE COURT: Yes.

10 (Pause.)

11 JAMES H. JONES, having been
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION BY MR. BRANNON

14 MR. BRANNON: May it please the Court.

15 THE COURT: Yes.

16 Q Sir, please state your full name for the record.

17 A James H. Jones.

18 Q Have I ever met you before?

19 A No, sir.

20 Q Would you please tell the jury how you know Mr. Fitch?

21 A Mr. Fitch works for my company. I am the co-owner and
22 president of Action Building Company. He's been an
23 employee for over ten years.

24 Q Over ten years. Sir, do you trust him with your
25 business?

Glenda Ivey
Direct examination by Mr. Brannon

1 A Totally.

2 Q Do you trust him with your customers?

3 A Completely.

4 Q Are you aware of the allegations that have been made
5 against him?

6 A Somewhat, not in detail.

7 Q All right. Sir, based on what you know of the
8 allegations is it -- do you think that there's any way that
9 he's that kind of person?

10 A If Dave said it didn't happen, it didn't happen. I
11 trust him that completely.

12 MR. BRANNON: Nothing further, Your Honor. Thank you.

13 MR. LEIBERT: No questions, Your Honor.

14 THE COURT: You may step down.

15 GLENDA IVEY, having been duly
16 sworn, testified as follows:

17 DIRECT EXAMINATION BY MR. BRANNON

18 Q Ma'am, please state your full name for the record.

19 A Glenda Ivey.

20 Q Glenda Ivey. And how do you -- do you know Dave
21 Fitch?

22 A Yes, I do.

23 Q Do you know his wife?

24 A Yes, I do.

25 Q And Annette?

Glenda Ivey
Direct examination by Mr. Brannon

- 1 A Yes.
- 2 Q Okay. And you know the baby, right?
- 3 A Yes.
- 4 Q Tell me how you know the Fitches.
- 5 A Annette went to school with my children.
- 6 Q Okay. And has your relationship gone beyond that of
- 7 an acquaintance at this point?
- 8 A Yes. I would think we're friends.
- 9 Q Okay. You also babysit for them too, don't you?
- 10 A Yes, I do.
- 11 Q Okay. You keep the baby, right?
- 12 A The baby.
- 13 Q Ma'am, do you know what shift Dave Fitch works?
- 14 A First shift.
- 15 Q First shift. And what time does he leave and get
- 16 home, do you know?
- 17 A I know that he usually leaves for work around
- 18 7:00 because he's dropped the baby off before.
- 19 Q Okay. So he's brought the baby to your house from
- 20 time to time.
- 21 A Yes, sir.
- 22 Q And do you have any idea what time he gets home from
- 23 work?
- 24 A I think around 3:30 or 4:00.
- 25 Q Okay. All right. You have a daughter as well,

Glenda Ivey
Direct examination by Mr. Brannon

1 correct?

2 A Yes, sir, I do.

3 Q And what is that daughter's name?

4 A Sara.

5 Q Okay. And Sara and Annette are friends, right?

6 A Yes, sir.

7 Q Do you, Sara and Annette spend nights together from
8 time to time?

9 A Yes, sir.

10 Q Annette at your house?

11 A Yes, sir.

12 Q Sara at her house?

13 A Yes, sir.

14 Q All right. Ma'am, were you made aware of the
15 allegations against Dave?

16 A Yes, sir.

17 Q Did you still trust your daughter or trust him with
18 your daughter spending the night at his house?

19 A Yes, sir.

20 Q Ma'am, how long have you known Dave Fitch?

21 A About five years.

22 Q Okay. Based on your knowledge of him and your
23 friendship, did you have any reason to be fearful of your
24 daughter spending the night over there?

25 A No, sir.

Glenda Ivey
Cross-examination by Mr. Leibert

1 Q Do you think there's any way he's capable of doing
2 this is -- what has been alleged against him?

3 A No, sir.

4 Q You trust your daughter over there.

5 A Yes, sir.

6 MR. BRANNON: Your Honor, I have nothing further.

7 CROSS-EXAMINATION

8 BY MR. LEIBERT

9 Q When was your daughter over there?

10 A Sir?

11 Q When was your daughter -- she was never alone with
12 him, was she?

13 A She was over there.

14 Q Not alone though.

15 A Oh, I don't know. I have never asked her.

16 Q You wouldn't permit him to be alone with her, would
17 you?

18 A With Dave with my daughter, yes.

19 Q You didn't hear the doctor testify, did you?

20 A No, sir.

21 Q You weren't in here.

22 MR. BRANNON: Objection, Your Honor. I move to strike
23 that.

24 THE COURT: Overruled.

25 Q Did you know them when they were at the brown house?

Sara Ivey
Direct examination by Mr. Brannon

1 A Briefly. I didn't know them that well.

2 Q Were you ever with Dave and V out in the woods at
3 the brown house?

4 A No, sir.

5 Q Were you ever out at the go-cart at their current
6 house with V and Dave?

7 A No.

8 Q Okay. Thank you.

9 MR. BRANNON: No followup, Your Honor.

10 THE COURT: You may step down.

11 SARA IVEY, having been first
12 duly sworn, testified as follows:

13 DIRECT EXAMINATION BY MR. BRANNON

14 MR. BRANNON: May it please the Court, Your Honor.

15 THE COURT: Yes, sir.

16 Q Ma'am, you are Sara Ivey.

17 A Yes.

18 Q How old are you?

19 A I'm 18 years old.

20 Q Okay. Are you friends of Annette Fitch?

21 A Yes, I am.

22 Q Okay. Do you know her dad?

23 A Yes, I do.

24 Q Ma'am, has he ever been in any way inappropriate with
25 you?

Sara Ivey
Cross-examination by Mr. Leibert

1 A No, never.

2 Q Has he ever tried to touch you in any way?

3 A No.

4 Q Are you afraid of him?

5 A No.

6 Q All right. Does he appear to you to be a good dad to
7 Annette?

8 A Yeah. He's a very good dad.

9 Q Okay. You're not afraid of him?

10 A No.

11 Q Have you spent the night at his house?

12 A Many times I have.

13 Q Okay. With Annette?

14 A Uh-huh.

15 MR. BRANNON: I have no further questions, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. LEIBERT

18 Q Never been alone with him though, have you?

19 A Excuse me?

20 Q Never been alone with Mr. Fitch, have you?

21 A No.

22 Q Thank you.

23 THE COURT: You may step down.

24 MR. BRANNON: Followup, Your Honor.

25

Sara Ivey
Redirect examination by Mr. Brannon

1 REDIRECT EXAMINATION

2 BY MR. BRANNON

3 Q Would you be afraid to be alone with him?

4 A No, never.

5 Q Thank you. I'm done. Thank you.

6 THE COURT: You may step down.

7 MR. BRANNON: The defense rests. Excuse me. That's
8 not true. Dave Fitch.

9 DAVID FITCH, having been first
10 duly sworn, testified as follows:

11 DIRECT EXAMINATION BY MR. BRANNON

12 MR. BRANNON: May it please the Court.

13 THE COURT: Yes.

14 Q Sir, you are Dave Fitch.

15 A Yes, I am.

16 Q You've been charged with three different crimes,
17 right?

18 A Yes.

19 Q All of them relating to your niece V , is that
20 correct?

21 A That's correct.

22 Q Sir, have you ever touched V in a sexual manner?

23 A No, I have not.

24 Q Have you ever seen her without her clothing on?

25 A Just when she was a baby.

Dave Fitch

Direct examination by Mr. Brannon

1 Q Okay. From the time she's been ten to the present
2 have you seen her with no clothes on?

3 A No, I have not.

4 Q Have you had sex with V ?

5 A No, I have not.

6 Q Okay. Sir, at some point did you move from the state
7 of Kentucky to the state of South Carolina, and
8 specifically Spartanburg County?

9 A Yes, I did.

10 Q When you moved from Kentucky to South Carolina, who
11 came with you?

12 A My wife, my daughter Annette, Audrey, Brandy and
13 V and Brandon.

14 Q Who is Randy ?

15 A That's Audrey's husband.

16 Q Okay. All right. Did you live in an apartment?

17 A Yes, we did.

18 Q About how long?

19 A A year, or maybe just a little more.

20 Q Okay. Then did you move into the brown house?

21 A Yes, we did.

22 Q Are these pictures of the brown house?

23 A Yes.

24 Q Okay. Did you ever see that old blue car out in the
25 back of the brown house?

Dave Fitch

Direct examination by Mr. Brannon

- 1 A Yes, I did.
- 2 Q Did you ever have sex with V on that blue car?
- 3 A No, I did not.
- 4 Q Sir, where is the blue car in relation to the brown
5 house?
- 6 A It's out in the woods.
- 7 Q Okay. Do you own the blue car?
- 8 A No, I do not.
- 9 Q Did you own the woods?
- 10 A No, I did not.
- 11 Q Did you own the brown house?
- 12 A No, I did not.
- 13 Q Did you put the blue car in the woods?
- 14 A No, I did not.
- 15 Q Okay. Was there a rule about kids in the woods?
- 16 A Yes, there was.
- 17 Q What was the rule?
- 18 A Not to go in the woods because there might be snakes
19 or other animals, or there was a lot of glass. We didn't
20 want them in the woods.
- 21 Q Okay. All right. After you moved from Kentucky did
22 you get a job?
- 23 A Yes, I did.
- 24 Q Where?
- 25 A Through a temporary service to start with.

Dave Fitch
Direct examination by Mr. Brannon

1 Q Okay. And how long did you have that job?

2 A Over a year.

3 Q Okay. And then, and then what did you do?

4 A Then I, I got on with Action Building Company.

5 Q The company that you work for today, is that correct?

6 A Yes.

7 Q All right. What shift do you work as a, an employee
8 of Action Building?

9 A I work from 7:00 to 3:30.

10 Q Okay. And is that Monday through Friday?

11 A Sometimes on Saturday also.

12 Q Okay. All right. Did you or were you ever the
13 primary babysitter for : ✓ and Annette and Brandon?

14 A No, I was not.

15 Q Okay. Can you point to a time, any time, that it was
16 you and ! ✓ alone since you have moved from Kentucky to
17 South Carolina?

18 A No.

19 Q All right. Was there ever a time that your wife and
20 her sister said we're going to Wal-Mart, we're leaving
21 : ✓ here with you?

22 A It was not just ✓ . All three kids were together
23 at all times.

24 Q All right. Were there also times that your in-laws
25 were there?

Dave Fitch
Cross-examination by Mr. Leibert

1 A There was.

2 Q And was there also times that Mr. was there?

3 A There was.

4 Q Okay. Sir, did you have sex with your niece?

5 A No, I did not.

6 Q Did you touch her?

7 A No, I did not.

8 Q Mr. Leibert is going to ask you some questions. Okay?

9 A Okay.

10 CROSS-EXAMINATION

11 BY MR. LEIBERT

12 Q There were times when you were there alone with the
13 three children, correct?

14 A That's correct.

15 Q March of 2000 you were alone with the children.

16 A I don't know if I was there March of 2000 or not.

17 Q When you moved into the blue house, there were times
18 that your wife left and didn't take you with her, isn't
19 that true?

20 A That may be true.

21 Q Were you handcuffed to your wife, sir?

22 A No, sir, I was not.

23 Q Your wife didn't -- or she didn't watch you every
24 second of every day, did she?

25 A No, she did not.

Dave Fitch
Cross-examination by Mr. Leibert

- 1 Q And this blue car is out in the woods behind the brown
2 house, isn't it?
- 3 A As far as I know, it still is.
- 4 Q Are you saying you never went out there?
- 5 A I did go out there.
- 6 Q March of 2000 you went out there.
- 7 A I don't know if I did March of 2000 or not, sir.
- 8 Q After you moved in the house you went back to the
9 woods with this car, didn't you?
- 10 A I don't know, sir.
- 11 Q You knew the car was there after you moved there.
- 12 A I did.
- 13 Q You went to the car and got parts off it at times,
14 didn't you?
- 15 A Yes, I did.
- 16 Q So you took your niece out there, and you said I can
17 do this because nobody's allowed to come back here, right?
- 18 A I did not take my niece out there.
- 19 Q And then you fondled her breasts, didn't you?
- 20 A No, sir.
- 21 Q Said don't tell anybody because nobody'll believe you
22 anyway.
- 23 A I did not do that, sir.
- 24 Q And then you jerked your pants off and stuck your
25 penis in her.

Dave Fitch
Redirect examination by Mr. Brannon

1 MR. BRANNON: Objection. Argumentative, Your Honor.

2 MR. LEIBERT: It's a simple question.

3 THE COURT: Overruled.

4 Q You jerked your pants off and stuck your penis in her
5 vagina, didn't you?

6 A No, sir, I did not.

7 Q Thank you.

8 REDIRECT EXAMINATION

9 BY MR. BRANNON

10 Q Did you even live in the brown house in March of '04?

11 A I don't think so.

12 Q Okay. And you've heard all of the testimony in this
13 case, haven't you?

14 A Yes, I have.

15 Q And in Tabitha Webber's report it says the last time
16 it occurred was about a year ago, right?

17 A That's right.

18 Q So what does March of '04 have to do with anything
19 except a doctor's appointment?

20 A I don't know.

21 Q Sir, have you been alone, have you been -- have you
22 seen Rachel since she made these allegations?

23 A Just in a car one day passing.

24 Q Like that.

25 A Like that. And I didn't know who she was.

Dave Fitch
Recross-examination by Mr. Leibert

1 Q Nothing further.

2 RECROSS-EXAMINATION

3 BY MR. LEIBERT

4 Q I apologize if I said it wrong. My questions were as
5 to March of 2000. The answer is the same as to March of
6 2000 that you gave me. March of 2000.

7 A What was the question again?

8 Q You were in the brown house in March of 2000.

9 A Yes. That sounds right.

10 Q The blue car was back there.

11 A It could have been.

12 Q All of my questions are March of 2000. The date,
13 everybody was there then.

14 A As far as I know.

15 Q And there were times that your wife wasn't there,
16 correct?

17 A Correct.

18 Q And you were there just with the children.

19 A Correct, but not alone with one certain child.

20 Q The children did what you told them, didn't they?

21 A No, they didn't.

22 Q "Annette, go to your room. Okay. Daddy, no. Daddy,
23 I am not." Is that what happened?

24 A They wouldn't always mind. They were children.

25 Q Thank you, sir.

1 MR. BRANNON: Nothing further, Your Honor.

2 THE COURT: You may step down.

3 MR. BRANNON: No. We rest, Your Honor.

4 THE COURT: Any reply?

5 MR. LEIBERT: May we approach?

6 (Bench conference held off the record in the presence
7 of the jury but out of the hearing of the jury.)

8 THE COURT: All right. Ladies and gentlemen, I've got
9 a couple of matters to address.

10 I'll ask you to please go to your jury room. Do not
11 yet discuss the case. I'll bring you back shortly.

12 (The following takes place outside the presence of the
13 jury.)

14 MR. LEIBERT: Your Honor, we'll discuss it here if
15 that's all right.

16 THE COURT: Yes. I am going to take a break. We'll
17 be in recess for ten minutes.

18 (Whereupon, a recess was taken.)

19 THE COURT: Is the state going to have any reply?

20 MR. LEIBERT: No, sir, Your Honor.

21 THE COURT: All right. Do you want to renew your
22 motions?

23 MR. BRANNON: No, Your Honor.

24 THE COURT: Okay. Bring the jury in.

25 (The following takes place in the presence of the

1 jury.)

2 THE COURT: Any reply, Mr. Leibert?

3 MR. LEIBERT: No, sir, Your Honor.

4 THE COURT: All right. Ladies and gentlemen, that is
5 all of the testimony or other evidence to be offered in the
6 trial of the case, and therefore what remains to be done
7 are the lawyers' final summations, after which I will
8 instruct you on the law. And then you'll begin
9 deliberations.

10 Now, I've got some other matters I need to address
11 this afternoon, and so we're not going to be able to get
12 through all of that today. So we're going to excuse you
13 now.

14 We will conclude in the morning beginning at 9:30 with
15 the lawyers' summations, my instruction on the law and your
16 deliberations.

17 So keep in mind during the overnight recess you're
18 still not permitted to discuss the case in any fashion
19 whatsoever with any person whatsoever. Don't allow anyone
20 to try to discuss the case with you.

21 Don't conduct any research or do your own
22 investigation into any issue that might have arisen during
23 the trial, and don't permit yourselves to be exposed to any
24 type of media coverage should there be any, whether it be
25 television, radio or newspaper.

1 Do have a good evening. And we'll see you in the
2 morning at 9:30. Please report to your jury room at that
3 time.

4 (The following takes place outside the presence of the
5 jury.)

6 THE COURT: Any instruction requests from the state?

7 MR. LEIBERT: Your Honor, the only one that I would
8 ask for, and I don't remember, and I think it may be
9 included in your charge, is Code of Law 16-3-657, the
10 testimony of the victim need not be corroborated.

11 And maybe just on the safe side there's a case from
12 Greer hospital system that a minor under the age of 16
13 cannot consent to a sexual battery. But I think that's in
14 your part of your charge too I believe. Those are the only
15 two requests I would have.

