

VOLUME II of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO KERSHAW COUNTY

Court of Common Pleas

The Honorable Grace Gilchrist Knie, Circuit Court Judge

Case No. 2019-CP-28-00236

RECEIVED

Feb 27 2023

S.C. SUPREME COURT

James Wayne Miller, #367454,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2022-000753

APPENDIX

ASHLEY A. MCMAHAN
McMahan Law, LLC
PO Box 50536
Columbia, SC 29205
(803) 219-1110

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

WILLIAM W. BLITCH, JR.
Sr. Asst. Dep. Attorney General
PO Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

TRANSCRIPT OF TRIAL	1
FINAL BRIEF OF APPELLANT	673
FINAL BRIEF OF RESPONDENT.....	714
OPINION NO. 2018-UP-121 (Ct. App. filed March 21, 2018)	753
PETITION FOR REHEARING	757
ORDER DENYING PETITION FOR REHEARING	773
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS.....	774
RETURN TO PETITION FOR WRIT OF CERTIORARI	800
ORDER DENYING THE PETITION FOR WRIT OF CERTIORARI	826
REMITTITUR	828
APPLICATION FOR POST-CONVICTION RELIEF	830
AMENDED APPLICATION FOR POST-CONVICTION RELIEF.....	845
RETURN	851
TRANSCRIPT OF POST-CONVICTION RELIEF HEARING.....	878
APPLICANT’S EXHIBIT NO. 1 (Sentinel Health Documents).....	1008
APPLICANT’S EXHIBIT NO. 2 (Medical Records)	1011
APPLICANT’S EXHIBIT NO. 3 (Medical Records)	1027
APPLICANT’S EXHIBIT NO. 4 (Medical Records)	1028
APPLICANT’S EXHIBIT NO. 5 (Email Communication)	1031
RESPONDENT’S EXHIBIT NO. 1 (Email Communication).....	1032
ORDER OF DISMISSAL.....	1033
CLERK OF COURT’S RECORDS.....	1087
SCDC RECORDS.....	1097

1 MS. CAVANAUGH: Thank you, Your Honor.

2 THE COURT: All right. Thank you. It is 1:15. How
3 long do you all need for lunch? Can y'all do it in 45
4 minutes? Can we get back here at 2:00?

5 MS. CAVANAUGH: Yes.

6 THE COURT: I would appreciate that. Let's get back
7 here at 2:00 so we don't have the jury out forever.
8 Thank you.

9 (Luncheon recess.)

10 BAILIFF: All rise.

11 THE COURT: Okay. Thank you. Please be seated.
12 Bring in the jury please.

13 (Whereupon, the jury returned to the courtroom at
14 2:00 p.m.)

15 THE COURT: All right. Welcome back from lunch.
16 I'll ask the State to call their next witness.

~~17 MS. CAVANAUGH: Thank you, Your Honor. The State~~
18 calls Dr. Allison Marie Foster.

19 Thereupon,

20 ALLISON MARIE FOSTER

21 after having been first duly sworn, testified as follows,

22 THE CLERK: Please have a seat. After you're
23 seated, please state your full name for the record.

24 THE WITNESS: My name is Allison Marie Foster.

25 DIRECT EXAMINATION

1 BY MS. CAVANAUGH:

2 Q. Dr. Foster, what is your profession?

3 A. I'm a licensed clinical psychologist. I'm chief
4 psychologist at a place called the Assessment and Resource
5 Center which is a children's advocacy center in Columbia.

6 Q. When you say a children's advocacy center, what is
7 meant by that phrase?

8 A. Sure. Children advocacy centers are multi
9 disciplinary programs that are accredited and they provide
10 services to children when there is an investigation of
11 suspected child abuse. So we provide forensic interviews of
12 children, forensic medical exams, some limited therapy and
13 victim advocacy support services.

14 Q. And are those type of child resource centers, are
15 they located throughout the state?

~~16 A. Yes. I think we have 17 of them in South~~
~~17 Carolina.~~

18 Q. Do you also currently have a private practice?

19 A. Yes, I do. I have a private practice known as
20 Forensic Family Associates.

21 Q. How long have you had that private practice?

22 A. I started moonlighting, I worked full-time at The
23 ARC beginning in 1995. For 17 years there I was the program
24 director, but I also had a little bit of moonlighting private
25 practice in the background since the late 1990's. Finally in

1 2012 I stepped aside from my full-time work at The ARC and
2 became a half time chief psychologist and then I spend the
3 rest of my time in private practice doing child custody
4 evaluations and other court ordered work involving children
5 and families.

6 Q. So what area do you actually specialize in?

7 A. Everything I do involves forensics and children and
8 families so whether that's child abuse evaluations or court
9 ordered family court sort of things, DSS cases, that sort of
10 thing.

11 Q. What is your educational background?

12 A. I went to college at Emory University in Atlanta and
13 then I worked for a year at a residential treatment facility
14 for emotionally, behaviorally disturbed adolescents in
15 Kennesaw, Georgia, and then I relocated to Columbia where I
16 entered the Ph.D. program in clinical psychology so I
~~17 graduated in the spring of 1996 with my Ph.D. in clinical~~
18 psychology.

19 Q. And your undergraduate degree, was that also in
20 psychology?

21 A. It was in psychology.

22 Q. And are you licensed in South Carolina?

23 A. Yes. So to be licensed as a psychologist in South
24 Carolina you have to have a doctorate degree which I have, and
25 then you do a year of post doctoral supervised practice and

1 take a national exam and a state oral exam and then every
2 year, of course, I attend continuing education credits to
3 maintain my license.

4 Q. And again that specific licensure is in clinical
5 psychology?

6 A. Correct.

7 Q. Do you have to complete any training to maintain
8 your licensure?

9 A. Yes. Every year I'm required to attend a certain
10 number of hours of continuing education through conferences or
11 reading articles or doing my own presentations and research in
12 the field.

13 Q. You just mentioned presentations. Do you actually
14 give presentations in this area?

15 A. Yes. I train nationally in child abuse conferences

~~16 as well as regionally. I'm invited speaker to various~~
~~17 conferences and then here in our State of South Carolina I'm~~

18 senior faculty for a five day forensic interview training
19 course that we provide called Child First and that's where we
20 teach law enforcement officers and child protective service
21 workers and forensic interviewers and other professionals
22 about how to appropriately conduct an interview of a child.

23 Q. Do you also -- You stated that you present in Child
24 First. Do you also develop the curriculum and training for
25 these programs?

1 A. Yes, I do.

2 Q. Do you stay up to date and current with the research
3 in this field as well?

4 A. Yes, I do.

5 Q. Have you been qualified as an expert in a court of
6 law in the field of child abuse assessment?

7 A. Yes.

8 Q. Approximately how many times?

9 A. Uhm, probably 150 to 200 times.

10 MS. CAVANAUGH: Your Honor, at this time I would
11 offer Dr. Allison Foster as an expert in the field of
12 child abuse assessment.

13 THE COURT: All right. Any objection?

14 MS. GOOD: No, ma'am.

15 THE COURT: All right. She is so qualified.

16 BY MS. CAVANAUGH:

~~17 Q. Dr. Foster, what does the field of child abuse~~
18 assessment actually encompass?

19 A. Uhm, it encompasses a lot of things from
20 understanding children and their developmental states so
21 understanding how abuse can affect children at different
22 developmental stages. Also, how they can remember and relate
23 information. Psychological effects of abuse depending on the
24 relationship between the perpetrator and the victim and the
25 age of the victim. So often in our field we talk about the

1 dynamics of child abuse as part of the specialty of child
2 abuse assessment. And then, of course, related, too, is just
3 the process of how to gather information from children and
4 understanding the process of disclosure. How children tell
5 and when they tell and that sort of thing.

6 Q. And when you're referring to child abuse, are you
7 talking about physical and sexual abuse?

8 A. Yes.

9 Q. Are there certain behavioral characteristics that
10 are common in child victims of sexual abuse?

11 A. Yes. Uhm, some dynamics will vary depending on what
12 kind of relationship we are talking about between the offender
13 and the victim so that it can vary somewhat in terms of the
14 dynamics and how disclosure happens depending on that
15 relationship.

~~16 Q. And do these --- We'll get into the specific~~
~~17 characteristics later, but are these characteristics that are~~
18 often displayed? Do they seem atypical to someone who is not
19 familiar with these victims?

20 A. Exactly. They can seem unexpected. For example, we
21 know in the field of child sexual abuse and what we call the
22 disclosure pattern, in other words, when and how children
23 tell, that it's more common for there to be a delay. It's
24 called delayed disclosure and the delay can be as long as
25 years. So it can be weeks, months or years. We actually know

1 from research that the majority of bona fide victims, people
2 who are known to have been victimized as children, two-thirds
3 of them won't come to anyone's attention until adulthood. So
4 things like that can seem not to be common sense if you're not
5 an expert in the field or if you're not familiar with the
6 kinds of dynamics that keep children from telling.

7 Q. And is this a field that's been studied over a
8 number of years?

9 A. Yes.

10 Q. Specifically related to this case have you had any
11 direct involvement with the investigation of the defendant
12 James Miller?

13 A. No. I have not.

14 Q. Did you interview [minor one] or counsel [minor]
15 Miller in any way in this case?

16 A. No.

~~17 Q. Did you have any opportunity to review her forensic~~
18 interview or any statement that she might have given in this
19 case?

20 A. No.

21 Q. But again you just testified are there behavioral
22 characteristics that are common to a large majority of victims
23 of child sexual abuse?

24 A. Yes.

25 Q. How is this particular area of study, how are the

1 studies conducted? Who is used in the studies?

2 A. Over the years the studies of child abuse behaviors
3 and dynamics has moved from being something that therapists
4 and clinicians have studied to more of an examination looking
5 at cases that have played out in court. So at this point most
6 of the research relies on researchers going back and looking
7 at cases where there were arrests and investigations,
8 prosecutions and convictions and then the researchers look
9 back and they look back at how the disclosure process
10 happened. How did the child tell. What were the behavioral
11 components that kept the child keeping a secret for some
12 period of time and things of that nature. So it's called
13 retrospective research because they go back and look at cases
14 that are - cases where there is a lot of data that - mostly
15 out of like child welfare files like CPS, DSS files, law
16 enforcement files and court records.

17 ~~Q. Now, you mentioned delay disclosure. First of all,~~
18 backing up just a little bit, do all child victims of sexual
19 abuse even disclose?

20 A. No. They do not.

21 Q. And to these studies -- How do you know? If they
22 never disclose, how do you know that there are child victims
23 out there they don't disclose?

24 A. That's a very good question. There's actually been
25 a body of research in the last 10 to 15 years by the CDC,

1 Centers for Disease Control and Kaiser Permanente Insurance
2 where they have just collected a large amount of research on
3 American citizens today and it's anonymous survey data and
4 that has become one of the rather surprising pieces of
5 information is how many well educated, well employed insured
6 Americans out there who have never told anybody but who are
7 endorsing on these surveys that they experienced child abuse.
8 So it's not perfect because nobody is going to go out to
9 verify each of those claims. But there's a lot of information
10 to suggest that the minority of children tell during childhood
11 if they are being abused more than will tell in adulthood and
12 some will never. Some portion of probable victims just never
13 tell law enforcement or seek any kind of justice like that.

14 Q. Along those same lines is there a term known as
15 accidental disclosure where the child is not the first one to
16 disclose?

17 A. Yes.

18 Q. How does that come about?

19 A. So within the cases that do come to our attention
20 and make my work, some of those discoveries happen. We call
21 it - there's two types of discovery, accidental and
22 purposeful. Some children decide and it's a purposeful
23 process, they decide to tell somebody what's happening and
24 that's how they come to our attention. For others it's
25 accidental discovery. For example, the child is trying to

1 keep it a secret, but somebody walks in and there is an eye
2 witness to something that alerts people that something is
3 going on. Or some other evidence shows up like a parent
4 discovers photos or a text message or any number of things
5 that could lead to an accidental discovery of abuse without
6 that child really being ready to come forward and tell.

7 Q. So as far as the child victims that do disclose, are
8 there statistics associated with how many of those child
9 victims have a delayed disclosure?

10 A. Yes. We know that the norm is for there to be a
11 delay. Most child sexual abuse occurs with dynamics around
12 influencing children to keep a secret. Children tend to be
13 very vulnerable to worrying about the consequences for
14 themselves and the offender. More often than not child sexual
15 abuse occurs between an adult who is well known and is
16 typically a family member or authority figure over the child.

~~17 So it's a very complex relationship and those dynamics will~~
18 lead children to not tell and to delay their disclosure for
19 months if not years.

20 Q. When a child does decide to disclose, is there
21 always a full disclosure?

22 A. No. In our field we talk about stages of disclosure
23 and how children can move from a stage including a stage
24 called denial. In other words, like you asked about the
25 accidental discoveries. Let's say somebody stumbles upon some

1 information and confronts a child. That child may first say
2 no, nothing is happening. That's a denial stage. Then they
3 move into a tentative stage where they're testing the waters
4 where they tell some of what's happened, maybe drop some hints
5 and perhaps want to see how it's handled so they don't want to
6 go too far down the road if they were not going to be
7 believed, for example, or if some bad consequences might
8 happen. Then they move into what is called active disclosure
9 and active disclosure is when, sometimes it happens when
10 children have kind of matured into a certain developmental
11 stage or something has shifted in their family where they
12 realize they see an opportunity to tell where maybe they
13 didn't see before so then they'll move into active disclosure
14 and they might be willing to tell pretty much everything.

15 Q. When they do finally tell someone what is happening,
16 uhm, do they give the full detail the very first time that
17 ~~they tell they have been abused?~~

18 A. It's not typical. That's less likely to happen.
19 First of all, if you think about it, if it's something that
20 you have not been speaking of, you have been suppressing
21 months or years, the first telling requires a tremendous
22 amount of psychological effort both emotionally and even just
23 organizing the memories to tell everything. So we know that
24 not everything is likely to come out in a single interview or
25 in a single outcry. There's going to be sort of an initial,

1 sometimes we refer to it as script memory where a child is
2 telling the basics of how things usually go. Then if they are
3 asked more detailed questions, they will be able to relate
4 information about specific incidents in more graphic detail.

5 Q. And what type of factors play into the delayed
6 disclosure?

7 A. Uhm, the factors that play into delayed disclosure
8 have to do with the pressures that are brought to bear on the
9 child to feel responsible for keeping a secret whether that be
10 to keep the perpetrator out of trouble, to keep themselves out
11 of trouble, to protect other family members. So depending on
12 kind of if they have been manipulated and how they have been
13 controlled they will have various concerns weighing on their
14 mind and so those things are going to inhibit the child from
15 wanting the abuse to be discovered and then once - if it's
~~16 chronic which is what most child sexual abuse is, meaning it~~
~~17 happens more than one time, once a chronic sort of pattern~~
18 gets established it gets harder and harder for a child to even
19 feel like they have the right to speak up and change the terms
20 so that's called entrapment and accommodation in our field.
21 So they still go to school. They still do their chores. They
22 still make friends and they actually invest in just trying to
23 have normalcy, normal life and accommodate and put up with the
24 part that they can't change.

25 Q. Do child victims ever feel a sense of

1 helplessness?

2 A. Yes. So the stages that we teach in our field to
3 help understand this process is that at the outset the child
4 understands that this is a secret. The child may be overtly
5 told to keep it a secret. They may just implicitly understand
6 that it's a secret and that there will be bad consequences if
7 people knew. They enter a state of helplessness again because
8 they feel like they have sort of fallen into something that
9 they don't know how to get out of. They may even feel that
10 because they didn't say no, or they didn't scream or then
11 didn't do something the first time, they almost feel like they
12 have just no right to get out of it. Like they have complied
13 with that. So then they enter that stage of helplessness that
14 goes into entrapment. The feeling that, well, I'm stuck with
15 this now. I'm trapped in these circumstance but I need to
16 just accommodate it because I still have a life to live. So

17 ~~those stages are what we refer to as the child sexual abuse~~
18 accommodation dynamics that kind of sustain that not telling,
19 that kind of investment in not telling for some period of
20 time.

21 Q. You stated it is not uncommon for the perpetrators
22 to be within the home?

23 A. Right.

24 Q. In fact, is that a common situation for victims of
25 child sexual abuse?

1 A. Yes. It is, I believe, still the most statistically
2 the most common.

3 Q. And if there are multiple children in the home, is
4 the perpetrator necessarily going to abuse all of the children
5 in the home?

6 A. No. No. There are going to be a few different
7 dynamics at play. One is going to have to do with perpetrator
8 preferences, so male, female, age range, that sort of thing.
9 But also beyond that it has to do with the sense of power and
10 control in that particular relationship. Obviously an
11 offender doesn't want to get caught and so the quality of the
12 relationship between that -- You said it was -- you asked me
13 about in the same home?

14 Q. Yes.

15 A. So there, say it's a parent or parent figure, they
~~16 may have a very different kind of emotional behavioral~~
~~17 relationship with one child over another. Maybe one child is~~
18 emotionally closer to that parent, more loyal to that parent,
19 maybe one child is more assertive or goes their own way and
20 that child would be less likely to be a target, but the one
21 that is closer or more easily manipulated or more loyal to the
22 parent, that would be the more submissive one perhaps or the
23 one that is more invested in that relationship would be the
24 one that would be more vulnerable to being groomed. So there
25 are child characteristics, there are perpetrator

1 characteristics and the perpetrator may even test the waters
2 with more than one child, you know, but they are going to
3 determine which child they feel that they can engage in this
4 relationship.

5 Q. If a child is older, 15, 16 or 17, do these factors
6 still come into play?

7 A. Yes. Again assuming a hypothetical where we're
8 talking about family relationships, if this is a child maybe
9 15, 16, 17, but has been a child of a parent since infancy so
10 the relationship is built across all of those years.

11 Q. In cases of chronic abuse, what is meant by chronic
12 abuse?

13 A. Multiple times. Sort of an ongoing situation.

14 Q. Okay. Is there going to be a clear memory of each
15 and every time they were sexually abused?

16 A. No. No more than anybody here if they were asked to
~~17 provide an account of each and every time that they did~~

18 something that they did chronically, your brain would have
19 quite a difficult time sorting through each and every time.

20 Q. Are there certain instances that they might remember
21 more clearly versus another?

22 A. Yes. Uhm, often, often the last time, a time just
23 before discovery or just before the end, a lot of times that
24 is a more easily retrieved event because it's recent and
25 because it's the end. Things change. Things happened after

1 that. So that could be one. Sometimes children will remember
2 specific events because they have happened in unusual
3 locations. So, for example, if abuse often happens in the
4 daughter's bedroom just by way of example but then sometimes
5 it happened in a vehicle or it happened in another location,
6 that might stand out. Also, if something progressed in
7 a certain way like the first time perhaps the sexual abuse
8 goes from something less painful or less intrusive like
9 touching or fondling or something to something more invasive
10 like full sexual penetration or oral sex or something like
11 that. So there can be different markers and different reasons
12 why certain memories will stand out, but then if there are a
13 lot of events that seem to go a certain way all the time those
14 tend to be sort of blurred together.

15 Q. And does chronic sexual abuse often affect memories
~~16 of other activities going on in the child's life at that~~
~~17 time?~~

18 A. Well, in general when something aversive is
19 happening, so in other words, if you're in a situation you
20 don't want to be in and you're enduring a situation that you
21 don't want to endure, there is a process that sometimes
22 victims will describe that we call dissociation. They're just
23 not paying attention to everything that's going on because
24 they are sort of mentally trying to not be there so that can
25 kind of affect their memory and their recall of like what all

ALLISON FOSTER, Ph.D. - CROSS BY MS. GOOD

517

1 is going on because they're frankly trying not to think.

2 Q. Dr. Foster, to wrap up, you stated that you do stay
3 up to date on the research in this field?

4 A. Yes.

5 Q. Does your knowledge also come from just experience
6 as a psychologist?

7 A. Yes. As a psychologist who has evaluated about 2000
8 children suspected of sexual abuse.

9 MS. CAVANAUGH: Thank you. Please answer any
10 questions from the defense.

11 CROSS EXAMINATION

12 BY MS. GOOD:

13 Q. Dr. Foster, you stated that the research that's gone
14 back over the last several years, do you know the majority of
15 that research what age group the children were?

16 A. Cases that go to court tend to involve older
~~17 children as a wide age range, but I would say that the~~
18 majority is more like eight years of age to adolescence.

19 Q. What is adolescence? What would you consider that
20 age?

21 A. Through 18.

22 Q. And is there a difference -- You testified the
23 developmental capacity of say a five year old versus a 17 year
24 old, what's the difference developmentally wise when it comes
25 to their brains and memory in development?

1 A. Quite a lot. So five year olds think very - we talk
2 about how it's important to be simple and concrete with five
3 year olds because they live in the world of the senses, what
4 they see, hear, taste, touch and smell and they live in the
5 present and they don't understand all the complexities of
6 life. Obviously that was age five. You were asking me to
7 contrast to age what?

8 Q. 17, 18.

9 A. So 17, 18, you have somebody who is as we say in
10 psychology launching so they are sort of at the tail end of
11 childhood and preparing more for independence, for independent
12 living and independent thinking and independent judgment and
13 they do understand a lot more about the complexities of
14 relationships and different psychological factors and things
15 like that.

~~16 Q. Okay. And when it comes to the memory of a five~~
~~17 year old versus a 17 year old, is there a difference when it~~
18 comes to what they can remember when it comes over their
19 childhood or lifetime like from the several months before
20 versus for a 17 year old like ten years before?

21 A. Uhm, yes. So all of us are better at recall for
22 recent events than past events, but certainly five year olds,
23 we don't expect them to remember nearly as many details as we
24 expect adolescents to be able to retrieve about things and
25 adolescents 16, 17, 18 year olds, uhm, they tend to be able

1 to, assuming normalcy, assuming they have normal IQ, no
2 impairments, we would expect them to be able to map out and
3 recall different life events from their elementary school
4 years into their middle school and high school.

5 Q. So that would be something normal you would see
6 their events through elementary school and middle school?

7 A. Right. What we know is that most of us lose our
8 most of our preschool memories and then as we get older we
9 code memories with more details and so they can become more
10 retainable so you probably have better recall of your later
11 elementary school years into your middle school years and your
12 high school years and as you go back in time to your earlier
13 elementary years your memories are likely to be more sparse.

14 Q. And usually in traumatic events do you find that
15 suspected victims or when you're interviewing somebody recall
16 their hobbies and the normal things that they like to do
17 everyday?

18 A. I normally expect they would be able to answer
19 questions about normal activities, yes.

20 Q. For example, if they stated they liked fishing or
21 hunting, they would be able to discuss those with you and talk
22 to you about those different things because that's something
23 that's a sense of normalcy that they were okay with. They
24 didn't have a traumatic event with?

25 A. If it's something that they experienced that I'm

1 asking them about, like if it's a child who knows about
2 hunting or fishing and I'm asking them to describe that, I
3 would expect them to be able to describe it if it's something
4 they have experienced unless for some reason it's associated
5 with something traumatic that they are trying to suppress.

6 Q. And do you find as the children get older that there
7 is more purposeful, they decide to tell something versus
8 accidental disclosure?

9 A. That's correct. In the research accidental
10 discoveries are more commonly with littler ones and more
11 purposeful statements become more common with older
12 children.

13 Q. And you discussed these different things of secrecy,
14 entrapment, accommodation, helplessness and delayed
15 disclosure. In fact, those things throughout the research can
16 also be found in instances where somebody came forward about a
17 situation and it's found to be not a sexual abuse scenario,
18 correct?

19 A. Right. So somebody could report something as
20 happening and say it happened a long time ago and it could
21 turn out that they were just saying something happened that
22 never really happened.

23 Q. When you were discussing multiple children in the
24 home, that there is perpetrator preference by what a child
25 maybe looks like, their age, that sort of thing but also a

1 sense of power and control and you stated that's less likely
2 for one of the children in the home who is more outgoing to be
3 the target of the sexual abuse in the area versus another
4 child in the home who might be more passive?

5 A. I think I used -- I don't think I used the word
6 outgoing. I think I said something like assertive or
7 aggressive or acting out so right. If an offender is
8 concerned that somebody is more likely to just create trouble
9 and say things to others, then that might prevent the offender
10 from picking that child as a target.

11 Q. And finally you stated that usually when somebody is
12 disclosing chronic abuse in a sexual abuse scenario, one of
13 the times more often you said that they remember is the last
14 time something happened, correct, because it's the most fresh
15 in their memory?

16 A. Yeah. Not a hundred percent of the time, but it is
~~17 often one of the freshest ones and one of the ones that's more~~
18 retrievable.

19 MS. GOOD: No further questions, Your Honor.

20 THE COURT: Thank you. Any redirect?

21 MS. CAVANAUGH: Just a few follow up questions, Dr.
22 Foster.

23 REDIRECT EXAMINATION

24 BY MS. CAVANAUGH:

25 Q. Is the first time also a memory that child victims

1 remember well?

2 A. Yes. I forgot to mention that, but the first time
3 or the first time that the child realizes that something
4 sexual is occurring that shouldn't be occurring definitely
5 depending on the age of the child when that's happening can be
6 a very salient palpable memory.

7 Q. And Ms. Good asked you about the personality of the
8 victim. Earlier you also testified that the degree of
9 closeness between the perpetrator and the victim also played a
10 role in who is abused; is that correct?

11 A. Yes. That is correct.

12 Q. So if the defendant is closer to one particular
13 child, is that child the one that they often choose?

14 A. Yes, because it's the emotional bond. Emotional --
15 To sustain a child's secrecy and cooperation requires
~~16 emotional manipulation. If it's going to be a family child~~
~~17 sexual abuse situation, it requires emotional manipulation and~~
18 compliance and so that's going to be born out of, it can be
19 born out of that closeness. The fact that that child is
20 loved, is loyal to that parent and so that makes them more
21 vulnerable.

22 MS. CAVANAUGH: Thank you. No further questions.

23 THE COURT: Thank you, Dr. Foster. You may step
24 down. The State may call their next witness.

25 MS. CAVANAUGH: The State calls Justin Dill.

JUSTIN DILL - DIRECT BY MS. CAVANAUGH

523

1 Thereupon,

2 JUSTIN DILL

3 after having been first duly sworn, testified as follows,

4 THE CLERK: Please have a seat. After you're
5 seated, please state your full name for the record.

6 THE WITNESS: Justin Lee Dill.

7 DIRECT EXAMINATION

8 BY MS. CAVANAUGH:

9 Q. Good afternoon. Justin, were you employed with
10 Kershaw County Sheriff's Office at one point?

11 A. Yes, ma'am, I was.

12 Q. When were you with the Kershaw County Sheriff's
13 Office?

14 A. From October of 2005 until January of 2016.

15 Q. Did you resign recently?

16 A. I did.

~~17 Q. But you were with the Sheriff's Department for~~
18 approximately 11 years?

19 A. Yes, ma'am.

20 Q. And what were your positions in the Sheriff's
21 Department over that period of time?

22 A. Started as a road patrol deputy. I did warrants and
23 then I was a criminal domestic violence investigator and then
24 I moved into criminal investigations.

25 Q. Did you -- Were you eventually a sergeant within the

1 Sheriff's Department?

2 A. Yes, ma'am. I was a sergeant then lieutenant.

3 Q. Back in August of 2012 what was your position at the
4 Sheriff's Department?

5 A. Criminal investigator, I believe.

6 Q. What type of investigations did you have in that
7 role?

8 A. Any type burglaries, homicides, vandalism. Just any
9 type of crime.

10 Q. Were you involved in the investigation against James
11 Miller?

12 A. Yes, I was.

13 Q. When did you become involved in that
14 investigation?

15 A. On the night that the call was given out, I was the
~~16 actual on-call investigator. That's how I was called to be~~
~~17 a part of the investigation.~~

18 Q. When were you -- I know that was a long time ago.
19 Do you have your report with you?

20 A. Uhm, I have the CAD and a few other papers. I don't
21 have the actual report.

22 Q. Would the incident report actually help with your
23 memory of this case?

24 A. Yes, ma'am.

25 Q. When did - what time of day did you actually become

JUSTIN DILL - DIRECT BY MS. CAVANAUGH

525

1 involved in this case?

2 A. I believe it was the afternoon.

3 Q. (Proffering.)

4 A. Thank you.

5 Q. Okay. And how did you become notified that your
6 assistance was needed?

7 A. A phone call from the responding deputies.

8 Q. Do you remember which responding officer called
9 you?

10 A. I believe it was Deputy Brooks Houser.

11 Q. And at that point what was the nature of the
12 complaint?

13 A. Uhm, that a father in a household had been sexually
14 assaulting one of the children.

15 Q. Okay. What was your understanding of -- What was
16 Corporal Houser doing when he notified you? Where was he?

17 ~~A. He was at the residence on Wild minor in Kershaw~~
18 County. I believe [REDACTED] Road at Lake Wateree.

19 Q. What did you advise him to do at that point?

20 A. Bring him over to the Kershaw County Sheriff's
21 Office for questioning.

22 Q. Okay. Was it your understanding that -- Did you
23 also direct Corporal Houser to read the suspect his Miranda
24 Warnings?

25 A. I don't recall if I did or if he advised me that he

1 had already advised him of his Miranda.

2 Q. Okay. Did you actually go to the Miller's house
3 that day?

4 A. No, ma'am, not that day.

5 Q. Where did you first come in contact with James?

6 A. He was transported to the Kershaw County Sheriff's
7 Office in Lugoff. I first came in contact with him there.

8 Q. Do you know what time he was, he arrived at the
9 Sheriff's Department?

10 A. Approximately 3:35 that day on August the 11th,
11 2012.

12 Q. When he arrived at the Sheriff's Department, where
13 was he taken?

14 A. Through the back entrance of the office into the
15 interrogation room or interview room in the criminal
16 investigation division.

~~17 Q. Okay. Tell me about that room. Is there recording~~
18 equipment available there?

19 A. Yes, ma'am. Audio and visual recording. It's just
20 a small room with a door and a small window, table and some
21 chairs.

22 Q. How is the recording equipment activated?

23 A. The recording equipment at our office actually
24 records all the time, 24 hours a day even when it's dark and
25 the door is closed and no one is in there. When you walk in,

1 the lights turn on and you walk in and it's already
2 recording.

3 Q. So that's where you took James once he arrived at
4 the Sheriff's Office?

5 A. Yes, ma'am.

6 Q. At that point was he under arrest?

7 A. No, ma'am. He was just detained.

8 Q. So upon him coming into the interview room, what did
9 you do?

10 A. Read him his Miranda Rights.

11 Q. And how do you actually -- What is meant by Miranda
12 Rights?

13 A. His rights as a citizen. He has the right to an
14 attorney. He doesn't have to talk to us and he's free to go
15 at any time basically.

16 Q. Okay. I'm going to show you what's been marked as
~~17 State's exhibit number 1. Do you recognize that document?~~

18 A. Yes, ma'am, I do.

19 Q. What is that?

20 A. It's our standard Miranda form at the Kershaw County
21 Sheriff's Office.

22 Q. Is this a form that you used that afternoon?

23 A. Yes, ma'am.

24 Q. How do you know that?

25 A. It's got his name, date of birth, the information at

1 the top, the date and also my name and it says at KCSO which
2 is where we were along with his signature at the bottom
3 waiving his rights.

4 MS. CAVANAUGH: Your Honor, at this time I would ask
5 that State's exhibit number 1 be admitted into evidence.

6 THE COURT: Any objection?

7 MS. GOOD: No object.

8 THE COURT: So admitted,

9 BY MS. CAVANAUGH:

10 Q. Do you have a copy of that form with you?

11 A. Yes, ma'am, I do.

12 Q. And when you go over the Miranda Warnings, how do
13 you actually do that?

14 A. Generally before Miranda I get a person's
15 information, name, date of birth, address, any current phone

16 number, generally always write the date and always write

17 ~~who is present in the room during the Miranda interview at the~~
18 top, then I advise them I'm gonna read them their rights.

19 After each line, each right, I ask them do they understand and
20 if they acknowledge that they do understand, I check beside
21 it.

22 Q. Can you read the individual rights for us?

23 A. Yes, ma'am. The first is you have the right to
24 remain silent. The second is anything you say can and will be
25 used against you in a court of law. You have the right to

1 talk to a lawyer and have him or her present with you while
2 you're being questioned. If you cannot afford to hire an
3 attorney, one will be appointed to represent you before any
4 questioning, if you wish. You can decide at any time to
5 exercise these rights and not answer any questions or make any
6 statements.

7 Q. When you go over each of these rights, do you make a
8 check mark after you read each one?

9 A. Yes, ma'am, I do.

10 Q. Then you sign after you have read each of those
11 rights?

12 A. I write my name where it says officer's name and
13 title, then I go over what we refer to as a waiver of rights
14 at the bottom of the page, a small paragraph. Once they
15 understand that and the terminology in that paragraph, I also
16 check it. I advise them that this is no admission of any
17 ~~guilt. It's so that you understand what your rights are and~~

18 that you always have them and if they wish to talk to me,
19 please sign in which in this case he did sign, and the I
20 witnessed at the bottom with the time and the date.

21 Q. Can you actually read the waiver?

22 A. Yes, ma'am. It says this is to certify that I have
23 read or have had read to me the above statement of my rights.
24 I understand each of these rights and having these rights in
25 mind I waive them and willingly make a statement. No promises

1 or threats have been made to me and no pressure or coercion of
2 any kind has been used against me.

3 Q. What is actually meant by the term coercion?

4 A. Not doing anything that would make him feel like he
5 had to tell me what I want to hear.

6 Q. Could you give an example of coercion?

7 A. Generally my analogy that I use on every person that
8 I talk to is if I pulled out my pistol and pointed it at you,
9 you would probably feel like you needed to tell me whatever I
10 wanted to hear, but that's not going to happen here. And
11 that's coercion.

12 Q. Did you actually explain that to James that
13 particular afternoon?

14 A. Yes, ma'am, I did.

15 Q. After he signed the waiver, did you sign your name
16 as a witness?

17 A. Yes, ma'am, and time and date.

18 Q. Again what was that time?

19 A. August 11th, 2012 and 3:47 p.m.

20 Q. So that was about 13 minutes after he arrived at the
21 Sheriff's Department?

22 A. Yes, ma'am.

23 Q. Did he appear to understand his rights at the
24 time?

25 A. Yes, ma'am, he did.

1 Q. Did he appear to be under any stress or distress?
2 Sorry. Not stress. Distress at the time as far as did he
3 appear to be hot or incapable of understanding what you were
4 saying?

5 A. Not that I recall.

6 Q. Okay.

7 (Whereupon, State's Exhibit #46 and #47 marked for
8 identification.)

9 BY MS. CAVANAUGH:

10 Q. Did you actually record the interview at 3:47?

11 A. Yes, ma'am.

12 Q. Have you had an opportunity to actually review that
13 interview?

14 A. I reviewed the audio.

15 Q. Is this a copy of the interview from that particular
16 afternoon?

17 ~~A. Yes, ma'am, it appears to be.~~

18 MS. CAVANAUGH: Okay. Your Honor, at this time I
19 would ask that State's exhibit 46 be admitted into
20 evidence.

21 THE COURT: Any objections?

22 MS. GOOD: No objection.

23 THE COURT: It is so admitted.

24 MS. CAVANAUGH: Your Honor, at this time I would ask
25 for permission to publish it to the jury.

1 THE COURT: You may. Is this audio and video or
2 just audio?

3 MS. CAVANAUGH: Audio and video.

4 THE COURT: Okay. So we need to dim the lights for
5 the jury's benefit, too. If anyone on the jury has a
6 hard time hearing or seeing, let me know.

7 (Whereupon, State's exhibit #46, audio and video CD
8 played for the jury.)

9 MS. CAVANAUGH: Could we turn the lights back on?

10 THE COURT: Yes. Could we please turn the lights
11 back on.

12 BY MS. CAVANAUGH:

13 Q. Investigator Dill, at that point as you stated to
14 Mr. Miller had you talked to the victim?

15 A. No, ma'am.

16 Q. Had you talked to the victim's mother?

17 A. No, ma'am.

18 Q. Did he, when you told him bottom line this is what
19 the accusations are, did he deny those?

20 A. No. He didn't say anything.

21 Q. In fact, what did he say about what happened? Did
22 he say that he needed to get his story on the same page as
23 hers?

24 A. Yes. He said he didn't want his to differ from
25 hers.

1 Q. Did that interview end at this point?

2 A. Yes, ma'am.

3 Q. And did you take, at that point did you place James
4 Miller under arrest?

5 A. Yes, ma'am, I did.

6 Q. And when he first came in, he was not under arrest.
7 He was detained; is that correct?

8 A. Yes, ma'am.

9 Q. But you still advised him of his rights?

10 A. Yes, ma'am.

11 Q. You still advised him that he had a right to remain
12 silent and not speak to you?

13 A. Yes, ma'am.

14 Q. But he chose to speak to you after that?

15 A. Yes, ma'am.

16 Q. And he indicated to you that he didn't know where he
17 was at. Did he appear coherent to you?

18 A. Yes, ma'am.

19 Q. Did he know that he was at the Sheriff's Office?

20 A. Absolutely.

21 Q. Did he know that you were an investigator?

22 A. Yes, ma'am.

23 Q. After did you take, uhm, or did someone take
24 Mr. Miller back to, uhm, or not back to but to the jail, uhm,
25 at that point?

1 A. Yes, ma'am. He was transported to the detention
2 center at the conclusion of that interview?

3 Q. Okay. And again he did not, he did not tell you he
4 didn't do it?

5 A. No, ma'am.

6 Q. At some point did Deputy Hathaway call?

7 A. Yes, ma'am, he did.

8 Q. Did you go to the jail after that?

9 A. Yes. Deputy Hathaway called me and he told me that
10 Mr. Miller did want to speak with me again.

11 Q. Okay. What time did you receive that call from
12 Deputy Hathaway?

13 A. Sometime before 4:51 that afternoon.

14 Q. Sometime before 4:51?

15 A. Yes, ma'am.

16 Q. So that was approximately an hour after he first
17 arrived at the Sheriff's Department?

18 A. Close to it.

19 Q. And did you go to the jail after you received that
20 call from Deputy Hathaway?

21 A. I did. I went and transported Mr. Miller. I
22 actually went and asked him if he did, in fact, want to talk
23 to me again and he said he did and then I transported him
24 myself back to the Sheriff's Office for another interview.

25 Q. How far away is the jail away from the Sheriff's

1 Department?

2 A. Five to ten minutes maybe.

3 Q. During that drive, did you speak to him or ask him
4 any questions related to the investigation?

5 A. No, ma'am.

6 Q. Was he trying to speak to you at that point?

7 A. I recall some brief conversation, but it wasn't in
8 relation to the investigation. I advised him that I couldn't
9 talk to him about it until we got back to the interview
10 room.

11 Q. What time did you arrive back at the Sheriff's
12 Department?

13 A. 5:05.

14 Q. Okay. When you arrived back at the Sheriff's
15 Department, where did you take Mr. Miller?

16 A. Back through the back straight into the interview
17 room.

18 Q. Same interview room that we just saw?

19 A. Same interview room, yes, ma'am.

20 Q. Did you advise Mr. Miller of his rights once
21 again?

22 A. Yes, I did.

23 Q. Did you use the same form and method that you used
24 the first time?

25 A. Yes, ma'am. Other than I told him that we had

1 already gone over coercion once.

2 Q. So you didn't have to go through that again?

3 A. No, ma'am.

4 Q. I'm going to ask you to look at State's exhibit
5 number 2. Do you recognize that document?

6 A. Yes, ma'am.

7 Q. What is this document?

8 A. It's a standard Miranda form from the Kershaw County
9 Sheriff's Office.

10 Q. Is that the form that you used during the second
11 interview?

12 A. Yes, ma'am.

13 Q. How do you know that?

14 A. His name. KCSO is on there. He then initialed it
15 and then it says 5:15 p.m., on August 11th, 2012.

16 Q. So that's gonna be an hour and a half after the
17 first interview?

18 A. Yes, ma'am.

19 MR. CAVANAUGH: Okay. Your Honor, at this point I
20 ask that State's exhibit number 2 be admitted into
21 evidence.

22 THE COURT: Any objection?

23 MS. GOOD: No objection.

24 THE COURT: It is so admitted.

25 BY MS. CAVANAUGH:

1 Q. And we'll I see it on the recording, but did you go
2 over his Miranda Rights again?

3 A. Yes, ma'am.

4 Q. And did you indicate that he wanted to talk to you
5 again?

6 A. Yes, ma'am.

7 Q. At that point did you have a little bit more
8 information about the case?

9 A. Yes, ma'am. I believe I had read over the statement
10 from the daughter at that point, **minor**.

11 Q. And was the second interview also recorded?

12 A. Yes, ma'am, it was, audio and video from the same
13 room.

14 Q. Have you had an opportunity to review that recording
15 of that interview?

16 A. Yes, ma'am, I have.

17 ~~Q. Is this that particular second interview, the~~
18 recording of that second interview?

19 A. Yes, ma'am, it appears to be a copy.

20 MS. CAVANAUGH: Okay. Your Honor, at this time I
21 ask that State's exhibit number 47 be admitted into
22 evidence.

23 THE COURT: Any objection?

24 MS. GOOD: No objection.

25 THE COURT: It is so admitted.

1 MS. CAVANAUGH: Permission to publish to the jury?

2 THE COURT: You may.

3 (Whereupon, State's exhibit number 47, video and
4 audio interview played for the jury.)

5 THE COURT: If we could turn on the lights again
6 please.

7 BY MS. CAVANAUGH:

8 Q. Investigator Dill, is the interview over at that
9 point?

10 A. Yes, ma'am.

11 Q. So Investigator Dill, after you read him his rights
12 the second time, do you layout what the allegations are at
13 that point once again?

14 A. Yes, ma'am.

15 Q. And his first response after you confront him the
16 second time or during the second interview with the

17 allegations, does he start telling you a story about a
18 camper?

19 A. Yes, ma'am.

20 Q. Does he say, no, I didn't do it at that point?

21 A. No.

22 Q. So his first response is to again talk about
23 something that occurred a year ago in the camper?

24 A. Yes, ma'am.

25 Q. What exactly, we just saw it, but did he mention it

1 twice?

2 A. Yes, ma'am.

3 Q. What did he say about what happened in the camper?

4 A. They were sleeping in the camper together and he
5 woke up with his hand on the inside of her leg or on her leg
6 and they both woke up and cried a little bit and then they
7 hugged and went on back to sleep.

8 Q. And you talked to him a little bit about his
9 reaction when the deputies arrived at the house that
10 afternoon, right?

11 A. Yes, ma'am.

12 Q. And does he tell you -- He admits to you that they
13 didn't tell him why they were there initially?

14 A. No, ma'am.

15 Q. And he went to the dock and he asked if Minor , he
16 asked **minor** if they were there for him. Is that what he told
17 you?

18 A. Yes, saying that she said yeah and didn't tell him
19 why.

20 Q. And then he also, does he also tell you what he told
21 Tammy at the house that afternoon?

22 A. That this is not all my fault.

23 Q. And again that's before he knew why they were
24 there?

25 A. That's what he said, yes, ma'am.

1 Q. Does he try to blame it on a boy, try to blame why
2 she said this on a boy?

3 A. I believe it's retaliation for a young boy who
4 kissed her on her cheek and held her hand.

5 Q. But all he told you about that boy is that he heard
6 that he kissed her on the cheek, right?

7 A. Yes, ma'am, and that he was a sweetheart.

8 Q. How old is Minor ?

9 A. I believe at that time she was 17.

10 Q. Does he also tell you that he has had any other
11 problems with minor like this?

12 A. No. He just referred back to that one instance
13 about finding a letter that supposedly she had written that
14 she wanted to go to Charleston.

15 Q. What did he say his reaction was when he found this
16 letter about going to Charleston?

17 A. I think he said he cried all day.

18 Q. After this interview -- Let me ask you this: Where
19 are the cameras located in that room?

20 A. If you turned around and looked back at the door
21 which is the wall that you don't see, if you were standing
22 looking at the door, at the top left hand corner is a big
23 black bubble like you see in Walmart.

24 Q. Okay. So if someone is sitting where James is
25 sitting, can they see that camera?

1 A. They're looking right straight at it. I mean, it's
2 the only thing off color in the whole room other than the
3 chairs.

4 Q. What did you do after this interview was over?

5 A. Transported him back to the detention center.

6 Q. And was that the extent of your interaction with
7 James that afternoon?

8 A. I'm sorry. Can you repeat the question?

9 Q. Was that the extent of your interaction with James
10 that afternoon?

11 A. Yes, ma'am.

12 Q. Okay. Did you have an occasion to go to the house
13 several days later?

14 A. Yes, ma'am, with Captain Knafelc.

15 Q. Which house is that?

16 A. [REDACTED] Lane. [REDACTED] Road. Yes.

17 That's correct.

18 Q. That's in Kershaw County?

19 A. Yes, ma'am, at the lake.

20 Q. Can you describe the road and the driveway that
21 leads to that house?

22 A. It's one way in, one way out, dirt road. The
23 driveway, if I recall correctly, goes down like a slope. I
24 believe it's a two story house.

25 Q. When you went to the house, who else did you go

1 with?

2 A. I remember Captain Knafelc was there, two female
3 SLED agents. They were crime scene agents. I don't recall if
4 the victim and her mother were there but I want to say the
5 mother was there.

6 Q. What did you do while you were at the house?

7 A. Stood by while the crime scene technicians analyzed
8 the house.

9 Q. Was this case actually assigned to Captain
10 Knafelc?

11 A. Yes, ma'am.

12 Q. Was that the extent of your involvement with this
13 particular investigation?

14 A. Yes, ma'am.

15 MS. CAVANAUGH: Please answer any questions from the
16 defense.

17 ~~THE COURT: All right. Before we get into cross~~
18 examination, let's take a break. It is about ten to
19 four. We'll be back on the record at 4:00. Again I
20 remind you not to talk about this case while we are on
21 the break. Thank you.

22 (Whereupon, the jury entered the jury room at 3:50
23 p.m.)

24 (Short recess.)

25 BAILIFF: Come to order, please.

JUSTIN DILL - CROSS BY MS. GOOD

543

1 THE COURT: Thank you. Be seated. All right.
2 Mr. Dill, I remind you that you are still under oath. We
3 can bring the jury back in.

4 (Whereupon, the jury returned to the courtroom at
5 4:00 p.m.)

6 THE COURT: All right. Ms. Good.

7 MS. GOOD: Thank you, Your Honor.

8 CROSS EXAMINATION

9 BY MS. GOOD:

10 Q. Investigator Dill, in the videos that were just
11 shown to the jury, did you ever see Mr. Miller look up and see
12 that the camera was there?

13 A. Not that I saw, no, ma'am.

14 Q. So you don't know if he was aware that there was a
15 camera in there or not?

16 A. No, ma'am.

17 ~~Q. The first thing on the first interview before you~~

18 walked in the room, do you recall the first thing he said
19 while he was crying was -- Let me make sure I get it right --
20 why would they want to get rid of me?

21 A. I didn't hear that, ma'am.

22 Q. And then you came into the room at that point and
23 what was his demeanor? He was crying and upset?

24 A. Yes, ma'am.

25 Q. Did he seem overwhelmed?

1 A. That's fair to say.

2 Q. And he had concern for his family at that time?

3 A. That's what he kept saying.

4 Q. Then after that interview ended, the second one when
5 you brought him back from the detention center began, he was
6 still crying?

7 A. He began to cry, yes, ma'am.

8 Q. And the first thing he said to you was I'm confused
9 and hurt, correct?

10 A. I'm not going to disagree.

11 Q. So he continued to deny throughout that interview
12 that he ever had intercourse or sexual relations or oral sex
13 or anything with **minor one** correct?

14 A. Not the entire interview but he did deny it at some
15 point.

16 Q. And, in fact, at that point how much information did
17 you have about the case?

18 A. I just read, I believe I only read over Minor 's
19 statement which was a very detailed statement that she had
20 written.

21 Q. It was only about a page and a half, correct?

22 A. I haven't seen it since.

23 Q. This was the first statement that she wrote to
24 Houser?

25 A. As far as I know, yes, ma'am.

1 Q. And, in fact, it didn't have many, many details in
2 it, did it?

3 A. That's not how I remember it but I haven't seen it
4 since that day.

5 Q. But you continued to tell him that there were many,
6 many details, that it was over the course of a year, constant,
7 constant, constant, constant, and it's just elaborate details
8 about all of this, correct?

9 A. Sure.

10 Q. And at that point he still continued to deny
11 anything happened?

12 A. Sometimes, yes, ma'am.

13 Q. In fact, he did know why he was there, correct?
14 Didn't he indicate to you in the first interview that the
15 officers told him what he was being investigated for?

16 A. I believe I asked him if the officers told him and
17 ~~he said no. But at some point he did say that he knew why. I~~
18 can't remember if I told him or not.

19 Q. Didn't he say that they told me that my daughter
20 said that I have been forcing myself on her for a year and
21 having sex and you said who told you that and he said the
22 officers?

23 A. Oh, that is correct. Was that the second interview?

24 Q. That was the first interview. But so he was aware
25 of what the allegations were?

1 A. Yes, ma'am, he knew.

2 Q. Okay. And he continued to cry throughout both
3 interviews?

4 A. Yeah. He cried on and off, yes, ma'am.

5 Q. And he continued to be concerned about his family?

6 A. It appeared so.

7 Q. And despite the crying and being completely
8 overwhelmed with everything and wondering why they would do
9 this, you continued to push him saying just tell me what
10 happened? Tell me what happened, correct?

11 A. Yes, ma'am.

12 Q. And he continued to deny it over and over saying I
13 don't know why they are doing this?

14 A. He did deny it, yes, ma'am.

15 Q. Didn't he say that **minor** was the wild fire in the
16 family?

17 A. ~~I believe he called her a wild flower.~~

18 Q. And that **minor** was the one they had under
19 control?

20 A. Yes, ma'am, that's what he said.

21 Q. And at that point he told you about the Harrelson
22 boy, correct?

23 A. The 15 year old, yes, ma'am.

24 Q. That they had been arguing about that?

25 A. Yes, ma'am.

1 Q. Did you ever speak to **minor** at any point?

2 A. I didn't interview her, ma'am.

3 Q. Because it wasn't your investigation, correct?

4 A. Not after talked to my -- Later on, no, ma'am.

5 Q. And before you went into the room with him the first
6 time, did you ever tell him why he was there?

7 A. I don't recall.

8 Q. You just assumed he knew why he was there at that
9 point, correct?

10 A. Yes, ma'am.

11 Q. And ultimately you went with the search warrant with
12 Knafelc. Did you get the search warrant or did Knafelc get
13 it?

14 A. I don't recall.

15 Q. When you were there, who was present for the search
16 warrant?

~~17 A. I believe -- I know that myself and Captain Knafelc~~
18 were there. I believe Melissa Skipper from SLED was there. I
19 believe there was a blond hair female from SLED there and
20 I want to say but I can't swear under oath, but I think that
21 the mother was there.

22 Q. Do you remember any of the children there, either of
23 the twins?

24 A. Not for certain, no, ma'am.

25 Q. And throughout the entire interview both the first

1 and the second one he continued to say it's not fair to my
2 family, correct?

3 A. He did say that, yes, ma'am.

4 Q. He didn't say it wasn't fair to him?

5 A. I think he said it isn't fair to either one of us.

6 MS. GOOD: No further questions, Your Honor.

7 THE COURT: Any redirect?

8 MS. CAVANAUGH: Just a few, Your Honor.

9 REDIRECT EXAMINATION

10 BY MS. CAVANAUGH:

11 Q. Ms. Good asked you about the first interview and
12 whether he expressed concern related to his family which he
13 did in that interview, correct?

14 A. Yes, ma'am.

15 Q. And what else did he say about his story and the
16 family's story in that first interview?

17 ~~A. He wanted to make sure that his story didn't differ~~
18 from theirs.

19 Q. She also asked you whether during that second
20 interview that he did deny the allegations, correct?

21 A. Yes, ma'am.

22 Q. But did he admit that he regularly slept in her
23 bed?

24 A. Yes, ma'am, even the night before the interview.

25 Q. And did he also tell you about the one time where he

1 woke up with his hand inside of her leg?

2 A. Yes, ma'am.

3 Q. And yet he said he still continued to sleep with
4 her; is that correct?

5 A. Yes, ma'am.

6 Q. Ms. Good asked you about when James referred to
7 **minor** as the wild flower?

8 A. Yes, ma'am.

9 Q. And he said that to you, correct?

10 A. He did, yes, ma'am.

11 Q. Did he give you any reason as to why she was a wild
12 flower?

13 A. He just - he kept referring back to I'm assuming the
14 15 year old boy that had kissed her on the cheek and held her
15 hand.

16 Q. Okay. And he also mentioned a letter?

17 A. Yes, ma'am.

18 Q. But those were the only reasons that he was able to
19 give you as far as her being a wild flower; is that right?

20 A. That's the only thing he referred to.

21 Q. And as far as him realizing or becoming aware of the
22 allegations, I would like to get to that. Did he admit to you
23 that his first reaction when the responding officers arrived,
24 what did he do?

25 A. It's my understanding he put his hands up behind his

1 head, actually took everything out of his pockets, pulled his
2 pockets out and put his hands up behind his head is my
3 understanding.

4 Q. And that was after you went down to the dock, right?

5 A. Yes, ma'am.

6 Q. And that was after he asked **minor** if they were
7 there for him, right?

8 A. Yes, ma'am.

9 Q. And he admitted that she said yes; is that right?

10 A. Yes, ma'am.

11 Q. But that was all she told him, right?

12 A. Pertaining to what he told me, yes, ma'am, as far as
13 I know.

14 Q. So he didn't know at that point what the police were
15 specifically there for; is that correct?

16 A. That's what he said, yes, ma'am.

~~17 Q. But by the time he came to the police station he did~~
18 know what the allegations were, right?

19 A. Obviously, yes, ma'am.

20 Q. But his reactions at the house that morning or that
21 afternoon were before he even knew why they were there and he
22 admitted to that, correct?

23 A. Yes, ma'am.

24 MS. CAVANAUGH: Thank you.

25 MS. GOOD: Very briefly.

JUSTIN DILL - RECROSS BY MS. GOOD

551

RECROSS EXAMINATION

1

2 BY MS. GOOD:

3 Q. It was mentioned that he admitted to you that he
4 went down to the dock and [minor] told him that the cops were
5 there for him, correct?

6 A. I'm sorry. Can you repeat that?

7 Q. I'm sorry. Just now you stated that he told you,
8 James Miller told you that [minor] said yes, they're there for
9 him, correct? '

10 A. After he asked her, yes, ma'am.

11 Q. And as a police officer when you go to arrest
12 somebody, what's the normal procedure?

13 A. What's the normal procedure?

14 Q. Right. Do you ask them to take everything out of
15 their pockets?

16 A. I tell them they're under arrest first of all.

17 Q. But do you ask them to take things out of their
18 pockets?

19 A. No, ma'am.

20 Q. Put their hands up?

21 A. You don't want them to put their hands in their
22 pockets. Show me your hands.

23 Q. But indicating putting your hands up, that would
24 indicate that you're cooperating?

25 A. Oh, yeah, that would be indicative, yes, ma'am.

1 Q. Yeah. Okay. So that if three cops were coming at
2 you, it would show, hey, look, I'm not trying to do
3 anything?

4 A. I suppose, yes, ma'am.

5 MS. GOOD: No further questions.

6 THE COURT: Thank you. You may step down.

7 MS. CAVANAUGH: Your Honor. At this time the State
8 rests.

9 THE COURT: Okay. Ladies and gentlemen of the jury,
10 the State has now rested. There are matters of law that
11 I need to take up with the attorneys so I'm going to go
12 ahead and let you go for the day. It's now almost 4:20
13 in the afternoon. Let me talk to you a little bit about
14 tomorrow morning. Because of some scheduling issues we
15 are not going to start until 11:15 tomorrow and so I
16 ~~would like you all to be here right around about 11:00 so~~
17 we can start promptly at 11:15. I do not anticipate this
18 trial going beyond this week so if anybody is worried
19 about it bleeding over into Monday, that's not any sort
20 of anticipation. That's not on the radar screen that
21 that would happen in this case. So tomorrow if you could
22 be here at 11:00 in the morning, I would appreciate it.
23 Again, I thank you because you guys have been such a
24 great jury as far as being on time. It makes all the
25 difference in the world. So thank you. When you go home

1 tonight, do not talk about this case. Don't research the
2 case and we will see you tomorrow. Thank you.

3 (Whereupon, the jury was released for the evening at
4 4:20 p.m.)

5 THE COURT: All right. I believe the State wanted
6 to put something on the record. While the jury was out,
7 we talked about it at the bench.