16 THE COURT: Okay. Any objection to those,
17 Mr. Brannon?

18 MR. BRANNON: No, Your Honor. And I'm sure that
19 you're going to do this, but the definition of a sexual
20 battery, include that, Your Honor.

21 THE COURT: I will. Any other requests?

22 MR. LEIBERT: No, sir, Your Honor.

23 MR. BRANNON: No, Your Honor.

24 THE COURT: All right. Court is in recess until
25 9:30 in the morning.

1 MR. BRANNON: Your Honor, my client will stay here
2 until I provide that fax to you.

3 THE COURT: Yeah.

4 Mr. Ennis, he will be in custody until Mr. Brannon
5 verifies his bond with me. If you'll just keep him up here
6 it should be --

7 MR. BRANNON: I'm hoping -- I'm going to run across
8 the street.

9 THE COURT: She'll be here in just a few minutes. If
10 you don't mind, just keep him up here. And I'll talk to
11 you in a minute.

12 MR. BRANNON: Thank you, Your Honor.

13 END OF PROCEEDINGS MAY 21, 2008
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1 (Proceedings May 22, 2008

2 (The following takes place outside the presence of the
3 jury.)

4 THE COURT: All right. Are we ready for the jury?

5 MR. LEIBERT: Yes, sir, Your Honor.

6 THE COURT: Okay. Bring them in.

7 (The following takes place in the presence of the
8 jury.)

9 MR. BRANNON: Your Honor, here is that letter I got
10 late yesterday evening. Do you want me to make that a
11 court's exhibit?

12 THE COURT: No.

13 (The following takes place in the presence of the
14 jury.)

15 THE COURT: Good morning, ladies and gentlemen.

16 As you know, when we recessed yesterday all of the
17 evidence had been received. And so what remains to be done
18 are the lawyers' final summations, after which I'll
19 instruct you on the law. And then you'll begin with your
20 deliberations in the case.

21 So please give the lawyers your attention now as they
22 you their opening statements.

23 We'll start with the state. Mr. Leibert goes first,
24 followed by Mr. Brannon, and then Mr. Leibert gets to make
25 a reply argument.

Closing arguments

1 Mr. Leibert.

2 MR. LEIBERT: May it please the Court, Your Honor.

3 THE COURT: Yes, sir.

4 MR. LEIBERT: Mr. Brannon.

5 Ladies and gentlemen, I'm going to talk to you about a
6 minute. I get to open on the law. And I want to read the
7 law to you again like I did a couple of days ago.

8 We have three very distinct offenses here that the
9 defendant is on trial for. So I'm going to read it to you
10 again.

11 There is criminal sexual conduct with a minor in the
12 first degree. And it's about age. So this is the
13 definition.

14 A person is guilty of criminal sexual conduct with a
15 minor in the first degree if the actor or the defendant
16 engages in a sexual battery with a victim who is less than
17 11. And you will see that V was born May the 10th of
18 1990. She was 11 on May the 10th of 2001.

19 The first indictment goes from March of 2000 until the
20 day before her 11th birthday, which would have been May the
21 9th of 2001.

22 The second distinct offense is criminal sexual conduct
23 with a minor in the second degree. That is defined as the
24 actor or the defendant engages in sexual battery with a
25 victim who is 14 years of age but less than 11 years of

Closing arguments

1 age. But you have to be at least 11.

2 So the second indictment that you will deliberate on
3 goes from her 11th birthday until right before she was 13.

4 Sexual battery is defined as follows, and His Honor
5 will give you this definition I believe.

6 Sexual battery means sexual intercourse, cunnilingus,
7 fellatio, anal intercourse or any intrusion, however
8 slight, of any part of a person's body or any object into
9 the genital or anal openings of another person's body
10 except when such intrusion is accomplished for medically
11 recognized treatments.

12 The third and distinct offense is lewd act. Fondling
13 is another way to say lewd act. That is from when she was
14 nine years and ten months old, March of 2000, until 2002, I
15 believe in the indictment. It was before she turned 13.

16 With that you have to be less than 16. I have to
17 prove that the defendant was over 14. And that's why if
18 you're wondering why we asked the detective the age of the
19 defendant, I have to prove that he was over 14 because
20 here's the definition of lewd act.

21 It is unlawful for a person over the age of 14 years
22 to wilfully and lewdly commit or attempt a lewd and
23 lascivious act upon or with the body or its parts of a
24 child under the age 16 years with the intent of arousing,
25 appealing to or gratifying the lusts.

Closing arguments

1 I've got to catch my breath. I'm sorry.

2 May I start over?

3 THE COURT: Sure.

4 MR. LEIBERT: It is unlawful -- I am sorry. Can
5 everybody hear me?

6 It is unlawful for a person over the age of 14 years
7 to wilfully and lewdly commit or attempt to commit a lewd
8 or lascivious act upon or with the body or its parts of a
9 child under the age of 16 years with the intent of
10 arousing, appealing to or gratifying the lusts or passions
11 or sexual desires of the person or of the child.

12 Mr. Brannon will now give his closing argument, and
13 then I'll get up and give my closing argument. Thank you,
14 ladies and gentlemen.

15 MR. BRANNON: May it please the Court.

16 THE COURT: Mr. Brannon.

17 MR. BRANNON: Mr. Leibert.

18 Ladies and gentlemen of the jury, I would first like
19 to take the opportunity to thank you for your patience and
20 your attention to this very serious matter.

21 Anybody that's ever taken a public speaking course or
22 those of us who attended law school, we're taught that when
23 you want to make a point, the person that you are trying to
24 impress needs to hear something three times.

25 In my opening argument I said some things. And within

Closing arguments

1 that opening argument if you remember it, that would have
2 been the first time that you heard some of those things.

3 The second time that you would have heard some of
4 those things was from the witness stand here and the
5 different witnesses that testified.

6 The third time for you to hear those things is now.

7 Now, some of them you're going to hear four and five
8 times. The judge is going to tell you what the law in this
9 case is. He's going to tell you all kinds of things that
10 will control your deliberation in this matter. So some of
11 them you may hear four and five times.

12 But I first want to start with the things that I
13 mentioned in my opening argument.

14 In this case what you have is a victim, V, an
15 alleged victim, saying that my client, David Fitch,
16 assaulted her, sexually assaulted her. And you have my
17 client taking the witness stand and saying he didn't, it
18 never happened.

19 I told you in my opening argument you were going to
20 hear a doctor get on the witness stand and that she was
21 going to testify that the victim did not have a hymen. You
22 heard her get on the witness stand and say it.

23 But in cross-examination I was able to get the doctor
24 to admit to you that there are some women that are born
25 without a hymen. She also told you that lack of a hymen is

Closing arguments

1 not indicative of a woman having lost her virginity. A
2 hymen can disintegrate as a result of athletic activity or
3 accident.

4 So the fact that V on March the 18th of 2004 had
5 no hymen is not indicative of anything. So says Dr. McGee.
6 It's what I told you in my opening argument.

7 V took the witness stand. She testified that
8 when she first moved from Kentucky to South Carolina they
9 lived in the brown house.

10 Ladies and gentlemen, every other witness that took
11 the witness stand that knows anything about the family's
12 move from Kentucky to South Carolina told you that V
13 was wrong. They moved as a group of seven into an
14 apartment and lived in that apartment for nearly a year.
15 I V was wrong with where they moved to.

16 If you remember, I asked V who moved from
17 Kentucky with her. She said her mom, her brother, her
18 uncle, her aunt and her cousin Annette.

19 V didn't remember that Mr. Goble, her dad, moved
20 from Kentucky with them and lived here for that first year
21 that they lived in the apartment.

22 V met with Tabatha Weber, pretty red-headed lady,
23 forensic interviewer. And she disclosed to Tabitha the
24 same allegations that she made to Dr. McGee and to the
25 police investigator.

Closing arguments

1 In that report, in Tabitha Weber's report, it was
2 dated June of '04 -- in Tabitha Weber's report √ said
3 the last time she was assaulted was a year before that. A
4 year before June of '04 would be June of '03.

5 When she got on the witness stand -- keep in mind she
6 was 14 years of age in 2004. Given what she told Tabitha
7 Weber, the last time that she alleges my client touched her
8 she would have been 13 years of age. But yesterday sitting
9 on this witness stand she said, oh, no, it happened when
10 she was 15 or 16.

11 Her mother got on the witness stand and testified that
12 she had not allowed her daughter to be with Mr. Fitch since
13 she learned of the allegations.

14 √ can't remember or was very confused about her
15 dates. √ said that she was alone with Mr. Fitch on a
16 number of occasions, but yet many, many witnesses got on
17 the witness stand -- Annette, Jeanette Fitch, Dave. They
18 got on the witness stand and told that, no, they weren't
19 alone.

20 Even when Audrey, her mother, √'s mother, and
21 Jeanette went to Wal-Mart there were still three or five
22 people at the house. It didn't happen. It just didn't
23 happen.

24 And if you remember, ladies and gentlemen, Audrey
25 said that she typically went to Wal-Mart with

Closing arguments

1 Jeanette, Dave's wife, after work. They worked second
2 shift. They were going to Wal-Mart about midnight.

3 V's own statement was every time she alleges
4 something happened it was during the day. It didn't happen
5 at 1:00 or 2:00 in the morning. It was during the day that
6 she says it happened. They were going to Wal-Mart at
7 midnight.

8 Mr. Leibert tried to confuse Jeanette by saying you
9 don't know what day March the 24th was and you don't know
10 where you were. But what she said, what she said
11 steadfast, was if March the 24th was a Wednesday and I
12 wasn't on vacation, I was at work from 5:30 in the morning
13 until 1:00 o'clock in the afternoon.

14 No, I don't know what day March the 24th of 2004 was.
15 But if it was a Wednesday or if it was a Tuesday and I
16 wasn't on vacation, I was at work from 5:30 to 1:00
17 o'clock.

18 Dave Fitch worked from 8:00 to 5:00. He worked the
19 most standard work shift. There was always people in the
20 home, always people in the home.

21 Ladies and gentlemen, I know that y'all watch T. V.
22 and you see C. S. I. and you see those shows and, you know,
23 you've heard about D. N. A. evidence.

24 Ladies and gentlemen, the state has the burden in this
25 case to prove beyond a reasonable doubt that Dave Fitch did

Closing arguments

1 something to V .. There's no D. N. A. evidence.

2 There's no blood evidence.

3 If you remember, Dr. McGee wrote in her notes there
4 were no lesions to the vaginal area of V . Remember,
5 she was sitting right here and I said there were no
6 bruises, right, there were no tears, right. And she said,
7 yes, that's right. She wrote that in her note.

8 I want to talk to you a little bit more about Dr.
9 McGee. Dr. McGee being a medical doctor is what's called a
10 mandatory reporter. If Dr. McGee believes that a person
11 has been sexually assaulted, she has an obligation under
12 the law to report that immediately, immediately.

13 Dr. McGee said that V was shy and timid and that
14 it took about three visits to get V to the point where
15 she would allow her to examine her.

16 Ladies and gentlemen, the third visit was March the
17 18th of 2004. That was the third visit. That's when
18 V was comfortable enough with her doctor to allow Dr.
19 McGee to examine her.

20 And on that date there were no lesions, there were no
21 tears, there were no bruises. And Dr. McGee waited 60 days
22 to report, 60 days to do what she is obligated under the
23 law to do immediately.

24 Was Dr. McGee lapse? Was she -- did she fail in her
25 duty? Maybe. But you know what it could be? Maybe she

Closing arguments

1 didn't believe it. Maybe she didn't believe it.

2 And, ladies and gentlemen, that maybe-she-
3 didn't-believe-it is one of those points where you got to
4 go, hum. Reasonable doubt.

5 Ladies and gentlemen, on March the 18th Dr. McGee
6 performed that examination, that third examination, on
7 ✓ . It wasn't until May the 24th that she reported it.
8 But she is a mandatory reporter.

9 I think the last and most important point that I want
10 you to hear for the third time is that ✓ didn't make
11 the allegation of sexual abuse by my client until the day
12 that the doctor told her in front of the mother that she
13 wasn't a virgin. The doctor told her the hymen was gone.
14 It's at that point that she made an allegation against my
15 client.

16 I told you you were going to hear that in the opening
17 argument. And then the most important time that you heard
18 that was when ✓ was sitting in this chair right here.
19 And I said you didn't make this allegation until the doctor
20 told you. And she said that's right.

21 She didn't tell. She didn't say anything about Dave
22 Fitch until she was put in a position in a doctor's
23 examination room with her mother present. That's when the
24 allegation was made; that's when the allegation was made.

25 Ladies and gentlemen, this case boils down to a girl

Closing arguments

1 saying it happened and a man saying it didn't happen.

2 There were other witnesses, but this investigator, she
3 didn't know anything other than what she was told. She
4 didn't see anything. She wasn't there. She told you that.

5 Tabitha Weber. She wasn't there. She didn't know
6 anything more than what she was told by the child and by
7 the child's mother.

8 Dr. McGee doesn't know anything more than
9 scientifically what she showed you on that diagram and what
10 : √ told you. She doesn't know any more than what she
11 was told.

12 I want to go back to Tabitha Weber for just a minute.
13 She is what's called a forensic interviewer. And what that
14 means is that she's trained to ask questions. But before
15 her training kicks in and she can know what questions to
16 ask, she has to have other records and other information.

17 And she told you that she talked with Audrey on
18 the same day that she talked with √ for the first
19 time. She also had the incident report, and may have had
20 medical reports before she talked to √ .

21 So, you see, Tabitha Weber is trained to ask
22 questions, but she asked those questions based on
23 information that she had gained from other sources. So she
24 knew. She was going in a direction. She was headed to a
25 point, and that point was to get this allegation and put it

Closing arguments

1 in writing.

2 She had information given to her by Audrey and by the
3 police officer and by the doctor. It was like a road map.
4 She knew where she wanted to go. And once she got there,
5 she was the state's witness that testified that V told
6 her something. But V had already gotten on the
7 witness stand and told you the same thing.

8 Ladies and gentlemen, V didn't allege anything
9 against my client until Dr. McGee called her out in the
10 examination room.

11 Audrey has another child named Brandon. Brandon
12 has continued to have a relationship with his Aunt
13 Jeanette, his Uncle Dave and his cousins, Annette and the
14 baby. He has continued to go to their house to spend the
15 night at their house.

16 I'm sorry. But if I believed that a man had touched
17 my child inappropriately, or one of my children, I sure as
18 the world wouldn't have let my other child go to his house.
19 But it continued. It continued. And then you heard the
20 testimony that she didn't want you to hear that Brandon was
21 spending the night over there, so she said no the last
22 time.

23 Ladies and gentlemen, the judge is going to tell you
24 all of the laws that pertain to this case. But most
25 importantly, ladies and gentlemen, when the judge told you

Closing arguments

1 earlier in this case all defendants are innocent until you
2 say that the state has met its burden, until you say Mr.
3 Leibert has proved beyond a reasonable doubt that Dave
4 Fitch is guilty. So as he sits in that chair over there
5 right now he is an innocent man.

6 Ladies and gentlemen, that reasonable doubt, again, is
7 the doubt that would cause a reasonable person to hesitate
8 to act. Just make you hesitate, make you say hum.

9 Ladies and gentlemen, V didn't call, didn't say
10 anything about Uncle Dave until Dr. McGee called her out.
11 Nothing until Dr. McGee called her out.

12 Dave Fitch was never alone with V. Dave Fitch
13 didn't do this. Dr. McGee waited 60 days to report. Dave
14 Fitch is innocent. There is reasonable doubt. Thank you
15 very much.

16 THE COURT: Mr. Leibert.

17 MR. LEIBERT: May it please the Court.

18 Wow. Pretty good. Now let's talk about the facts.

19 You can listen to Dr. McGee's testimony again, and I
20 hope you do. You can listen to Rachel's and you can listen
21 to Tabitha's. He got it wrong. I'm putting my reputation
22 on the line. He got it wrong.

23 What did Dr. McGee say? She didn't say she didn't
24 have that hymen. She didn't say it was separated. And I
25 am going to quote for you here.

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1 "She had a hymen that was torn, flattened and
2 obliterated" at 13 years and nine months old.

3 You see a little girl at ten years old. She's out in
4 the woods. And she's making a clubhouse. Innocence. And
5 if anybody believes for one second that in 2000 and 2001
6 and 2002 you can live with somebody and not be alone with
7 them, that is so ridiculous.

8 Child molesters don't molest in front of their wife or
9 their friends or their boss. It's a crime of opportunity.
10 And they wanted to talk about the apartment when they came
11 down here when she was six.

12 He didn't have an opportunity. He needed a back yard.
13 He needed woods. And he tried to say, well, I don't own
14 that house, I don't own that car. But you've been there,
15 haven't you? Yeah. You knew it was there, didn't you?
16 Yeah. And he even used it for parts.

17 And when that sweet little thing came in here he said
18 I'm going to get some of that, so he did. He helped
19 himself, and he shoved his hand, he rubbed her breasts, and
20 he said don't tell anybody because if you do they won't
21 believe you.

22 And two weeks later he came and got her and took her
23 out in the woods and put her on the car. And they made a
24 big deal. Well, you didn't say it was the blue car. How
25 many cars you got out in the woods there, Mr. Fitch? How

Closing arguments

1 many? One.

2 Okay. So she didn't say it was the blue car. The car
3 out in the woods. He jerked off his pants and he stuck his
4 penis inside of her. And, no, she didn't tell. She was
5 afraid to tell.

6 What did Tabitha Weber tell you? You had two expert
7 witnesses. 80 percent tell after they're 18. And there
8 was no promise.

9 See, with each witness, see, reasonable doubt, ladies
10 and gentlemen, doesn't mean that if you go back there and
11 say, hum, it's not guilty, or His Honor would say, all
12 right, I'm going to send you to deliberate and be back in
13 five minutes. That's not what reasonable doubt is.

14 You have had to review the evidence. So you get to
15 say everybody that got in this witness stand, do I believe
16 ✓ . She's a shy girl. She had to talk about her uncle
17 sticking his penis in her vagina to a bunch of strangers.
18 I couldn't do it and I wouldn't let me daughter do it. But
19 that's what she had to do. Do you believe her? Then he's
20 guilty.

21 His Honor will tell you the testimony of the victim
22 need not be corroborated, Code of Laws 16-3-657. He's
23 going to tell you that. And that means if you believe her,
24 that's it. Proof beyond a reasonable doubt.

25 But we brought you a lot more. And what did Dr. McGee

Closing arguments

1 say when they tried to say, oh, maybe, insinuate, oh, it's
2 a boyfriend? She said, well, no, this is my patient. Her
3 mother wasn't in here. I offered her the patch at 13 years
4 and nine months. She wasn't interested. Here is free
5 birth control, kiddo. She wasn't interested. She's a shy
6 little girl.

7 And did she remember every day? No. He rammed his
8 penis in her vagina when she was ten, and it hurt. And the
9 medical evidence supports that. Torn, flattened and
10 obliterated.

11 She examined her three different ways, ladies and
12 gentlemen, to make sure she got it right. Very unusual.
13 If anything, then you only got to hear her talk once.
14 You're allowed to listen to it again if you need to.

15 She said very unusual what this was. And this was
16 old. Prepubertal, I think is the word she used, which
17 means before puberty. I think I'm saying that right.
18 Prepubertal. Very unusual to be torn the way it was, and
19 at the bottom.

20 It's not that she didn't have a hymen. It wasn't that
21 she had a separated hymen. She had a hymen that was torn,
22 flattened and obliterated at 13 years and nine months. And
23 it was old. It wasn't fresh. And the lesion she didn't
24 have were not her herpes. Remember. She used a big word
25 for herpes like an adjective. Herpesdial or something.

Closing arguments

1 She said herpes. That's what that lesion was not. It was
2 torn. Okay. I know she said it was torn. I got it.
3 Torn, flattened and obliterated.

4 Tabitha Weber told you the way the brain works it's
5 hard to give chronological times, especially if it's
6 happened repeatedly and repeatedly. And, see, that's the
7 beauty of your job.

8 You're not allowed to take notes, you're not allowed
9 to go on the internet, you're not allowed to have the law
10 book. I mean, I get to sit there with the law book and
11 look at it two or three times. You see me reading over
12 there. I'm looking at the law. You don't get to do that.

13 But what you do get to do is bring in your common
14 sense. See, when you start applying common sense, can you
15 live in a house for three years and never, never, never,
16 never, never be alone with somebody? Not unless I'm
17 handcuffed to me.

18 I mean, his wife admitted him and the mom, and
19 V 's mom, went to the store. And what did she say?
20 Most of the time her parents were there. That's right.

21 And then he finally admitted, well, there were times
22 it was just him and the kids. But the kids don't listen to
23 him. Are you kidding me? It's a crime of opportunity.

24 And back here when they left the apartment, see,
25 V came. And you'll have this back there. In '96 when

Closing arguments

1 she was six and they went into the apartment, and they went
2 back to Ohio. And then they came back on March the 20th of
3 2000. And that's the date of the indictment. And that's
4 when V was nine years and ten months old.

5 And she said it happened shortly thereafter. The
6 first time was when he rubbed her out at the clubhouse.
7 And the clubhouse is back here. Here's the brown house.
8 Here's the yard and here's the car, one car.

9 And he made her point to the hood. And, see,
10 everybody had moved away from here, you see. So the
11 pictures weren't taken until years later. But he put her
12 on the hood. He took her to the old car. So they went and
13 found the old car, see.

14 I think he said he bought a house in '01. The car's
15 still there when that detective went out to find out about
16 the car. It's a crime of opportunity. He wasn't alone
17 with her in 2000 and 2001 and 2002? Are you kidding me?

18 And V got confused with the dates as Ms. Weber
19 says is common. He shoved it down her throat. But I
20 messed up too.

21 See, it's not like Hollywood, and please don't expect
22 it to be like C. S. I. You see, when I dropped that thing
23 yesterday at the doctor's, that would have been cut, and
24 then take two if we were on the film. And, see, we'd have
25 an actress up here, not a little girl that had her vagina

Closing arguments

1 bothered when she was ten.

2 You see, it's take one, take two. If it's real funny,
3 it goes on the blooper show, see. Here it's real. Okay.
4 Everything is real. Well, I messed up too because I was
5 questioning him about March of '04. He made me pay for
6 that too, didn't he?

7 So let's blow away the smoke. The law says if you
8 didn't do it, we didn't do it. Well, if that's the
9 standard, we can go close our jail.

10 Child molesters molest children in secret. It's a
11 crime of opportunity. You don't do it in front of your
12 wife or your friends, certainly not your boss.

13 And, you see, with each witness while you're
14 deliberating you get to say, well, what's the bias. You
15 know, well, the wife doesn't want him convicted. His
16 daughter doesn't want him convicted. His boss, he's a good
17 worker.

18 But ask yourself that about little V , because
19 when did it first come out with your mom? Uncle David was
20 coming to get her to go buy go-carts and V wouldn't
21 go. That seems strange. See, there was no fighting, no
22 big family fight.

23 V said I can't do this any more, see, because the
24 last time she said it happened when she was still 12. It
25 happened after riding the go-cart. And he was coming to

Closing arguments

1 get her to ride the go-cart hoping for another opportunity
2 to commit a crime. And she said I can't, I can't go, I
3 can't go. Her mother knew something was wrong.
4 Something's wrong.

5 Should the doctor maybe have called sooner? She said
6 she called a cab. She didn't know why. The Honorable J.
7 Derham Cole won't say it's okay to molest a child when
8 she's 12 if the doctor doesn't call for 60 days.

9 And what's this about, are you still married to her
10 mama? The Honorable J. Derham Cole won't say if your
11 mama's not divorced from your daddy you can stick your
12 penis in her vagina. What's the point of that? See, blow
13 the smoke away.

14 Let's look at the facts. V said right after I
15 got here March the 20th of 2000, nine years and ten months
16 old, I was building a clubhouse. He put his hands down my
17 shirt, skin on skin, and his hands down in my pants.

18 They tried to make a big deal, first time, second
19 time. This was the first time, rubbing. The penis and the
20 vagina in the car was the first time penetration. The
21 second time a sexual assault. That's the distinction.

22 Tabitha Weber says she was shaking, she was shy. She
23 wasn't going to tell. But she -- all she did was say I, I,
24 I can't go ride that go-cart, I can't go to Uncle Dave's
25 today and please don't make me go. And that's what set it

Closing arguments

1 in motion or we still wouldn't know about it.

2 And when he tried to get her with the first and second
3 time and whether she said blue car, I read this to you.
4 Now, this isn't in evidence, but it's this sheet of paper.
5 But this was read to you. So it's part of the record.

6 Happened outside. Lived in a brown house. I was
7 outside in the woods building a clubhouse and he started to
8 rub me. My cousin and brother was there, and my mom and
9 aunt wasn't.

10 Then in a couple of weeks I was in the woods and he
11 approached me and took me to an old car and jerked down his
12 pants and started to put his thing in me.

13 Well, you didn't say it was blue. Are you kidding me?
14 How many old cars are in the woods? One. See the
15 deception there? They're trying to trick you. The facts
16 if you believe her as proof beyond a reasonable doubt. Did
17 you believe her? Any reason to lie?

18 Her uncle's coming to take her to his house. There's
19 no problem. And all she did was said I can't go. And her
20 mom. That's not right.

21 But then you add Tabitha Weber. She said it started
22 when she was ten and happened about a year ago. She
23 started in June of '04, and said she was still 12.

24 Is it consistent not to give everything? Yeah. Just
25 like when you go on a vacation. You don't give everything.

Closing arguments

1 And that's positive. Or when you brush your teeth that you
2 might tell a little different.

3 And then the doctor came in. This is very unusual.
4 Torn, flattened and obliterated. Examined her three
5 different ways.

6 Is this consistent with a child who has been
7 penetrated? Yes. Is this consistent within a reasonable
8 degree of medical certainty the child has been penetrated
9 repeatedly? Yes, because of the way it was flattened down.
10 She had a hymen, but it was, it was in terrible shape. It
11 was obliterated.

12 And she could tell. Remember when she put the thing
13 on the bottom. She said that's the key to this, where it
14 was, it was pressed down and obliterated. That means it
15 was prepuberty.

16 There's a child molester in this room, and his name is
17 David Fitch. You have a lot more than proof beyond a
18 reasonable doubt.

19 Ladies and gentlemen, my job is to do justice. And
20 your verdict means to speak the truth. You get to
21 deliberate, go over everybody's testimony, look at their
22 exhibits. Ask yourself does this have a ring of truth,
23 does that make common sense, does this make sense. What is
24 their bias of this witness? No bias of a doctor, no bias
25 of Tabitha Weber, no bias for V . She just didn't want

Jury charge

1 to go.

2 On behalf of Trey Gowdy and on behalf of V
3 I ask you to do justice. Justice is guilty as charged on
4 all three counts. Thank you.

5 Thank you, Your Honor.

6 THE COURT: Mr. Foreman and ladies and gentlemen of
7 the jury, you of course have now heard and seen all of the
8 evidence, as well as heard the final summations of the
9 lawyers.

10 So I'm now going to instruct you on the law that's
11 applicable in the case. And then you'll be asked to go
12 back and begin with your deliberations. And through that
13 process you'll examine the evidence, decide the facts,
14 apply the law and arrive at a fair and just decision.

15 It is your exclusive duty to determine what the facts
16 are. And you do that through your own common-sense
17 examination and evaluation of all of the testimony and the
18 other evidence received during the trial of this case.

19 You 12 jurors alone will decide what weight, value and
20 effect to give to any particular witness' testimony or even
21 portions of testimony.

22 Your sole objective is to simply reach the truth in
23 the matter. And by doing that you will have fulfilled your
24 obligations as jurors. And that is to simply give both the
25 state and the defendant a fair and impartial trial.

Jury charge

1 Now, as you know, in this case the state through the
2 prosecutor has accused the defendant, David Fitch, with
3 having committed three separate and distinct offenses.

4 The allegations setting forth those offenses are
5 contained in those documents referred to as indictments.
6 They are the documents that I explained to you prior to
7 your selection. The indictments in this case charge the
8 defendant with three separate and distinct offenses.

9 One indictment alleges the offense of criminal sexual
10 conduct with a minor in the first degree alleging that
11 between March the 20th of 2000 and May the 9th of 2001
12 David Fitch did here in Spartanburg County commit the crime
13 of criminal sexual conduct in the first degree in that he
14 did engage in a sexual battery with a victim by the name of
15 ✓ at a time where she was under the age of 11
16 years.

17 A second indictment charges the defendant with
18 criminal sexual conduct with a minor in the second degree.
19 That indictment alleges that Mr. Fitch did between the
20 dates of May the 10th of 2001 and March the 1st of 2003
21 commit that offense in that he did have -- commit a sexual
22 battery upon ✓ who at the time was at least 11
23 years of age but less than 14 years of age.

24 And the final indictment alleges that between the
25 dates of March the 20th of 2000 and March the 3rd of 2003

Jury charge

1 Mr. Fitch, being over the age of 14 years, did wilfully and
2 lewdly commit or attempt to commit a lewd and lascivious
3 act upon the person or body of one √ , a minor
4 under the age of 16 years, with the intention of appealing
5 to or arousing or gratifying the lusts, passions or sexual
6 desires of himself or of the child, or of both for that
7 matter.

8 Now, the indictments will be in the jury room with
9 you. As I told you, the indictments are not proof of
10 anything. They don't establish anything. They're simply
11 the means by which a person is brought into this court and
12 formally put on notice as to a crime that the state claims
13 they have committed.

14 The indictments will be in the jury room, Mr. Foreman,
15 because it's going to be on the back of each indictment
16 that you will be indicating the jury's unanimous decision
17 as to that particular charge. But other than serving as
18 the verdict form, the indictments serve no purpose so far
19 as you 12 jurors are concerned.

20 Now, as to the allegations contained in each
21 indictment and as to the charges set forth the defendant
22 has entered a plea of not guilty. And, as you've been
23 told, that plea of not guilty therefore places upon the
24 state the burden of proving the allegations that they have
25 set forth in each of those indictments, the burden of

Jury charge

1 proving each of the essential elements of the crimes that
2 are alleged in each of those indictments; and therefore the
3 burden is upon the state to establish the defendant's guilt
4 to your satisfaction beyond a reasonable doubt before a
5 verdict of guilty could be returned as to a particular
6 indictment.

7 The burden is never upon a defendant to prove that he
8 is not guilty or to prove that he is innocent because in
9 some cases that might not be possible. The burden is
10 always upon the state in bringing a charge against another
11 to establish that person's guilt to the satisfaction of a
12 jury beyond a reasonable doubt.

13 You are instructed that it is a vital, important and
14 cardinal rule of law that every defendant in a criminal
15 trial -- and it doesn't matter how serious the offense
16 might be for which that person stands charged -- that
17 person shall always be presumed innocent of that charge.

18 That presumption of innocence remains with any
19 defendant, as it does with Mr. Fitch, from the time that he
20 is arrested, throughout the course of the criminal process
21 and even throughout the course of the actual trial.

22 As I told you, that presumption of innocence will be
23 with him even as you go back to engage in your
24 deliberations in this case. And that presumption of
25 innocence will be with him in that jury room, and it will

Jury charge

1 be with him forever unless you 12 jurors determine that
2 he's no longer entitled to that presumption of innocence.

3 That is after you've carefully considered all of the
4 evidence in the case, and from that evidence you've decided
5 the facts as you believe them to be, and after deciding
6 those facts you apply the law that I will have provided
7 you, if you determine that his guilt as to a particular
8 indictment has been proven beyond a reasonable doubt, then
9 he would no longer be entitled to that presumption of
10 innocence. But it's only if, unless and until you are
11 satisfied of his guilt beyond a reasonable doubt that the
12 presumption of innocence would no longer be applicable.

13 Now, while the state does have the burden of proving a
14 defendant's guilt beyond a reasonable doubt, that doesn't
15 mean that the state has to prove his guilt beyond all doubt
16 or beyond any possible doubt. But it does require the
17 state to prove his guilt to your satisfaction beyond a
18 reasonable doubt.

19 The term reasonable doubt should be given its plain
20 and ordinary meaning. A reasonable doubt is the kind of
21 doubt that would cause a reasonable person to hesitate to
22 act upon the information provided.

23 A defendant in a criminal trial is entitled to any
24 reasonable doubt that arises from the evidence or lack of
25 evidence in a case. And if upon any factual issue

Jury charge

1 essential to a finding of a verdict of guilty you have some
2 reasonable doubt as to how that issue should be resolved,
3 it would be your duty to resolve that reasonable doubt in
4 favor of the defendant.

5 Therefore if upon your consideration of the whole case
6 as it relates to a particular charge, if you have a
7 reasonable doubt as to the defendant's guilt having been
8 proven, you must resolve that reasonable doubt in his favor
9 and return a verdict of not guilty as it relates to that
10 particular indictment.

11 And, on the other hand, after you've carefully
12 considered the evidence and decided the facts and applied
13 the law, if you have no reasonable doubt as to the
14 defendant's guilt as it relates to a particular indictment,
15 then of course it would your corresponding duty to convict
16 the defendant or to find him guilty of any charge that you
17 find has been proven to your satisfaction beyond a
18 reasonable doubt.

19 Now, the same law that provides that you are the
20 judges of the facts also provides that I am the judge of
21 the law. And that simply means nobody's going to tell you
22 how to arrive at your determination of facts in this case.

23 You do that, as I have stated, through the exercise of
24 good judgment and common sense conscientiously applied to
25 the testimony and the evidence in the case. You must

Jury charge

1 however under your oath as a juror accept the law as I
2 provide it to you as being the law that is applicable in
3 this particular case.

4 In other words, you are not to concern yourself with
5 what you thought the law was before you came to serve as a
6 juror this week or what you think the law ought to be. You
7 must simply accept the law as I provide it to you as being
8 the law that you are to apply in this case.