8 MS. CAVANAUGH: Yes, Your Honor. Because the
9 interviews, the copies of the interviews that were
10 actually introduced into evidence and shown to the jury
11 were the subject of the Jackson v. Denno hearing and we
12 did redact the original interviews to take out references
13 to wanting a lawyer or requesting a lawyer, I think he
14 might have mentioned it in both interviews -- Well,
15 excuse me. In the first interview he mentioned I want a
16 lawyer. That portion was redacted when he said maybe
17 I want a lawyer or a counselor. And then afterwards when
18 it was a clear indication, of course, we redacted that as
19 well so we would want the original copy of that admitted
20 as a Court's exhibit. Then as far as interview number 2,
21 that is also a redacted copy. The only person that was
22 removed from the interview number two was the reference
23 when Investigator Dill said it's my understanding that
24 you want to speak to me without a lawyer, and so we just
25 redacted that part as well. I just wanted to make sure

1 the original copies are part of the record because they
2 were the subject of the Jackson v. Denno Hearing.

3 THE COURT: Okay. So we have already as exhibits
4 for the State the redacted versions. These would be
5 court exhibits?

6 MS. CAVANAUGH: Yes, Your Honor.

7 THE COURT: All right. They will be admitted as
8 Court's exhibits 2 and 3.

9 MS. CAVANAUGH: And that was all, Your Honor.
10 That's our case.

11 THE COURT: Any motions from the defense?

12 MS. GOOD: Thank you, Your Honor. At this time I
13 make a motion for directed verdict based on the evidence
14 and in a light most favorable to the State. I believe
15 that the evidence is not enough for the totality of the
16 ~~circumstances, that it should be put to the jury that~~

17 this occurred in any way, the incest or the criminal
18 sexual conduct second degree based on credibility of the
19 victim, we would ask for a motion for directed verdict
20 regarding that, Your Honor.

21 THE COURT: All right. When looking at a motion for
22 directed verdict, the State is to look at the evidence in
23 a light most favorable to the State. I find that there
24 is enough evidence to allow these charges to go to the
25 jury so your motion is respectfully denied.

1 MS. GOOD: Your Honor, I would renew all previous
2 motions and objections at this time also.

3 THE COURT: Okay.

4 MS. GOOD: In addition, I would ask at this time, I
5 know he's in custody. He's not been allowed to have his
6 medication. I was seeing if he can take it here so that
7 he can have his medication at least for overnight for
8 purposes of his back.

9 THE COURT: Okay. What medication is that that he
10 wishes to take?

11 MR. MILLER: Oxycontin, Lortab, a steroid pill and
12 two of the muscle swelling, makes the muscles go down or
13 whatever. I don't know exactly what you call it.
14 Something that reduces the swelling or whatever.

15 THE COURT: All right. So he's wishing to take all
16 of those all at once? Seems like a bad idea.

17 MR. MILLER: That's what they prescribed. I'm not
18 taking any more than they're prescribing.

19 MS. GOOD: He hasn't had anything since he left
20 court here yesterday, Your Honor. They would not allow
21 him to take his medication with him to the detention
22 center nor allow him to take his medication.

23 THE COURT: Do you have his prescriptions?

24 MS. GOOD: We do, Your Honor.

25 THE COURT: I would like to see those.

1 MS. GOOD: (Proffering.)

2 THE COURT: Two of these I don't see any indication
3 that they were prescribed for him specifically so I don't
4 know if y'all have the actual prescription, but there is
5 nothing to indicate that they are for him specifically.
6 With regard to the hydrocodone and the oxycontin, I do
7 see that they are for James Miller and I will allow him
8 to take them as prescribed. Now, I'm not a doctor but I
9 happen to have a lot of experience with surgeries and
10 pain medication and my assumption is that you are not to
11 take the oxycontin and the hydrocodone at the same time.
12 You take one and then if the pain doesn't subside, you
13 have the opportunity to take another. Again I'm not a
14 doctor but I don't think you're supposed to take them at
15 the exact same time. I would suggest that the jail, they
16 would be in custody of his medication. He can go ahead
17 and take one of the pain pills now. The two that don't
18 have his name on it we are not going to transport him
19 with those drugs. Otherwise with the pain medication he
20 can be transported with those and the medication will be
21 in the custody of the jail itself.

22 MS. GOOD: Thank you, Your Honor.

23 THE COURT: And we're going to note that the pain
24 medication was taken at 4:30, whichever one. I assume he
25 wants the oxycontin first but again it's up to him which

JAMES WAYNE MILLER - RIGHT TO TESTIFY

557

1 one he wants to take first.

2 MS. GOOD: Thank you, Your Honor. Finally, I have
3 discussed it with my client and it's his indication at
4 this time not to testify. I don't know if you want to go
5 ahead and put on the record and question him regarding
6 about his right to testify.

7 THE COURT: Let's go ahead and do that. If he will
8 come forward and we'll place him under oath. Just so he
9 has a microphone there.

10 Thereupon,

11 JAMES WAYNE MILLER

12 after having been first duly sworn, testified as follows,

13 THE COURT: James Miller, at this time I'm going to
14 tell you a little bit about your rights. I want to make
15 sure that you understand everything that I say so that at
16 any time if you have a question or you need me to explain
17 something further, you just speak up and let me know and
18 I'll be happy to do that.

19 MR. MILLER: Yes, ma'am.

20 THE COURT: We have reached the stage of the trial
21 where you may present your defense. You have the right
22 to claim the protections given to you by the Fifth
23 Amendment to the Constitution and that amendment states
24 in part no person shall be compelled in any criminal case
25 to be a witness against himself. This means you can't be

1 required to testify in this case. You have a right to
2 testify on your own behalf, but no one can make you do
3 that and this is a personal right and no one can make the
4 decision about whether to testify except for you. If you
5 decide to testify, you will be subject to the same rules
6 that govern other witnesses. You may be examined and
7 cross examined on any relevant issue in the case.

8 Additionally, if you have any convictions involving
9 dishonesty or false statement or for crimes punishable by
10 imprisonment for more than one year and I determine that
11 the probative value of admitting this evidence outweighs
12 its prejudicial effect to you, then I will allow the
13 State to introduce your record to attack your
14 credibility.

15 If you decide to testify, this decision on your part
16 ~~must be made freely, voluntarily and intelligently with~~
17 the knowledge of the protections given to you by the
18 Fifth Amendment and the consequences of your decision to
19 testify.

20 If you decide not to testify, I will instruct the
21 jurors that they cannot give the fact that you did not
22 testify any consideration whatsoever and that there is to
23 be absolutely no prejudice to you because you did not
24 testify. It is left entirely up to you whether you
25 testify or not. You may talk with your attorney, your

1 family or anyone else, but the final decision will be
2 entirely up to you.

3 Do you understand what I have just explained to you?

4 MR. MILLER: Yes, ma'am.

5 THE COURT: Do you have any questions?

6 MR. MILLER: I would like just to consult with them
7 one more time.

8 THE COURT: Okay. I will allow you to do that. Go
9 ahead and consult with them.

10 MR. MILLER: I'm good.

11 THE COURT: Have you discussed with your lawyer
12 whether or not to testify?

13 MR. MILLER: Yes, ma'am. I feel like I already
14 have.

15 THE COURT: And do you wish to testify?

16 MR. MILLER: No, ma'am.

17 THE COURT: Okay. Thank you very much.

18 MR. MILLER: Yes, ma'am.

19 MS. GOOD: I believe that's it, Your Honor.

20 THE COURT: Okay. All right. As I announced to the
21 jurors, we will not be starting court until 11:15
22 tomorrow. I hope to be here at about 11:00 tomorrow so
23 if there is anything that you need from me. What about
24 any jury instructions? Does anybody have anything that
25 they would like to request? My law clerk and I have been

1 working on a jury instruction. Of course, we will
2 continue to work on it tonight. So let me know if
3 there's anything specific.

4 MS. CAVANAUGH: Your Honor, we've obviously already
5 addressed 16-3-657, so we understand that that's not
6 going to be an issue at all but you did indicate that we
7 could at least --

8 THE COURT: You can argue it to the jury in your
9 closing argument, but I will not charge the statute in my
10 instructions.

11 MS. CAVANAUGH: Yes, Your Honor. And then we do
12 have maybe one or two as they relate to reasonable doubt
13 and the lesser included. Potentially lesser included
14 defenses that might be charged. So if we could e-mail
15 those to you tonight or to Emily, your law clerk would
16 that be --

17 THE COURT: That would be fine. Send a copy to Ms.
18 Good on that e-mail. What lesser included offense are
19 you looking to request?

20 MS. CAVANAUGH: I think the only one that we would
21 be looking to request is the CSC third, criminal sexual
22 conduct in the third degree.

23 MS. GOOD: Your Honor, I can either wait or now. We
24 would object to any lesser included. It's been very
25 clear that the defense is that this did not happen.

1 Whether they believe part of her or not part of her as
2 either it happened or it didn't happen, we don't believe
3 a lesser included is appropriate.

4 THE COURT: All right. Well, we will address that
5 more fully tomorrow when I see what the request is and
6 when I study it a little bit myself tonight. Emily, Ms.
7 Burgess, if you don't mind e-mailing to the State and to
8 Ms. Good our proposed jury charge, that way you can study
9 what we have so far and make a very - you will be able to
10 make your arguments I think more specifically so we are
11 not talking in vague terms and we'll see what we already
12 have and maybe we have the reasonable doubt charge that
13 the State wishes. Maybe we don't. There may be some
14 things that both of you seek that we need to add. We
15 also have a verdict form. I can, of course, just send
16 the indictments back with the plea. I just have a
17 verdict form for the jurors to sign. We'll send both of
18 those to you tonight and we'll address any changes we
19 need to make tomorrow before I let the jury back in. How
20 long do you anticipate for your closing?

21 MS. CAVANAUGH: Your Honor, I think my closing will
22 be about an hour.

23 THE COURT: Okay.

24 MS. GOOD: Probably about the same.

25 THE COURT: And I anticipate the instructions to be

1 pretty quick actually. Maybe about 20 minutes. Maybe a
2 little bit less. So most likely we'll be ordering pizza
3 for the jurors tomorrow. We'll probably just start at
4 11:15 and go straight through and give it to the jurors
5 around 1:15 or maybe 1:30.

6 MS. CAVANAUGH: Thank you.

7 MS. GOOD: Thank you.

8 THE COURT: Thank you.

9 (Whereupon, court was adjourned for the evening at
10 4:45 p.m.)

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 March 17, 2016

2 THE COURT: All right. Ready to bring in the jury?

3 MS. CAVANAUGH: Yes, Your Honor.

4 THE COURT: I will remind the jury that the State
5 has rested and then, Ms. Good, you can rest on the record
6 and then we'll go straight into closing argument. Is
7 everybody ready to do that?

8 MS. GOOD: Yes.

9 MS. CAVANAUGH: Yes, Your Honor.

10 THE COURT: Okay. Wonderful. The State will be
11 going first on closing argument and Ms. Good gets the
12 final word. All right. Let's bring in the jury.

13 (Whereupon, the jury returned to the courtroom at
14 11:35 a.m.)

15 THE COURT: All right. Good morning, ladies and
16 gentlemen. Well, it's still morning, just barely.
17 Appreciate having you here. As you recall when we ended
18 yesterday afternoon the State had just rested and now
19 I'll turn to Ms. Good.

20 MS. GOOD: The defense rests at this time, Your
21 Honor.

22 THE COURT: All right. The State and the defense
23 have rested and we will now hear closing arguments. Ms.
24 Cavanaugh.

25 MS. CAVANAUGH: May it please the Court.

1 THE COURT: Yes, ma'am.

2 MS. CAVANAUGH: Good morning, ladies and
3 gentlemen.

4 First of all, I want to start off by thanking you
5 for your careful attention throughout this trial. I paid
6 attention to you throughout this trial and I know that
7 you paid attention to each and every single witness that
8 testified in front of you today so I want to thank you
9 sincerely for that.

10 I know when you came in this courthouse on Monday
11 morning you certainly did not expect to have to listen to
12 what you listened to this week and the bottom line is
13 what you had to hear was uncomfortable, was unimaginable
14 and frankly disgusting. But, ladies and gentlemen, that
15 is what **minor one** now **minor one** had to live through for
16 an entire year.

17 And, ladies and gentlemen, your role in this case is
18 very important. When you came in on Monday morning, you
19 took an oath. Well, excuse me. On Tuesday morning when
20 you sat in this jury box, you took an oath to follow the
21 law as the Judge will instruct you on it at the end of
22 this trial and to deliberate once you receive the case at
23 the end of my closing argument and at the end of Ms.
24 Good's closing argument.

25 Now, your role in this case is very, very important.

1 You and you alone and collectively are the sole judges of
2 the facts so it's up to you to determine James Miller's
3 guilt. And, ladies and gentlemen, how you come to that
4 decision is through the evidence that we have presented
5 to you over the course of this week and that evidence
6 comes in the form of two forms, physical evidence such as
7 photographs of the home, photographs of Ms. Penrod's view
8 of the dock, the physical evidence you actually are going
9 to be able to see as you did earlier or yesterday, his
10 interview. So that's the physical evidence that you can
11 base your decision on. But you also have other evidence.
12 You have the testimony from each and every single witness
13 that played a role in this case and it is your job as
14 jurors in this case to determine their credibility and
15 I'll go through that a little bit later.

16 But as a result of Mr. Miller's actions over the
17 course of July of 2011 through August 11, 2012 to [REDACTED] minor
18 [REDACTED] finally ended her nightmare when she finally found
19 deep within her the bravery that it took to tell her mom
20 what had been going on, to finally let her mom help her.
21 Because of what he did to her over the course of that
22 year he's charged with two crimes, ladies and gentlemen.

23 The first crime that he is charged with is criminal
24 sexual conduct in the second degree. A person is guilty
25 of criminal sexual conduct in the second degree if the

1 actor uses aggravated coercion to accomplish the sexual
2 battery. Ladies and gentlemen, quite simply sexual
3 battery is intercourse, any intrusion whatsoever into the
4 private parts of a female including oral sex as well as.
5 Bottom line though, [minor one] testified about how
6 many times he raped her over and over over the course of
7 that year. Ladies and gentlemen, that is sexual
8 battery.

9 But what is aggravated coercion? That's also
10 defined in our laws, ladies and gentlemen, and it's a
11 longer definition but aggravated coercion means the actor
12 threatened to use force or violence of a high and
13 aggravated nature to overcome the victim or another
14 person -- For instance, the rest of her family -- if the
15 victim reasonably believes that the actor has the present
16 ability to carry out the threat such as a gun around your
17 waist, or threatens to retaliate in the future by the
18 infliction of physical harm, kidnapping or extortion
19 under circumstances of aggravation against the victim or
20 another person. After the first time he grabbed her
21 wrists, if you tell anyone what I did, it will ruin our
22 family. And he said that to her throughout that year.

23 But there is more to aggravated coercion. [minor]
24 testified she tried to fight him off for the first few
25 months but she eventually gave up. You saw her three

1 years later, four years later. [minor] is a tiny girl.
2 She was 16. She was even smaller. She tried to fight
3 him off but he held her down. After the first time the
4 threat when he grabbed her wrists in that truck. If you
5 tell anyone what I did, it will ruin us. You will be
6 homeless. You will have no one. He started carrying a
7 gun on his waist for the first time in July of 2011. You
8 didn't just hear that from [minor one] You heard that from
9 Tammy. You heard that from [minor two] Completely different
10 to what he used to do. Only when he started raping his
11 daughter did he start carrying that gun. And while he
12 didn't directly threaten her with it while he was doing
13 it, he made those threats over the course of that year
14 and it's around his knees as he's doing that.

15 If I can't have you, no one will. [minor]
16 interpreted that to mean, and she testified to this, that
17 he would hurt me if I didn't let him do it to me. You
18 will ruin this family. Bruises on her arms from when he
19 held her down. Bruises on the inside of her thighs from
20 his thrusting forcefully as he was raping her.

21 Dr. Luberoff testified she had an injury at the 7:00
22 position on her hymen. Combine that with her history
23 it's consistent with sexual abuse.

24 Ladies and gentlemen, the defendant is also charged
25 with incest and in our code of laws it's a long

1 complicated definition but the bottom line is having sex
2 with your biological daughter is a crime in South
3 Carolina. So in addition to criminal sexual conduct he's
4 also charged with incest.

5 Ladies and gentlemen, the laws in this state
6 regarding criminal sexual conduct is also -- The
7 legislature recognizes that these are crimes of secrecy
8 and they are shameful so unlike armed robberies and
9 unlike murders, sometimes, oftentimes there are no other
10 witnesses. Luckily in this case there were other
11 witnesses that corroborated the victim's testimony and
12 I'll get to that because there were plenty that
13 corroborated the victim's testimony including the
14 defendant himself. But the law does state as it relates
15 to criminal sexual conduct in the State of South
16 Carolina, the testimony of the victim need not be
17 corroborated.

18 However, as I stated previously you are the judges
19 of the credibility of each witness so along with **minor**
20 you judge her credibility and along those lines you don't
21 necessarily have to believe as it relates to each
22 witness, you don't have to believe all of their
23 testimony. It is okay if you just believe some of their
24 testimony. However, I submit to you that each witness
25 that the State presented is credible. And how do you

1 actually determine their credibility? Well, do they have
2 a bias? Do they have any particular reason to not tell
3 the truth?

4 Ladies and gentlemen, I'll just cut to the chase.
5 You saw James Miller's interview when he spoke to
6 Investigator Dill. Did he try to say that Tammy has been
7 fighting him all this time? That Tammy and [minor] are
8 teaming up against him? No. He says, well, Tammy and I
9 have been fussing with [minor one] He doesn't try to make it
10 this big conspiracy when he has the opportunity to do
11 that that day. He says that [minor] has been emotional
12 and Tammy and James have noticed that. So again, do the
13 witnesses have any bias? Any prejudice? Do the
14 witnesses that testified, do they have an opportunity to
15 view what they observed? For example, Martha Penrod, we
16 saw pictures of her porch. We saw how she has a view of
17 the dock, a view of where the hammock used to be before
18 that fence was put up by James. So, of course, she had
19 an opportunity to view the things that she saw. And you
20 can view that for yourself. Were they hesitant? Were
21 they forthright? So those are the things that you keep
22 in mind when you think about the credibility of the
23 witnesses.

24 And who are those witnesses? Well, we brought 14
25 witnesses in front of you in the course of two days.

1 Corporal Brooks Houser, Deputy Justin Scott, Deputy Cody
2 Wilson, and Sergeant Thomas Hathaway. Now, I realize
3 that those are all responding officers and they all
4 essentially set the scene for you that particular
5 afternoon. However, what they had to say was very
6 important because, ladies and gentlemen, when the
7 officers arrived that afternoon, and watch the interview,
8 the second interview because James admitted this himself,
9 first of all, he's the man of the house, right?
10 Investigator Dill doesn't just roll up at your house.
11 What is James' reaction as the man of the house? Instead
12 of walking towards the police officers as he sees them in
13 the driveway he sneaks down to where his daughter is.
14 What kind of sense does that make? His first reaction is
15 to walk to his daughter instead of go and talk to the
16 police and say, hey, guys what's going on?

17 And you don't have to just believe the officers. He
18 tells you that. In his second interview with
19 Investigator Dill he says I walked down to my daughter.
20 So you don't have to just take their word for it.
21 Credibility. Even the defendant himself says that's what
22 he did.

23 So after he goes down and talks to his daughter,
24 **minor** testified that he said, why didn't you warn me?
25 But even he corroborates what his daughter testified to.

1 Because what does he tell Investigator Dill he did, he
2 said, are they here for me? A little different. But he
3 admits that his first instinct was to go down there and
4 ask her, are they here for me? And even he tells
5 Investigator Dill -- She said yes. So he says that she
6 said yes. But does he say that she gives him specifics?
7 That she says, yes, they are here to arrest you because
8 you have been sexually assaulting me for a year. No. He
9 says she is crying, emotional. She doesn't answer why.
10 She doesn't tell me why. He says that.

11 So what does he do? Empties out his pockets, turns
12 around, put his hands behind his head, ready to go off
13 with the officers. Ladies and gentlemen, I submit to you
14 that that is an unreasonable response. He knew why they
15 were there. He knew why they were there.

16 Sergeant Thomas Hathaway testifies that when they
17 went to the Sheriff's Office, there were no discussions
18 about the case. And let me get one thing straight.
19 Let's be clear. By the time he gets to Investigator
20 Justin Dill, of course he knew what was going on, but the
21 point is, and he admits this, his first instinct he did
22 not know what was going on. He walked toward his
23 daughter, not towards the cops. He held out his hands
24 for arrest. Of course, he's on the scene for
25 approximately an hour and a half. At some point the

1 officers do tell him, listen, we're taking you to the
2 Sheriff's Office. Your daughter has just told us what's
3 been going on. Do you want to go talk to Investigator
4 Dill? Yes.

5 So sure, after an hour and a half he knows by the
6 time he gets there what's going on. Don't be confused
7 about that issue. And listen to the interview because he
8 admits it.

9 Also, Ms. Good kept asking the officers, well, did
10 he ever say who she is? Because remember, he said
11 whatever she says is true. Whatever she says is not a
12 lie. She wouldn't lie. Whatever she says. Whatever she
13 says. And Ms. Good asked each officer, well, did he ever
14 say **minor one** Well, no. He didn't. But in his second
15 interview, watch it carefully. He does tell Investigator
16 Dill that when he was saying those things, he was

17 referring to **minor one** It was in the context of him
18 saying, well, I wanted to make sure she wasn't going down
19 the wrong path. So he admits even in his interview that
20 he was talking about **minor one** Pay attention to that
21 second interview for a lot of reasons but because of that
22 issue, too.

23 One more unreasonable reaction, unbelievable
24 reaction that James has at the scene and then I'll move
25 on. When he's walking by his wife, and again he still

1 doesn't know exactly why they are there, at least he
2 hasn't been told directly, uhm, he says to his wife, it's
3 not all my fault. It's not all my fault. Okay. Well,
4 how about, what the hell is going on? Or maybe, why are
5 they here? What's happening? I thought this was about a
6 lost gun. No. He even admits that's what he says to his
7 wife as he's, while he's walking with the police because
8 he knew he was under arrest after no one has told him
9 anything. His response is to tell his wife it's not all
10 my wife? Not, what the hell is happening?

11 And then I'm going to come back to **minor one** James
12 Miller has a right to confront the witnesses against him.
13 So each witness that is going to testify against him has
14 to take the stand and he has the ability to confront the
15 witnesses through his lawyer so we can't enter the
16 statements, the written statements. We can't just show
17 you that two and a half hour interview that **minor** gave
18 at The CARE House. She has to take the stand and tell
19 you herself what happened to her. And, ladies and
20 gentlemen, in that second interview he doesn't think
21 she's going to do it because his first response -- Well,
22 after he doesn't respond the first time he talks to
23 Investigator Dill, all that time goes by when he's
24 confronted with the allegations, he says, I need to know
25 what her story is.

1 Later on in the second interview he says, well, she
2 said this and I see her say it, then I'll go to jail. He
3 does not think that **minor** can do it. Think about what
4 Dr. Foster said. The helplessness. The accommodation.
5 The secrecy. He doesn't think she can do it. Those
6 characteristics are real and even he knows it. But she
7 did. She took the stand and she told you what happened
8 to her over the year, over that year.

9 And, ladies and gentlemen, if this is just some big
10 conspiracy to get him out of the house, let's think about
11 that for a second. Why not make it a little bit easier
12 on her? Why not make it a little bit more believable?
13 How about this. Instead of talking about the times that
14 he did it at the job sites when Ms. Norwood, the elderly
15 lady was upstairs in the room and he brought her to that
16 bathroom, closed the door and did it to her over the
17 counter, why not leave that one out? Or when he did it
18 to her in the water after he saw Martha Penrod and her
19 family go away on the boat, leave that one out. Just
20 make it easy on yourself. Just talk about the times when
21 you had your own room, he came in that room and he had
22 sex with you. Just leave it at that. If this is such a
23 conspiracy, make it easier on yourself. But she didn't
24 because she is telling you what happened and that is what
25 happened.

1 How about this. If this is just some conspiracy to
2 get him out of the house, instead of talking about that
3 gun around his waist, why not just say when he had sex
4 with me, he pointed it at me or he used that directly to
5 make me do it instead of just saying, well, it was around
6 his pants when he would rape me? Just make it easy on
7 yourself. But she doesn't do that because she's telling
8 you what actually happened.

9 What about the bruises? Why not say that those
10 bruises came when he was physically violent towards her
11 instead of when he was holding me down or when he was
12 thrusting himself in me? Why not throw some physical
13 violence in there when no one else is around. She
14 doesn't do that because that's not what happened. What
15 did happen is what she testified to. And it might be
16 hard to believe, but she is certainly not making it up.

17 And a lot was mentioned about that first statement
18 about how it was short and not thorough. Ladies and
19 gentlemen, you're allowed to use your common sense, too,
20 okay? Common sense. This has been going on for a year.
21 This is the first time that she's told anybody. The
22 emotions are high that day. The dad that she's always
23 known and that she's been scared of for the past year is
24 gone. Corporal Houser did his job, but his job that day
25 is not to sit here and get a detailed question and

1 answer. He is a responding officer. This case is going
2 to be assigned an investigator. It's not over that first
3 day. He said that. He hands her a piece of paper and
4 says write it down. It's unreasonable to think that she
5 is going to be able to write down a year of detail at
6 that point in time.

7 Later Investigator Knafelc made sure that she was
8 interviewed more thoroughly at The CARE House. There is
9 an appropriate time for that and it is not at that moment
10 when the responding officer is trying to deal with a
11 sexual assault investigation to make sure the defendant
12 is separated from the scene. The suspect is separated
13 from the scene. And it's just frankly unreasonable to
14 expect her at that point in time to give some long
15 detailed statement about what has happened. But what I
16 do want to make clear to you, and Corporal Houser

17 testified to this and so did **minor one** she gave enough
18 information. She was thorough enough to let the
19 investigator know what had been happening. She said it
20 was constant. She said when the first time it happened.
21 She said it was going on for over a year and she said he
22 forcibly had sex with me against my will. So a page and
23 a half but, ladies and gentlemen, it was as thorough as
24 it needed to be under those circumstances.

25 One more thing about that first statement. If this

1 is just some big conspiracy that Tammy and Minor have
2 against James, there is opportunity right there. How
3 about making it as detailed right there so we can, you
4 know, finally get him out of the house. Again, this is
5 not - it's not what happened because that's not what's
6 going on.

7 Tammy Price, **minor one** mom, I'm sure that throughout
8 this trial after hearing what Tammy observed over that
9 year and after as far as him sleeping in her bed, as far
10 as her not trying to get her daughter to counseling, she
11 did everything she could do over that year to try to see
12 what was going on. And again, go back to his second
13 interview. He doesn't try to say that Tammy has been
14 fussing with him this whole entire time. He says they
15 have both been fussing with **minor one** He's not trying to
16 align Tammy and **minor** the day he was arrested, but he's
17 trying to do that today.

18 Think about what Tammy said about her and James'
19 relationship. They met when they were in fifth grade.
20 They got married when they were 16. They had the twins
21 when she was 17. He made the money for the family. He
22 was the provider. She didn't work. The kids were home
23 schooled. So when Ms. Good asked her about counseling,
24 think about it. They didn't have health insurance.
25 Counseling costs money. James makes the financial

1 decisions. [minor one] despite how hard she tried has still
2 been too scared to tell her mom what's been going on.
3 She doesn't have a public school to attend. She can't
4 say go talk to your guidance counselor. Something is
5 going on. Go talk to your teacher that you trust. As
6 her mother at that time considering she has been with
7 James practically her whole life, she did the best she
8 could.

9 She confronted James. Why are you sleeping in
10 [minor one] bed? Get out of her bed. What's his response?
11 Oh, it's more comfortable for my back. More comfortable
12 for my neck. What does she do? She switches out the
13 beds. But he still goes up there. What's his response
14 then? Oh, well, what's the big deal? I'm sleeping with
15 my 16 year old, 17 year old daughter. What's wrong about
16 that? He starts to make her feel crazy. [minor one] still
17 not telling her what's been going on. She starts to feel
18 crazy. She physically tries to get him out of the bed.
19 Well, go down to the couch. She'll wake up and he'll be
20 right back up there. And you don't have to just take her
21 word for it. He tells Investigator Dill in that second
22 interview that he sleeps with his daughter. And the
23 investigator is like she's not five. She's 16 or 17 and
24 apparently she doesn't want you in there. So you don't
25 have to just take Tammy's word for it.