9 Then you simply take that law and you apply it to the
10 facts as you 12 jurors determine those facts to be based
11 upon your common-sense examination and evaluation of the
12 testimony received and other evidence received during the
13 trial of this case.

14 Now, as I've have told you, you are the sole judges of
15 the facts in this case. And therefore you are also
16 necessarily the sole judges of the credibility, that is the
17 believability, of each witness that has testified during
18 the trial of this case.

19 You 12 jurors alone will decide what weight, value and
20 effect to give to any particular witness' testimony, or
21 even a portion of that testimony. And so there are a
22 number of factors which you should consider in arriving at
23 your assessment and evaluation of a witness' credibility.
24 And I'm going to list those factors for you.

25 You may consider the demeanor of the witness, how the

Jury charge

1 witness appeared to you as the witness testified from the
2 witness stand. Was the witness straightforward in
3 responding to questions, or was the witness hesitant or
4 evasive in responding to questions that were asked of the
5 witness? Simply put, did the witness appear to you to be
6 telling the truth and to have knowledge of the facts to
7 which that witness has testified.

8 You may also consider whether or not the testimony of
9 a witness is consistent, or is it inconsistent with that
10 witness' own testimony, as well as testimony or statements
11 made by that same witness outside of court, as well as
12 inside of court. And you may consider whether or not the
13 testimony of a witness is consistent, or is it inconsistent
14 with other testimony or other evidence received during the
15 trial of the case?

16 You may also consider how the witness came to know the
17 facts to which that witness has testified. In other words,
18 what was that particular witness' opportunity and ability
19 to perceive the existence of those facts to which that
20 witness has testified. And then what is that witness'
21 ability to be able to come into court and to accurately
22 recollect to you as to what they have previously seen or
23 heard, or felt for that matter.

24 You may also consider any bias or prejudice or
25 interest that a witness might have in the outcome of a

Jury charge

1 case. In other words, do you find some reason that a
2 particular witness would testify one way or another to help
3 or to hurt one side or the other? And you may consider any
4 interest that a witness might have in the outcome of the
5 case if you determine that a witness does have such an
6 interest and you find that that interest would bear upon
7 that witness' credibility.

8 You may also consider whether or not the testimony of
9 a witness is strengthened, or is it weakened by other
10 testimony or other evidence received during the trial of
11 the case?

12 Now, because you are the sole judges of the facts and
13 because you are the sole judges of the credibility of each
14 witness, you are permitted to believe as much or as little
15 of what a witness has testified to as you deem is
16 appropriate.

17 So you may believe everything that a witness testified
18 to; you may choose to believe none of it. You may believe
19 one portion of a witness' testimony and reject some other
20 portion of that same witness' testimony. In a given case
21 you could believe one witness as opposed to many, or many
22 as opposed to one.

23 The law provides that in the case of criminal sexual
24 conduct the testimony of a victim need not be corroborated
25 in such prosecution. But you simply have to determine the

Jury Charge

1 most credible evidence, testimony and otherwise, based upon
2 your careful examination and evaluation of all of the
3 factors relating to that particular issue simply based upon
4 the exercise of good judgment and common sense.

5 Of course your sole objective is to simply reach the
6 truth in the matter. And by doing that you will have
7 fulfilled your obligations as jurors. And that is to give
8 both the state and the defendant a fair and impartial
9 trial.

10 Now, as you know, the defendant is charged with three
11 separate offenses. One is criminal sexual conduct with a
12 minor in the first degree; one is criminal sexual conduct
13 with a minor in the second degree; and the last is
14 commission of a lewd act upon a child.

15 I'm going to define for you the law as it relates to
16 criminal sexual conduct with a minor in the first degree
17 and the second degree.

18 The differences between the two offenses is simply the
19 age of the person who is alleged to be the victim at the
20 time that the incident occurs. First degree involves a
21 minor less than 11 years of age; second degree involves a
22 minor at least 11 years of age but less than 14 years of
23 age. Those are -- those offenses are set forth in
24 statutes.

25 16-3-655, Subsection A, provides that a person is

Jury charge

1 guilty of criminal sexual conduct in the first degree if
2 the actor, the person alleged to have committed criminal
3 sexual conduct, engages in a sexual battery, which I'll
4 define for you shortly, with the victim, the person alleged
5 to have been the victim of criminal sexual conduct, who is
6 less than 11 years of age.

7 Now, Section 16-3-651 is a statutory provision that
8 provides for definitions for various terms contained in the
9 criminal sexual conduct statute. And as I've stated, the
10 term actor is defined as a person accused of criminal
11 sexual conduct. In this case that would be the defendant,
12 David Fitch.

13 The term victim is defined as a person alleged to have
14 been subjected to criminal sexual conduct. In this case
15 that would be V.

16 A sexual battery is defined as sexual intercourse,
17 cunnilingus, fellatio, anal intercourse or any intrusion,
18 however slight, of any part of a person's body or of any
19 object into the genital or anal openings of another
20 person's body except when accomplished for medically
21 recognized treatment or diagnostic purposes.

22 Therefore based upon the language of the statute there
23 are two essential elements which must be established beyond
24 a reasonable doubt before the defendant could be found
25 guilty of criminal sexual conduct in the first degree.

Jury charge

1 First, it must be proven to your satisfaction beyond a
2 reasonable doubt that the defendant, David Fitch, did
3 engage in a sexual battery as that term has been defined
4 with the victim in this case, V ; and, secondly,
5 it must be proven to your satisfaction beyond a reasonable
6 doubt that at the time of the commission of any sexual
7 battery the victim was less than 11 years of age.

8 If either of these elements has not been proven beyond
9 a reasonable doubt, your verdict must be for the defendant.
10 You must find him not guilty.

11 I'm now going to read for you and define for you the
12 criminal offense known as criminal sexual conduct with a
13 minor in the second degree. As I told you, the difference
14 is the age of the victim.

15 Section 16-3-655, Subsection Two, provides that a
16 person is guilty of criminal sexual conduct in the second
17 degree if the actor, in this case David Fitch, engages in a
18 sexual battery with a victim, in this case V ,
19 who is 14 years of age or less but who is at least 11 years
20 of age.

21 Therefore based upon the language of the statute there
22 are two essential elements that must be proven before the
23 defendant could be found guilty of criminal sexual conduct
24 with a minor in the second degree.

25 First, it must be proven to your satisfaction beyond a

Jury charge

1 reasonable doubt that the defendant, David Fitch, did
2 engage in a sexual battery as that term has been defined
3 for you previously with the victim, V ; and,
4 secondly, it must be proven beyond a reasonable doubt that
5 at the time of the commission of any sexual battery Rachel
6 Goble was 14 years of age or less but was at least 11 years
7 of age.

8 If either of these two elements has not been proven to
9 your satisfaction beyond a reasonable doubt, your verdict
10 must be for the defendant.

11 Now, in these cases consent is not an issue in the
12 trial or in any case of criminal sexual conduct involving a
13 minor child under the age of 16 years. Under the law of
14 this state a minor under the age of 16 years is not legally
15 capable of voluntarily consenting to a sexual battery
16 committed by an adult.

17 The final indictment charges criminal sexual -- excuse
18 me. The final charge is commission of a lewd act upon a
19 child under the age of 16. That's a separate code section
20 set forth in 16-15-140.

21 That section provides that it is unlawful for a person
22 over the age of 14 years to wilfully and lewdly commit or
23 attempt a lewd or lascivious act upon or with the body or
24 its parts of a child under the age of 16 years with the
25 intent of arousing, appealing to or gratifying the lusts or

Jury charge

1 passions or sexual desires of that person or of the child,
2 or both for that matter.

3 Now, within the meaning of that statute the term
4 wilfully means an act done with a bad purpose, without just
5 cause or legal excuse.

6 It may be further defined as an act done
7 intentionally, knowingly and purposefully without
8 justifiable excuse as distinguished from an act done
9 carelessly, thoughtlessly, accidentally or inadvertently or
10 mistakenly.

11 The term lewd within the meaning of the statute is
12 defined as obscene, lustful or indecent. A term importing
13 a lascivious intent, it signifies that form of immorality
14 which has relation to moral impurity, or that which is
15 carried on in a willful and wanton manner eager for sexual
16 indulgence.

17 The term lascivious within the meaning of the statute
18 is defined as an act tending to excite lusts. It is
19 further defined and synonymous with lewd, indecent or
20 obscene and tending to deprave the morals with respect to
21 sexual relations.

22 Any such act must be done with the intent of arousing,
23 appealing to or gratifying the lusts or passions or sexual
24 desires of the defendant or of the child.

25 Now, Mr. Foreman and ladies and gentlemen of the jury,

Jury charge

1 I am not in any way concerned with what your decisions are,
2 but your verdicts must be unanimous. Whatever decision you
3 reach as to a particular indictment has to be unanimous.
4 All 12 of you must be in agreement.

5 Therefore, Mr. Foreman, after you and your fellow
6 jurors have carefully deliberated the case, after you have
7 decided what you believe to be the true facts and applied
8 the law that I've given you, once you arrive at a decision
9 I'm going to ask that you indicate that decision on the
10 respective indictments.

11 You'll notice on the back of each indictment in the
12 lower left-hand corner there's the word verdict. Someone
13 has also taken the indictment and clocked it in. And so
14 there's a clerk's stamp in the space where you to write the
15 verdict. That stamp's not supposed to be there, but it is
16 there. So just ignore it. Just write over it.

17 But, in any event, as to each of the separate
18 indictments you have two possible verdict forms. If the
19 state has proven each of the essential elements of the
20 crime alleged in that particular indictment beyond a
21 reasonable doubt, then your verdict would be guilty. If
22 the state has failed to prove any one or more of the
23 essential elements of the crime alleged in that indictment
24 beyond a reasonable doubt, then your verdict would be not
25 guilty.

Jury charge

1 So whatever it is, guilty or not guilty, indicate it
2 in the space provided on the appropriate indictment. And,
3 of course, as I say, you'll be arriving at three separate
4 verdicts because you have three separate indictments.

5 Your verdicts may be the same; they may be different.
6 That will depend upon your determination of fact and then
7 your application of the law as I have provided it.

8 Now, as you go back to deliberate, I don't know if we
9 have any smokers on the jury. But if we do, you can't
10 smoke in the jury room. You have to go outside if you want
11 to smoke. So if there is anybody that needs to smoke while
12 you are deliberating, if you'll let the bailiff know, he'll
13 take you outside to accomplish that purpose.

14 But you are instructed that if any juror is absent for
15 an authorized purpose the deliberations have to stop. They
16 may only resume when all 12 jurors are present so that all
17 may participate.

18 If during the course of your deliberations there comes
19 a time where you have a question about the facts or the
20 evidence in the case or you wonder if there's something
21 else that will be available that might help you come to a
22 decision, understand that all of the evidence to be
23 presented in this case has been presented.

24 Now that you're going back to begin your
25 deliberations, no additional evidence may be received.

Jury charge

1 Even if it did exist, you couldn't have it because the
2 trial is concluded. You're going back to deliberate.

3 If however you have a question about testimony and you
4 think that question can be answered by having a witness'
5 testimony replayed in whole or in part, if you'll let me
6 know of that fact through the bailiff, I can bring you back
7 into the jury room to, excuse me, I can bring you back into
8 the courtroom to have that testimony replayed in whole or
9 in part.

10 I don't have transcripts available. But if you need
11 to rehear testimony we'll bring you back. You can listen
12 to it in its entirety, or just some portion of it if that's
13 all you need.

14 If at any time you have a question about the law that
15 you are to apply, I can answer those questions. So if you
16 ever need an additional explanation, a clarification or a
17 reinstruction as to any principle of law, if you'll let me
18 know, I'll be happy to bring you back for that purpose.

19 I think that's everything. So I'm going to send you
20 back now to the jury room.

21 Oh, let me say this to you. I don't know how long
22 your deliberations are going to take. It could be a
23 shorter period, could be a longer period. It just depends
24 upon your careful examination of the evidence and your
25 deliberations.

Jury charge

1 But it's about 11:00 o'clock now. If you ever get to
2 a point in your deliberations where you wish to order
3 lunch, it usually takes about an hour or maybe a little bit
4 more than an hour to have the lunch ordered, prepared and
5 brought to the jury room for your benefit.

6 So as you go back and as you begin deliberations if
7 there comes a time where you think it appropriate to have
8 lunch, just keep in mind that timeframe. And if you need
9 to order lunch, let the bailiff know. The clerk will come
10 into the jury room and take your lunch orders.

11 All right. With the exception of the alternate juror,
12 I'll ask the original 12 if you'll please go with the
13 bailiff to the jury room. But do not begin deliberations
14 until I send you word to do so.

15 (Whereupon, the jury retired to deliberate at
16 10:55 a.m.)

17 (Whereupon, the alternate juror was excused.)

18 THE COURT: Are there any exceptions taken to the
19 instruction or requests for additions to the instruction by
20 the state?

21 MR. LEIBERT: No, sir, Your Honor.

22 THE COURT: By the defendant?

23 MR. BRANNON: No, Your Honor. Thank you.

24 THE COURT: Let me ask y'all to verify the exhibits
25 before they go back.

Verdict

1 (Pause.)

2 MR. BRANNON: They are all there, Your Honor.

3 THE COURT: All right. Tell the jury to begin
4 deliberations and notify us when they've concluded.

5 We'll be at ease while they are deliberating.

6 (Whereupon, the exhibits were submitted to the jury at
7 10:58 a.m.)

8 THE COURT: All right. I understand the jury has
9 reached a verdict. Are we ready to receive it?

10 MR. LEIBERT: Yes, sir, Your Honor. I don't have the
11 sentencing sheets if we need them but --

12 MR. BRANNON: Yes, sir, Your Honor.

13 THE COURT: Okay. Bring them in, please.

14 (Whereupon, the jury returned to the courtroom at
15 11:40 a.m. to report its verdict.)

16 THE COURT: Mr. Foreman, have you and your fellow
17 jurors reached a unanimous decision as to each of the
18 separate indictments?

19 THE FOREMAN: Yes, we have.

20 THE COURT: And have you indicated those decisions on
21 the back of the indictments as requested?

22 THE FOREMAN: Yes, sir, we have.

23 THE COURT: Did you sign your name as the foreperson
24 and date it?

25 THE FOREMAN: I did.

Verdict

1 THE COURT: If you will, please hand those up by way
2 of the bailiff.

3 You may publish the verdicts.

4 THE CLERK: In the State of South Carolina, the County
5 of Spartanburg, Indictment No. 2008-GS-42-2533, the State
6 vs. David Fitch, indictment for criminal sexual conduct
7 with a minor first degree, the jury has reached a unanimous
8 decision with a verdict of guilty. Signed by the
9 foreperson the 22nd of May of 2008.

10 Indictment No. 2008-GS-42-772 -- 2775, the State vs.
11 David Fitch, indicted for criminal sexual conduct with a
12 minor second degree, the jury has reached a unanimous
13 decision with a verdict of guilty. Signed by the
14 foreperson the 22nd day of May of 2008.

15 2008-GS-42-2771, the State vs. David Fitch, indictment
16 for sex -- a lewd act upon a minor less than -- less than
17 16 years old -- I am sorry -- the jury has reached a
18 unanimous verdict of guilty. Signed by the foreperson the
19 22nd of May of 2008.

20 Ladies and gentlemen of the jury, is this your verdict
21 and still your verdict? If so, please raise your right
22 hand.

23 (Whereupon, all responded in the affirmative.)

24 THE COURT: All right. Does the defendant wish to
25 have the jury polled?

Sentence

1 MR. BRANNON: No, Your Honor.

2 THE COURT: Okay.

3 (Whereupon, the trial jury was excused.)

4 THE COURT: All right. Any other matters we need to
5 address prior to the imposition of sentence?

6 MR. LEIBERT: Your Honor, may I see the indictments to
7 complete the sentencing sheets? But there's nothing from
8 the state, no, sir.

9 MR. BRANNON: No, Your Honor.

10 THE COURT: Okay.

11 (Pause.)

12 MR. LEIBERT: May I approach, Your Honor?

13 THE COURT: Let him sign it.

14 Mr. Leibert, give those to them and let them sign it.

15 (Pause.)

16 THE COURT: Do y'all have the code, the C. D. R. code?
17 We have to put that on here.

18 MR. LEIBERT: Yes, sir.

19 THE COURT: They are not on there.

20 MR. LEIBERT: I'm sorry.

21 THE COURT: All right. Anything further on behalf of
22 the state?

23 MR. LEIBERT: No, sir, Your Honor. Ms. ✓ doesn't
24 wish to speak.

25 THE COURT: All right. Mr. Brannon.

Sentence

1 MR. BRANNON: Your Honor, the only thing that I would
2 ask, I've explained the potential sentences to my client.

3 Your Honor, he has no prior criminal history. You've
4 seen his family support in the courtroom. I would ask you
5 to be as lenient as possible and to sentence concurrently
6 if possible.

7 THE COURT: Let me get y'all to fill out that
8 biographical information, please.

9 (Pause.)