1 When she says we had a healthy sex life but we
2 stopped when we moved to Camden, he even tells
3 Investigator Dill, yeah, I have been having sexual issues
4 with my wife. But don't just take her word for it. You
5 also have photographs. Take me just a second. These
6 were taken ten days after the allegations came out and
7 [minor] told her mom what had been happening. Tammy
8 testified I even - I couldn't get him out of the bed. I
9 even moved my bed that was in the master bedroom which
10 she pointed out used to be this room upstairs with the
11 kids to try to get him out of [minor one] room. So you
12 don't just have to take her word for it. You have the
13 pictures. You have this interview where he said yes, I
14 slept with my daughter in her bed and, yes, I haven't had
15 sex with my wife for a while.

16 When [minor] finally found the courage to tell her
17 mom what was happening on August 11, she goes down there
18 and says, [minor one] this has got to be more than you just
19 not being allowed to go to the Harrelson's house. What
20 is happening? She says she directly asked her. She gave
21 her that moment that [minor] needed. Is he touching you?
22 Yes. Everyday. And that was enough. She finally had
23 what she had been - what had been her gut instinct of
24 what was going on. And ever since she knew she did
25 everything she was supposed to do as a mom. She called

1 her sister to call the police because she was so scared
2 he was going to go to her phone and find out she called
3 911. So she called the police through her sister.

4 She took her daughter to the hospital. She took her
5 daughter -- She did everything the investigator told her
6 to do. She took her daughter to the hospital. She took
7 her daughter to the interview. She took her daughter to
8 the medical examination at Dr. Luberoff's office. She
9 moved to Florida to get away from that Camden house.
10 Yes, she sold their items because she didn't have
11 anything. She didn't have anything so she sold the
12 things that she could sell to make a better life for her
13 and her kids and she moved to Florida. She studied to be
14 an insurance agent. She got her license to be an
15 insurance agent. She got her license to be a CNA. She
16 has done everything she was supposed to do as a mom.

17 And again, going back to your common sense. Ms.
18 Good asked a few of the witnesses, well, isn't Tammy the
19 one who called you to come back to the house to look at
20 certain areas? Well, that was within the investigator's
21 responsibility. But, ladies and gentlemen, use your
22 common sense. Her daughter has just disclosed what had
23 been happening for a year to her. Of course they are
24 going to have some conversations about where it happened.
25 How did it happen. How did I miss this. So yes, of

1 course they're going to have a couple conversations and
2 so when [minor] tells her where these assaults occurred in
3 the home, is it that unreasonable for her to go look at
4 those places? And you can see from these photos some of
5 the spots that the light reacted on that Melissa Wallace
6 used, you can see for yourself, there are spots on pieces
7 of the furniture where the sexual assaults happened. Is
8 it that unreasonable to ask the investigator to come
9 check those out? No, it's not.

10 You also heard from B.K. who is
11 [minor one] twin sister. She told you that she has always
12 been more of a mommy's girl and [minor] has been more of a
13 daddy's girl. She likes to do art. She likes to spend
14 time inside. She takes care of the kids. [minor] and
15 James have always gone off and done whatever, fishing,
16 hunting, working on the jobs. That's just their thing.
17 Just like Dr. Foster said, the perpetrator is going to
18 choose the person that he has the closest relationship
19 with because they are the most vulnerable person and they
20 are the most likely not to break that bond of secrecy
21 that [minor] and her dad have. She says that they argued
22 a little bit. They're 16, 17 years old. They're
23 teenagers. They're twins. They're home schooled.
24 They're around each other all the time. Of course
25 they're going to argue a little bit.

1 But did you see when Ms. Senn asked her, did you
2 notice a change in **minor one** behavior? And at that point
3 that's when **minor** broke down. She said yes, because now
4 she - at that point they were arguing. They were
5 fussing. She didn't feel like she was there for her
6 sister when she needed to be, and she broke down.

7 She also talked about, again, we go back to some of
8 the times that **minor** said that it happened. She told
9 you that it happened when her sister was across the room
10 sleeping before they got their own bedrooms, but **minor**
11 said their beds are on the opposite ends of the bedroom.
12 It happened at night when everybody was asleep. There is
13 a separation in between the rooms. It's not there
14 anymore because the rooms switched after that. But
15 again, this was not some long drawn out romantic sexual
16 intercourse. It took one to two minutes. **minor** said
17 she didn't say anything because she was scared. **minor**
18 testified how the room was. It's not just **minor one**
19 **minor** said the beds are on the opposite side of the room
20 with a separation in between.

21 And yes, after this happened she was placed in an
22 uncomfortable situation with one of her aunts and she did
23 have to see James, but she was forthcoming with that and
24 she did say that he reached out to her in the past month.
25 She has no idea how he got her number. Apparently

1 somebody at the courthouse. And I have apologized to her
2 for that. However, she said she did not want that
3 contact. She felt uncomfortable at the time, but she did
4 see him right after this happened and she was forthcoming
5 about that.

6 Martha Penrod. Ms. Penrod has no dog in this fight.
7 Yes, they had a few disputes over him putting a chain
8 across the driveway and a gate across her driveway. Sure
9 that irritated her, but she didn't sit here and try to
10 portray him as this horrible individual. She said he was
11 fine unless he was drinking with his buddies and then he
12 was - she didn't say he was a nuisance but she basically
13 she said, yes, I was irritated with him for those things.
14 That is completely understandable. She corroborates what
15 minor told you and James tells us in the interview, that
16 minor and James were by themselves for a couple of weeks
17 before the rest of the family moved in. She says that,
18 and she could tell the difference between the twins, she
19 still can, she saw James with minor all the time. She
20 left the house all the time to go to job sites with him.
21 She's their neighbor. She's retired. She saw the twins.
22 She does not live in the household. So you don't have to
23 just rely on the family to tell you about that. And, of
24 course, James also said that, but she noticed it, too.
25 She has been teaching school for 29 years, eighth

1 graders. She has had a lot of opportunities to interact
2 with teenage girls and their parents, but yet she noticed
3 some things that made her extremely uncomfortable between
4 James and **minor one**

5 She testified that there were several occasions that
6 she remembered. One was in the hammock. I'll just take
7 a second here. This is her porch. The hammock used to
8 be in between those trees. These pictures were taken
9 more recently so the hammock has been removed, but she
10 testified that the only person that she ever saw James in
11 the hammock with was **minor one** She saw them spooning in
12 the hammock, not just lying with their heads in opposite
13 directions. Not just lying where you kind of have your
14 legs hanging over the hammock, but literally spooning in
15 the hammock. She also saw them with their arms around
16 each other in the lake. She said was a little

17 inappropriate for her. It wasn't just playing around in
18 the water. And then she testified about a situation that
19 she saw that made her so uncomfortable from her porch she
20 literally had to go back inside because she just couldn't
21 sit there and watch that, and that was when he wrapped
22 his hand around her, put his leg all the way around her
23 to where he's basically straddling his 16 year old
24 daughter.

25 And I also point out to you Investigator Dill wasn't

1 the only one that James had absolutely no response to
2 when he was confronted the first time about him raping
3 his daughter. Martha did. Martha confronted him and
4 said, I know that you have been sleeping with your
5 daughter. And what was his response? Nothing. White as
6 a ghost.

7 Now, we brought several expert witnesses this week
8 and they testified about their specific field and
9 Investigator Wallace did say that she took her light
10 source to the house in hopes of finding bodily fluid,
11 specifically semen that he would have left behind. Now,
12 Ladies and gentlemen, again common sense will tell you
13 that, of course, testing for his DNA as far as touch DNA
14 is not going to be useful in that particular situation
15 because it's his house. So, of course, his touch DNA is
16 gonna be everywhere so they didn't test for that because
17 that wouldn't necessarily be helpful to this case. He
18 lived there. His DNA is gonna be in there.

19 But they did try to detect semen. Now, Courtney
20 Thompson testified, and she's an expert in the field of
21 serology which is the study of bodily fluids, she said
22 that there are certain things that cause degradation of
23 the sample and that just because a bodily fluid was at
24 some point there, just because semen was at some point
25 was there, doesn't mean that that sample she's going to

1 have is gonna test positive. And why did she say that?
2 Degradation. So time. Some of the places they tested
3 were carpet. So, of course, people walk over the carpet.
4 They tested the pillow case. Pillow cases are washed.
5 She testified that that can also degrade the sample. And
6 then [minor] said, ladies and gentlemen, after he would
7 ejaculate, most of the times he would do it on her, not
8 in her, but on her most times. But what did she say he
9 would do? Wipe it up with a towel and he would put that
10 towel in the washing machine or either put that napkin in
11 the trash can.

12 Ladies and gentlemen, semen is not like urine.
13 Urine spreads over an area. Semen goes in one spot. You
14 can see it. Just wipe it up. That's what he did. Is it
15 that unreasonable to think that those samples that they
16 ~~took aren't going to be positive?~~ No. However, the
17 expert that did have something to testify to, not that
18 her's wasn't important, but Dr. Susan Luberoff, a child
19 abuse pediatric specialist who has seen over 10,000
20 children over the course of her career, this is the first
21 time [minor] has ever had any sort of gynecological exam
22 down there. And what did Dr. Luberoff find? A notch on
23 [minor one] hymen at the 7:00 position. Combine that with
24 [minor one] sexual abuse history and that is consistent with
25 penetrating trauma. Ladies and gentlemen, it doesn't get

1 too much straight forward than that.

2 We also called Dr. Foster to the stand. And the
3 elephant in the room, and we're not trying to hide it, is
4 what **minor** thought earlier. People that don't have
5 experience with sexual abuse, and it's not necessarily an
6 unreasonable thought and Dr. Foster testified that the
7 large majority of people, of children do disclose a lot
8 later. Some of them don't even disclose at all. Some of
9 them don't disclose until adulthood. Two-thirds of the
10 population that has been studied relating to sexual abuse
11 child victims come forward later. It is not an uncommon
12 situation.

13 Let's talk about what latent disclosure means and
14 how sometimes when the child finally does tell, that it
15 is partial. That it is very usual that they will have an
16 event that will finally trigger everything to come out.
17 Think about that particular day. **minor** testified for
18 about a month she had been home and she had just started
19 to feel worse. She was 17 at that point. She just
20 really was having a very hard time holding it in anymore.
21 She testified that the last time that he tried to do it
22 when she had mono, she was lying in bed and she pushed
23 him off. She didn't feel like doing it.

24 And, ladies and gentlemen, just to clear this up,
25 mono is considered the kissing disease. I'm sure

1 everybody has heard that. So [minor] didn't say that he
2 was sitting there kissing her and exchanging saliva which
3 is how it's transferred to another person. She said it
4 was just one or two minutes and it's done. It's not a
5 romantic encounter. They're not sitting there kissing.
6 And she even said when she had mono, she fought him off.
7 She didn't want him to do it that day. I just wanted to
8 clear that up because that was brought up several times.

9 Back to Dr. Foster though. Partial disclosure.
10 Sometimes there is a triggering event such as her mom
11 finally saying directly, is he touching you? Yes, mom.
12 Everyday. So it's not unusual that that very first time
13 that it all comes out they don't sit there and tell the
14 entire story at that point. They don't tell every single
15 detail that's been happening. It's an overwhelming
16 traumatic situation. So again, the research, the
17 studies, and your common sense and knowledge of human
18 nature will tell you that very first time she's not going
19 to sit there and give it all out there. And Tammy
20 testified to that. [minor] testified to that. The first
21 day she told what she needed to tell her. Not unusual.
22 Dr. Foster's been in this field for 30 years. Not
23 unusual.

24 She also testified that the factors that play into
25 that delayed disclosure are things like helplessness and

1 accommodation and the secrecy that comes along with that
2 and what do those mean. Helplessness. The family is all
3 she had. Tammy told you, minor told you, they have had
4 very few friends. They have moved over 20 times.
5 They're home schooled. They're in that house. Unless
6 minor has an opportunity to go to a job site, they are
7 in that house all the time. So when he threatens her,
8 I'm gonna ruin you. You're gonna ruin this family.
9 You're gonna have no one, why wouldn't she believe that?
10 That's all she's ever known is her family.

11 Accommodation. Dr. Foster testified that after the
12 first few times that it happens, and minor said she
13 tried to fight him off for several months. She couldn't
14 do it anymore. He wasn't going to stop. She just let
15 him force himself on her and rape her because she could
16 not fight him off after a couple months. She talked
17 about accommodation. What that means is that after the
18 first couple of times that it happened, even if it's
19 against your will, even if you fight it off, but once it
20 happens, you feel like it, she feels like it's something
21 that she has to just succumb to essentially. Blames
22 herself. That is a factor that also comes into play with
23 child sexual abuse of victims.

24 She also testified, you know, that just because as
25 far as who the particular perpetrator chooses, which

1 child the perpetrator chooses has a lot to do with the
2 relationship. Remember, Dr. Foster didn't interview
3 **minor one** She didn't review the forensic interviews. She
4 testified as what's called a blind expert. She's talking
5 about her knowledge of the field. But she corroborates
6 everything that everyone has told you, even James.

7 **minor** is the child closest to him. She is the most
8 vulnerable. She is the one most likely to keep a secret.

9 And in that second interview James himself tells
10 Investigator Dill that everyone is scared of him, he
11 says, because when he's talking about the little kiss on
12 the cheek that he finds out about, he says, well, of
13 course, I had to find out about it secondhand because
14 everybody is so scared to tell me anything. He tells
15 Investigator Dill that people are scared of him. That
16 his family is scared of him. When he says, well, when I,

17 I guess -- What did he say? You will have the video, but
18 when I see her say it, then I'll go to jail.
19 Helplessness. He doesn't think she is going to say it.
20 He says that.

21 Ladies and gentlemen, of course, they are going to
22 be scared of him just like he said. Of course they are
23 going to be scared of him. His temper is out of control.
24 His moods are out of control. He's so volatile. He
25 turns moods in a second. Oh, yeah, and he carries a gun

1 around his waist all the time. So yes. Just like he
2 said, they're gonna be scared of him. She's gonna feel
3 helpless.

4 One more thing along the lines of what Dr. Foster
5 testified to. If they are sheltered, that contributes to
6 the helplessness that the victim feels. Even James in
7 the second interview admits, talks about some of the
8 things that show how sheltered they are. You don't have
9 to just take **minor one** or **minor two** word for it when they
10 say they're sheltered. Listen to some of the things he
11 says when he's talking about his 16 and 17 year old
12 daughter. Even though she's such a wild flower, what
13 reasons does he give? That he heard that a boy kissed
14 her on the cheek. A 17 year old girl. That's what makes
15 her a wild flower? And then also this letter that he
16 found that he cried for days over. I mean, he says, he
17 even admits that they're sheltered.

18 When Investigator Dill asked him about porn, it's
19 like, they're teenagers. We don't. We don't. Mmm-mmm.
20 We don't show them that stuff.

21 Now, I think it's very interesting. Well, let me go
22 right back to **minor** and then go to James, and I promise
23 I'll wrap it up. Dr. Foster testified about the fact
24 that the first memory is often very clear and **minor** has
25 a very clear memory when that first time it happened.

1 They were in the camper together, she woke up with him
2 performing oral sex after he had been drinking with his
3 friend. She fights him off. He apologizes and then he
4 comes back and finishes the job. What's interesting is
5 not only that it's a very clear memory, and that's the
6 first time that she remembers it happening, is that that
7 is the first thing that James says when he comes back
8 that second time. Listen to that second interview.
9 Again, Justin Dill after he reads him his rights, he
10 tells him you don't have to talk to me if you don't want
11 to after he confronts him with what he's been accused of,
12 what **minor** told, he doesn't say in that second
13 interview, okay, no, I didn't do it. He doesn't blow up
14 and say, oh, my gosh. What in the world are you talking
15 about? He says, in the second interview he says, well,
16 there was a time in the camper where I woke up and my
17 hand was on her leg. Then he later clarifies, he says,
18 well, it was inside of her leg, on the inside of her leg
19 and that scared us both. We cried and we cried and we
20 went back to sleep. It's very interesting that that is
21 the first time it happened and that's the first thing
22 that he says once he finally starts talking about what
23 happened to Investigator Dill.
24 **minor** also testified that after it happened that
25 first time, it was constant. And what did Tammy tell

1 you? When they were gone to Summerville and she talked
2 to her daughter, she had a hard time reaching James on
3 his cell phone, he wouldn't answer which was unusual for
4 him, and she talked to [minor] that one time and she said
5 something about her voice just really concerned me.
6 Really concerned me and I wanted to go back sooner but
7 James wouldn't come get me so we had to stay the whole
8 two weeks without me being able to go back to my
9 daughter. But after that first time [minor] said it
10 happened constantly. I ask you, ladies and gentlemen,
11 that concern that Tammy picked up on after the first time
12 it started happening was real. Again, corroboration.
13 [minor] also said that there were things that she
14 would try to do to get away from him. She would try to
15 go to the dock sometimes because she knew that Ms. Penrod
16 was retired and she spent a lot of time on her porch.
17 Ms. Penrod told you that. She would go there in hopes
18 that it would not happen, to get away from him just for a
19 little bit in hopes that Ms. Penrod would be on that
20 porch. The time that she testified to that it happened
21 in the water Ms. Penrod was gone and James knew that she
22 was gone because he had just seen them leave on their
23 boat. [minor] doesn't try to say that it happened over
24 and over in the water but the one time that it did happen
25 in the water supposedly out in public, the one person

1 that he knew would likely see was gone.

2 And again, I'll just go back to if this is some big
3 conspiracy to get him out of the house, why not make it
4 easy. Why not just say, you know, the times that he came
5 in my room when I was sleeping, that's when he did it.
6 Just make it easy. That gun that he always carried
7 around on his waist, instead of saying that he indirectly
8 threatened me with it, instead of saying, yeah, it was
9 down by his knees when he was raping me, just say he had
10 it to my head. She didn't because that's not what
11 happened. She testified to what happened.

12 Okay. Finally, what did James say to Investigator
13 Dill? Well, we know what he didn't say during the first
14 interview after Investigator Dill gets the basics and you
15 will have both of them in the jury room, you can watch
16 them, but the first interview after he gets all the basic
17 information, and again at this point he already knows
18 because the cops at some point told him after he had a
19 unreasonable response at that scene, but have you been
20 having sexual relations with **minor one** Oh, my gosh.
21 Pause, pause, pause. Pause, pause, pause. Nothing,
22 nothing, nothing. I need to know what they are saying.
23 Yeah. Before I say something, I don't want my story to
24 differ from hers. Sure. Sure. In this particular
25 silence after Justin confronts him with the allegations,

1 sure. Investigator Dill is saying a few more things but
2 again his first response to the allegations is I need my
3 story to be the same.

4 All right. So that interview lasts about ten
5 minutes. Then he realizes he probably needs to - well,
6 he wants to say what he wants to say. So he decides to
7 see Investigator Dill and his first response again after
8 they go through the Miranda Warnings and after he
9 indicates that he wants to speak to the investigator, he
10 says, again he doesn't say, no, I didn't do it. He
11 doesn't say, oh, my gosh, I can't believe they're saying
12 this. Well, I woke up in the camper with my hand on her
13 leg. It scared us both. She cried. I cried. You know,
14 my wife always says make sure you don't sleep with her.
15 Okay. So instead of after you wake up, after he wakes up
16 like that, instead of, oh, my gosh, sorry about that. ---
17 I'm going in the other room and never sleep with her
18 again because it scared him so much, he continues to
19 sleep in the same bed on a regular basis with his
20 daughter? I did last night. He told the investigator.
21 I did last night.

22 Then he also says when Investigator Dill says, well,
23 I also heard you have been having issues with your wife
24 and in the context of the sleeping arrangements when he
25 asked him that, I haven't been sleeping in the same bed

1 as my wife. He says, yes, it's true. Okay. And again
2 in that second interview he mentions the camper.
3 Corroboration. He admits to sleeping in the same bed on
4 a regular basis with his daughter. Do you remember when
5 Tammy said that one of the things that really, really
6 worried her, a specific memory that she had is when
7 **minor** had mono and he admitted to her that he had felt
8 that lump on her breast? He knows that Tammy knew that
9 so he knows that, you know, that might come up. That's
10 something I actually admitted to my wife doing. So he
11 even says that he slept in the bed with her the other day
12 when she was sick. He admits to that because he knows.
13 He remembers him telling her that he felt that lump on
14 her breast when she had mono so he admits to that.

15 He admits to his reaction when the police show up.
~~16 He says, no, I didn't go talk to the police. I went~~
17 straight to my daughter and said, are they here for me?
18 You don't have to just take their word for it. He tells
19 you that he said that I emptied my pockets. I put my
20 hands behind my bed. I didn't ask them, what's going on?
21 Why are y'all here? I did those things before I even
22 knew because he did know. Again, when he said that, he
23 said, yes, whatever she says. Whatever she says. He
24 admits that he was talking about **minor** because he's
25 scared she's going down the wrong path.

1 Again, he tells the investigator, yes. I asked my
2 daughter, just like [minor] said, he came to me and asked
3 me. She said he said, why didn't you warn me? He says,
4 are they here for me? And she says yes. But then he
5 admits to the investigator that she didn't even say
6 anything else. He said she was crying and emotional so
7 he doesn't even say that [minor] said, oh, I told them,
8 dad. I told them what's happening. Mmm-mmm. Even he
9 tells you that she didn't tell him that. Not all my
10 fault when. He told that to Tammy when the police are
11 leading him to the car. It's not all my fault. Why not,
12 what the hell is happening? What's going on? No. No.
13 No. He said it's not all my fault.

14 Again he confirms that he's having sexual issues
15 with his wife. You don't have to just take Tammy's word
16 for that. He told Investigator Dill that they were
17 having problems in the bed. Again, if she says it and I
18 see it, then I'll go to jail. He thinks she's not going
19 to be able to tell but she does. We have already talked
20 about Tammy as far as what James - James even
21 corroborates what the witnesses have testified to and
22 these are a few of the examples with Tammy. He admits to
23 all of the things that she has testified to and - not all
24 of them. A few of them. And again if this is some big
25 conspiracy to finally get him out of the house, why

1 didn't he say that then? He said both of us have been
2 fussing with [minor one] Not, well, Tammy and [minor] have
3 been coming at me. He says both of us have been fussing
4 with [minor one] They have been fighting for a few weeks.
5 Not all my fault. He admits that. He says that as he's
6 being lead away.

7 Okay. And this Henry, Henry Harrelson, this 14 year
8 old prepubescent little boy that they were family friends
9 with, okay? So if this is all about [minor] not being
10 able to go to see Henry, why -- I mean, James says to
11 Investigator Dill, well, I found out secondhand that
12 Henry kissed her on the cheek. Really? And he even says
13 it wasn't that big of a deal. Wasn't that big of a deal.
14 But now it's all about Henry. No big deal. Again, all
15 of that is secondhand information about a kiss on the
16 cheek and, of course, this is all coming from James. I
17 have been fighting to keep her away from him. This is
18 all kids stuff. He cannot have this jealousy. Even he
19 realizes how silly. A 17 year old. Investigator Dill
20 said you are off the chain about [minor] because it's
21 true. He cannot even hide his jealousy in that second
22 interview. He tries to back away from it and says it's
23 all kids stuff, but then he says in the same vein I have
24 been fighting to keep her away from him.

25 A little bit along those lines, let's think about

1 it. He said that [minor] had a boyfriend and it was
2 a long distance relationship. It didn't work out. He
3 didn't get all fired up about that. Both girls aren't
4 allowed to date and [minor] had this long distance
5 boyfriend for a little while. Why does he all of a
6 sudden get all upset about [minor] going down the wrong
7 path over a kiss on the cheek? He doesn't get all fired
8 up about [minor two] Again, Dr. Foster said they choose the
9 victim that they don't think are going to tell. He tells
10 Investigator Dill [minor] is really close to their mom.
11 They have been reading the Bible together. She is with
12 the kids a lot. He tells you himself. He tells
13 Investigator Dill himself that [minor] is the closer one
14 with mom. So you don't have to just take [minor two] Tammy,
15 [minor one] Tammy, Martha's word for it. He tells
16 Investigator Dill [minor] is closer with the mom. So just
17 like Dr. Foster said, he is not going to choose [minor]
18 who is the closer one to mom and more likely to tell mom.
19 He chooses the one closer with him. He admits to that.

20 Okay. He also said after finding out secondhand
21 information about that kiss on the cheek that he cried
22 about it. Investigator Dill said, she's 17. Why cry
23 about it? When he's talking about how [minor] is a wild
24 flower, again he says himself I have never known her to
25 do anything like this. The only two reasons that he can

1 give for her being the wild flower is the kiss on the
2 cheek by the prepubescent boy with braces and a letter
3 about going to Charleston.

4 So, ladies and gentlemen, I know it's a lot but when
5 you listen to all of those witnesses, when you tie all of
6 those pieces of this nightmare together, and they all
7 fit, all of the pieces of the puzzle fit, and what fits
8 is they fit with what he's charged with, criminal sexual
9 conduct in the second degree and incest.

10 Ladies and gentlemen, you took an oath to follow the
11 law, to listen to the testimony of the witnesses
12 carefully and you have. I have watched you. You have
13 done it. Find this man accountable for what he did to
14 his daughter for that year. Thank you.

15 THE COURT: Okay. Ladies and Gentlemen, you have
16 been listening for about an hour and 15 minutes. We
17 still have another closing argument and instructions from
18 me before you can begin deliberating so I'm going to let
19 you have a break right now for ten minutes. It is 12:40.
20 Let's do a little bit less than ten minutes. Let's get
21 back at ten to one and then we will finish off the trial
22 and when you hear from me that you can begin
23 deliberating, you can begin deliberating but right now
24 just take a quick comfort break and we will be back on
25 the record soon. Thank you.

1 (Whereupon, the jury entered the jury room.)

2 BAILIFF: Come to order.

3 THE COURT: Please be seated. Thank you. All
4 right. Bring in the jury.

5 (Whereupon, the jury returned back to the courtroom
6 at 12:55 p.m.)

7 THE COURT: The jury is seated so, Ms. Good, proceed
8 with your closing argument.

9 MS. GOOD: Good afternoon. Everybody has that
10 friend in their life that they like to listen to their
11 stories and everybody has that friend that goes fishing
12 and they say the first time you hear that story a fish is
13 about this big (indicating.) And then each time you hear
14 them tell it over and over again because they're one of
15 your best friends, you hear them tell that story and it
16 gets exaggerated and exaggerated to the point where the
17 fish is this big (indicating) by the time that the story
18 is done the last time that you hear it. Do you ever say
19 anything about it? No. You just kind of laugh at him
20 and say, oh, he's just telling a story. It's not a big
21 deal.

22 In this case, ladies and gentlemen, the story
23 started about this big (indicating.) The fish was this
24 small (indicating) and today **minor** and Tammy are here
25 and the fish is about this big (indicating.) And they

1 are here to finish what they started.

2 Ms. Cavanaugh asked you to look at this like a
3 puzzle. And I suggest that you do that also because it's
4 up to you to find beyond a reasonable doubt that the
5 State proves to you that this occurred. And I submit to
6 you that it didn't occur at all. However, if you take
7 all these puzzle pieces and you try to fit them together,
8 you have to take each one separately and decide if it
9 makes a big picture. In this case it does not.

10 Beyond a reasonable doubt the way I like to explain
11 it is you buy some milk at the grocery store, you put it
12 in your refrigerator and it has a sell by date on it.
13 You don't know if that means you drink it by that date or
14 you just buy it by that date, nobody knows. So you take
15 it out. It's that day and you smell it a little bit and
16 say I'm not quite sure. That's essentially reasonable

17 doubt, ladies and gentlemen. The judge will instruct you
18 what reasonable doubt means. It means a reasonable
19 person hesitates to act and in this case they said you
20 will look at physical evidence and that they have all
21 this physical evidence for you to look at and testimony.
22 I want you to look at what they don't have. I want you
23 to look at all the inconsistencies in the testimony and
24 I'm gonna go through them, but all the inconsistencies
25 that they have. These puzzle pieces do not fit together.

1 I'm gonna start with the DNA evidence. I'm gonna
2 start with the smaller pieces around the outside before
3 we get to the two big pieces which are right in the
4 middle. The DNA evidence. The State says just because
5 it's not there doesn't mean it wasn't ever there. But if
6 you listened to what the serologist said, I want to you
7 think about it. What did [minor] say happened? [minor]
8 said it happened multiple times every single day and it
9 happened everywhere in the house. Sometimes he would
10 ejaculate on me and sometimes he would ejaculate to the
11 side but he would wipe it up. But if you listen to the
12 serologist, ladies and gentlemen, she says just because
13 somebody wipes something up doesn't mean it's not still
14 there. And if he is having intercourse with her and
15 ejaculated to the side day in and day out it would be
16 somewhere, ladies and gentlemen. But you heard her say
17 it was negative. Everything was negative which indicates
18 that it was never there at all.