10 THE COURT: We didn't get his age. How old is he?

11 MR. BRANNON: Forty-seven.

12 THE COURT: Okay. Anything further on behalf of the
13 defense?

14 Mr. Fitch, have you got anything you want to tell me
15 before I impose a sentence?

16 THE DEFENDANT: No.

17 THE COURT: All right. On Indictment 2008-2533, an
18 indictment for criminal sexual conduct with a minor in the
19 first degree, wherein you have been found guilty by a jury
20 of that offense, the Sentence of the Court is you, David
21 Fitch, be confined to the South Carolina Department of
22 Corrections for a period of 24 years.

23 Indictment 2008-2775, an indictment for criminal
24 sexual conduct with a minor in the second degree, wherein
25 you have been found guilty by a jury of that offense, the

Sentence

1 Sentence of the Court is you, David Fitch, be confined to
2 the South Carolina Department of Corrections for a period
3 of 24 years.

4 Indictment 2008-2771, an indictment for commission of
5 lewd act upon a child, wherein you have been found guilty
6 by a jury of that offense, the Sentence of the Court is
7 you, David Fitch, be confined to the South Carolina
8 Department of Corrections for a period of 15 years.

9 Each of those sentences are concurrent, one with the
10 other.

11 Mr. Fitch, you have a right to appeal the verdicts of
12 the jury and the Sentence of the Court. You must file any
13 notice of your intention to appeal those decisions within
14 ten days of today's date. So you discuss that with
15 Mr. Brannon.

16 Let the record reflect on Indictment 2008-2775,
17 criminal sexual conduct in the second degree, the sentence
18 should be amended to reflect 20 years.

19 END OF REQUESTED TRANSCRIPT OF RECORD
20
21
22
23
24
25

Certificate

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 21st and 22nd days of May 2008.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 25, 2008



Linda D. Moffitt
Circuit Court Reporter

DOCKET NO.

08-GS-42-2533

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

WITNESSES

Spartanburg County Sheriff's Office

T.K. Tullston

1. SENTENCE MARK

2. REPORT MARK

3. CARD FILLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

Direct Indictment ASSESSMENT AND

FINE CARD MADE

6. TRAVEL VIOLATIONS COST ☒

Computer

Computer

COURT OF GENERAL SESSIONS

MAY 19 2008

TERM

THE STATE

VS.

David Fitch

ACTION OF GRAND JURY

True Bill

[Signature]

Foreperson of Grand Jury

Date: 5-15-08

VERDICT

MARC KITCHENS

60614 61 MAY 19 2008

SPARTANBURG COUNTY

[Signature]

Foreperson of Petit Jury

Date: 5-22-2008

Indictment for

CRIMINAL SEXUAL CONDUCT
W/MINOR, FIRST DEGREE

SC Code: 16-03-0655 (A)(1)

CDR Code: 0385

Class FEL-C(V)

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on MAY 15 2008 the
Grand Jurors of Spartanburg County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE

That David Fitch did in Spartanburg County, between March 20, 2000 and May 9, 2001, commit the crime of Criminal Sexual Conduct with a Minor in the First degree, in that the defendant did engage in a sexual battery upon the minor victim, . . . , who was under eleven (11) years of age at the time of the said incident. Said incident occurred in Spartanburg County, South Carolina, in violation of §16-03-655 (A) (1), *CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

DOC. NO. **08-GS-42-2775**

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

MAY 19 2008

TERM

THE STATE
VS.

DAVID FITCH

Indictment for

**CRIMINAL SEXUAL CONDUCT
WITH A MINOR, SECOND DEGREE**

SC Code: 16-03-655 (B)
CDR Code: 0386
Class FEL/C (V)

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

MAY 15 2008

At a Court of General Sessions, convened on _____ the
Grand Jurors of Spartanburg County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, SECOND DEGREE

That the Defendant, David Fitch, did in Spartanburg County, between the dates of May 10, 2001, and March 1, 2003 commit the crime of Criminal Sexual Conduct with a minor in the Second Degree in that the Defendant did commit a sexual battery upon the minor, _____, who was fourteen (14) years of age or less, but who was at least eleven (11) years of age at the time of the incident. Said incident occurred in Spartanburg County, South Carolina, in violation of Section 16-03-655 (B) (1), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

T. K. Tullotson

1. RETURNED TO SENDER

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

7. ASSESSMENT AND
Direct Indictment

8. TRAFFIC VIOLATIONS COPY

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: *5/15/08*

VERDICT

MARC KITCHENS

Guilty
2008 MAY 19 PM 3:15

CLERK OF COURT
SPARTANBURG COUNTY
person of Petit Jury

5-22-2008

DOC 08-GS-42-2771

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

MAY 19 2008

TERM

THE STATE
VS.

David Fitch

Indictment for

SEX/LEWD ACT, COMMIT/ATTEMPT
UPON CHILD <16

SC Code: 16-15-0140

CDR Code: 2458

Class FEL-D

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

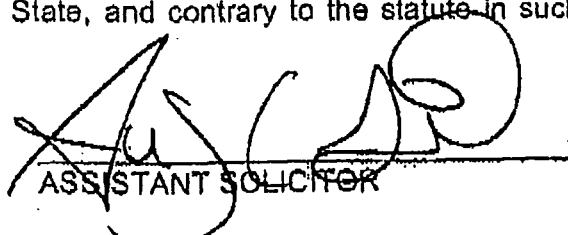
INDICTMENT

At a Court of General Sessions, convened on MAY 15 2008 the
Grand Jurors of Spartanburg County present upon their oath:

SEX/LEWD ACT, COMMIT/ATTEMPT UPON CHILD <16

That David Fitch, did in Spartanburg County, between the dates of March 20, 2000 and March 3, 2003, he being over the age of fourteen (14) years, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of one a minor under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child, of in violation of §16-15-0140, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

Anna Fowler

ARREST WARRANT NUMBER

Indictment

ACTION OF GRAND JURY

True Bill

[Signature]

Person of Grand Jury

8-23-07

VERDICT

MARK KITCHENS

2007 AUG 29 PM 8:13

SPARTANBURG COUNTY
CLERK OF COURT

FILED
of P. Jury

200

DOCKET NO. -

07-GS-42-3986

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

AUG 27 2007

TERM

THE STATE

vs.

David Fitch

Indictment for

SEX/LEWD ACT, COMMIT/ATTEMPT
UPON CHILD <16

SC Code: 16-15-0140

CDR Code: 2468

Class 1 D

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

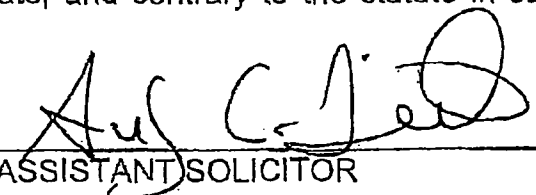
INDICTMENT

At a Court of General Sessions, convened on AUG 23 2007, the
Grand Jurors of Spartanburg County present upon their oath:

SEX/LEWD ACT, COMMIT/ATTEMPT UPON CHILD <16

That David Fitch, did in Spartanburg County, between the dates of August 16, 2001 and March 3, 2003, he being over the age of fourteen (14) years, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of one a minor under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child, of in violation of §16-15-0140, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

Anna Fowler

ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

True Bill

foreperson of Grand Jury

Date: 8-23-07

VERDICT

MARC KITCHENS

2007 AUG 29 PM 8:13

CLERK OF COURT

foreperson of Grand Jury

FILED

202

DOCKET NO.

07-GS-42-3788

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

AUG 27 2007

TERM

THE STATE

vs.

DAVID FITCH

Indictment for

CRIMINAL SEXUAL CONDUCT
WITH A MINOR, SECOND DEGREE

SC Code: 16-03-655 (B)

CDR Code: 0396

Class FEL/C (V)

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on AUG 23 2007 the

Grand Jurors of Spartanburg County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, SECOND DEGREE

That the Defendant, David Fitch, did in Spartanburg County, between the dates of August 16, 2001, and March 1, 2003 commit the crime of Criminal Sexual Conduct with a minor in the Second Degree in that the Defendant did commit a sexual battery upon the minor, who was fourteen (14) years of age or less, but who was at least eleven (11) years of age at the time of the incident. Said incident occurred in Spartanburg County, South Carolina, in violation of Section 16-03-655 (B) (1), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

Anna Fowler

ARREST WARRANT NUMBER

739451

ACTION OF GRAND JURY

True Bill

[Signature]

Person of Grand Jury

Date: 8-23-07

VERDICT

MARK KITCHENS

2007 AUG 29 PM 8:13

Person of Petit Jury

FILED

204

DOCKET NO.

07-GS-42-3989

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

AUG 27 2007

TERM

THE STATE

vs.

DAVID FITCH

Indictment for

CRIMINAL SEXUAL CONDUCT
WITH A MINOR, SECOND DEGREE

SC Code: 16-03-655 (B)

CDR Code: 0396

Class FF/C (M)

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

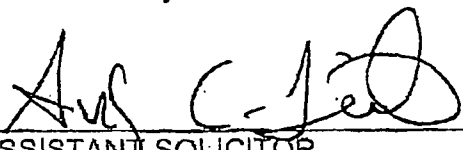
INDICTMENT

At a Court of General Sessions, convened on AUG 23 2007, the
Grand Jurors of Spartanburg County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, SECOND DEGREE

That the Defendant, David Fitch, did in Spartanburg County, between the dates of May 10, 2001, and August 15, 2001 commit the crime of Criminal Sexual Conduct with a minor in the Second Degree in that the Defendant did commit a sexual battery upon the minor, , who was fourteen (14) years of age or less, but who was at least eleven (11) years of age at the time of the incident. Said incident occurred in Spartanburg County, South Carolina, in violation of Section 16-03-655 (B) (1), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

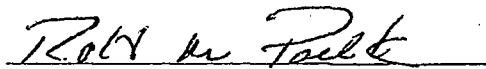
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT 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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 13th, 2009



Robert M. Pachak
Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

FILED
CLERK OF COURT
SPARTANBURG COUNTY
MERC KITCHENS

2008 MAY 28 PM 2:45

The State of South Carolina

vs.

David Fitch
Defendant(s)

MOTION FOR NEW TRIAL

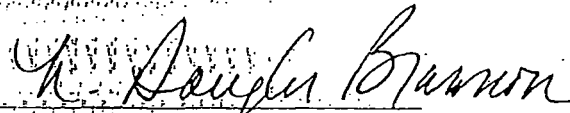
2008-GS-42-2533
2008-GS-42-2771
2008-GS-42-2775

To: The Honorable J. Derham Cole and Anthony C. Leibert, Assistant Solicitor.

YOU WILL PLEASE TAKE NOTICE that the undersigned, as Attorney for the Plaintiff, will move before the Honorable J. Derham Cole, Resident Judge of the Circuit Court for the Seventh Judicial Circuit, Spartanburg County, South Carolina as soon as this matter may be scheduled for a new trial on the above referenced indictments.

This motion is made based on the allegation that the jury's verdict went against the great weight of the evidence presented at trial.

Respectfully Submitted,



N. Douglas Brannon
Attorney for the Defendant
175 Magnolia Street, Suite 101
Spartanburg, SC 29306
(864)-585-1339 - Phone
(864) 585-1398 - Fax

Dated: 5/28/08
Spartanburg, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

The State of South Carolina)
Plaintiff,)

vs.)

David Fitch,)

Defendant,)

IN THE COURT OF GENERAL SESSIONS

2008-GS-42-2533

2008-GS-42-2771

2008-GS-42-2775

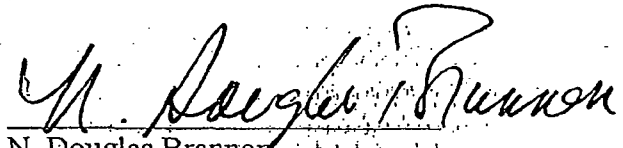
CERTIFICATE OF SERVICE

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2008 MAY 28 PM 2:45
MARC KITCHENS

The undersigned does hereby certify that he has this date served Defendant's Motion for New Trial upon the Assistant Solicitor Anthony C. Liebert, Seventh Judicial Circuit Solicitor's Office by hand delivery to the following address:

Anthony C. Liebert, Assistant Solicitor
Seventh Circuit Solicitor's Office
Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, South Carolina 29306

THE BRANNON LAW FIRM, P. C.



N. Douglas Brannon
Attorney for Defendant

Spartanburg, South Carolina

May 28, 2008

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS

The STATE,

-vs-

David FITCH,

DEFENDANT.

ORDER

Denying Motion for New Trial

Warrant/Indictment Number(s)

08-GS-42-2533, 08-GS-42-2775,
08-GS-42-2771

MARC KITCHENS

2008 JUN -3 PM 1:00

FILED
CLERK OF COURT
SPARTANBURG COUNTY

This matter was before this Court on the defendant's motion filed May 28, 2008, by and through his attorney, Douglas N. Brannon, Esq., pursuant to Rule 29, SCRCrP, for a new trial on the above-referenced charges. At the trial held in this matter the State was represented by Anthony Liebert of the Circuit Solicitor's office.

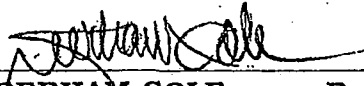
This is a criminal action wherein the defendant was charged with the crimes of Criminal Sexual Conduct with a Minor First Degree, Criminal Sexual Conduct with a Minor Second Degree, and Commission of a Lewd Act Upon a Child. These cases came to be tried before a jury. On May 22, 2008 the jury found the defendant guilty of each charge and he was sentenced by the court on May 22, 2008 to a term of 24 years imprisonment on Indictment Number 08-GS-42-2533, 20 years imprisonment on Indictment Number 08-GS-42-2775, and 15 years imprisonment on Indictment Number 08-GS-42-2771, with all sentences to run concurrently. The defendant now moves for the court to grant a new trial in this matter based upon the insufficiency of the evidence.

These cases were primarily based upon the testimony of the victim who testified that the defendant committed a sexual battery, sexual intercourse, on at least one occasion while she was under the age of eleven and on at least one occasion after she became eleven but before she was fourteen years of age. She further testified that prior to the age of sixteen she was fondled in some fashion by the defendant under circumstances constituting the commission of a lewd act upon her. The defendant testified and denied the allegations.

There was testimony presented by the state along with other corroborative evidence which tended to establish each of the essential elements of the crimes charged. Where the evidence is in conflict it is for the jury to determine what is the most credible and believable evidence. Where the determination of the guilt is dependent upon the credibility of witness testimony it is for the jury to decide what is the most credible and believable testimony. It is apparent that in carrying out their duty as the fact finder the jury found the testimony of the victim to be credible and believable as to the material facts. The jury apparently did not find the testimony of the defendant to be credible or create a reasonable doubt as to his guilt in this case.

Defendant's **motion** for a **new trial** based upon the insufficiency of the evidence should be and is therefore **denied**.

It Is So Ordered.


J. DERHAM COLE, Presiding Judge
THE SEVENTH JUDICIAL CIRCUIT COURT

June 3, 2008

* 2

FILED
 CLERK OF COURT
 ADAMS COUNTY

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

AMENDED APPEAL FROM SPARTANBURG COUNTY
IN THE COURT OF GENERAL SESSIONS

The Honorable J. Derham Cole
Seventh Judicial Circuit Court Judge

Case No.s: 2008-GS-42-2533, 2771, 2775

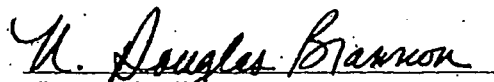
The State of South Carolina.....Respondent

v.

David Fitch.....Appellant

NOTICE OF APPEAL

David Fitch appeals the Jury's Verdict of Guilty and his trial held before the Honorable J. Derham Cole on May 21, 2008, decided on May 22, 2008 and filed with the Spartanburg County Clerk of Court and the Order Denying Defendants Motion for New Trial signed by the Honorable J. Derham Cole on June 3, 2008 and filed with the Spartanburg County Clerk of Court.


N. Douglas Brannon
175 Magnolia Street, Suite 101
Spartanburg, South Carolina 29306
(864) 585-1339
Attorney for the Appellant

Date _____
Spartanburg, South Carolina

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

AMENDED APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions

The Honorable J. Derham Cole
Seventh Judicial Circuit Court Judge

Case No.s: 2008-GS-42-2533, 2771, 2775

The State of South Carolina.....Respondent

v.

David Fitch Appellant

PROOF OF SERVICE

I certify that I have served the Amended Notice of Appeal on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on June 10, 2008 addressed to Henry McMaster, Office of the Attorney General, Post Office Box 11629, Columbia, South Carolina 29211.

N. Douglas Brannon

N. Douglas Brannon
175 Magnolia Street, Suite #101
Spartanburg, South Carolina 29306
(864) 585-1339
Attorney for the Appellant

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID FITCH,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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Cases

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<u>State v. Totherow</u> , 263 S.C. 275, 210 S.E.2d 228, 230 (1974)	6
<u>State v. Turner</u> , 117 S.C. 470, 109 S.E. 119, 120 (1921).....	6
<u>United States v. Ortiz</u> , 445 F.2d 1100, 1103 (10 th Cir. 1971)	6
<u>United States v. Varoz</u> , 740 F.2d 772, 775 (10 th Cir. 1984).....	6

Statutes

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charges against appellant when the State failed to present any substantial evidence of the age of the victim at the time of the offenses?