19 And they said, well, sometimes it can be degraded.
20 If you listened to what she said, she said it gets
21 degraded because it's cleaned from detergent or vacuuming
22 potentially, but look at the pictures of this home,
23 ladies and gentlemen. Does it look like anything has
24 been vacuumed? Does it look like this house has been
25 cleaned? Investigator Knafelc even said it was

1 cluttered, it wasn't a very clean house. So that
2 argument goes out the window as to why DNA is not
3 evident.

4 And also, how did they get to the house that day?
5 Yes, Investigator Knafelc had a duty to go out there but
6 two weeks later they go out there and it's the day after
7 Tammy Price interjects herself into this and says you
8 need to come look at these spots. I want you to remember
9 how does she know that these are the spots he needs to
10 look at? Look at her testimony and **minor one** **[REDACTED]**
11 says that she never told her mother details about what
12 happened. It was too embarrassing for her. She never
13 spoke to her about it after that first day. But what did
14 Tammy say? Tammy said yeah, we talked about it several
15 times. So who is right? If this has happened to you day
16 ~~in and day out and you told your mother about this, you~~
17 would remember you've told your mother about the details
18 of what happened but they couldn't even get that part
19 straight. And why, ladies and gentlemen? Because they
20 got their story straight with some things but when
21 questioned about things that they never told people
22 before they don't have the same answers because they have
23 never spoken about it.

24 And another thing about that search warrant. People
25 testified obviously law enforcement is there. Tammy is

1 there. It's her house. Where are the other children?
2 They are not there. Yet she brings [minor] to the home so
3 law enforcement can do a big search warrant on the house
4 for these things. Why would you take a traumatized child
5 who has been sexually abused by her father for a year to
6 where law enforcement is all around to make her even more
7 uncomfortable? You wouldn't, ladies and gentlemen,
8 unless it didn't happen and you wanted to make sure
9 everything stayed straight.

10 And then you look at Dr. Luberoff, this other piece
11 of the puzzle. She testified that there was a notch on
12 the hymen, but she testified in accordance with the
13 history that she had. Where does that history come from?
14 It comes from [minor one] It doesn't come from anybody else.
15 It doesn't come from the witnesses who have seen them
16 having sex. It comes from [minor one] And I will get to
17 [minor] later. However, she said these things can also
18 come from skiing. It's documented incidents where skiing
19 caused these types of things. Where do they live, ladies
20 and gentlemen? On a lake. What did everybody testify to
21 about [minor one] She was an outdoors girl. She liked doing
22 these things. They liked to go skiing. They liked to go
23 hunting. They liked to do all of these things outdoors.
24 That makes sense as to why she would have that there.

25 And then you throw in this whole thing that Dr.

1 Luberoff talks about mono. [minor] says he would lay down
2 in bed with her and she testified that it's not just
3 saliva. That's what most people see it as, but bodily
4 fluids. If you're having sex with your daughter day in
5 and day out, mono doesn't just happen in one day and
6 you're all of a sudden sick. It happens over a course.
7 If you're having sex with your daughter, there's bodily
8 fluids, ladies and gentlemen, everywhere. Vaginal
9 secretions. Ejaculation. Why was he not sick? Why did
10 he not get mono? Why did nobody ever say he got sick
11 at that point? Because it never happened.

12 And then Dr. Foster, I want you to listen carefully
13 to what Dr. Foster said. She used these magical words of
14 helplessness, accommodation, entrapment. Ladies and
15 gentlemen, they brought her here so that you would pay
16 attention to her and not to what [minor] said. But I want
17 you to pay attention to what [minor] said. She used these
18 magical words. I felt helpless. I felt trapped. How
19 did she know to use those words when she was testifying,
20 ladies and gentlemen? You heard her mother testify
21 because they have been through a criminal sexual conduct
22 investigation before. Her little brother was molested by
23 the grandfather and they sent him to jail for it several
24 years before. They know how it works. They know what
25 those magical words are. They know that somebody is

1 gonna come and arrest somebody and that they can go away.

2 And I'll get to the motives for going away.

3 However, if you continue to listen to Dr. Foster, she has
4 30 years and her knowledge in the field these things are
5 seen also in cases where it's been found out somebody
6 says something and they investigate it and find out it
7 never happened at all. So it doesn't just happen in
8 cases of actual sexual abuse. It actually happens in
9 cases where there's no sexual abuse, too. And she says
10 with multiple children in the home it's less likely for
11 the person to be the target if they're the outgoing
12 child, more independent child. And the State argues this
13 because he was with her most of the time. But if you
14 listen to what everybody said including **minor two** including
15 **minor one** including Tammy, **minor** is the passive child.
16 She is the one that doesn't stand up for herself. She is
17 the one that they had under control. Wouldn't that be
18 the one that you would go for? They're identical twins.
19 They look exactly the same. Wouldn't you go for the
20 passive one? The one you have under control if you want
21 to make sure nobody is going to say something about it?

22 And that in children with chronic abuse especially
23 older children, 17 year old children, you remember the
24 normal things in your life because those are the things
25 that aren't traumatic for you. You remember your

1 teachers growing up in elementary school. You remember
2 your normal everyday hobbies. [minor] is home schooled,
3 but she testified, yeah, I went to school a little bit,
4 public school. So she didn't even have that many
5 teachers to remember, ladies and gentlemen. I remember
6 every single teacher I have had from kindergarten. I had
7 Ms. Eastland in kindergarten. I had Ms. Perry in first
8 grade. I had Ms. Wilson in second grade. I had Ms.
9 Murphy in third grade. I has Ms. Sheppard in fourth
10 grade, and I could keep going on. She couldn't remember
11 one name of one teacher. I don't recall. I don't
12 remember.

13 You grew up hunting with your dad? Yeah. How many
14 times have you been hunting? I don't remember. More
15 than once? More than twice? Ten times? I don't
16 remember. Maybe just once. Yet this girl had her own
17 gun. This girl everybody has testified to is skinning
18 foxes, yet she doesn't remember more than one time she's
19 been hunting. She doesn't have to remember exact dates
20 or where she had been hunting, but you would know if you
21 had gone hunting over the course of years. She doesn't
22 remember the types of clothes she wears. She gets up
23 there and she testifies she has all these bruises. She
24 can only go swimming in board shorts and a shirt because
25 she's not allowed to wear anything else. But what did

1 everybody else on that stand say? She wore bikinis all
2 the time when she went swimming. Her aunt even said they
3 wore bikinis. Never saw bruises on her. So why can't
4 she just say that she wore a bikini? Because she's never
5 been questioned about that before. And at this point she
6 doesn't know what to say because that was not part of
7 their story.

8 And Dr. Foster also said which I think this is
9 important, the last time it happens to you is one of the
10 most recalled times that the child of sexual abuse can
11 tell. In this case **minor** said it happened every single
12 day most times of the day. The day she finally told
13 August 11th, 2012 and when she was interviewed later she
14 couldn't recall the last time it happened. Wouldn't she
15 know the last time it happened if this traumatic event is
16 finally over?

17 Martha Penrod. They make a big deal that Martha
18 Penrod is this unbiased witness who sees all these things
19 happening. I want you to pay attention to what she said.
20 First off, she said they always had friends around.
21 Well, everybody else testified that they were sheltered.
22 They didn't have friends. Yet there were always friends
23 around. People always outside playing. And she said she
24 could see things on the dock. Two things with this,
25 ladies and gentlemen. First of all, she has been

1 teaching for over 20 years. She knows what to look for.
2 If she saw all these things and it concerned here so
3 much, why didn't she say something? And she said she did
4 say something one time and Tammy was there. Tammy heard
5 it. If Tammy is so concerned that she thinks all this is
6 going on, she's been through it before with her son, red
7 flags are flying, why didn't she do something
8 at that point? Why didn't she say, Martha, why didn't
9 you say something? Why doesn't Martha come forward until
10 four years later? Why didn't she say something to the
11 cops that day when they finally arrived?

12 Look at these pictures, ladies and gentlemen. This
13 is on her deck down to the dock. She states that she can
14 see down to the dock. In this picture you can. But
15 during the summer when people would be outside, think
16 ~~about where the leaves would be. Leaves are scattered~~
17 all over. Even if these are new trees, that's not four
18 years worth of growth, ladies and gentlemen. Use your
19 common sense. There's leaves everywhere. She can't see
20 down there. Not to mention as she stood right here and
21 she had to look, she had to go like this (indicating) to
22 see which one **minor** was. Yet I was standing way in the
23 back of the courtroom and she says that she can see all
24 the way back there, something is happening on the dock
25 and it just looked like she was crying and he was

1 comforting her. That doesn't mean they're having sex
2 when he's comforting a crying child.

3 And there is **minor two** ladies and gentlemen. **minor**
4 is caught in the middle of this. She is the soft spoken
5 passive one. She testified that they did have tons of
6 rules. It wasn't just **minor** that had rules. She had
7 them, too. They weren't allowed to have boyfriends.
8 They weren't allowed to date. And she stated that she
9 would see them on the couch or in the bed. I'll submit
10 this to you. If he's telling **minor** every single day
11 don't let anybody know, it will ruin our family. Don't
12 say anything. Why would he do these things in public in
13 front of sisters, mother and everybody else? It doesn't
14 make any sense. They made up this story and used things
15 that he did to put it there and say this is what's
16 happening.

17 And on the day of disclosure **minor** said that **minor**
18 and James were fighting. Why were they fighting?
19 Because he wouldn't let her go see this boy because
20 they're not allowed to date. And **minor** said that she
21 went up and used the computer after this happened. Her
22 dad had been standing in the door just like she had. Why
23 didn't she just go up and get her little brothers and
24 sisters? She didn't think it was so much of a big deal
25 that anything has happened. She's using the computer.

1 And I think this is important, ladies and gentlemen.
2 [minor] said after all this happened and James was
3 arrested, mom sent [minor] and the other children down to
4 Summerville with her sister. Her and [minor] stayed
5 behind. Now, I'll get to what happened after they stayed
6 behind. But why would you not want to keep all your
7 children with you after something like this has happened?
8 Why would you stay behind with just [minor one] Because
9 y'all are concocting this story and it's only a page and
10 a half at this point, but we have to talk about it before
11 anything else happens. But yet [minor] says they never
12 talked about it. But Tammy says they did in detail.

13 And then within a month everybody moves to Florida
14 and [minor] says Tammy had her boyfriend move in. She
15 doesn't remember when but he moved in, yet Tammy doesn't
16 get a divorce until three years later. She said past
17 year 2015 is when she finally divorced the man who has
18 been sexually abusing her daughter for over a year. And
19 [minor] said she seen her father since he was arrested.
20 Where did she see her father? At Tammy's sister's house
21 in Summerville. Why would Tammy's sister let him come
22 around? Why would she text her dad multiple times? She
23 said she didn't want contact with him, yet she continues
24 to text him.

25 Now we get to the big pieces of the puzzle. The two

1 big pieces in the middle. [minor] and Tammy. I think
2 it's very important to listen to their two testimonies,
3 ladies and gentlemen. These two women were sick of the
4 rules. Tammy's been with James since the fifth grade,
5 the entirety of her life. They all stated he was very
6 controlling. They had these rules. They had been
7 fighting. You heard James in the interview, the State
8 tries to say he didn't say anything about that. I want
9 you to listen to that second interview. He says, yeah,
10 Tammy and me been arguing but nothing to do with [minor one]
11 And Tammy has a new boyfriend move in a month and a half
12 later down in Florida, yet she's been with a man for her
13 entire life.

14 I think it's important, ladies and gentlemen, when
15 you listen to [minor] testify, look at her demeanor. She
16 wasn't upset about this. She pretended to cry a couple
17 times. But did you ever see any tears? How did she
18 refer to her father? This has been the man that she has
19 called dad for years and years. What did she call him?
20 James. When she talked about what happened, she didn't
21 say my dad did this to me. My dad this did this to me
22 over and over. She said James did this. James did this.
23 Think about how she all of a sudden is calling him James
24 because her and Tammy have been talking about him. And
25 what does Tammy call him? James.

1 And she talks about this first time it happening in
2 the camper. Again, use your common sense, ladies and
3 gentlemen. She says she woke up to him having oral sex.
4 I asked her what she was wearing. She says I was wearing
5 shorts and a shirt. How do you not feel somebody take
6 your pants off, take your underwear off and start having
7 oral sex with you? And even if you can get past that the
8 first time, okay, she said she never fully fell asleep
9 again after that. She was pretty much awake because she
10 was terrified of what just happened. Yet again she woke
11 up to him having sex with her and her again not fully
12 asleep but she didn't feel him take her pants off and
13 underwear off and stick his penis into her? Ladies and
14 gentlemen, it doesn't make sense.

15 And that two weeks that they were fixing up the
16 house in Camden, and this is when mom says that she
17 starts getting concerned about her, listen to what **minor**
18 said. She said I hardly talked to my mom at all. I
19 talked to her maybe one or two times because my dad
20 wouldn't let me use the phone. What did Tammy say?
21 Tammy said she talked to her a lot more than she talked
22 to James those two weeks. She said she talked to her at
23 least five or six times and she was concerned about what
24 she heard in her voice so they wanted to rush back. So
25 that's a red flag. She's concerned about what she hears

1 in her voice. She's been through this with her son. She
2 knows what her son was feeling and his reaction over that
3 time. But it didn't concern her enough to say anything
4 at that point, push further because it didn't concern her
5 at all.

6 And then it happened all over the house, in job
7 sites. Why again would he do it in public in job sites
8 with people there if he didn't want the family to find
9 out? Where is Ms. Norwood? Is she here to testify about
10 seeing them at her house or anything? No. And they were
11 sleeping in the same bed. I want you to remember [minor
12 said he would sleep in [minor one] bed, he would sleep on
13 the couch. Here is an important statement. She said he
14 would also sleep with my mother. But they testified that
15 he slept every single night with [minor one]

16 And I asked about why she didn't take her to
17 counseling if she was so concerned. She saw all these
18 signs. She's heard Martha Penrod say you're sleeping
19 with your daughter. She's worried about him sleeping in
20 her bed. If she is worried about her concern over her
21 and these behavioral changes, yet remember Dr. Luberoff
22 testified that she got the history and that nobody told
23 her there was any behavioral changes. They said there
24 were no behavioral changes. If you're so concerned, she
25 said we didn't have money for counseling. Again, listen

1 to what she said and what she actually testified to.

2 I asked her about the guns. [minor] had a gun. One
3 of the younger ones had a gun. She had a gun. James had
4 a couple guns. She said she got some money from an
5 inheritance and used some of that to buy the guns. She
6 used a little bit of the money from the inheritance and
7 moved to Florida. Well, if she had this money from an
8 inheritance, she had money to take her to counseling that
9 James would not know about. And she home schools these
10 children. While James goes to work that's a perfect time
11 to take her when he wouldn't know. But she didn't
12 because throughout that year it wasn't happening. She
13 wasn't concerned. It was when they finally got fed up
14 with the rules, her arguing with him, [minor] wanting to
15 date boys, that they finally said okay.

16 Something also important was this Kannapolis trip.

17 [minor] testified she went to Kannapolis, North Carolina
18 one time and it happened while they were there. She was
19 terrified there. She knew it would happen. Yet when
20 confronted about it on her Facebook page she posted that
21 she was excited to go to Kannapolis with her dad. I
22 said, well, why would you do that? She said, well, I had
23 to keep up a good appearance. Well, if you're keeping up
24 a good appearance, you don't even have to post a single
25 thing or say anything about it at all. Don't even say

1 anything about it. But instead you want to talk about
2 how excited you are about going to Kannapolis. It
3 doesn't add up. Because nobody ever asked them about
4 Kannapolis before.

5 And this is important, too, ladies and gentlemen.
6 All of a sudden she disclose to her mom on the dock. Mom
7 knows dad is around. Mom says she is scared to call 911
8 so she makes her sister do it. First off, why would you
9 leave your daughter down on the dock by herself with the
10 man who supposedly is sexually abusing her up in the
11 house? You wouldn't leave her alone. You would stay by
12 her side. If you're scared to call 911, ladies and
13 gentlemen, Tammy testified she told James it was about
14 this lost gun. So why are you scared if he looks through
15 your phone and sees 911 when you told him you called them
16 about a lost gun? That doesn't make sense either.

17 Tammy testified that she collapsed on the ground she
18 was so upset about all this happening. All those three
19 officers got up here and testified, they said she was
20 upset. Did any of them testify that she collapsed on the
21 ground? That she was that upset over this? No. Because
22 they were starting to make up a story that keeps going
23 and they are here to finish what they started. And after
24 James was arrested and [REDACTED] minor has gone through this
25 traumatic event, he calls the house. And what does Tammy

1 do? She puts [minor] on the phone with James. Why would
2 you put [minor] on the phone with James if he's just been
3 sexually assaulting her for over a year?

4 Or even better, [minor] says she never talked to her
5 dad again after he was arrested that day. Yet Tammy said
6 she did. They have never been asked these questions
7 before so the answers are different now. And then what
8 happened after James was gone? Within two weeks, they
9 testified to this, [minor] got a nose ring. [minor] got a
10 driver's license. [minor] got to start dating boys.
11 24-year-old Mark Stokes spent the night in the house.
12 Would any of that have happened if James was in the
13 house? No. And then what happened, within a month they
14 moved to Florida and mama's got a new boyfriend.

15 MS. CAVANAUGH: Objection. I don't think that was
16 the testimony.

17 THE COURT: Overruled.

18 MS. GOOD: Thank you. Mama's got a new boyfriend.
19 He moves in the house. They can't remember exactly when.
20 But remember when they moved to Florida, Tammy said they
21 lived with a friend for two days and then she got a
22 house. [minor] said no, we were there for about a month
23 and a half before we got a new place. Two days and a
24 month and a half is a big difference. And then what
25 happens, [minor] and several of the other children move

1 back up to Summerville or [minor] and several of the other
2 children. Who stays down in Florida? [minor] and mama,
3 so they could do what they wanted now that James was
4 gone.

5 Finally, I'm going to get to James' statement.
6 Start with the scene. I'm gonna go chronologically for
7 you. On the scene he went down there. Tammy told him
8 it's about the gun so he goes down there to [minor one] She
9 says yeah, they're here for you. What would a reasonable
10 person do if you see three officers coming down towards
11 you on the dock. You have just been told they're here
12 for you. Wouldn't you want to say, hey, look, i'm not
13 trying to fight you or anything. I'm cooperating.
14 Especially, and I have much respect for law enforcement,
15 my brother is law enforcement, but with today's society
16 people are scared. You would want to show, look, I'm not
17 doing anything to make law enforcement comfortable
18 as well. And then whatever she said. Whatever she said.
19 At that point James is watching everybody. The cops have
20 rolled up. No cop has ever gone down to talk with
21 [minor one] All the cops are up there with Tammy. So
22 whatever she said. Whatever she said. That doesn't
23 necessarily refer to [minor one] He's saying what Tammy has
24 told him. It's about the gun.

25 Then in this first interview, and all of this is

1 recorded, the question was asked, well, this camera is up
2 here in the corner. I want you to watch those videos.
3 Did James Miller ever look up and see that there is a
4 camera there? No. In those moments that you see in that
5 interview room, he has no idea a camera is there. What's
6 the first thing that you see? Him crying. Moments when
7 no one is around him and these are important moments,
8 ladies and gentlemen. That's when you see the real
9 person. He's crying and upset. And he says, why would
10 they want to get rid of me? And then Dill comes in and
11 Dill says, yeah, it was very obvious he was overwhelmed.
12 He was crying. He was upset. And he says, did you have
13 sex with your daughter? They make a big deal about this
14 pause, pause, pause. Notice what he's doing during the
15 pause. He's crying. His world has just been turned
16 upside down because his wife and his daughter are
17 accusing him of having sex with her. He has no idea what
18 to do because nobody is ever in this situation. He's in
19 handcuffs. And what is his concern? His concern is for
20 his family. He wants to make sure that they are okay.
21 It's not for himself.

22 And then in the second interview they bring him in.
23 What's the first thing he says? He says I'm confused and
24 I'm hurt. He's still crying at this point. And Dill
25 walks in and lies to him over and over again and tells

1 him we've got a statement that's got elaborate detail in
2 it. We know everything that happened. Well, if that's
3 the case and he wanted to know what their story was, he
4 would have just confessed right there, ladies and
5 gentlemen. But what does he do? He continued to deny it
6 and say, no. I have not had sex with my daughter.

7 And he starts talking about the Harrelson boy.
8 I want you to think about 14 year old boys today, ladies
9 and gentlemen. It's not like when we were growing up
10 when we were younger. My eight year old is up to here on
11 me. 14 year old boys and girls are much more developed
12 now than they were. Just because she was 16 and he was
13 13 or 14 doesn't mean that they were any different in
14 size or development. And he makes the comment that they
15 had **minor** under control and **minor** is the wild flower
16 and that even Tammy has been arguing with Tammy. But
17 he's been arguing with Tammy, too, not even anything
18 about **minor one**. They try to say that he never brings up
19 that he's been arguing with Tammy but he does. He says
20 we've been arguing about things other than **minor one**. And
21 he continues to say it's not fair to his family.

22 And then, ladies and gentlemen, the interview ends.
23 At that point he still does not know there is a camera in
24 the room. You got to see the most intimate moments of
25 the man. When Dill left the room, if he was lying about

1 all this, he would have stopped crying. He would have
2 potentially smirked or smiled or maybe a little smile out
3 the side of his mouth. But what did he do? He started
4 crying harder and then he bowed his head and he preyed to
5 God for his family and for him and to steer **minor** on the
6 right path. Please give them all the strength to get
7 through this. He was still concerned for his family, not
8 himself.

9 I grew up in Lexington, South Carolina and I would
10 say I was probably a goody two shoes growing up. Any
11 time I had to make a hard decision, and I was close to my
12 dad, my dad would always tell me, Anna, the right thing
13 to do isn't always the easiest thing to do. Ladies and
14 gentlemen, it's not an easy thing to be sitting in these
15 12 chairs and determine the guilt or innocence of a man,
16 but with the evidence that the State has given you, the
17 inconsistencies, the lack of physical evidence, it's not
18 going to be easy to look over there and say the words not
19 guilty, but in this case and with this evidence they have
20 not proven anything happened beyond a reasonable doubt
21 and I ask that you find James Miller not guilty.

22 THE COURT: Mr. Foreperson and members of the jury,
23 you have heard the testimony, the evidence and the
24 arguments from both sides. I will now explain to you the
25 law that applies to this case.

JURY CHARGE

623

1 The indictments charged the defendant with criminal
2 sexual conduct in the second degree and incest. I remind
3 you that the fact that the defendant was arrested,
4 charged and indicted in this case is not evidence in the
5 case and cannot be considered by you as evidence of guilt
6 in this case, nor does it create any presumption or
7 inference of guilt. The indictments are simply the
8 formal written instruments which contain the charges made
9 against the defendant. They are the formal documents by
10 which this case is brought into the court.

11 The indictments in this case allege two different
12 offenses against the defendant. The first indictment,
13 number 2012-GS-28-1381 accuses the defendant of criminal
14 sexual conduct in the second degree, and the second
15 indictment 2012-GS-28-1382 accuses the defendant of
16 incest. Each indictment charges a separate and distinct
17 offense. You must decide each indictment separately on
18 the evidence and the law applicable uninfluenced by your
19 decision as to any other indictment. The defendant
20 may be convicted or acquitted on both, one or none of the
21 offenses charged. You will be asked to write a separate
22 verdict of guilty or not guilty for each indictment.

23 I remind you that during this trial you and I have
24 certain duties to perform. As the trial judge it is my
25 responsibility to preside over the trial of this case and

1 I also have the duty to rule on the admissibility of the
2 evidence offered during this trial. You are to consider
3 only the competent evidence before you. If there was any
4 testimony ordered stricken from the record in this case
5 during this trial, you must disregard that testimony.
6 You are to consider only the testimony which has been
7 presented from this witness stand, any exhibits which may
8 have been made part of the record in this case, and any
9 stipulations of counsel.

10 I have the additional duty to charge you the law
11 applicable to this case. As the presiding judge I am the
12 sole judge of the law of this and it is your duty as
13 jurors to accept and apply the law as I now state it to
14 you. If you already have an idea as to what the law is
15 or what the law ought to be and it does not agree with
16 what I now tell you the law is, you must abandon this
17 idea because you are sworn to accept the law and apply
18 the law exactly as I state it to you.

19 In every case tried in this court before a jury, the
20 jury becomes the sole and exclusive judge of the facts of
21 the case. A trial judge cannot state, comment on or make
22 any statement to a trial jury about the facts in the
23 case. Since you the jury are the sole judges of the
24 facts in this, you are not to infer from what I have said
25 during the progress of this trial and the ruling upon the

JURY CHARGE

625

1 admissibility of evidence or otherwise or anything that I
2 say now during the course of this instruction to you that
3 I have any opinion about the facts in this case. This is
4 a matter solely for you the jury to determine. As jurors
5 it is your duty to determine the affect, value, weight,
6 and truth of the evidence presented during this trial.

7 There are two types of evidence which generally
8 presented during a trial, direct and circumstantial
9 evidence. Direct evidence is the testimony of a person
10 who claims to have actual knowledge of a fact such as an
11 eyewitness. It is evidence which immediately establishes
12 the main fact to be proved.

13 Circumstantial evidence is proof of a chain of facts
14 and circumstances indicating the existence of a fact.
15 Crimes may be proven by circumstantial evidence. The law
16 makes no distinction between the weight or value to be
17 given to either direct or circumstantial evidence.

18 However, to the extent the State relies on
19 circumstantial evidence, all the circumstances must be
20 consistent with each other and when taken together point
21 conclusively to the guilt of the accused beyond a
22 reasonable doubt. If these circumstances merely portray
23 the defendant's behavior as suspicious, the proof has
24 failed. The State has the burden of proving the
25 defendant guilty beyond a reasonable doubt. The burden

1 rests with the State regardless of whether the State
2 relies on direct evidence, circumstantial evidence or
3 some combination of the two.

4 The defendant has pled not guilty to these
5 indictments and that plea puts the burden on the State of
6 South Carolina to prove the defendant guilty beyond a
7 reasonable doubt of every element of the alleged crimes.

8 A person charged with committing a criminal offense
9 in South Carolina is never required to prove himself
10 innocent. I charge you that it is an important rule of
11 the law that the defendant in a criminal trial no matter
12 what the seriousness of the charge may be, he will always
13 be presumed innocent of the crime for which the
14 indictments were issued unless guilt has been proven by
15 evidence satisfying you of his guilt beyond a reasonable
16 doubt. ~~This presumption of innocence does not end when~~
17 you begin your deliberations but it stays with the
18 defendant throughout the trial unless you reach a verdict
19 of guilt based on the evidence satisfying you of that
20 guilt beyond a reasonable doubt.

21 The presumption of innocence is like a robe of
22 righteousness placed about the shoulders of the defendant
23 which remains with the defendant unless it has been
24 stripped from him by evidence satisfying you of the
25 defendant's guilt beyond a reasonable doubt. The

JURY CHARGE

627

1 presumption of innocence is not a mere legal theory. It
2 is not just a legal phrase. It is a very important
3 constitutional protection that every defendant is
4 entitled to unless you the jury are satisfied from the
5 evidence of the defendant's guilt beyond a reasonable
6 doubt.

7 What is reasonable doubt? Reasonable doubt has been
8 defined on a number of occasions by our Supreme Court.
9 And it is very simply defined as the kind of doubt that
10 would cause a reasonable person to hesitate to act. The
11 Supreme Court has also explained that proof beyond a
12 reasonable doubt is proof that leaves you firmly
13 convinced of the defendant's guilt. There are very few
14 things in this world that we know with absolute
15 certainty. And in criminal cases the law does not
16 require proof that overcomes every possible doubt. If,
17 based on your consideration of the evidence, you are
18 firmly convinced that the defendant is guilty of the
19 crime charged, then you must find the defendant guilty.
20 However, if on the other hand, you think there is a real
21 possibility that the defendant is not guilty, you must
22 give the defendant the benefit of the doubt and find him
23 not guilty.

24 Necessarily you must determine the credibility of
25 witnesses who have testified in this case. Credibility

1 simply means believability. It becomes your duty as
2 jurors to analyze and to evaluate the evidence and
3 determine which evidence convinces you of its truth. In
4 determining the believability of witnesses who have
5 testified in this case you may believe one witness over
6 several witnesses or several witnesses over one witness.
7 You may believe a part of the testimony of a witness and
8 reject the remaining part of the testimony of that same
9 witness. You may believe the testimony of a witness in
10 its entirety or reject the testimony of a witness in its
11 entirety. You may consider whether any witness has
12 exhibited to you any interest, bias, prejudice or other
13 motive in this case. You may also consider the
14 appearance and manner of a witness while on the witness
15 stand.