STATEMENT OF THE CASE

Appellant was convicted of first degree criminal sexual conduct with a minor, second degree criminal sexual conduct with a minor, and lewd act upon a child after a jury trial held before the Honorable J. Derham Cole in Spartanburg County on May 21-22, 2008. Respective sentences of twenty-four (24) years, twenty (20) years, and fifteen (15) years were imposed.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charges against appellant when the State failed to present any substantial evidence of the age of the victim at the time of the offences.

To prove criminal sexual conduct in the first degree with a minor the State is required to prove the victim was under eleven years of age at the time of the alleged incident. S.C. Code §16-03-655 (A) (1). To prove criminal sexual conduct in the second degree the State is required to prove the victim is between eleven (11) and fourteen (14) years of age. S.C. Code §16-03-655 (B)(1) The indictments charging appellant with these alleged crimes were true billed on May 15, 2008, just over the victim's 18 year old birthday which was stipulated to be May 10, 1990. (ROA p. 86, lines 24-25)

The victim said the first time she lived with appellant, her uncle, she was "about eight or nine." (ROA p. 34, lines 7-20) She moved and then came back to live with appellant when she was "ten or eleven." (ROA p. 34, line 23 – p. 35, line 10) She said the first time appellant did anything to her she was nine, when she moved back she was "eleven, close to eleven," and the last time anything happened she was about "15 or 16." (ROA p. 42, line 15 – p. 43, line 9)

At the conclusion of the State's case defense counsel moved for a directed verdict because the State failed to prove every element of the alleged crimes. The trial court denied the motion. (ROA p. 87, line 23 – p. 88, line 6) That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof— defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the

existence of every element of the offense.” Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

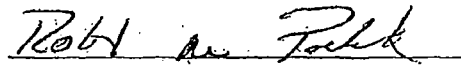
[T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is “sufficient to raise a strong suspicion of the guilt of the accused” is not sufficient to constitute “any evidence from which the guilt of the accused may be fairly and logically deduced.” State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, “where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused’s guilt.” State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir. 1971). Guilt is only to be found when there is a “rationally supportable state of near certitude.” Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir. 1994).

In this case the State failed to provide sufficient evidence of the victim's age at the time the alleged acts were committed. The evidence only invited speculation.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robt M. Pachak", written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of May, 2009.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID FITCH,

APPELLANT

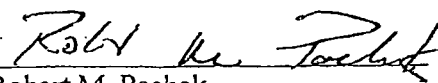
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Fitch states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on May 21-23, 2008, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed the one arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for David Fitch.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

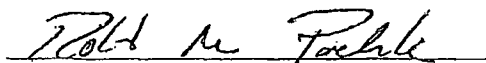
ATTORNEY FOR APPELLANT

This 4th day of May, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 4, 2009



Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

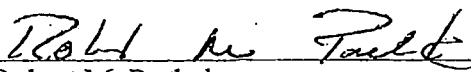
V.

DAVID FITCH,

APPELLANT

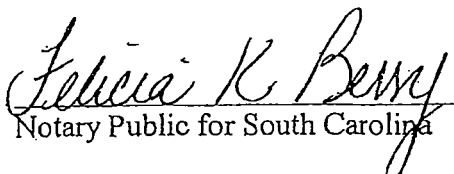
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Final Anders Brief of Appellant and Record on Appeal has been served on David Fitch, #328503 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472; this 4th day of May, 2009.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of May, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

David Fitch,

Appellant.

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2010-UP-016
Submitted January 4, 2010 – Filed January 25, 2010

APPEAL DISMISSED

Acting Chief Appellate Defender Robert M. Pachak,
of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh, and

Assistant Deputy Attorney General Salley W. Elliott,
all of Columbia; and Solicitor Harold W. Gowdy, III,
of Spartanburg, for Respondent.

PER CURIAM: David Fitch appeals his convictions and sentences for criminal sexual conduct with a minor in the first and second degrees and lewd act upon a child, arguing the circuit court erred in refusing to direct a verdict in his favor because the State failed to present any substantial evidence of the victim's age at the time of the offenses. After a thorough review of the record and counsel's brief pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss¹ Fitch's appeal and grant counsel's motion to be relieved.

APPEAL DISMISSED.

HUFF, A.C.J., GEATHERS, J., and CURETON, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

**RECEIVED**

FEB 11 2010

ATTORNEY GENERALS
OFFICE

The South Carolina Court of Appeals

TANYA GEE
CLERKV. CLAIRE ALLEN
DEPUTY CLERKPOST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
WWW.SCCOURTS.ORG

February 10, 2010

REMITTITUR

The Honorable Ponda A. Caldwell
180 Magnolia Street
Spartanburg, SC 29304Re: The State v. Fitch, David
2008-GS-42-02533 2008-GS-42-02771 2008-GS-42-02775

Dear Ms. Caldwell:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in cursive script that reads "V. Claire Allen".

V. Claire Allen
Deputy Clerk of Court

VCA/lf

cc: Appellate Defender Robert M. Pachak
David Fitch # 328503
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Harold W. Gowdy, III, Esquire

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of SPARTANBURG)

2011-CP-42-0344

David Fitch #328503)

Full name and prison number, if any, of applicant)

v.)

APPLICATION FOR

POST-CONVICTION RELIEF

The State of South)

Name of Respondent)

Carolina, Spartanburg County)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Highway Correctional Inst. P.O. Box 205

Highway, S.C. 29672

2. Name and location of Court which imposed sentence In The Court of General

Sessions: Spartanburg County

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) 2008-GS-42-2533;

(b) 2008-GS-42-2771;

(c) 2008-GS-42-2775.

4. The date upon which sentence was imposed and the terms of the sentence:

(a) May 22, 2008. Indictment 2008-2533, 24yrs. Indictment 2008

(b) 2775, 24yrs. On Indictment 2008-2771, 15yrs.

(c) Each of these sentences are concurrent.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
SOUTH CAROLINA
JUL 11 2011

5. Check whether a finding of guilty was made

- (a) after a plea of guilty _____
 (b) after a plea of not guilty was found guilty
 (c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? I did

Appeal from the judgement of conviction.

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. The State of South Carolina, In The Court of Appeals
 ii. _____
 iii. _____

(b) the result in each such Court to which you appealed:

- i. Appealed was dismissed
 ii. _____
 iii. _____

(c) the date of each such result:

- i. February 3, 2010
 ii. _____
 iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. N/A
 ii. _____
 iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of Council

(b) _____

(c) _____

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 SOUTHERN DISTRICT OF CALIFORNIA
 2010 FEB 11 PM 3:11
 1000 MAIN STREET
 SAN FRANCISCO, CA 94102

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) Attorney did not bring out the facts of this case.

(b) _____

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

N/A

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) N/A

(d) any other petitions, motions or applications in this or any other Court?

N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

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SOUTH CAROLINA
JAN 11 2011
MUSKOGEE COUNTY

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? N/A

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) N/A
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Douglas Brannon, Esquire
- (b) your trial, if any? Trial
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Robert M. Pachak
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. Robert M. Pachak; Division of Appellate Defense

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Appellate Court

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

New trial

19. Are you now under sentence from any other court that you have not challenged?

N/A

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CLERK OF COURT
SPRINGFIELD COUNTY
JUN 23 2014
M. WOODWARD

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Spartanburg) VERIFICATION

I, David Fitch #328503, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

David Fitch

Sworn to and subscribed before me

This 21st day of January, 2011.

Luduan Bryant L.S.

Notary Public for South Carolina

My Commission Expires May 26, 2020

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, David Fitch #328503, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

David Fitch

Applicant

Sworn to and subscribed before me

This 21st day of January, 2011.

Luduan Bryant L.S.

Notary Public for South Carolina

My Commission Expires: May 26, 2020

RECEIVED

JAN 21 2011

MAIL ROOM
 LIEBER C.I.

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
David Fitch, #328503,	)	2011-CP-42-0344
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

In response to the post-conviction relief application filed on January 31, 2011, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Applicant was indicted at the May 2008 term of the Spartanburg County Grand Jury for criminal sexual conduct with a minor – 1st degree (2008-GS-42-2533), lewd act upon a minor (2008-GS-42-2771), and criminal sexual conduct with a minor – 2nd degree (2008-GS-42-2775). N. Douglas Brannon, Esquire, represented the Applicant at trial. On May 22, 2008, the Applicant was convicted of all charges by a jury. The Honorable J. Derham Cole presided over the Applicant's trial and sentenced him to confinement for twenty four years for criminal sexual conduct with a minor – 1st degree, twenty years for criminal sexual conduct with a minor – 2nd degree, and fifteen years for lewd act upon a minor, all sentences to run concurrently. Subsequently, Applicant's Counsel filed a Motion for a New Trial on May 28, 2008. Judge Cole denied the Motion on June 3, 2008.

A timely Notice of Appeal was timely filed and an Anders brief was submitted on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and

sentence. State v. Fitch, Op. No. 2010-UP-016 (filed January 25, 2010). The Remittitur was returned on February 10, 2010.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post conviction relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to bring out the facts of the case.

III.

Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. Respondent asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S. Ct. 2052. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

V.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By:



Attorneys for the Respondents
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

February 15, 2012.

1 STATE OF SOUTH CAROLINA

2 COUNTY OF SPARTANBURG

} COURT OF COMMON PLEAS NONJURY

3
4 DAVID FITCH,

5 APPLICANT,

6 vs.

7 STATE OF SOUTH CAROLINA,

8 RESPONDENT.

TRANSCRIPT

OF

RECORD

2011-CP-42-0344

9
10 June 11th, 2012
11 Spartanburg, South Carolina

12
13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge.

15
16 A P P E A R A N C E S:

17 ERIC A. NODINE

ESQ.

Attorney for the Applicant

18
19 SUZANNE WHITE

20 ASSISTANT ATTORNEY GENERAL

Attorney for the Respondent

21
22
23
24 PAMELA E. GREEN
Circuit Court Reporter
25 Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

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P R O C E E D I N G S

1
2
3 THE COURT: Yes, ma'am, you may call the next case.

4 MS. WHITE: Thank you, Your Honor.

5 This is David Fitch versus the State. Case Number
6 2011-CP-42-344. He's represented today by Mr. Eric Nodine.
7 Excuse me.

8 Mr. Fitch was indicted May of '08 on CSC with a minor
9 first degree, lewd act on a minor, and CSC with a minor
10 second degree. He proceeded to trial where he was
11 represented by Mr. Doug Brannon, and May 22nd, 2008, was
12 found guilty of all three charges. Received a sentence of
13 24 years, 15 years, and 20 years to run concurrent. An
14 Anders brief was filed. An appeal was handled. It affirmed
15 his conviction. There was also, I believe, a motion for a
16 new trial that had been filed in the interim as well. It
17 was denied. He's filed this application alleging
18 ineffective assistance of counsel saying that counsel failed
19 to bring out the facts of the case.

20 So, I will turn it over to Mr. Nodine at this time.

21 THE COURT: Yes, sir.

22 MR. NODINE: Good morning, Your Honor. Eric Nodine
23 here on behalf of Mr. Fitch.

24 THE COURT: How are you today?

25 MR. NODINE: Doing well. I hope you are, Your Honor.

1 THE COURT: I'm doing fine. Thank you.

2 MR. NODINE: We're here today to show that Mr. Brannon
3 failed to flesh out the facts of the case, give the jury any
4 reason to believe Mr. Fitch was innocent, and left the jury
5 to their only conclusions that the testimony of the alleged
6 victim was the truth. I'd like to put Mr. Fitch up as my
7 first witness.

8 THE COURT: All right. Come forward please, Mr. Fitch.
9 Mr. Fitch, when you get over here, if you'll put your
10 left-hand on the Bible and raise your right-hand to the best
11 of your ability.

12 DAVID FITCH, having been first duly
13 sworn, testified as follows:

14 THE COURT: Have a seat please.

15 (Witness complies.)

16 THE COURT: State your name please, sir.

17 WITNESS: David Fitch.

18 THE COURT: Counselor, your witness.

19 DIRECT EXAMINATION

20 BY MR. NODINE:

21 Q Mr. Fitch, was Doug Brannon your initial attorney?

22 A No, he wasn't.

23 Q Was Doug Brannon appointed to you or was he, or was he
24 a private paid attorney?

25 A No, he wasn't. I hired another attorney and he had Mr.

David Fitch - Direct examination
by Mr. Nodine

- 1 Brannon take over the case because he was moving away.
- 2 Q Okay. So, your initial attorney advised you that he
- 3 would not be handling your case and he turned it over to
- 4 Mr. Brannon?
- 5 A That's correct.
- 6 Q Did you pay the initial attorney any monies to
- 7 represent you?
- 8 A Yes, I did.
- 9 Q Okay. Is your understanding that those monies were
- 10 turned over to Mr. Brannon?
- 11 A No, it's my understanding that he did not get paid.
- 12 Q Okay. But Mr. Brannon represented you at trial?
- 13 A Yes, he did.
- 14 Q Okay. Did -- how many times did you meet with Mr.
- 15 Brannon?
- 16 A I can't remember exact. It wasn't over four times at
- 17 the most if that many.
- 18 Q Okay. Did you ever meet with the first attorney other
- 19 than initial consult---
- 20 A No.
- 21 Q ---to pay monies?
- 22 A Just, just to deal with the money issue.
- 23 Q Okay. Did Mr. Brannon visit the home or homes of the
- 24 alleged incident?
- 25 A Not that I'm aware of he did not.

David Fitch - Direct examination
by Mr. Nodine

1 Q Okay. Did Mr. Brannon call any female character
2 witnesses on your behalf?

3 A He called one.

4 Q Okay. And that being?

5 A Sara Ivey.

6 Q Okay. And who is Mrs. Ivey?

7 A She's a friend of the family.

8 Q Okay. Did Mr. Brannon call any witnesses or try to
9 elicit any testimony related to any other males living in or
10 around the home where the alleged incidents took place?

11 A No, sir.

12 Q Did Mr. Brannon call any witnesses or ask any questions
13 relative to why this young lady would have a motive to make
14 these allegations against you?

15 A Say it again, sir.

16 Q Did Mr. Brannon ask any questions of the alleged victim
17 or any other witnesses or call any witnesses on your behalf
18 that would, in your opinion, cause a jury to believe that
19 there's any motive for this young lady to make these
20 allegations other than the fact that you did, did what she
21 was alleging?

22 A No.

23 Q Is there anything you'd like to tell the Court that I
24 have not brought out to be a direct question or anything
25 you'd like to say about Mr. Brannon's representation of you

David Fitch - Direct examination
by Mr. Nodine

1 and his alleged failure to develop the facts as you see that
2 they should of been developed?

3 A No.

4 MR. NODINE: Your witness.

5 MS. WHITE: Okay. Thank you.

6 CROSS-EXAMINATION

7 BY MS. WHITE:

8 Q Mr. Fitch, just a couple of questions.

9 You said your attorney only called one female character
10 witness, Sara Ivey?

11 A Uh-huh. (Affirmative).

12 Q He also called your wife and your daughter?

13 A Yes, I didn't know -- I didn't think about that. He
14 did.

15 Q Okay. And then also Sara Ivey's mother, Glenda Ivey,
16 is that correct?

17 A Yes.

18 Q Okay. So, all of those folks testified about you and
19 your character and, and whether or not they were afraid to
20 either be in your presence alone or if you had done anything
21 to them, is that correct?

22 A Correct.

23 Q Okay. He also -- you said he never called any
24 witnesses in regards to males, other males that lived at the
25 home, but testimony was brought out about the fact that the

David Fitch - Cross-examination
by Ms. White

1 victim's father, at one point, had lived with y'all and that
2 the mother's boyfriend, is that correct --

3 A Yes.

4 Q -- and, and her brother?

5 So, there was definitely testimony that other males
6 were living in the home at various times?

7 A That did not come to trial.

8 Q But the testimony was put before the jury, isn't that
9 right?

10 Didn't the jury hear about those folks living in the
11 home?

12 A Yes.

13 Q Okay.

14 All right. Your Honor, that's all the questions I have
15 for this witness.

16 THE COURT: Anything further from the---

17 MR. NODINE: One more point, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. NODINE:

20 Q Relative to the female witnesses that were not called,
21 were, were there two female witnesses unrelated to you who,
22 who were on, as far as you understood, with your pretrial
23 conference with Mr. Brannon that would be called to trial,
24 but, given logistics, were not called to trial?