16 ~~Ladies and gentlemen, during this trial you have~~
17 heard from witnesses who were qualified as experts in
18 some field. The rules of evidence ordinarily do not
19 permit witnesses to testify to opinions or conclusions,
20 however, an exception to this rule exists for expert
21 witnesses. A witness who by education and experience has
22 become an expert in some art, science, profession or
23 calling may state an opinion as to relevant and material
24 matter in which the witness claims to be an expert and
25 may also state the reasons for the opinion. You should

JURY CHARGE

629

1 consider any expert opinion received in evidence in this
2 case and like any other evidence give it the weight you
3 think it deserves. If you decide that the opinion of an
4 expert witness is not based on sufficient education and
5 experience or if you conclude that the reasons given in
6 support of the opinion are not sound or that the opinion
7 is outweighed by other evidence, you may disregard the
8 opinion entirely. An expert witness' testimony is to be
9 given no greater weight than that of other witnesses
10 simply because the witness is an expert. Further, you
11 are not required to accept an expert's opinion even
12 though it's not contradicted.

13 Now let me turn to someone who did not take the
14 witness stand, the defendant. I instruct you and
15 emphasize that the fact that the defendant did not
16 testify is not a factor to be considered by you in any
17 way in your deliberation and in your consideration on the
18 question of the defendant's guilt or innocence. It must
19 not be considered by you in any manner whatsoever. A
20 defendant has the constitutional right to remain silent
21 and the assertion of this right must not be considered by
22 you in your deliberations. I repeat, under your oath you
23 are to draw no conclusion whatsoever from the fact that
24 the defendant in this case did not testify. The fact
25 that this defendant did not testify should not even be

1 discussed in the jury room. The burden of proof as I
2 have stated to you is on the State. The defendant is not
3 required to prove his innocence. The burden of proof
4 remains on the State to prove guilt beyond a reasonable
5 doubt.

6 In order to establish criminal liability criminal
7 intent is required. For example, the mental state
8 required to be proven by the State for a particular crime
9 might be purpose, intent, knowledge, recklessness or
10 criminal negligence. Criminal intent must be proven by
11 the State beyond a reasonable doubt. Criminal intent is
12 always a matter that must be determined by the jury from
13 the circumstances surrounding the situation. There is no
14 way to prove intent to a mathematical certainty. There
15 is no way medical science can dissect a person's brain
~~16 and determine what the person had in mind so the law says~~
17 that criminal intent may be inferred from the
18 circumstances shown to have existed. This is how you
19 make a determination of whether or not the element
20 requiring intent was present. It is not necessary to
21 establish intent by direct and positive evidence, but
22 intent may be established by inference in the same way as
23 any other fact by taking into consideration all the facts
24 and circumstances in this case.

25 Criminal intent is a mental state. A conscience

JURY CHARGE

631

1 wrongdoing. It is up to you to determine what the
2 defendant intended to do based on the circumstances shown
3 to have existed.

4 The defendant is charged with committing criminal
5 sexual conduct in the second degree. In order to prove
6 criminal sexual conduct in the second degree the State
7 must first prove beyond a reasonable doubt that the
8 defendant engaged in a sexual battery with the victim. A
9 sexual battery is sexual intercourse, cunnilingus,
10 fellatio, anal intercourse, or any intrusion however
11 slight of any part of a person's body or of any object
12 into the genital or anal openings of another person's
13 body except when the intrusion is accomplished for
14 medically recognized treatment or diagnostic purposes.
15 If you find that a sexual battery did occur, you must
16 then decide whether the State has proven beyond a
17 reasonable doubt that the defendant used aggravated
18 coercion to accomplish the sexual battery.

19 Aggravated coercion means that the defendant
20 threatened to use force or violence of a high and
21 aggravated nature to overcome the victim or another
22 person if the victim reasonably believes that the
23 defendant had the present ability to carry out the
24 threat. Aggravated coercion may also exist if the
25 defendant threatened to retaliate in the future by the

1 infliction of physical harm, kidnapping or extortion
2 under circumstances of aggravation against the victim or
3 any other person.

4 The defendant is also charged with incest. In order
5 to prove incest the State must prove beyond a reasonable
6 doubt that defendant had sexual intercourse with certain
7 types of relatives. For a male defendant these relatives
8 include the defendant's mother, grandmother, daughter,
9 granddaughter, stepmother, sister, grandfather's wife,
10 son's wife, grandson's wife, wife's mother, wife's
11 grandmother, wife's daughter, wife's granddaughter
12 brother's daughter, sister's daughter, father's sister or
13 mother's sister.

14 Let me say something to you about you're
15 deliberations. The genius of our jury system is that it
~~16 allows 12 good men and women from 12 different~~
17 backgrounds, life experiences and perspectives to
18 consider the evidence, talk about it and ultimately reach
19 a verdict. We call them deliberations for a reason. You
20 are to consider the evidence in this case carefully and
21 deliberately and discuss it in a calm thorough and
22 courteous manner. Remember, you are not partizans or
23 advocates for either side favoring one side or the other.
24 You are judges. Judges of the facts. Your sole interest
25 is to find the truth from the evidence you have heard in

JURY CHARGE

633

1 the courtroom, listen to the views of all of your fellow
2 jurors, consider other people's points and points of view
3 and talk through and discuss the evidence. And remember,
4 if you are doing something deliberately, you are not in a
5 big hurry. This case is very important to both sides and
6 this is their only day in court.

7 When you retire to the jury room, you should discuss
8 the case with your fellow jurors to reach an agreement if
9 you can do so. Your verdict must be unanimous. Each of
10 you must decide the case for yourself but you do so only
11 after you have impartially considered all the evidence,
12 discussed it fully with the other jurors and listened to
13 the views of your fellow jurors. Do not be afraid to
14 change your opinion if the discussion persuades you that
15 you should. But do not come to a decision simply because
16 other jurors think it's right. It is important that you
17 attempt to reach a unanimous verdict but, of course, only
18 each of you can do so after having made your own
19 decision. Do not change an honest belief about the
20 weight and effect of the evidence simply to reach a
21 verdict. In other words, do not change your opinions
22 solely for the sake of reaching a unanimous verdict.

23 On each indictment there are two possible verdicts.
24 You are to decide whether the defendant is guilty or not
25 guilty of criminal sexual conduct in the second degree

1 and whether or not the defendant is guilty or not guilty
2 of incest. There is no significance whatsoever in the
3 order in which I state these possible verdicts. It is
4 simply that I must state one first.

5 Ladies and Gentlemen, your verdict must be a
6 unanimous one. Mr. Foreperson, when the jury agrees on
7 the verdict, you will write the verdict on the verdict
8 form that we will give to you, then you can knock on the
9 jury room door and inform the bailiff that you have
10 reached a verdict. At that time we'll escort you back
11 into the courtroom. I ask that all the jurors now go
12 into the jury deliberation room with the exception of the
13 two alternates. If you could just have them stay out in
14 the hallway and I'll talk with them shortly. Members of
15 the jury, you are still not to deliberate until I give
~~16 you the verdict form and all of the exhibits in this case~~
17 so you can go back into the jury room. You may have
18 lunch waiting on you. You're welcome to start eating
19 lunch but don't start deliberating until the bailiff
20 comes to the door with the verdict form and all of the
21 exhibits and says you may begin to deliberate. Is that
22 understood?

23 (Whereupon, the jury acknowledged affirmatively in
24 unison.)

25 THE COURT: All right. Thank you all very much.

1 (Whereupon, the jury entered the jury room at 1:40
2 p.m.)

3 THE COURT: Any objections to the jury instructions?

4 MS. CAVANAUGH: None from the State, Your Honor.

5 MS. GOOD: None from the defense, Your Honor.

6 THE COURT: If you could all just check the exhibits
7 to make sure we have everything in order. I have the
8 verdict form here. Look over that as well.

9 (Whereupon, the exhibits and verdict form were sent
10 back to the jury in the jury room and the jury commenced
11 their deliberations at 1:50 p.m.)

12 * * * * *

13

14

15

16

17

18

19

20

21

22

23

24

25

* * * * *

(Jury question at 2:45 p.m.)

THE COURT: Hold on a second. I have got a jury question. All right. We have received a note from the jury. I'll just go ahead and read the note as it is written. "Could we get a transcript of the mother Tammy and the daughter **minor one** Would like, too, **minor** copy of testimony. Would like to view the interview videos, State's comments from their closing statements, Officer Dill's testimony, Officer Houser, doctor from The ARC's statement."

So as you all know we do not have a transcript available for any of that testimony, however, if they wish to listen to that testimony again, they are certainly welcome. We can pull that up and they can ~~relisten to all of that testimony. It's a lot of~~ testimony, but I would certainly allow them to do that if that's what they wish. Sometimes in trials when juries find out there is no transcript, they can kind of whittle down their request for what they actually want to hear so we can see what they'll say once they realize that there is no actual transcript.

Of course, the interview videos, those are easy for us to give back to the jurors with a computer so they can watch that at their leisure but otherwise I will just

1 explain to them what I just explained to you, that we do
2 not have transcripts but they are welcome to relisten to
3 any testimony they wish. I'll let them go back out of
4 the courtroom so they can discuss as a group if they want
5 to listen to all this testimony. And again, if they want
6 to listen to all this testimony, I, of course, will let
7 them do it but they may be able to narrow it down. Does
8 anybody have any comments about what I propose to say to
9 the jury? Does that suit everyone?

10 MS. GOOD: Yes, ma'am.

11 MS. CAVANAUGH: Yes, Your Honor.

12 THE COURT: Okay. If you will bring in the jury,
13 please. Let's make that a Court's exhibit.

14 (Whereupon, the jury returned to the courtroom at
15 2:50 p.m.)

16 THE COURT: All right. I have received your note
17 and before I talk about your note, I just wanted to say
18 that I told you before during the trial that sometimes
19 folks are sitting over here. None of these folks have
20 anything to do with this trial that you just heard. I
21 want to make sure there's no confusion about that.

22 Your note asks for the transcript of the mother
23 Tammy and the daughter **minor one** testimony. You also wish
24 for **minor two** testimony. You would like to view the
25 interview videos. You would like to have the comments

1 from the State during their closing statements, Officer
2 Dill's testimony, Officer Houser's testimony, and the
3 testimony from the doctor from The ARC.

4 Uhm, I just want to let you know we do not have a
5 transcript that I could send back with you. I don't have
6 a written document of everybody's testimony. I have a
7 court reporter here who is recording everything, but he
8 types it all up later. He's got a rough draft but we
9 can't give you the rough draft of any sort of transcript.
10 What we can do for you is we can replay any testimony
11 you want replayed. But it would be y'all coming back
12 into the courtroom and us finding it on the tape recorder
13 or the audio that we have and replaying that testimony.
14 I don't know if you want all of that testimony replayed
15 to you. That would be hours of testimony and that's
~~16 fine. We can absolutely do it but I didn't know if it~~
17 made a difference to you once you found out we didn't
18 actually have a transcript you could read.

19 With regard to the interview videos, we can give you
20 a computer to go back there with and you can play those
21 DVD's and watch the interview videos back in the jury
22 room. That's not a problem so I'll make sure you have
23 got a computer back there to watch that.

24 So what I'm going to do is I'll let you as a group
25 discuss what I just told you. If you all want to listen

1 to the audio of all of this testimony, then we will get
2 that prepared for you. We can come back in here and
3 listen to the testimony. If knowing that you don't have
4 a transcript you can just rifle through and read makes a
5 difference to you all, you can let me know that, too.
6 Does that make sense? Does anybody have any questions?

7 (No reply from the jury.)

8 THE COURT: All right. I'll let y'all go back there
9 and discuss that and we'll get a computer back there so
10 you can watch the DVD's at your leisure.

11 (Whereupon, the jury entered the jury room to
12 continue their deliberations at 2:57 p.m.)

13 * * * * *

14

15

16

17

18

19

20

21

22

23

24

25

* * * * *

(Jury question at 5:05 p.m.)

THE COURT: All right. We are back on the record in the State versus Miller. We have received another note from the jury. The note says, "Can we see the laws for reasonable doubt?" Then number 2, "Audio of the mother and minor one testimony." And number 3 is a little unclear. I'll just say exactly what it says. "3, police testimony." And so there's like a number 3 circled. There are three items. Number 1 was can we see the reasonable doubt laws. Number 2, can we see the audio of minor and the mother's testimony. And number 3, and after it says 3, police testimony. So I don't know which three police officers they want to hear the testimony for. I assume that's what they mean. Is that your assumption that that's what they mean? I mean, I don't know. We probably will have to ask them.

MS. GOOD: I assume we would ask them, but I would think the three would be the first three.

THE COURT: The first three. That's what my law clerk thought as well, the first three.

MS. CAVANAUGH: Yes, Your Honor, I agree, but I think we should ask to just clarify it with them.

THE COURT: Okay. We will. As far as the can we see the laws for reasonable doubt, I can reread my

1 reasonable doubt. It's a page long. I can also send
2 them back with just this page on reasonable doubt. There
3 is some case law where if you're gonna send the jury
4 charge back to the jury, you're supposed to send the
5 entire thing back to the jury. My entire jury charge is
6 typed up but I have a lot of scratch outs that I would
7 have to go edit if I was going to send the entire charge
8 back, otherwise, I think there's nothing wrong with me
9 rereading the reasonable doubt portion if everybody were
10 to agree to that. But I leave it up to you to tell me
11 what y'all want.

12 MS. CAVANAUGH: I would be fine with just rereading
13 the charge, Your Honor.

14 MS. GOOD: I would, too.

15 THE COURT: And just the reasonable doubt portion of
16 the charge?

17 MS. CAVANAUGH: Yes, Your Honor.

18 MS. GOOD: Yes, ma'am.

19 THE COURT: All right. Well, we will bring the
20 jurors back in here so I can reread the reasonable doubt
21 charge. Let me talk to my court reporter for a minute
22 about the audio of Tammy Price and **minor** **minor one** and the
23 rest of the testimony. Make that a Court's exhibit.

24 (Whereupon, the jury returned to the courtroom at
25 5:50 p.m.)

1 THE COURT: All right. I received another note from
2 the jury with three items on the note. The first
3 question was, "Can we see the laws for reasonable doubt."
4 As for that question I'm going to reread to you my charge
5 regarding reasonable doubt.

6 The State has the burden of proving the defendant
7 guilty beyond a reasonable doubt. Reasonable doubt has
8 been defined on a number of occasions by our Supreme
9 Court, and it is very simply defined as the kind of doubt
10 that would cause a reasonable person to hesitate to act.
11 The Supreme Court has also explained that proof beyond a
12 reasonable doubt is proof that leaves you firmly
13 convinced of a defendant's guilt. There are very few
14 things in this world that we know with absolute certainty
15 and in criminal cases the law does not require proof that
~~16 overcomes every possible doubt. If, based on your~~
17 consideration of the evidence, you are firmly convinced
18 that the defendant is guilty of the crimes charged, then
19 you must find the defendant guilty. However, if on the
20 other hand you think there is a real possibility that the
21 defendant is not guilty, you must give the defendant the
22 benefit of the doubt and find him not guilty.

23 That is the law on reasonable doubt.

24 The second question is that you wanted to hear the
25 audio of the mother and **minor one** testimony. We will get

1 that audio ready for you. It will take the court
2 reporter a few minutes to cue that audio up. But let's
3 go on to the third question because I have a question
4 about your question. I believe for item number 3 it just
5 says three police testimony. And I don't know if you
6 mean you want to hear testimony from three of the police
7 officers or --

8 JURY FOREMAN: The first three, ma'am.

9 THE COURT: The first three officers. Okay. There
10 were four officers who testified right in the beginning
11 of the trial. I just want to make sure. The first was
12 Corporal Houser of the Kershaw County Sheriff's Office.
13 The second was Justin Scott also of the Kershaw County
14 Sheriff's Department and Deputy Cody Wilson of the
15 Kershaw County Sheriff's Department. And then there was
16 also Deputy Hathaway of the Kershaw County Sheriff's
17 Department. They were the first four. You want the
18 first three?

19 JURY FOREMAN: The first three.

20 THE COURT: The first three. Okay. All right. I
21 assume that you will hear the police officers' testimony
22 first because they will be first on the audio that we
23 have, then we will cut over to begin with **minor**
24 **minor one** testimony followed by her mother Tammy Price's
25 testimony. But that's going to take my court reporter a

1 few minutes to cue up so I'm going to send you back in
2 the jury room and we'll get you out here when we are
3 ready to play the audio. Thank you. And we'll make this
4 a Court's Exhibit. Oh, one other thing before you all
5 go. I'm sorry. I forgot. Someone verbally asked the
6 bailiff how long y'all would be staying here tonight. I
7 wanted to answer that question. You are now in
8 deliberations. We will stay here as long as we need to
9 stay here until you all can come to a verdict. So we are
10 in here for the long haul as long as it takes for y'all,
11 okay? Thank you.

12 (Whereupon, the jury returned to the jury room
13 momentarily.)

14 THE COURT: Okay. Let's bring in the jury to listen
15 to the testimony at this time.

16 ~~(Whereupon, the jury returned to the courtroom at~~
17 5:55 p.m.)

18 (Whereupon, the audio portion of the testimony of
19 Deputy Brooks Houser, Justin Scott, Deputy Cody Wilson,
20 **minor** **minor one** and Tammy Price was played for the jury.)

21 THE COURT: Ladies and gentlemen, it's 7:00. Your
22 dinner is here. I will let you go and have your dinner
23 for a few minutes and then we will bring you back in.

24 (Whereupon, the jury returned to the jury room for a
25 dinner recess.)

1 (Dinner recess.)

2 THE COURT: Are we ready to bring the jury back?

3 MS. CAVANAUGH: Yes, Your Honor.

4 MS. GOOD: Yes, Your Honor.

5 THE COURT: All right. Let's bring them back in and
6 we will finish listening to the testimony.

7 (Whereupon, the jury returned to the courtroom to
8 continue listening to the audio portion of the witnesses'
9 testimony at 8:00 p.m.)

10 JURY FOREMAN: Some of the jurors may need a pad of
11 paper to write something on.

12 THE COURT: All right. He will come back in with
13 pads and pens for you. And I just wanted to stop here
14 for a moment. I have another note from a juror. The
15 juror is concerned, what happens if everybody can't come
16 to an agreement? Uhm, that's not unexpected to come at a
17 time when you have been deliberating for so many hours.
18 I'll read the question word-for-word so that everybody
19 knows exactly what the question was. "What if you don't
20 feel persuaded and your decision is final. What is going
21 to happen?"

22 I mean, if it's not going to be an all guilty or an
23 all not guilty, if you can't come to a unanimous verdict,
24 then I would have to declare a mistrial. When I declare
25 a mistrial, nobody wins. It just means that this case is

1 going to have to be retried and 12 other people will be
2 selected from Kershaw County who would sit in the very
3 same seats that y'all are sitting in and they would hear
4 the same testimony and receive the same evidence that
5 y'all have received, and there's no reason to think that
6 they would be 12 smarter people or that they would be 12
7 more capable people to reach a verdict. And so I say
8 that to tell you that I hope that you will continue to
9 deliberate. I understand that some of you may be
10 thinking that it may not be a unanimous verdict. I do
11 want to let you know that you can't be forced into a
12 unanimous verdict.

13 As I told you in your instructions, you are to
14 remain with your convictions and that is okay. But I do
15 want you to keep an open mind, to listen to each other
16 and to continue to try. If y'all want to discuss that in
17 the jury room before coming back out here to hear the
18 remainder of the testimony, I'll allow you to do that.
19 Otherwise, we can hear the remainder of the testimony.
20 And let me just go ahead and tell you that I think that
21 we need to break at about midnight. If y'all think you
22 can have fruitful conversation still and that
23 deliberations are still working, then I would like us to
24 come back tomorrow. We have had a late night tonight, so
25 tomorrow we wouldn't come in until about noon and we

1 would start fresh after everybody has had a good night's
2 sleep. You still wouldn't be able to talk to anybody
3 about the case tonight obviously, but that would give you
4 a chance to have a good night's sleep and start fresh
5 tomorrow if y'all believe that's fruitful. So do y'all
6 think you want to discuss that or would you like to
7 finish hearing this testimony? Let's go ahead. I think
8 I see more people wanting to finish with the testimony so
9 let's go ahead and finish with the testimony and then as
10 I said, I will give you an opportunity to break for the
11 evening. We can go home and all get a good night's sleep
12 and start fresh tomorrow.

13 And again, I want to make it clear that nobody is
14 ever coerced into coming to either a guilty or not guilty
15 verdict. There is a reason why we have juries of 12
16 people. We want you to bring in your experience, but we
17 also want you to discuss with each other and try your
18 very hardest to come to a unanimous verdict because like
19 I said, nobody wins when there's a mistrial, okay? So
20 let's continue with the hearing of the testimony. And
21 let me make this note a Court's exhibit please.

22 (Whereupon, the jury listened to the remainder of
23 the audio portion of the testimony of the witnesses.)

24 THE COURT: All right. Y'all have now heard the
25 testimony that you wished to hear. It's almost midnight

1 and what I would like for you to do now is to gather up
2 your things and go ahead and go home and get a good
3 night's rest. Do not talk about this case with anyone.
4 We will be back here tomorrow at noon to begin
5 deliberating again. Please report here at noon, and I
6 ask that you eat lunch before you get here tomorrow. All
7 right. Have a good night's sleep.

8 (Whereupon, the jury was excused for the evening at
9 12:00 a.m.)

10 THE COURT: All right. Anything before we adjourn
11 for the night?

12 MS. CAVANAUGH: No, Your Honor.

13 MS. GOOD: No, ma'am.

14 THE COURT: We will be back here at noon tomorrow.
15 Thank you.

16 (Whereupon, court was recessed for the evening at
17 12:05 a.m.)

18
19
20
21
22
23
24
25

LEX

1 March 18th, 2016

2 BAILIFF: All rise.

3 THE COURT: Good morning. Thank you. Please be
4 seated. I don't have any big announcement. I just
5 warned to put on the record that as the jurors came in
6 this morning we told them not to deliberate or talk to
7 each other until all 12 were present in the deliberation
8 room. All 12 are now here. We are getting the exhibits
9 back to them because overnight they were stored in the
10 clerk's office so we are getting them the exhibits and I
11 told them they can begin to deliberate. So we will be at
12 ease as we wait for the jury to come to a verdict.

13 MS. CAVANAUGH: Thank you.

14 MS. GOOD: Thank you, Your Honor.

15 (Court in recess while awaiting jury verdict.)

16 BAILIFF: Come to order.

17 THE COURT: Thank you. Please be seated. We have
18 received another note from the jury. It has four
19 different items on this note. Number 1, request to hear
20 testimony from OB/exam doctor regarding her findings and
21 what the findings say equivocally. So that would be Dr.
22 Luberoff, correct?

23 MS. CAVANAUGH: Yes, Your Honor.

24 THE COURT: All right. The next request is a
25 request for a hard copy of the definitions of the charges

1 against the defendant. Now, for this request the only
2 thing I would be willing to do is to give them the entire
3 charge written, not just a portion of the charge. As I
4 understand the case law the jury can have hard copies of
5 the jury charge so long as it's the entire jury charge.
6 So I will say that I have printed out a clean copy of the
7 jury charge that you all have. I did make one change.
8 There was a heading that said failure of the defendant to
9 testify. I changed that to the defendant not testifying.
10 I just didn't want there to be a connotation that there
11 was a failure on the part of the defendant because
12 obviously he has a constitutional right not to testify.
13 But otherwise you have seen the copy of the jury
14 instructions.

15 The next question. "If a juror wrote notes last
~~16 night outside of the jury room would that be a mistrial?"~~

17 Now, for this question I think I need to ask a
18 little bit more to the jurors to understand what kind of
19 notes were made. If there was independent research being
20 done last night, that would be a mistrial. However, if
21 the juror was just writing notes to remind himself or
22 herself of what he or she remembers occurred, if it's all
23 just independent, that it was their notes alone, that
24 would not be a mistrial and that would be appropriate and
25 that's fine if they decided that they wanted to write

1 notes.

2 And then the final question is, "Our instructions on
3 how we determine on how the jurors understand the law on
4 how we interpret the law on deciding guilty or not
5 guilty." I think that again is encompassed by giving
6 them a copy of the written instructions.

7 Anything from the State or the defense about those
8 questions and my proposed answers to those questions?

9 MS. CAVANAUGH: Your Honor, I agree with all of your
10 proposed ways to deal with those.

11 MS. GOOD: I'm a little concerned about number 3
12 regarding the juror notes as to who has written that
13 down, how the information came about, which juror it is.
14 Maybe independently outside the other jurors we could ask
15 them. I would just like a lot more detail about what
16 those notes are, how it came about in the jury room and
17 which juror it is so we can specifically ask that juror.

18 THE COURT: Okay. I agree with that. I think we
19 need more information about those notes. I plan to bring
20 the entire jury out and read the question aloud and just
21 ask questions to the entire jury about -- I don't know
22 that we need to know necessarily specifically which juror
23 wrote the notes, although I don't know if that would be a
24 problem since I need to ask that juror how they came
25 about those notes so I guess the only way to really

1 understand whether those were independent notes or if
2 they were written after, say, doing a Google search about
3 who knows what, that would be a problem, and the only way
4 to get to the bottom of that is to know which juror
5 actually wrote the note. So I agree with that, Ms. Good.
6 We'll get to the bottom of who wrote the notes and what
7 those notes, how those notes were written, how they came
8 about.

9 MS. CAVANAUGH: And then once we determine that, are
10 we going to question that particular juror in the
11 presence of the other jurors or send the rest of the jury
12 out?

13 THE COURT: Why don't we go ahead and send the rest
14 of the jury out just to make sure that juror feels like
15 they can be a little more forthright perhaps without the
16 ~~other jurors listening.~~

17 MS. CAVANAUGH: I agree.

18 THE COURT: Let's go ahead and get off the record so
19 we can find the testimony from the doctor so when we get
20 the jurors back out here, we can have everything ready to
21 go. Mr. Bailiff, would you bring in the jury. Or just
22 bring in the juror who wrote the notes. Let's make that
23 note a Court's exhibit.

24 (Whereupon, juror Douglas Kirkland entered the
25 courtroom at 12:10 p.m.)

1 THE COURT: All right, sir. Can you tell me your
2 juror number and your name.

3 DOUGLAS KIRKLAND: 84, Douglas Kirkland.

4 THE COURT: Mr. Kirkland, one of the questions from
5 the jury was wondering whether there would be a mistrial
6 because a juror wrote notes last night outside of the
7 jury room so I wanted to just talk to you to understand
8 what notes were written and I thought it would be better
9 to just bring you out rather than you having to talk in
10 front of all the other jurors. Tell me about the writing
11 of the notes. Were they -- What were those notes based
12 on?

13 DOUGLAS KIRKLAND: Would you like to see them?
14 Well, I wanted to come in this morning and say my piece
15 --

16 THE COURT: Right.

17 DOUGLAS KIRKLAND: -- and just get it out there. So
18 this morning I woke up. I was clear. I was ready. And
19 so I sat down and made some notes of some key points and
20 some things that I wanted to talk about in front of
21 everybody.

22 THE COURT: And Those were just your own thoughts.

23 DOUGLAS KIRKLAND: These are just my own thoughts
24 and you're welcome to see them.

25 THE COURT: Okay. Well, I don't need to see your

1 notes. What I need to make sure is that they didn't come
2 from anywhere other than your own brain and what you
3 heard in the courtroom.

4 DOUGLAS KIRKLAND: Yes. These are just my train of
5 thought when I got up in front of everybody and started
6 talking.

7 THE COURT: Okay. And there is nothing wrong with
8 taking notes and writing down your own thoughts so that
9 you have a clear way to communicate with other folks and
10 to remind yourself of what points you wanted to make.
11 But I do want to give the attorneys an opportunity if
12 there are questions that I haven't asked of him that you
13 would like me to ask, now is a good time to ask those
14 questions. My concern and the reason why I brought
15 Mr. Kirkland out here was to make sure that there was no
16 ~~independent research being done. These weren't notes you~~
17 took after speaking with a family member or someone
18 outside of the courtroom?

19 DOUGLAS KIRKLAND: No, ma'am.

20 THE COURT: That was the key issue which I wasn't
21 clear on from the question whether there was more to the
22 notes than just your own recollection.

23 DOUGLAS KIRKLAND: Okay. And I asked the --

24 THE COURT: Bailiff.

25 DOUGLAS KIRKLAND: -- folks here if I could take

1 them in before I took them in, too.

2 THE COURT: Sure. Right. Again there is absolutely
3 nothing wrong with writing down your thoughts so I don't
4 want you think that you're in trouble in any way. I just
5 wanted to make sure that that was the extent of what
6 those notes were.

7 DOUGLAS KIRKLAND: Yes, ma'am.

8 THE COURT: That it wasn't anything outside of the
9 courtroom. Is everybody satisfied with that?

10 MS. CAVANAUGH: Yes.

11 MS. GOOD: Yes, Your Honor.

12 THE COURT: All right. Let's bring in the rest of
13 the jury so we can answer the other questions.

14 (Whereupon the remaining jurors returned to the
15 courtroom at 12:20 p.m.)

16 THE COURT: Good afternoon, ladies and gentlemen. I
17 have received your note and I'm going to go through each
18 of your questions. Your first was a request and that was
19 to hear testimony from the OB exam doctor regarding her
20 findings and what the findings say equivocally. We will
21 find that testimony on the tape and replay it for you.
22 We need to answer all of your questions first and then
23 give the court reporter an opportunity to go back and
24 find that audio on his equipment and we will play her
25 testimony. The next is a request of a hard copy of the

1 definitions of charges against the defendant. And I'll
2 also go to your last request which was our instructions
3 on how we determine on how the jurors understand the law,
4 on how we interpret the law on deciding guilty or not
5 guilty.

6 For those two requests I'm going to send back
7 with you a copy of my written instructions that I read to
8 you. These are the instructions of law. I want to
9 remind you that you should consider all of the
10 instructions and not just look at some and ignore others.
11 That's why I'm giving you the entire copy of the charge
12 so you can see exactly what I charged you as to the law.
13 But I'm happy to send that back to you in written form.

14 And then there also was a question about if a juror
15 wrote notes last night outside of the jury room, would
~~16 that be a mistrial? And the answer to that question is~~
17 no. You all are allowed to put your thoughts onto paper.
18 There is no problem with that even you if put those
19 thoughts on paper to help remind yourself of what the
20 arguments are. What would be a mistrial is if anybody
21 did any outside research. If anybody went on the
22 Internet to look up a question that you thought you
23 wanted answered and it wasn't answered for you here in
24 the courtroom. You're to decide this case solely on the
25 information you have received in this courtroom from the

1 witnesses.

2 Now, again, there is nothing wrong with you
3 processing those thoughts by writing them down when
4 you're at home or when you're in the jury room. That's
5 okay. You just can't get any information from an outside
6 source. I hope that clears up your questions. I will go
7 ahead and I'm going to sign this, the last page of this
8 jury instruction and I'll hand it to the bailiff so he
9 can give it to the foreman and then we will work while
10 you look at these instructions. We will cue up the audio
11 tape and bring you back in the courtroom whenever you're
12 ready to hear that testimony. All right. Thank you.
13 You can go ahead and bring them back and give them those
14 instructions.

15 (Whereupon, the jury returned to the jury room to
16 continue deliberations at 12:40 p.m.)

17 THE COURT: Any objections as to how I instructed
18 the jurors?

19 MS. CAVANAUGH: None from the State, Your Honor.

20 MS. GOOD: No, ma'am.

21 THE COURT: Okay. Wonderful. We will come back in
22 the courtroom when the jurors are ready to hear the
23 testimony of Dr. Luberoff.

24 (Short recess.)

25 BAILIFF: All rise.

1 THE COURT: Thank you. Please be seated. The jury
2 has let us know they are ready to hear the testimony so
3 let's bring the jury back into the courtroom.

4 (Whereupon, the jury returned to the courtroom at
5 3:20 p.m. at which time the audio portion of the
6 testimony of Dr. Susan Luberoff was played.)

7 THE COURT: Okay. Ladies and gentlemen of the jury,
8 please return to the jury room to continue your
9 deliberations.

10 (Whereupon, the jury returned to the jury room to
11 continue their deliberations at 3:45 p.m.)

12 THE COURT: All right. I have just received another
13 note from the jury. Can I have the attorneys come
14 forward first. I would like to first discuss with the
15 attorneys my response and give them an opportunity to
~~16 weigh in before I answer the question.~~

17 (Side bar off the record.)

18 (Whereupon, the jury returned to the courtroom.)

19 THE COURT: All right. I have a question from the
20 jury asking, "Can you define cunnilingus and fellatio?"
21 We have a South Carolina Court of Appeals case from 1972
22 that defines cunnilingus and that definition states that
23 the word cunnilingus means stimulation by the tongue or
24 lips of any part of a woman's genitalia. Penetration is
25 not required. As for fellatio, the definition in the

1 dictionary is the oral stimulation of a man's penis.
2 With that you all can return to the jury room and
3 continue with your deliberations.

4 (Whereupon, the jury returned to the jury room to
5 continue their deliberations.)

6 BAILIFF: Come to order.

7 THE COURT: Thank you. Please be seated. Now, I
8 understand that the jury has reached a verdict. I want
9 to just say something to the audience. You all have
10 behaved perfectly throughout this trial. You all have
11 behaved perfectly. When the verdict is read, I don't
12 know what the verdict is, I know this is a case with high
13 emotions, I hope that nobody will be delighted or cry or
14 make any sort of outbursts in the court. Now, I
15 understand how difficult that is so if you think that you
16 aren't going to be able to abide by those rules, I ask
17 that you leave the courtroom now, okay? All right.
18 Mr. Bailiff, please bring in the jury.

19 (Whereupon, the jury returned to the courtroom for
20 the publishing of the verdict at 4:42 p.m.)

21 THE COURT: Mr. Foreperson, I understand that the
22 jury has reached a verdict?

23 JURY FOREMAN: Yes, Your Honor, we have.

24 THE COURT: Is it a unanimous verdict?

25 JURY FOREMAN: Yes, ma'am.

1 THE COURT: All right. If you will pass it to the
2 bailiff please and I'll ask him to pass it to me.

3 (Whereupon, the foreman handed the verdict to the
4 bailiff and the bailiff handed the verdict to the Court.)

5 THE COURT: All right. I will ask the Clerk to
6 please read the verdict.

7 THE CLERK: Thank you, Your Honor. This is the
8 State of South Carolina, County of Kershaw. State of
9 South Carolina versus James Wayne Miller, defendant. For
10 indictments 2012-GS-28-1381 and 1382. We the jury by
11 unanimous consent find the defendant James Wayne Miller
12 as to the charge of criminal sexual conduct in the second
13 degree for indictment 2012-GS-28-1381 guilty. As to the
14 charge of incest, indictment 2012-GS-28-1382 guilty. It
15 is signed by the foreperson Mr. Johnnie Stover. Mr.
16 Stover or Mr. Foreman and ladies and gentlemen of the
17 jury, if this is your verdict, please signify by raising
18 your right hand.

19 (Whereupon, all jurors raised their right hand.)

20 THE COURT: Any motions while the jury is here?

21 MS. GOOD: Your Honor, I would just ask that each
22 juror be polled individually.

23 THE CLERK: All right. Madam Clerk, will you please
24 poll the jury.

25 THE CLERK: Thank you, Your Honor. Yolanda Y. Pate,

1 is this your verdict?

2 YOLANDA Y. PATE: Yes.

3 THE CLERK: Is it still your verdict?

4 YOLANDA Y. PATE: Yes.

5 THE CLERK: Thank you. Michael Brown, is this your
6 verdict?

7 MICHAEL BROWN: Yes.

8 THE CLERK: Is it still your verdict?

9 MICHAEL BROWN: Yes.

10 THE CLERK: Thank you. Danita Chestnut-Blackwell,
11 is this your verdict?

12 DANITA CHESTNUT-BLACKWELL: Yes.

13 THE CLERK: Is it still your verdict?

14 DANITA CHESTNUT-BLACKWELL: It is.

15 THE CLERK: Thank you. Simone S. Middleton, is this
16 your verdict?

17 SIMONE S. MIDDLETON: Yes.

18 THE CLERK: Is it still your verdict?

19 SIMONE MIDDLETON: Yes.

20 THE CLERK: Thank you. David C. Gardner, is this
21 your verdict?

22 DAVID GARDNER: Yes.

23 THE CLERK: Is it still your verdict?

24 DAVID GARDNER: Yes, ma'am.

25 THE CLERK: Thank you. Marvin J. Simon, is this

1 your verdict?

2 MARVIN SIMON: Yes.

3 THE CLERK: Is it still your verdict?

4 MARVIN SIMON: Yes.

5 THE CLERK: Thank you. Crystal B. Williams, is this
6 your verdict?

7 CRYSTAL WILLIAMS: Yes.

8 THE CLERK: Is it still your verdict?

9 CRYSTAL WILLIAMS: Yes.

10 THE CLERK: Thank you. Matthew W. Roach, is this
11 your verdict?

12 MATTHEW ROACH: Yes, ma'am.

13 THE CLERK: Is it still your verdict?

14 MATTHEW ROACH: Yes, ma'am.

15 THE CLERK: Thank you. Reginald J. Weston is this
16 your verdict?

17 REGINALD WESTON: Yes.

18 THE CLERK: Is it still your verdict?

19 REGINALD WESTON: Yes.

20 THE CLERK: Thank you. S. Douglas Kirkland, is this
21 your verdict?

22 DOUGLAS KIRKLAND: Yes.

23 THE CLERK: Is it still your verdict?

24 DOUGLAS KIRKLAND: Yes.

25 THE CLERK: Thank you. Donald E. Branham, Junior,

1 is this your verdict?

2 DONALD E. BRANHAM, JUNIOR: Yes.

3 THE CLERK: Is it still your verdict?

4 DONALD E. BRANHAM, JUNIOR: Yes.

5 TE CLERK: Thank you. Johnnie E. Stover, is this
6 your verdict?

7 JOHNNIE E. STOVER: Yes, ma'am.

8 THE CLERK: Is it still your verdict?

9 JOHNNIE E. STOVER: Yes, ma'am.

10 THE CLERK: Thank you. Your Honor, all the jurors
11 have been polled.

12 THE COURT: Thank you. All right. Ladies and
13 gentlemen, your jury service is over. I appreciate the
14 hard work you gave us this week. I know that you now
15 understand what a sober thing it is to sit on a jury. I
16 can't tell you enough how much I appreciate your
17 attention and your commitment to your jury work. We are
18 about to roll into sentencing now. The sentencing phase
19 is a phase in which the judge determines the sentence of
20 the defendant. You are welcome to stay and listen to the
21 sentencing phase or you are welcome to leave because your
22 jury service is over.. So if you would rather leave, you
23 may leave at this time or you may stay as you wish.

24 MS. CAVANAUGH: Your Honor, I believe I need to get
25 the sentencing sheet.

1 JUROR: If you want to leave, you can leave?

2 THE COURT: If you want to leave, you may leave.

3 Yes. Let's go ahead and prepare the sentencing sheet.

4 THE CLERK: Your Honor, if they wish to get a
5 statement for their employer, Mr. Dowd, if you will take
6 them to the Clerk's office, they will have them ready for
7 them.

8 THE COURT: Mr. Miller, you can stay at the desk or
9 you can come up here where there is a microphone.
10 Usually I like to have folks a little bit closer to me
11 right here.

12 Thereupon,

13 JAMES WAYNE MILLER

14 after having been first duly sworn, testified as follows,

15 THE COURT: All right. Well, I have presided over
16 ~~this trial and listened carefully to the testimony. I~~

17 will hear from Ms. Cavanaugh first with regard to
18 sentencing and if any of the victims - if the victim or
19 the victim's family would like to speak, I'll hear from
20 them, too, with regard to sentencing. Ms. Cavanaugh.

21 MS. CAVANAUGH: Thank you, Your Honor. I think the
22 trial as far as the facts are concerned speaks for
23 itself. We have been here for, well, there was two days
24 of full testimony so I believe that Your Honor is fully
25 aware of the facts in this case. As far as the

1 defendant's prior record is concerned, he has a 1995
2 conviction for possession of LSD from North Carolina. He
3 has a 1995 conviction for larceny, misdemeanor larceny
4 and then in 1998 he was convicted of possession with
5 intent to distribute marijuana. That's the extent of his
6 prior record. I did ask minor if she would like to
7 address the Court and I believe that she said that her
8 testimony, she feels like she already did address the
9 Court and, Your Honor, with the victim's understanding I
10 am - she does not want to address the Court, and I would
11 like to address you at the appropriate time.

12 THE COURT: Go ahead.

13 MS. CAVANAUGH: Yes. I spoke to the victim.
14 Obviously this is someone who was her father and still is
15 her father, but it's a sensitive situation. However, he
16 completely ruined that period of time for her and, of
17 course, she's gonna have to deal with that the rest of
18 her life. I asked her if she -- I, of course, want the
19 maximum sentence in this case. I asked her if she was
20 okay with me asking for that. She indicated that she
21 was. So the Court - so I am asking for the full 20 years
22 in this case, Your Honor.

23 THE COURT: All right. With CSC second degree the
24 maximum sentence is 20 years. With incest it's 10 years.

25 MS. CAVANAUGH: Yes, Your Honor.

1 THE COURT: You are not asking for those to be run
2 consecutively?

3 MS. CAVANAUGH: Yes, I am.

4 THE COURT: Ms. Good.

5 MS. GOOD: Thank you, Your Honor. Mr. Miller is 39
6 years old. As you heard he does construction work. He
7 actually has, I believe, three of his own businesses
8 right now including starting up a welding business that
9 he has just started, and doing construction work around
10 the state on different projects in homes including
11 Greenville, Rock Hill area and around here. I have
12 instructed him, Your Honor, and ask you not hold it
13 against him, not to speak today at the sentencing due to
14 any appeal issues we may potentially have. But I do know
15 his family would like to speak on his behalf at the
16 ~~appropriate time and I will address the Court after that~~
17 time.

18 THE COURT: All right. I will hear from anyone who
19 would like to speak on his behalf. I just ask that when
20 you stand up, state your name loudly and clearly for the
21 record and then you can say what you wish.

22 UNIDENTIFIED SPEAKER: I am the aunt of James and
23 **minor one**

24 THE COURT: I can't hear you. Why don't you come
25 right up to the bar right there so we can hear you a

1 little better. Thank you.

2 UNIDENTIFIED SPEAKER: I am the aunt to James and
3 **minor one** and I have observed what has gone on in the
4 family and the actions of the mother and a history of
5 claiming sexual abuse is throughout our knowing her. She
6 was also accusing people of stuff and I think that in
7 front of the children started a behavior, and I think
8 James was a kind and generous man. A lot of people would
9 starve if he didn't help them, but he was an over
10 protective father. He did not abuse his daughter and it
11 depends on, I think, the evidence was equal and it just
12 depends on which side that you look at or who you want to
13 take sympathy for. But I knew that network inside the
14 family and I believe in his innocence and I will until my
15 dying day.

16 THE COURT: Thank you.

17 UNIDENTIFIED SPEAKER: I even mortgaged my house to
18 help him. At first I helped Tammy and the children, but
19 when I started seeing what was going on and seeing them
20 not acting like victims and the way they were on
21 Facebook, I have it all printed out and I started
22 changing, and I started listening, and I started watching
23 and I decided to help James. And he had a public
24 defender, so I hired Anna at great emotional and
25 financial strain on our family. To my dying day I will

1 not believe that James Miller did this to minor

2

3 THE COURT: Thank you.

4 JERI MOORE: My name is Jeri Moore. I'm a friend of
5 James Miller's. I have been friends with him for about
6 three years now. The things that this man has gone
7 through in his life since I have known him and how much
8 he has cried and humbled himself to not ever seeing his
9 kids again, to not even seeing -- I mean, even the
10 younger kids that aren't even involved in this they are
11 pretty much gonna be brain washed. He's never gonna have
12 a true relationship again. He has talked so much about
13 how much he loved his wife. He loved his kids. He was a
14 family man. I know this. He is a very hard worker. He
15 has this home business. He has done nothing but provided
16 and looked out for even friends of his. He has taken so
17 many people in to help them in their times of life. He
18 is not a bad man. He has done nothing but prove himself
19 to be the best man that I have ever met. He is not a
20 child molester or a child abuser. This has totally torn
21 him apart. This has corrupted him. This has not only
22 corrupted the life of the family and the kids. This has
23 totally tore him apart to where he cries to me all the
24 time about wanting to see his kids. Wishing he had his
25 family. It's - it's just amazing to see the things that

1 they have put down and torn him apart with. That's all I
2 need to say.

3 THE COURT: Anyone else?

4 MS. GOOD: Your Honor, as you can see, he does have
5 a very --

6 THE COURT: I think we have one more person who
7 would like to speak.

8 DONNA WHITE: I was just going to say --

9 THE COURT: Can you state your name please.

10 DONNA WHITE: Donna White. I'm James' aunt, too. I
11 would just like to say that everybody that knows James
12 does not believe this. I mean, we could have had
13 everybody in Camden that knows him here. There is not
14 one person that knows him that believes this including
15 Tammy's family. Not one person. And I don't think that
16 anybody believes this that knows him. As far as I know
17 and from what I see nobody believes this happened. Not
18 one person believes this that knows this family and the
19 dynamics of it.

20 THE COURT: Ms. Good.

21 MS. GOOD: Thank you, Your Honor. As you can see he
22 has a very supportive family and friend system who stand
23 beside him and behind him. As you heard them state, he
24 will do anything to help anyone, who takes people in,
25 helps provide for them despite the fact that he's having

1 to provide for himself also. He has a very minimum prior
2 record, Your Honor, back from 1995, 1998, essentially 20
3 years ago, and he's been on bond pretty much this entire
4 time these three and a half years and has had no
5 incidents since then. We would ask Your Honor that you
6 be lenient in sentencing even so much as to potentially
7 putting him on probation. He could be on strict
8 probation due to the fact of any sex offender registry
9 he's gonna have to be on there are very strict
10 regulations as to people who are sex offenders. He will
11 have to register for that for the rest of his life and we
12 just ask Your Honor to be lenient and do any time
13 concurrent if you do give him the maximum sentence.

14 THE COURT: All right. I have carefully listened
15 throughout this trial. And I'm not one to really lecture
16 ~~defendants when I'm sentencing them. I think my sentence~~
17 speaks for itself, but I do want to say one thing that I
18 think is important and that is to Ms. **minor one** I believe
19 you. I believe you.

20 Mr. Miller, the sentence of the Court on indictment
21 2012-GS-28-1382 is for you to be committed to the State
22 Department of Corrections for a determinate term of 10
23 years. On indictment 2012-GS-28-1381, that's the charge
24 of criminal sexual conduct in the second degree, the
25 sentence of the Court is for you to be committed to the

1 State Department of Corrections for 20 years. Those
2 sentences are to run consecutively.

3 MS. GOOD: Your Honor, will he get credit for any
4 time served?

5 THE COURT: He will be given credit for any time
6 that he has already served on these charges. The Court
7 will be adjourned.

8 WHEREUPON, THE TRIAL WAS CONCLUDED.
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

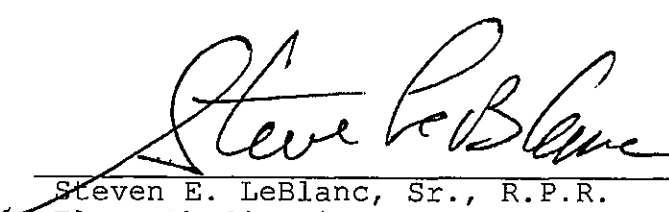
3 (COUNTY OF LEXINGTON)

4
5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Circuit Court Reporter for the Eleventh Judicial
7 Circuit in and for the State of South Carolina, do hereby
8 certify that I reported the proceedings in the before
9 captioned case in the Court of General Sessions in and for the
10 State of South Carolina on the 14th day of March through the
11 18th day of March, 2016.

12 I FURTHER CERTIFY that the forgoing 671 pages
13 constitute a true and accurate record of said proceedings.

14 I FURTHER CERTIFY that I am neither related, counsel
15 to, nor of interest to any party hereto.

16 ~~IN WITNESS WHEREOF, I have hereunto set my hand at~~
17 Lexington County, this 11th day of July, 2016.

18
19 
20
21 Steven E. LeBlanc, Sr., R.P.R.
22 Eleventh Circuit Court Reporter
23 State of South Carolina.
24
25

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Kershaw County

Tanya A. Gee, Circuit Court Judge

RECEIVED

JUL 20 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

APPELLANT

APPELLATE CASE NO 2016-000642

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
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

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS 5

ARGUMENT

 I. Violating Appellant’s right to due process of law, the trial judge
 erred in denying Appellant’s request for a continuance where
 “good cause” existed, in light of his serious medical condition,
 which rendered him unable to assist counsel. 8

 II. The trial court erred by permitting Allison Foster to testify as an
 expert in child abuse assessment where her testimony improperly
 bolstered the complaining witness’s credibility and there was
 insufficient evidence of the reliability of the subject matter of her
 testimony.....19

CONCLUSION.....34

TABLE OF AUTHORITIES

Cases

<u>Drope v. Missouri,</u>	
420 U.S. 162 (1975)	17
<u>Dusky v. United States,</u>	
362 U.S. 402 (1960)	17
<u>Jolly v. State,</u>	
314 S.C. 17, 443 S.E.2d 566 (1994)	33
<u>McLaughlin v. State,</u>	
352 S.C. 476, 575 S.E.2d 841 (2003)	10
<u>Medina v. California,</u>	
505 U.S. 437 (1992)	17
<u>Monahan v. State,</u>	
365 S.C. 130, 616 S.E.2d 422 (2005)	17
<u>Pate v. Robinson,</u>	
383 U.S. 375 (1966)	17
<u>Smith v. State,</u>	
386 S.C. 562, 689 S.E.2d 629 (2010)	29
<u>State v. Babb,</u>	
299 S.C. 451, 385 S.E.2d 827 (1989)	12
<u>State v. Bell,</u>	
293 S.C. 391, 360 S.E.2d 706 (1987)	17
<u>State v. Chavis,</u>	
412 S.C. 101, 771 S.E.2d 336 (2015)	30, 31
<u>State v. Douglas,</u>	
380 S.C. 499, 671 S.E.2d 606 (2009)	29
<u>State v. Forrester,</u>	
343 S.C. 637, 541 S.E.2d 837 (2001)	25
<u>State v. Funderburk,</u>	
367 S.C. 236, 625 S.E.2d 248 (Ct. App. 2006)	12
<u>State v. Govan,</u>	
372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007)	25
<u>State v. Irick,</u>	
344 S.C. 460, 545 S.E.2d 282 (2001)	12
<u>State v. Jennings,</u>	
394 S.C. 473, 716 S.E.2d 91 (2011)	30
<u>State v. Kromah,</u>	
401 S.C. 340, 737 S.E.2d 490 (2013)	28, 29, 33
<u>State v. McKerley,</u>	
397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012)	29, 30
<u>State v. McMillian,</u>	
349 S.C. 17, 561 S.E.2d 602 (2002)	14, 15
<u>State v. Meggett,</u>	
398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012)	12

<u>State v. Portillo,</u>	
408 S.C. 66, 757 S.E.2d 721 (Ct. App. 2014).....	29
<u>State v. Tanner,</u>	
299 S.C. 459, 385 S.E.2d 832 (1989).....	15, 16
<u>State v. Weik,</u>	
356 S.C. 76, 587 S.E.2d 683 (2002).....	10, 17
<u>State v. White,</u>	
382 S.C. 265, 676 S.E.2d 684 (2009).....	28, 30, 31
<u>State v. Williamson,</u>	
115 S.C. 315, 105 S.E. 697 (1921).....	16, 17
<u>State v. Yarborough,</u>	
363 S.C. 260, 609 S.E.2d 592 (Ct. App. 2005).....	12
<u>Ungar v. Sarafitr,</u>	
376 U.S. 575 (1964).....	12, 13, 14
<u>Varn v. Green,</u>	
50 S.C. 403, 27 S.E. 862 (1897).....	16
<u>Watson v. Ford Motor Co.,</u>	
389 S.C. 434, 699 S.E.2d 169 (2010).....	28
<u>Williams v. Bordon's, Inc.,</u>	
274 S.C. 275, 262 S.E.2d 881 (1980).....	12
 Statutes	
S.C. Code Ann. § 17-27-160(c).....	14
S.C. Code Ann. § 44-23-410.....	17
U.S. Const. amend. XIV	12
 Rules	
Rule 7(c), SCRCrimP.....	12
Rule 702, SCRE.....	28

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err in denying Appellant's request for a continuance where "good cause" existed, in light of his serious medical condition, which rendered him unable to assist counsel, violating Appellant's right to due process of law?
- II. Did the trial court err by permitting Allison Foster to testify as an expert in child abuse assessment where her testimony improperly bolstered the complaining witness's credibility and there was insufficient evidence of the reliability of the subject matter of her testimony?

STATEMENT OF THE CASE

A Kershaw County grand jury indicted Appellant for criminal sexual conduct in the second degree (2012-GS-28-1381) and incest (2012-GS-28-1382).¹ R. 602-603; R. 605-606. The state, represented by Kathryn Cavanaugh and Karlen Senn, called the case for trial on March 14, 2016, before the Honorable Tanya A. Gee and a jury. R. 1. Anna Good represented Appellant. R. 1.

The jury began its deliberations on March 17, 2016, at 1:50 p.m. R. 558, ll. 9-11. Within an hour, the jury sent a note requesting transcripts of the testimony from the complainant, complainant's mother, complainant's twin sister, from three police officers, a doctor, and the state's closing argument. R. 559, ll. 3-11; R. 598. The judge informed the jurors that transcripts could not be provided, but that testimony could be re-played. R. 560, l. 22 – R. 561, l. 3. She permitted the jury to discuss the request further, but did provide a computer so the jurors could watch videos as requested. R. 561, l. 24 – R. 562, l. 10. Approximately two hours later, the jury requested to hear the testimony from the complainant, her mother, and three police officers, along with the law on reasonable doubt. R. 563, ll. 2-13; R. 599. The judge re-instructed the jury on reasonable doubt. R. 565, ll. 6-22. The court reporter began playing the testimony for the jurors at 5:55 p.m. R. 567, ll. 16-20. At 7 p.m., the judge ordered a break for the jury to have

¹ According to the face of the indictments, the grand jury convened on October 17, 2012. R. 602-603; R. 605-606. However, the signature lines indicating the grand jurors true-billed the indictments were dated March 9, 2016. R. 602-603; R. 605-606. Further, the indictments were filed on March 9, 2016, with the Kershaw County Clerk of Court. R. 602-603; R. 605-606. Although the indictments were marked "Amended," there was nothing in the record to indicate why the indictments were amended or whether such an amendment required re-submission to a grand jury. Nevertheless, there were no objections made at the trial regarding the indictments or the grand jury process. However, this fact was important for the discussion on Appellant's motion for continuance.

dinner. R. 567, ll. 21-25. At 8 p.m., the court reporter resumed playing the testimony. R. 568, ll. 7-9.

During this time, a juror asked what would happen if the jury could not reach a unanimous verdict. R. 568, ll. 12-21; R. 600. The judge instructed the jury “if it’s not going to be an all guilty or an all not guilty, if you can’t come to a unanimous verdict, then I would have to declare a mistrial. When I declare a mistrial, nobody wins.” R. 568, ll. 22-25. She further explained the case would have to be “retried” in front of twelve other people selected from the same county who would receive the same evidence. R. 568, l. 25 – R. 569, l. 5. The judge expressed her “hope” that the jury would “continue to deliberate” and instructed them “to keep an open mind, to listen to each other and to continue to try.” R. 569, ll. 7-16. She told the jury to “try” their “hardest to come to a unanimous verdict because ... nobody wins when there’s a mistrial.” R. 570, ll. 17-19. At midnight, the judge allowed the jury to go home for the evening and reconvene the following day at noon. R. 571, ll. 5-9.

The following day, the jury requested to hear testimony from the doctor who examined Complainant, a hard copy of the definitions of the charges, and instructions on how to interpret the law. R. 572, l. 17 – R. 574, l. 6; R. 600. The judge provided the instructions to the jury in written form and then allowed the jury to hear the requested testimony. R. 578, l. 16 – R. 581, l. 6. Finally, at 3:45 p.m., the jury requested the definitions of cunnilingus and fellatio, which the judge provided. R. 581, l. 19 – R. 582, l. 3; R. 601. The jury returned with a verdict at 4:42 p.m. R. 582, ll. 19-20.