25 A Right.

Doug Brannon - Direct examination
by Mr. Nodine

1 MR. NODINE: Okay. Nothing further, Your Honor.

2 MS. WHITE: Nothing further, Your Honor.

3 THE COURT: You may step down, sir.

4 Petitioner wish to call additional witnesses?

5 MR. NODINE: Yes, Your Honor. We'd like to call Mr.

6 Brannon.

7 THE COURT: Come forward, sir, to be sworn.

8 DOUG BRANNON, having been first duly
9 sworn, testified as follows:

10 THE COURT: Have a seat please, and once seated, state
11 your name.

12 WITNESS: My name is Norman Douglas Brannon.

13 THE COURT: Your witness, counsel.

14 DIRECT EXAMINATION

15 BY MR. NODINE:

16 Q Good morning, Mr. Brannon.

17 How did you come to represent Mr. Fitch?

18 A Mr. Fitch retained an attorney named Tam Boggs.

19 Mr. Boggs and I were, are good friends. In early '08 Mr.

20 Boggs made the decision to change the nature of his law

21 practice, and actually moved to Clemson, South Carolina to

22 apparently develop a real estate practice. He called me and

23 asked if I would take over, not just Mr. Fitch's case, but

24 several cases. I think it was four cases total that I ended

25 up taking from him.

Doug Brannon - Direct examination
by Mr. Nodine

1 Q Okay. Were you paid to take over those four cases?

2 A I was.

3 Q Do you recall what amount of money would of been
4 allocated to Mr. Fitch's representation?

5 A I don't remember specifically. I know that he paid me
6 \$11,000 to take the four cases. Three of them were
7 significantly lesser cases than Mr. Fitch meaning that the
8 nature of the charges were less serious than Mr. Fitch's
9 case.

10 Q Okay. You are a criminal lawyer?

11 would you call yourself a criminal lawyer?

12 A I practice primarily in, in General Sessions and Family
13 Courts. So --.

14 Q And you've had other CSC with a minor cases---

15 A Many.

16 Q ---other than Mr. Fitch's?

17 A Many.

18 Q Do you recall having cross-examined the alleged victim
19 and whether or not you asked her questions relative to
20 motive of, of why, why Mr. Fitch would have done these
21 things to her?

22 Is it just that he had opportunity?

23 A well, I remember questioning her and I, I read the
24 transcript.

25 Q I guess my question is a little bit confusing. I've

Doug Brannon - Direct examination
by Mr. Nodine

1 confused myself.

2 Did you ask her any questions that would have allowed
3 the jury to believe that she may have had a motive for
4 making accusations other than the fact that he had violated
5 her?

6 A No, I think my answer to your question is no. But, you
7 know, there's the Rape Shield Law in South Carolina. So,
8 you have to be very careful about what questions you do ask
9 the victim in a case like this.

10 But my recollection, Mr. Nodine, is that each time I
11 met with Mr. Fitch, and, and I think every time but once
12 that I met with Mr. Fitch his wife was also present, and,
13 and maybe some other family members would of come with them
14 as well, and I remember each time saying why is she saying
15 this, why did she make this up, and, and I think their
16 answers were honest in that they didn't -- I mean nobody,
17 other than her, knows why she would make this type of false
18 accusation.

19 The defense was he was never alone with her to have the
20 opportunity or to have the time, and that there were other
21 men around that, that could be the potential perpetrators.
22 But then there was the secondary defense, which was look,
23 she was just sexually active, and, and this is how she could
24 cover that up. But you can't go into sexual partners and
25 those kinds of things in a case like this. So --.

Doug Brannon - Direct examination
by Mr. Nodine

1 Q So, you believe the, the law, Rules of Evidence would
2 preclude a line of questioning about boyfriends, sexual
3 relations with other individuals?

4 A well, I know it prohibits questions about sexual
5 activity with others. I don't know that it would prohibit,
6 you know, do you have a boyfriend. But having a boyfriend
7 and getting to where we needed to go are two different
8 things.

9 Q Uh-huh. (Affirmative).

10 okay. And did you ask -- it's my understanding that
11 the alleged victim had a female examination with Doctor
12 Angela McGee at roughly 14 years of age?

13 A Yeah, in fact, she had a series of examinations with
14 Doctor McGee. The first time Doctor McGee saw her I believe
15 was for an athletic physical, and then there were three,
16 three visits related to I guess which would of been her
17 first OB-GYN examination.

18 Q Okay. Did Mr. -- did Doctor McGee's testimony, did the
19 State put her up to show that the alleged victim had, in
20 fact, been sexually violated, a physical, she testified,
21 testified to some physical examination that would
22 necessarily prove that there had been penetration?

23 A Her testimony was that she had been penetrated.

24 Q Okay.

25 A And not; not once, but on multiple occasions.

Doug Brannon - Direct examination
by Mr. Nodine

1 Q Okay. And did you ask Doctor McGee or any other
2 witness or call any other witnesses for the purpose of
3 showing that one reason may have been that she was, in fact,
4 sexually active, but she did not want her parents to know
5 she was sexually active?

6 So, in an effort to not be punished by her parents for
7 her own sexual activity that she had a motive to blame her
8 uncle?

9 A Well, in my opinion, I, I can't ask, for instance, her
10 mother if she knew she, her daughter was sexually active. I
11 don't think I can ask that question, but I did ask Doctor
12 McGee. I think the question was along the lines, doctor,
13 your testimony, your testimony is that she has been
14 penetrated. Answer yes. Were there any bruises, marks,
15 tears, or anything like that. She said no. And I said no,
16 in other words, so, your testimony is that this, this
17 victim, this alleged victim had has sex, correct, and she
18 said yes. I mean -- and, and, you know, I, I think that's
19 about as far as I can go.

20 Q Okay. Is it fair to say that, in this case, there was
21 testimony of the alleged victim, the testimony of the
22 doctor, and then the testimony of the applicant, Mr. Fitch?

23 And, so, it's his word versus her word and the word of
24 the doctor who has no direct knowledge and would, was just
25 giving evidence of that, medical evidence that she had been,

Doug Brannon - Direct examination
by Mr. Nodine

1 in fact---

2 A Penetrated.

3 Q ---penetrated?

4 A That's correct.

5 Q Okay. And, in those cases, has it been your experience
6 that a prudent criminal defense lawyer has to, to have some
7 line of questioning that would give the jury an opportunity
8 to at least believe something other than the victim's
9 testimony?

10 I mean I guess what I'm getting at is you've got a
11 young female, and you've got a middle aged male defendant,
12 and it's her word versus his.

13 Is it -- has it been your experience that you need to
14 give the jury some line of questioning, some testimony, some
15 evidence, and granted, in this case, it appears there was
16 little to no physical evidence, something for them to
17 believe an alternative version of the story?

18 A Well, given that opportunity I would love to have had a
19 witness to say that there was a motive or something. I mean
20 I can only create -- I can only present the case that I
21 have, and I didn't have a witness that could give me a
22 motive. I mean, for a number of years, the victim in this
23 case lived in and out of the home of Mr. Fitch and his wife
24 and, and their children.

25 So, I mean if there was a witness that could of said

Doug Brannon - Direct examination
by Mr. Nodine

1 this young girl is a liar or this young girl is sexually
2 active or I would, I would of called that witness. But that
3 witness didn't exist as far as my client could tell me.

4 Q Okay. So, there was no evidence that this individual
5 had been suspended from school for some pornographic
6 materials, letters, or otherwise?

7 A If that evidence exists I didn't know about it.

8 Q Okay. So, you didn't know that she had been suspended
9 for two days relative to profanity, two days for
10 pornography---

11 MS. WHITE: Your Honor, I think he's asked and answered
12 the question, that he didn't know of any evidence of that,
13 and I don't -- I'm not sure where this evidence is coming
14 from or what, what it is in regards to being authenticated.

15 THE COURT: He has indicated he wasn't aware.

16 Is there some -- are you gonna ask him about a document
17 or something?

18 MR. NODINE: Well, Your Honor, unfortunately I didn't
19 prepare to submit this today. This was in the, the record
20 that I got from Mr. Brannon. So, I didn't do any
21 independent research.

22 WITNESS: Okay.

23 THE COURT: Well, if it's something in the discovery
24 you've reviewed, ask him about it.

25 A If I can see it?

Doug Brannon - Direct examination
by Mr. Nodine

1 MS. WHITE: Can I see it?

2 MR. NODINE: Okay. Sure.

3 Any objections?

4 MS. WHITE: I don't have any objections.

5 THE COURT: You want to show this to him?

6 MR. NODINE: Yes, Your Honor.

7 THE COURT: You can approach the witness.

8 Q Have you ever seen that document?

9 A Apparently I had, yes.

10 Q What does it purport to be?

11 A It appears to be some disciplinary records from the
12 school that she would of attended in Spartanburg County.

13 Q Okay. Was this document introduced into evidence at
14 the trial?

15 A I don't believe it was.

16 Q Okay. But it does read suspension for pornography?

17 A It does. It does.

18 Q Okay. Did you ask the alleged victim any questions
19 relative to whether or not she had been angry at her uncle,
20 if her uncle had ever punished her for anything, any line of
21 questioning, questions that would, that would not be,
22 necessarily would not go to something that would be
23 precluded from entering into evidence based on the Rape
24 Shield Statute or otherwise, but it would somehow give the
25 jury a reason to believe that this was retaliation for some

Doug Brannon - Direct examination
by Mr. Nodine

1 other act?

2 A I'm looking at the transcript to make --.

3 Q Okay.

4 A I, I apparently did not ask her a question about that.

5 MR. NODINE: I have no further questions, Your Honor.

6 THE COURT: Ms. White.

7 MS. WHITE: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. WHITE:

10 Q Mr. Brannon, you said you were retained in this case,
11 took over in early '08?

12 A Yes.

13 Q And the case actually went to trial the end of May of
14 that year, is that right?

15 A Yep.

16 Q So, do you recall meeting with the victim, I mean
17 meeting with the applicant approximately maybe how many
18 times y'all met?

19 A I, I looked and we actually met in my office five
20 times.

21 Q Okay. And you said that when you met he often had
22 other family members---

23 A Yes.

24 Q ---with him?

25 A Yes.

Doug Brannon - Cross-examination
by Ms. White

1 Q And, so, were you able to talk to him during those
2 times to see if they had, I think you already indicated they
3 indicated no idea of motivation for this, any other
4 witnesses that they thought could provide anything like
5 that?

6 A There were -- there was the mom's boyfriend, and then
7 the mom's estranged husband, the victim's mother's boyfriend
8 and the victim's mother's estranged husband. But it's my
9 understanding that both of them were in Kentucky. And, so,
10 obviously I couldn't, I couldn't subpoena those people,
11 and -- but everybody that they identified as a possible
12 witness was on my witness list. I, I do recall that there
13 were some people on my witness list that we didn't call, but
14 I don't remember -- at this point I don't remember why we
15 didn't call them.

16 Q Okay. And overall did you talk with Mr. Fitch about
17 the strategy of the case?

18 what was the, the discussion in regards to that?

19 A As I said earlier, the, the first defense was he was
20 never alone with her, and, and I thought we did a pretty
21 good job, through Mr. Fitch's wife and the other people that
22 we called, that pretty much covered a timeline that would of
23 suggested that he was never alone with her. But secondary
24 it was look, she was sexually active and she got caught, and
25 I asked the victim that question.

Doug Brannon - Cross-examination
by Ms. White

1 I said you never told anybody about your uncle until
2 after the doctor looked at you and said your hymen's busted,
3 you got busted, and you had to come up with a story. I mean
4 I did go down that road.

5 Q And, in fact, you asked the doctor some about whether
6 or not she had talked with her about having sex just in
7 general at these appointments?

8 A Uh-huh. (Affirmative).

9 Q Didn't you?

10 A Yeah.

11 Q Okay. In regards to the, any evidence that the, the
12 victim had been suspended for pornography or profanity,
13 weren't the dates on that late October of '07 and February
14 of '08 right prior to your trial?

15 A Yeah.

16 Q So, the victim had actually reported in 2004, hadn't
17 she?

18 A Correct.

19 Q So, these -- any of these incidents were almost four
20 years later?

21 A Right.

22 Q Okay. Would you have used those in trying to impugn
23 the victim or, or impeach her on anything?

24 A Well, apparently I didn't think it was, it was
25 relevant---

Doug Brannon - Cross-examination
by Ms. White

1 Q Right.

2 A ---and, quite frankly, I'm pretty certain that Mr.
3 Leibert would of objected to that line of questioning. So
4 --.

5 Q Okay.

6 All right. I think, Your Honor, that's all the
7 questions I have for this witness.

8 THE COURT: Anything further, counsel, Mr. Nodine?

9 MR. NODINE: Just one more, more thing, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. NODINE:

12 Q So, it was your strategy to, number one, say that the
13 defendant was, never had an opportunity because he was never
14 alone with the victim?

15 A Yes.

16 Q And then the fall back strategy or a second part to, to
17 the overall strategy was that she had been sexually active,
18 and was going to the doctor for her female exam and,
19 therefore, thought she was gonna be caught for, for sexual
20 activity unrelated to the defendant, and you tried to flesh
21 that out in testimony, in the doctor's testimony?

22 A Well, the doctor and the victim.

23 Q Okay. What did you ask the victim?

24 Do you recall specifically about whether or not she
25 thought that heading to the gynecologist was, in some way, a

Doug Brannon - Redirect examination
by Mr. Nodine

1 motive for making these allegations?

2 A Well, no, we didn't go there because, in fact, Mr.
3 Fitch's daughter and this victim, they both had their, their
4 first gynecological visits at the same time. I mean they,
5 they went the same day. The, the testimony was that -- I
6 don't know which one went first, but they passed in the
7 hallway going in to be seen.

8 So, this was some -- this initial visit -- when I say
9 initial visit, I'm not talking about the sports physical,
10 but the initial visit for the, the, the gynecological
11 check-up was, was planned by the two mothers I believe, and
12 Mrs. Fitch's, Mr. Fitch's wife took the two girls to the, to
13 the same doctor.

14 So, no, I don't -- the, the trip to the doctor wasn't,
15 wasn't caused by the victim to cover something up. She was
16 told she had to go to the doctor by her mom or by her aunt
17 and they took her to the doctor. It's what the doctor said,
18 once she was in there, that caused the problem, that caused
19 the problem in the girl's mind is, is what we believed.

20 Okay. But you, you kind of have to step back a little
21 bit. If you look at the opening statement, I mean Mr. Fitch
22 had no criminal record. He was a hard worker. He was
23 providing for his family. You know, he was, by all
24 accounts, he was a great dad, and, and that -- I mean that
25 story was told in the opening statement and then through the

Doug Brannon - Redirect examination
by Mr. Nodine

1 other witnesses that, that we called.

2 So, the overlying defense or the overriding defense was
3 look, this is the good guy that didn't, he didn't do this,
4 and because he's a good guy -- I mean we showed he never had
5 the opportunity. He was not alone with this child. And,
6 oh, by the way, she was sexually active, and I was able to
7 bring that out. I did ask that question in the trial of the
8 victim. It got objected to and I was called to the bench,
9 but I mean she answered that question.

10 Q Did you ask any direct questions of family members
11 about discussions prior to the first gynecological, gyno
12 visit?

13 Any, any -- did you, did you ask any questions about
14 did the females of the family discuss what's gonna happen at
15 the doctor, here's, here's how it's gonna go down, here's,
16 here's what you can expect from this visit for the first
17 female exam?

18 A The answer to your question is yes, I had that
19 discussion with Mrs. Fitch, but not in that detail. I mean
20 my questions were more okay, whose idea was it for this
21 appointment to be made, and it was -- I believe it was the
22 two moms thinking okay, the girls are now -- they need to
23 go, they need to go see the gynecologist. I mean -- but as
24 far as did they tell the girls what they were about to have,
25 to have, the type of examination or what might be done or

Doug Brannon - Redirect examination
by Mr. Nodine

1 what might be said, we didn't go there, but we did talk
2 about the planning of the visit by the two girls.

3 Q So, at trial you did not ask questions that would have
4 been intended to get some testimony into the record that
5 mother or aunt or some other person in the household told
6 the alleged victim that the first female visit could, in
7 some way, indicate whether or not she had been sexually
8 active?

9 A I didn't go into that, no. But it is my recollection
10 that neither the victim's mother or the victim's aunt, in
11 2004, knew that she was sexually active. So, I don't think
12 they knew that they needed to have that conversation.

13 Q But you didn't ask them anything---

14 A No, I did not.

15 Q ---that would have, had it been answered and had it, in
16 fact, been the case, that would have said, testimony, for
17 instance, that said no, we didn't have any discussions with
18 our daughters about what to expect at the female exam or no,
19 we didn't make any jokes about hey, you've been sexually
20 active, the doctor's gonna know?

21 You didn't ask any questions that would have fleshed
22 out whether or not they had had those discussions and
23 whether or not there had been any dialogue between the
24 mother, the aunt, and the girls about sexual activity and
25 what, you know, whether or not the medical visit could be

Doug Brannon - Redirect examination
by Mr. Nodine

1 expected to determine whether or not the alleged victim had
2 been sexually active?

3 A No, I didn't ask any of those questions.

4 MR. NODINE: Nothing further, Your Honor.

5 MS. WHITE: Just---

6 THE COURT: Anything further, Ms. White?

7 MS. WHITE: Just briefly, Your Honor. I want to---

8 THE COURT: Yes, ma'am.

9 MS. WHITE: ---clarify.

10 RECROSS EXAMINATION

11 BY MS. WHITE:

12 Q In the transcript, Page 49, you indicated you were
13 asking the victim that Doctor McGee told her that her hymen
14 was broken, and that that's when she said that Uncle David
15 touched her---

16 A Right.

17 Q ---after the doctor asked her if she was sexually
18 active---

19 A Right.

20 Q ---and, in fact, you said it wasn't until you got
21 busted that you put it on Uncle Dave?

22 A That, that---

23 Q Is that what you were talking about with asking her
24 about her sexual activity?

25 A Yes. Yes.

Doug Brannon - Recross examination
by Ms. White

1 Q Okay. And it was objected to and you had a bench
2 conference?

3 A Right.

4 Q And then you tried to kind of go further into that?

5 A Right.

6 Q Is that right?

7 A Yes.

8 Q Okay.

9 All right. That's all I have, Your Honor.

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

11 Applicant wish to call additional witnesses?

12 MR. NODINE: No, Your Honor.

13 THE COURT: State wish to call witnesses?

14 MS. WHITE: No, Your Honor. The State has no
15 witnesses.

16 THE COURT: All right. I'll hear from the applicant.

17 MR. NODINE: Your Honor, we believe that what happened
18 in the trial was the jury was presented effectively with the
19 testimony of Mr. Fitch who said I didn't do it, and they
20 were presented with the testimony of the daughter who said
21 he did it. The doctor's testimony just proved that she had
22 been sexually active to the extent medical science is even
23 reliable.

24 We feel like Mr. Brannon failed to ask questions of
25 family members and of the alleged victim of what she knew

1 about the pending medical visit that would have potentially
2 led her to believe that the doctor's gonna discovery she's
3 sexually active, and, you know, if, in fact, she was, had a
4 boyfriend or she was being sexually active with her brother
5 or other family member, whether consensual or not, you know,
6 that the doctor would necessarily know that. We don't think
7 that that was properly, properly explored at trial.

8 We also believe that Mr. Brannon failed to ask
9 questions relative to her relationship otherwise with Mr.
10 Fitch that might give the jury some reason to believe that
11 this was done in retaliation for, for Mr. Fitch having
12 punished her in some manner for, you know, him having done
13 something to her or his relationship with, with her mother,
14 with her aunt, or otherwise that would just give the jury
15 any reason to believe that this was a retaliatory act of the
16 alleged victim. We just think that, that Mr. Brannon failed
17 to, to ask sufficient questions to, you know, give the
18 benefit of the doubt.

19 Primarily, as I stated earlier, that the, that the
20 alleged victim had prior knowledge, before she went to the
21 doctor, that, you know, she needed to concoct a story to
22 cover-up her sexual activity that was with someone other
23 than, than her family, Your Honor.

24 THE COURT: Ms. White.

25 MS. WHITE: Thank you, Your Honor.

1 The State would submit that it's clear that Mr. Brannon
2 went through, investigated the case, and, and presented the
3 best defense he could with the evidence and the facts that
4 he had available. Excuse me. Even if they're additional
5 questions that the applicant alleges he should have asked,
6 there's no indication that -- it's, it's pure speculation
7 that any of those answers would of come out at trial.
8 There's no factual, you know, support for that, that there
9 was any retaliation, that there was any planning on her
10 behalf to concoct a story.

11 So, at this point it's just mere speculation that, that
12 these questions would of brought out any additional facts,
13 and, so, therefore, we would ask that you deny the
14 application because the applicant failed to meet his burden
15 of proof.

16 THE COURT: Well, I do find that there's been no
17 showing that had, of what evidence would of come from these
18 additional witnesses that should of been called. There's
19 been no showing as to what answers might of been gotten from
20 the females who talked to the victim about a visit to the
21 gynecologist or what it might reveal or what it wouldn't
22 reveal.

23 It would be speculation on this Court's part to assume
24 that all of those answers would of come out in favor of the
25 applicant, and also this Court can not make a, make a

1 determination that had the answers even been favorable that
2 it would of changed the outcome of the case in any
3 appreciable way.

4 So, at this time I'll deny the application.

5 Ask that the State prepare an order consistent with my
6 reasoning from the bench, and thank you very much.

7 That concludes the hearing.

8 MS. WHITE: Thank you, Your Honor.

9

10 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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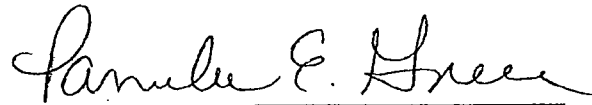
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 11th day of June, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 21st, 2012



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG)

David Fitch, #328503,)

2011-CP-42-0344

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)
_____)

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 31, 2011. The Respondent made its Return on or about February 15, 2012. An evidentiary hearing into the matter was convened on June 11, 2012, at the Spartanburg County Courthouse. The Applicant was present and represented by Eric A. Nodine, Esquire. H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. N. Douglas Brannon, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the trial transcript, Applicant's appellate records.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Applicant was indicted at the May 2008 term of the Spartanburg County Grand Jury for criminal sexual conduct with a minor - 1st degree (2008-GS-42-2533), lewd act upon a minor (2008-GS-42-2771), and criminal sexual conduct with a minor - 2nd degree (2008-GS-42-2775). N. Douglas Brannon, Esquire, represented the Applicant at trial. On May 22, 2008, the Applicant was

convicted of all charges by a jury. The Honorable J. Derham Cole presided over the Applicant's trial and sentenced him to confinement for twenty four years for criminal sexual conduct with a minor - 1st degree, twenty years for criminal sexual conduct with a minor - 2nd degree, and fifteen years for lewd act upon a minor, all sentences to run concurrently. Subsequently, Applicant's Counsel filed a Motion for a New Trial on May 28, 2008. Judge Cole denied the Motion on June 3, 2008.

A timely Notice of Appeal was timely filed and an Anders brief was submitted on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Fitch, Op. No. 2010-UP-016 (filed January 25, 2010). The Remittitur was returned on February 10, 2010.

ALLEGATIONS

In the current application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to bring out the facts of the case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the

evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

The Applicant testified that he originally hired another attorney, who ultimately had Counsel take over the case. Counsel testified that he took over the case when Tam Boggs moved to Clemson. Counsel testified that he practices primarily in criminal and family court but has represented a number of CSC cases in the past. Applicant testified that he met with Counsel up to

four (4) times. Counsel testified that he met with the Applicant in his office at least five (5) times. Applicant testified that he was not aware of Counsel ever visiting the locations of the incidents. He also testified that Counsel only called one female character witness on his behalf, Sara Ivey. However, Applicant later acknowledged that his wife and daughter did testify on his behalf.

Counsel testified that the defense in this case was that the Applicant was never alone with the victim; his niece who lived with his family, and he was able to present several witnesses who testified to that. The second defense was that the victim was sexually active. The State offered testimony from Dr. McGee that the victim had been penetrated numerous times, but Counsel testified that he was able to ask the victim whether or not she had gotten caught having sex. Counsel also testified that he asked Dr. McGee if she talked with the victim about having sex. Applicant testified that Counsel never called any witnesses to suggest motive for the victim's allegations against him. Counsel testified that although he believed a possible motive for the accusations was because the victim was sexually active and the doctor could determine that based on her exam; he never asked the victim about that potential motive due to the Rape Shield Law. Counsel testified that the law prohibits asking the victim questions about sexual partners. However, Counsel testified that every time he met with the Applicant he asked if he was aware of a motive for why the victim would make up the accusation. Counsel testified that he could only present the case he had and he did not have a witness to present evidence of a motive for making these allegations. Although presented by Applicant's PCR Counsel, Counsel testified the he was not aware of any evidence that the victim had been suspended because of profanity and pornography by her school prior to the allegations of abuse or the trial.

This Court finds Counsel's testimony to be more credible than the Applicant's. This Court finds that Counsel met with Applicant and thoroughly reviewed the discovery materials and potential trial strategy. The evidence and testimony offered by the Applicant that he alleges Counsel should have presented to the court was often cumulative and more prejudicial to his own defense than helpful. The testimony regarding the victim's school record was irrelevant to this matter as the school incidents occurred after allegations of abuse and following the trial. Additionally, the Applicant failed to offer any additional witnesses that Counsel could have called to testify that the victim had a motive for bringing these allegations. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Although Counsel did not ask specific questions relating to the victim's sexual activity, "a defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing, 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not present any testimony showing the witnesses' answers at trial would have supported his defense, but offered merely

speculation. Accordingly, this Court finds that the information presented by the Applicant was not sufficient to have altered the outcome of Applicant's trial had it been presented.

This Court finds that Counsel is an experienced attorney who was prepared for and effectively represented Applicant at his trial. This Court finds that the Applicant has failed to meet his burden of proof as to all claims of ineffective assistance of counsel; therefore, this claim is denied and dismissed.

Summary

This Court finds counsel adequately conferred with the Applicant, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Prasier *supra*. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

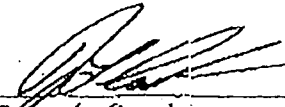
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This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1st day of August, 2012.


Roger L. Couch
Presiding Judge

W. SCRP 2012 AUG 6

2012 AUG -6 AM 9:29

CLERK OF COURT
SOUTH CAROLINA
APPELLATE COURT

WITNESSES

Spartanburg County Sheriff's Office

T.K. Wilston

1. SENTENCE MADE

2. REPORT ENTERED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

Direct Indictment ASSESSMENT AND

FINE CARD MADE

7. TRAFFIC VIOLATIONS COPY ☒

ACTION OF GRAND JURY

*True Bill**Stall*

Foreperson of Grand Jury

Date: 5-15-08

VERDICT

MARC KITCHENS

606741 61 MAY 19 2008

SPARTANBURG COUNTY

CLERK OF COURT

Foreperson of Petit Jury

Date: 5-17-08

08-GS-42-2533

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

MAY 19 2008

TERM

THE STATE

vs.

David Fitch

Indictment for

CRIMINAL SEXUAL CONDUCT
W/MINOR, FIRST DEGREE

SC Code: 16-03-0655 (A)(1)

CDR Code: 0385

Class FEL-C(V)

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

MAY 15 2008

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE

That David Fitch did in Spartanburg County, between March 20, 2000 and May 9, 2001, commit the crime of Criminal Sexual Conduct with a Minor in the First degree, in that the defendant did engage in a sexual battery upon the minor victim, Minor Child who was under eleven (11) years of age at the time of the said incident. Said incident occurred in Spartanburg County, South Carolina, in violation of §16-03-655 (A) (1), *CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Spartanburg
STATE David vs. FitchAKA: _____
Race: (w) Sex: M Age: 47
DOB: _____

DL# _____ SID# _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 08-GS-42-2533
AW#: _____
Date of Offense: 3/29/00 - 5/9/01
S.C. Code §: 16-3-655(1)
CDR Code #: 0385

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: CSC w/ minor 1st degreein violation of 16-3-655(1) of the S.C. Code of Laws, bearing CDR Code # 0385☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature] Solicitor David Fitch Defendant Doug Brannon Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 24 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.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ 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 \$ 100.00

\$14-1-211(A)(2) (DUI Surcharge): \$100 \$ _____

\$56-5-2995 (DUI Assessment): \$12 \$ _____

\$35.13 (Public Def/Prob): \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding): \$25 \$ 25.00

\$33.7, 1B TP (Drug Court Surcharge): \$100 \$ _____

\$50-21-114(BUI Breath Test Fee): \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment): \$40/ea \$ _____

3% to County (if paid in installments): \$ 3.75TOTAL \$ 128.75

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, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Court Reporter: Rinda MoffettClerk of Court Deputy Clerk T. CampPRESIDING JUDGE [Signature]Judge Code: 2Sentence Date: May 22, 2008

WITNESSES

Spartanburg County Sheriff's Office

T. K. Tullotson

1. SENTENCE MADE

2. REPORT ENTERED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

6. ASSESSMENT AND
Direct Indictment CARD MADE

7. TRAFFIC VIOLATIONS COPY

ACTION OF GRAND JURY

True Bill

[Signature]

Foreperson of Grand Jury

Date: 5/15/08

VERDICT

MARC KITCHENS

Guilty

2008 MAY 19 PM 3:15

CLERK OF COURT
SPARTANBURG COUNTY

Foreperson of Petit Jury

DOCUMENT

08-GS-42-2771

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

MAY 19 2008

TERM

THE STATE
vs.

David Fitch

Indictment for

SEX/LEWD ACT, COMMIT/ATTEMPT
UPON CHILD <16

SC Code: 16-15-0140

CDR Code: 2468

Class FEL-D

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

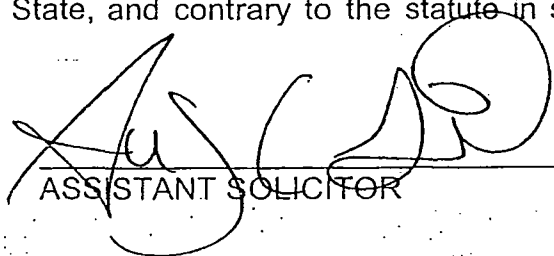
INDICTMENT

At a Court of General Sessions, convened on MAY 15 2008 the
Grand Jurors of Spartanburg County present upon their oath:

SEX/LEWD ACT, COMMIT/ATTEMPT UPON CHILD <16

That David Fitch, did in Spartanburg County, between the dates of March 20, 2000 and March 3, 2003, he being over the age of fourteen (14) years, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of one Minor Child a minor under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child, of in violation of §16-15-0140, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Spartanburg
STATE David VS. FitchAKA: _____
Race: _____ Sex: M Age: 47
DOB: 11/24/60 SS#: _____
Address: 190 Anderson St.
City, State, Zip: Clinton, SC 29324
DL# _____ SID# _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE #: 8 -GS-47-2771
AW#: D7
Date of Offense: 3/20/00 - 3/3/03
S.C. Code §: 10-15-140
CDR Code #: 24608

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Lewd act upon a minor
in violation of § 10-15-140 of the S.C. Code of Laws, bearing CDR Code # 24608☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTORNEYS: [Signature] Solicitor David Fitch Defendant Doug Brunson Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 1 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ 100.00; 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.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ 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	\$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§35.13 (Public Def/Prob)	\$500	\$
§73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ 3.75
TOTAL	\$	\$ 128.75

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, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Court Reporter: Rinda MoffittClerk of Court/Deputy Clerk: J. Camp

PRESIDING JUDGE

Judge Code: 2Sentence Date: May 22, 2008

WITNESSES

Spartanburg County Sheriff's Office

T.K. Tullison

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

Direct Indictment: ASSESSMENT AND
FINE CARD MADETRAFFIC VIOLATIONS COPY ☒

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: *5/15/08*

VERDICT

Guilty MARC KITCHENS

51 MAY 19 PM 3:15

Foreperson of Petit Jury

Date: *5-22-2008*

DOC NO.

08-GS-42-2775

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

MAY 19 2008

TERM

THE STATE
VS.

DAVID FITCH

Indictment for

CRIMINAL SEXUAL CONDUCT
WITH A MINOR, SECOND DEGREE

SC Code: 16-03-655 (B)

CDR Code: 0396

Class FEL/C (V)

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

MAY 15 2008

At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, SECOND DEGREE

That the Defendant, David Fitch, did in Spartanburg County, between the dates of May 10, 2001, and March 1, 2003 commit the crime of Criminal Sexual Conduct with a minor in the Second Degree in that the Defendant did commit a sexual battery upon the minor, Minor Child who was fourteen (14) years of age or less, but who was at least eleven (11) years of age at the time of the incident. Said incident occurred in Spartanburg County, South Carolina, in violation of Section 16-03-655 (B) (1), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Spartanburg
STATE David VS. Fitch

AKA:

Race: WSex: MAge: 47DOB: [REDACTED]SS#: [REDACTED]Address: [REDACTED]DL# [REDACTED]SID# [REDACTED]INDICTMENT/CASE# 08-GS-42-228AW#: [REDACTED]Date of Offense: 5/10/08S.C. Code §: 16-3-655(D)CDR Code #: 038-0596

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: CSC w/ minor 2nd degreein violation of § 0596 of the S.C. Code of Laws, bearing CDR Code # 0390
☐ 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 initial)The plea is ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State

ATTEST:

Solicitor [Signature]Defendant David FitchAttorney for Defendant Doug BrunsonWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 29 months/years or ☐ under the Youthful Offender Act not to exceed — yearsand/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.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ — plus 20% fee: \$ —

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:	\$	
\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
\$14-1-211(A)(2) (DUI Surcharge)	\$100	\$ <u>100.00</u>
\$56-5-2995 (DUI Assessment)	\$12	\$ <u>12.00</u>
\$35.13 (Public Def/Prob)	\$500	\$ <u>500.00</u>
\$73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
\$33.7, 1B TP (Drug Court Surcharge)	\$100	\$ <u>100.00</u>
\$50-21-114(BUI Breath Test Fee)	\$50	\$ <u>50.00</u>
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ <u>40.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.75</u>
TOTAL	\$	\$ <u>128.75</u>

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 FundOther: —☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 2Sentence Date: May 22, 2008Court Reporter: Rinda MoffittClerk of Court/Deputy Clerk J. Camp