The jury found Appellant guilty as charged. R. 583, ll. 7-19. After the jury returned its verdict, but prior to imposing the sentence, the judge noted that she thought her “sentence speaks for itself.” R. 593, ll. 16-17. However, there was “one thing” she thought was “important” to

say to Complainant: "I believe you. I believe you." R. 593, ll. 17-19. Thereafter, on March 18, 2016, the judge sentenced Appellant to twenty years imprisonment for criminal sexual conduct and ten years imprisonment for incest. R. 593, l. 20 – R. 594, l. 1; R. 604; R. 607. She ordered the sentences to be served consecutively. R. 594, ll. 1-2; R. 604; R. 607.

On March 24, 2016, Appellant filed and served his notice of appeal. This brief follows.

STATEMENT OF FACTS

Appellant met his future wife, Tammy, in third grade. R. 198, ll. 1-2. Tammy married Appellant when she was only sixteen years old. R. 198, ll. 8-9. At the age of seventeen, Tammy gave birth to twins, the couple's first children. R. 198, ll. 10-12. The pair went on to have three more children. R. 197, ll. 6-14.² Appellant worked construction, providing for his growing family. R. 200, ll. 8-12; R. 102, ll. 1-2. Tammy stayed home with the children, and even homeschooled them for the most part. R. 200, ll. 17-25; R. 101, ll. 1-21.

The couple's twins were girls – Complainant and Breana. Breana was “[v]ery passive, quiet. A follower.” R. 203, ll. 7-9. She enjoyed “[d]rawing and painting” and being inside with her mother. R. 203, ll. 14-16; R. 102, ll. 16-18. She helped “cook, clean” and with her younger siblings. R. 203, ll. 16-17. Complainant preferred to be “outside,” “[c]limbing trees, skinning foxes.” R. 203, ll. 20-24; R. 102, ll. 18-19. Appellant taught Complainant how to build things – “cut tile, cut wood, measure and put down laminate flooring.” R. 204, ll. 1-6; R. 104, ll. 2-8.

Around July 4, 2011, Appellant and his family visited friends in Camden. R. 204, ll. 11-20; R. 104, ll. 21-23. The family decided to move from Summerville to Camden. R. 204, ll. 15-18; R. 104, ll. 23-24. The family found a house on the lake in which they could move, but it needed a little work. R. 205, ll. 1-13. Tammy and all of the children except Complainant returned to Summerville to pack for the move. Appellant and Complainant stayed in Camden in a camper preparing the house for the family's eventual return. R. 205, ll. 14-19; R. 106, ll. 7-12. Within two weeks, the entire family was re-united in the house on the lake in Camden. R. 208, ll. 3-6.

² In 2006, Tammy's father went to prison when it was learned he had been sexually abusing one of the couple's sons.

When the family first moved in, Complainant and Breana, who were sixteen-years old at the time, “shared the big room” upstairs, the youngest daughter had her own room, and the two boys shared a third bedroom. R. 208, ll. 7-12; R. 210, ll. 13-14; R. 116, ll. 11-16. However, this arrangement did not last long because the twins could not get along. Eventually, Complainant got her own room, while Breana shared with her younger sister. R. 208, ll. 13-21; R. 118, ll. 1-21.

On August 11, 2012, the family planned to visit their friends, the Harrelsons. R. 224, ll. 22-25. However, Appellant and Complainant had an argument, and Appellant said Complainant was not permitted to go to the Harrelsons’ home. R. 226, ll. 5-13. Upset, Complainant walked to the end of the family’s dock over the lake. R. 227, ll. 2-6. Tammy went to talk to Complainant because she was crying. R. 227, ll. 7-25. When Tammy reached Complainant, Tammy asked, “[I]s he touching you?” R. 228, l. 1. Complainant responded, “[E]veryday.” R. 228, l. 2. Tammy then called her sister, who called the police to report what Complainant alleged. R. 228, ll. 10-12.

Eventually, Complainant alleged Appellant first sexually abused her while she and Complainant were staying in a camper in Camden while the rest of the family was in Summerville preparing for the move. She claimed she woke up “to [Appellant] performing oral sex on” her. R. 108, ll. 12-13. After pushing Appellant away, she ran to a bathroom. R. 108, ll. 17-20. She claimed Appellant apologized so she exited the bathroom and went to the couch. R. 109, ll. 10-23. However, at some point, she returned to bed and fell asleep. R. 110, ll. 1-6. Nevertheless, according to Complainant, she woke up again – this time to find Appellant on top of her trying to have sex with her. R. 110, ll. 6-7. According to Complainant, Appellant had sex with her, despite her protests. R. 110, ll. 17-23.

Complainant alleged the sexual abuse continued, even when the family moved into the house on the lake. R. 113, ll. 5-7; R. 114, ll. 11-15; R. 116, ll. 9-10. According to Complainant, Appellant had sex with her even while she was sharing a room with her twin sister, Breana. R. 117, ll. 9-19. Complainant alleged that when she got her own room, Appellant slept in her room every night. R. 121, ll. 19-21. Incredibly, according to Complainant, Appellant raped her in the houses where the two worked on remodeling projects, including when other people were present. R. 125, ll. 11-14; R. 126, ll. 2-21; R. 127, ll. 21-25. Essentially, Complainant alleged Appellant had sex with her whenever the two were together and even the slightest opportunity presented itself. R. 132, ll. 1-5; R. 133, ll. 6-14; R. 136, ll. 7-12; R. 142, ll. 1-3; R. 142, ll. 15-23. Despite what Complainant alleged were very open and easily detectable acts of sexual abuse, no one in Complainant's family knew of the abuse or observed a sex act between the two. R. 124, ll. 21-23.

Within two months of Appellant's arrest, Tammy had sold everything the family owned and moved to Pensacola, Florida. R. 242, ll. 15-23. Two months later, she was dating Jason Price, the man who would eventually become her second husband. R. 266, ll. 12-17. Six months later, Tammy sent Breanna and two of the younger children to live with Tammy's sister. R. 244, ll. 16-21. In 2013, Price moved in with Tammy and Complainant. R. 267, ll. 1-2. Complainant continued living with Tammy until 2014, when she moved in with her boyfriend. R. 244, ll. 23-25; R. 245, ll. 4-10.

Eventually, Breana got married and moved to California. R. 246, ll. 5-9. Complainant married too, and moved to Virginia. R. 246, ll. 5-9; R. 97, ll. 16-25. Tammy filed for a divorce from Appellant in 2014, and the pair was divorced in 2015. R. 266, ll. 4-11. Tammy married Price in June of 2015. R. 197, ll. 15-19.

ARGUMENT

I. Violating Appellant's right to due process of law, the trial judge erred in denying Appellant's request for a continuance where "good cause" existed, in light of his serious medical condition, which rendered him unable to assist counsel.

Relevant facts

On March 14, 2016, when the state called the case to trial, defense counsel moved for a continuance. R. 9, ll. 10-11. Counsel explained Appellant suffered from chronic back problems, which had escalated in the last week to the point where he required surgery. R. 9, ll. 12-16. On March 3, 2016, Appellant saw his doctor regarding his severe back pain. R. 9, ll. 16-18. The doctor prescribed hydrocodone for the pain and ordered an MRI. R. 9, ll. 18-19. On March 8, 2016, the MRI was conducted. R. 9, ll. 19-20. The results of the MRI were presented to the trial judge. R. 9, ll. 20-23; R. 595. According to the analysis of the MRI, Appellant suffered from "[l]eft central disc herniation at L 4/5, extending behind superior endplate of L5." This herniation caused compression of the thecal sac. R. 595. Additionally, Appellant suffered from "[r]ight foraminal disc herniation at L5/S1, compressing right L5 nerve root." R. 595. The doctor described this finding as "significant." R. 595. The MRI revealed spondylolysis at L5 as well. R. 595. Appellant suffered from facet degenerative joint disease "at L5/S1 bilaterally." R. 595. This disease, while painful in and of itself, contributed to compression of the L5 nerve root. R. 595. Finally, the MRI revealed "[m]odic type I endplate changes, far right lateral, at L5/S1," which the doctor described as "an inflammatory response" and capable of causing pain. R. 595. The day following the MRI, Appellant was prescribed oxycontin for pain. R. 10, ll. 4-6. Two days later, on March 11, his doctor gave him another steroid and prescribed Lortab for pain. R. 10, ll. 6-8.

Defense counsel explained that Appellant was “struggling here just to sit.” R. 10, l. 9. According to Appellant’s aunt and girlfriend, he had “been out in the car blacking out.” R. 10, ll. 12-14. Counsel expressed her concern with Appellant’s ability to receive a fair trial in light of his inability to assist in his defense:

[B]ased on the combination of medications that they have him on and based on the fact that he does need surgery to fix this as well as if he’s blacking out, ... he cannot aide me in any way and help in cross examining or questions I may need to ask because he would know this case better than I would when it comes to some of the questions as to the victim or the family members who may be testifying against him.

R. 10, ll. 16-24. Counsel continued to express her concerns with Appellant’s “capability” “to help in his defense based on the medication” and his level of pain. R. 10, l. 25 – R. 11, l. 3. Counsel noted that Appellant was unable to walk or stand, and had to use a wheelchair to get into the courtroom. R. 11, ll. 4-5.

Counsel acknowledged the case had been pending for over three years, but explained this date was the first time the case had been called for trial. R. 11, ll. 6-9. Although the state previously set trial dates, including a date certain, the state sought additional time due to the availability of witnesses. R. 11, ll. 8-12. Additional delays were due to the case being transferred from one solicitor to another and additional investigative work being conducted. R. 11, ll. 12-16. Counsel noted the defense had never requested a continuance in the case. R. 11, ll. 16-18.

The solicitor agreed with defense counsel’s procedural history of the case. R. 11, l. 25 – R. 12, l. 17. According to the solicitor, she was assigned to the case in November of 2015. R. 12, ll. 2-3. At that time, the case was set for trial on December 14, 2015; however, the solicitor noted some evidence had not been tested and she wanted the tests completed. R. 12, ll. 3-11. The solicitor informed defense counsel the case would not be called to trial as planned. R. 12, ll.

11-13. Thereafter, defense counsel and the solicitor agreed the case would be tried on March 14, 2016, and a trial notice was sent. R. 12, ll. 13-17. Objecting to the continuance request, the solicitor explained the state had “flown three witnesses in, one the victim and her sister and her mother. The sister lives in California. We have flown Breana in from California. We have flown [Complainant] in from Virginia and Ms. Miller, Tammy Miller from Florida.” R. 12, ll. 20-22. The solicitor acknowledged that on the Friday prior to the case being called for trial, defense counsel informed her of “something major going on with [Appellant’s] back.” R. 13, ll. 2-6. Without offering any proof, the solicitor argued “the timing is extremely inconvenient for this trial. It happened - - I don’t even know exactly what caused the severe back pain, but all of it started occurring last week, the week before trial.” R. 13, ll. 13-15; see also R. 14, ll. 11-12. The solicitor further argued against the continuance request because Appellant had not provided anything from a doctor stating he required “emergency back surgery.” R. 13, ll. 15-18.

Thereafter, the solicitor cited McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and claimed the case stood for the proposition that “antiseizure medication did not render the defendant incompetent to stand trial.” R. 13, ll. 19-24. The solicitor also referenced State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002) for the competency standard, which the solicitor asserted was “whether the defendant has the present ability. Just as long as he has the present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational understanding of the proceedings against him ... that he is able to stand trial and that the defendant bears the burden of proving his lack of competence by the preponderance of the evidence.” R. 13, l. 24 – R. 14, l. 9. The solicitor claimed, again without proof, that Appellant had been competent “for the past three and a half years.” R. 14, l. 6.

The judge denied the continuance request. R. 15, ll. 16-17. The only reason given was that the case had been pending since 2012. R. 15, ll. 17-18. The judge explained she understood Appellant was “in pain” and promised to take breaks “as necessary.” R. 15, ll. 18-19. The judge noted her recent surgery, and expressed that she would do her “best to accommodate” Appellant “with regard to his back pain,” but found his condition was “no reason to continue this trial.” R. 15, ll. 19-23.

When the trial resumed the following day, defense counsel renewed her motion for a continuance. R. 33, ll. 4-5. Counsel explained that Appellant had “been in the emergency room all night in Columbia” and “still ha[d] not been seen.” R. 33, ll. 5-7. Counsel again expressed her concern with Appellant’s ability to proceed to trial based on the medication he was taking, his lack of sleep, and his physical pain. R. 33, ll. 11-14. Offering no reasoning, the judge denied the request. R. 33, ll. 24-25.

During the trial, defense counsel explained that the jail had refused to permit Appellant to take the prescription medication while being detained at the jail during the pendency of the trial. R. 482, ll. 4-8; R. 482, ll. 19-22. Further, counsel, while providing the medications to the judge, requested the judge instruct the jail that Appellant be permitted to have his medication or take the medication in court. R. 482, ll. 4-8. The judge then instructed that two of the five prescription medications, which had been presented for her examination, be transported with Appellant to the jail and that he be permitted to take one of the pills at that moment during the proceedings. R. 483, ll. 2-24. Thereafter, the judge engaged in a colloquy with Appellant regarding his right to testify. R. 484, l. 13 – R. 486, l. 18.

Discussion

The Fourteenth Amendment to the United States Constitution guarantees criminal defendants the right to due process of law. U.S. Const. amend. XIV. “The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants.” Williams v. Bordon’s, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon “a showing of good and sufficient legal cause.” Rule 7(c), SCRCrimP. As such, “[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.” State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006)(“An abuse of discretion occurs when the trial court’s ruling is based on an error of law”).

“It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case.” State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012)(quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While “[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process,” the decision must rest upon “the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” Ungar v. Sarafitr, 376 U.S. 575, 589 (1964).

The South Carolina Supreme Court recently decided a case concerning the granting of a continuance. In Winkler v. State, Op. No. 27685 (S.C. Sup. Ct. filed Nov. 23, 2016)(Shearouse Adv. Sh. No. 45 at 13), the Court held the trial judge erred in failing to grant Winkler an extension of time in order to investigate evidence of brain damage. After Winkler was convicted, he filed an application for post-conviction relief and was appointed counsel. Id. Approximately two months into the representation, counsel suspected Winkler may suffer from brain damage. Id. Counsel requested funding to investigate, which was approved, and engaged a neuropsychologist. Id. The neuropsychologist recommended neuroimaging and consulting a neurologist or neuropsychiatrist. Id. Counsel, thereafter, requested funding for neuroimaging. Id. The judge approved the request. Id. Subsequently, counsel moved to extend the deadlines in the scheduling order by ninety days, explaining the testing and analysis would require approximately ten weeks. Id. The judge extended the deadline for filing an amended application, but refused to extend the PCR trial date. Id.

Although Winkler obtained the recommended MRI scan, he was unable to obtain the recommended PET scan because of elevated blood glucose levels. Id. Thereafter, counsel began working to treat Winkler's previously undiagnosed and untreated diabetes. Id. Despite Winkler receiving diabetes treatment, weeks later, a physician explained his blood sugar was still too high to perform an accurate study of his brain, and that an additional six to eight weeks of treatment would be required, followed by an additional six to eight weeks for analysis. Id. Counsel filed a second motion to extend the deadlines, requested a continuance of six months to file his final amended PCR application and adjustments of other dates, including the trial date. This request was denied. Id.

The Supreme Court explained that the PCR statute, much like the Rules of Criminal Procedure, provided that additional time should be granted “if ‘good cause is shown to justify a continuance.’” Id. (quoting S.C. Code Ann. § 17-27-160(c)). The Court found the PCR court abused its discretion in denying Winkler’s second motion for additional time because Winkler presented “good cause” for the continuance. Id. The Court emphasized the diligence with which counsel acted at each stage. Id. The Court found no evidence to support the PCR judge’s finding that PCR counsel had “‘ample opportunity’” to investigate and develop the evidence related to potential brain damage. Id. In fact, the Court found “it would have been impossible for PCR counsel to obtain PET scans in time to have an expert review them and be prepared to testify at the PCR trial.” Id. Thus, Winkler provided “good cause” to justify a continuance. Id. According to the Court, the PCR court’s denial of the continuance request “left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler’s brain damage.” Id.

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), the South Carolina Supreme Court held the trial court abused its discretion in denying McMillian’s motion for continuance in order to obtain the transcript of his first trial, which ended in a hung jury, in order to prepare for his second trial. McMillian requested the transcript timely, but the second trial started prior to his receipt of the transcript. Id. at 19, 561 S.E.2d at 603. He moved for a continuance to obtain the transcript in order to impeach the witness against him, but this request was denied. Id. The Court explained that “[t]he only ‘neutral’ witness for the state during McMillian’s second trial was Dorothy Williams Rumph.” Id. at 21, 561 S.E.2d at 604. As such, the Court found “her credibility was essential to McMillian’s defense.” Id. This fact was reinforced by the fact that the first jury deadlocked, 8-4, after re-hearing her testimony. Id.

According to the Court, “[t]he crucial nature of Rumph’s testimony cannot be overstated.” Id. In fact, the Court concluded “the verdict hinged upon her credibility, and that McMillian was hindered in his ability to impeach her” without the transcript from the first trial. Id. at 23, 561 S.E.2d at 605.

In another continuance case, State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989), the South Carolina Supreme Court held the trial judge erred in failing to grant a continuance. Tanner and Taylor were in a car accident in which two people died. Id. at 461, 385 S.E.2d at 833. At trial, the evidence was conflicting as to whether Tanner or Taylor was the driver, with Tanner’s defense being he was not the driver. Id. Although Tanner’s counsel was aware that blood, skin, and hair samples were taken from the car in which he and Taylor were occupants, the solicitor informed counsel that the samples were lost or misplaced. Id. at 462, 385 S.E.2d at 834. Ten minutes before the pre-trial hearing, SLED brought the samples to court, and defense counsel learned of their availability. Id. Requesting a continuance, Tanner’s counsel asked to conduct an independent examination of the samples, or at least to wait for a SLED analysis. Id. Denying the request, the judge ruled the state could not use the samples in its case against Tanner. Id.

The Court found that the trial judge abused his discretion in denying the defense’s motion for continuance because the judge failed to consider the potential exculpatory value of the samples. Id. at 463, 385 S.E.2d at 834. In light of Tanner’s defense that he was not the driver, the samples were “critical” to the case because “[a] testing of the samples could have supported Tanner’s contentions that he was merely a passenger by demonstrating that some of Ms. Taylor’s hair or blood was located on the driver’s side of the car. Discovering who the samples belonged to and the samples’ exact location in the car may also have aided Tanner’s accident

reconstruction expert in arriving at his opinion about who was driving.” Id. Thus, the Court held, “the eve of trial production of these samples warranted the granting of a continuance so that the defendant could adequately ascertain the samples’ full evidentiary harm,” and that “[n]o real harm would have befallen the state from this continuance.” Id.

The Court held a defendant was entitled to a continuance where his attorneys were incapacitated due to illness. Varn v. Green, 50 S.C. 403, 403, 27 S.E. 862, 862 (1897). One attorney was “confined to his bed and unable to attend court,” and the other, “who, although attending court was unable to articulate above a whisper, and only then with great pain, owing to an attack of grip and sore throat.” Id. The trial judge refused to grant the continuance request because the case “had been so long upon the docket.” Id. “Considering all the circumstances,” the Court held the defendant was entitled to a continuance of the case on account of the illness of his counsel, and that the circuit judge abused his discretion in forcing the case to trial under the circumstances.” Id. The Court concluded the judge committed an error of law by allowing his exercise of discretion “be controlled by his custom to require clients to employ other counsel when the counsel engaged were too sick to conduct the cause, and the cause had been long on the docket.” Id.

The Court found error in refusing to grant a continuance where the defendant’s wife, who was a crucial witness in the case, was unable to attend court due to her advanced stage of pregnancy. State v. Williamson, 115 S.C. 315, 315, 105 S.E. 697, 698 (1921). Wife’s doctor submitted an affidavit, stating it would be dangerous for her to testify at the trial. Id. at 315, 105 S.E. at 697. However, it was undisputed, she was “a most important witness for her husband; the killing of [the decedent] having occurred on account of alleged opprobrious language used to her by him a few days before the killing, ... and she was present and witnessed the homicide.” Id.

The Court held the trial judge “was manifestly in error in not continuing the case, on showing made and under all of the facts and circumstances of the case.” *Id.* at 315, 105 S.E. at 698.

As noted by the solicitor, defense counsel’s request for a continuance in the instant case involved concerns regarding Appellant’s competency to stand trial. An individual’s constitutional right to due process of law as provided in the Fourteenth Amendment to the United States Constitution prohibits the conviction of an incompetent defendant. *Medina v. California*, 505 U.S. 437, (1992); *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). Therefore, states must provide procedures adequate to protect this right. *Pate*, 383 U.S. at 378. South Carolina statutory law provides that whenever a judge “has reason to believe that a person on trial before him, charged with the commission of a criminal act ... is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or assistant in his own defense as a result of lack of mental capacity,” the judge *shall* order an examination of the individual by the Department of Mental Health. S.C. Code Ann. § 44-23-410. The test for determining competency to stand trial is whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.” *State v. Weik*, 356 S.C. 76, 81, 687 S.E.2d 683, 685 (2002) (citing *Dusky v. United States*, 362 U.S. 402 (1960)); *State v. Bell*, 293 S.C. 391, 395-396, 360 S.E.2d 706, 708 (1987). Competency to stand trial relates to the time the defendant is before the court for trial, not the time of the alleged offense. *Monahan v. State*, 365 S.C. 130, 616 S.E.2d 422 (2005).

The trial judge abused her discretion by denying Appellant’s continuance request where Appellant established good cause for the continuance. Appellant presented medical documentation and prescription medication to show that he was suffering from debilitating back pain. Not only

was Appellant's physical capacity to endure the trial at risk, but Appellant's mental and cognitive capacity was at risk. Defense counsel repeatedly expressed her fear that Appellant was unable to assist counsel – presently – due to his extreme pain and the intoxicating effects of the prescription medications. At a minimum, the judge should have inquired as to Appellant's competency, as the statute required. Further, the evidence presented by Appellant established “good cause” to overcome any desire by the state to try the case that week. The only reason given by the judge for not granting the request was that the case had been pending for over three years. Yet, the delay in calling Appellant's case rested solely at the feet of the state, not Appellant, because the state controls the docket in General Sessions. Further, the undisputed evidence was that the state had not been ready to try his case previously. In fact, while the charges against Appellant had been pending for years, the indictments used by the state to try Appellant were only presented to the grand jury on March 9, 2016 – less than one week before the state called his case to trial. Thus, the state could not have called the case to trial prior to March 14, 2016. The trial judge abused her discretion in denying Appellant's request for a continuance where Appellant presented good cause – his physical and mental capacity, including concerns about his competency – to continue the case.

II. The trial court erred by permitting Allison Foster to testify as an expert in child abuse assessment where her testimony improperly bolstered the complaining witness's credibility and there was insufficient evidence of the reliability of the subject matter of her testimony.

Relevant facts

Motion to exclude

Prior to trial, the state informed the judge of its intent to call Dr. Allison Foster as an expert witness “in the field of child abuse assessment.” R. 16, ll. 19-22. According to the state, Foster was “a completely blind witness. She’s never met [Complainant], the victim, in this case. She has never reviewed any of The CARE House interviews or even seen those recordings so she has had no direct interaction with this case.” R. 16, l. 22 – R. 17, l. 2. The solicitor clarified the intent to “qualify her as an expert in child abuse assessment” to permit testimony on “just the different range of responses and the factors that play into victims of sexual abuse.” R. 17, ll. 7-24.

Defense counsel objected, explaining the state proposed to have the witness testify to “child sexual abuse accommodation syndrome,” which was not a recognized disorder. R. 18, ll. 1-19. Defense counsel explained the subject of Foster’s testimony was “not peer reviewed, ... not done in a clinical setting to determine how these different things affect children.” R. 18, ll. 19-22. The judge agreed to permit the state to proffer Foster’s testimony prior to ruling on its admissibility. R. 19, ll. 16-24.

Proffer

Later in the trial, the state proffered Foster’s testimony. Foster explained that she is a licensed clinical psychologist employed as the chief psychologist at the Assessment and Resource Center (ARC), a children’s advocacy center, and as a psychologist in private practice.

R. 406, ll. 10-19. Additionally, she serves as “senior faculty for a five day forensic interview training course called Child First,” which has been in existence for fifteen years. R. 408, ll. 4-6. According to Foster, she had “been conducting forensic interviews of children who are suspected of being victims for 21 years.” R. 407, ll. 7-14. When asked if she developed training and programs for different agency personnel regarding suspected child abuse, Foster responded that she trains “in national conferences,” develops “the curriculum for the Child First forensic interview training course,” and teaches others, including other forensic interviewers, regarding the techniques. R. 408, ll. 7-15. Regarding her publications, Foster explained she had “published a monograph for the American Prosecutors Research Institute on child development,” published “a book chapter” “about the assessment of mental disorders in custody evaluations,” and had “research in preparation on a couple of matters involving forensic interview techniques,” which were not published. R. 408, ll. 16-25.

Foster claimed the “subject” of her “field” of study was “child abuse assessment or dynamics of child abuse.” R. 409, ll. 11-14. She further claimed the field is studied because “there are a lot of factors that are not necessarily a lay person, within a lay person’s understanding and also because it’s important for us to understand children’s development, linguistics, how memory works, how processes like coercion, parent/child relationships or offender/child relationships, how those play into the dynamics of abuse.” R. 409, ll. 15-23. Foster claimed “there are a lot of behavioral issues as well as developmental issues that are researched in the behavioral science literature to help us understand the best way to evaluate these situations as well as the best way to explain to lay people dynamics that they might not otherwise understand.” R. 409, l. 23 – R. 410, l. 3.

An example of “dynamics” included “things like the fact that delay in reporting by victims is a very robust finding in the research.” R. 410, ll. 4-7. Foster claimed, “We know behaviorally that the majority of substantiated cases of child sexual abuse include a very large delay even into adulthood before victims often report childhood sexual abuse.” R. 410, ll. 7-10. Such was “not necessarily logical to somebody who is not trained in the field,” she asserted. R. 410, ll. 10-12. Other examples of the “dynamics” were “[s]ome of the ways children accommodate abuse in situations they can’t control,” and “recantation,” which “jurors might not otherwise understand if they didn’t have the benefit of education.” R. 410, ll. 15-18. Finally, “secrecy” was a dynamic. R. 410, ll. 19-20.

At this point, the state sought to qualify Foster in the field of “child abuse assessment.” R. 410, ll. 21-24. Defense counsel posed no objection to the qualification. R. 411, l. 6.

Continuing with the proffer of testimony, Foster testified regarding what she claimed were some of the behavioral characteristics not known to the average individual, including that “a lot of child sexual abuse occurs at the hands of a family member, an adult who is in a role of an authority figure, a parental figure or step parent figure.” R. 412, ll. 8-20. In those situations,

[T]he abuse tends to be chronic meaning that it occurs over a sustained period of time and so for that relationship to be sustained without the offending behavior being detected there are certain dynamics that are known to occur in those cases along the lines of how an offender exploits his authority, the sense of love, dependency, the complexities of that kind of relationship and how they can manipulate that to maintain a victim’s secrecy and cooperation or compliance.

R. 412, l. 20 – R. 413, l. 3. She continued to explain they “dynamics that the victims experience,” typically described as “helplessness,” “entrapment and the fact that they need to accommodate the abuse because they’re really in a situation that they feel powerless to change.” R. 413, ll. 4-8.

Next, Foster delved into “about 30 years of ... retrospective research.” R. 413, ll. 19-21. She described this as “where researchers have looked back over a 30 year time span of studies that conclude that two-thirds of child sexual abuse victims in America don’t come to anybody’s attention until adulthood.” R. 413, ll. 21-24. She claimed these “statistics [] come from cases that have been well substantiated.” R. 414, ll. 3-12. This led her to draw the conclusion that “delayed disclosure is a common aspect to the experience of child sexual abuse.” R. 414, ll. 1-2. When questioned about the “reliability of the behavioral science” on which she was basing her testimony, she claimed there were “a lot of studies,” but she mentioned only “a meta analytic study that was published a few years ago by Steven Ceci, Carl London, Maggie Roth,” which involved the review of “research spanning this 30 plus year time frame” with any specificity. R. 415, ll. 9-22. She then shifted to discuss the work of Roland Summit on “the phenomenon of chronic sexual abuse and delayed disclosure.” R. 416, ll. 6-8. In this publication, Summit explained “the manner in which children become trapped first by a stage of secrecy ... they are manipulated, lured, threatened into believing they need to keep the behavior secret.” R. 416, ll. 8-12. According to Foster, the child enters a “stage of helplessness,” which causes the child to “live in some period of time that’s described as a state of entrapment and accommodation.” R. 416, ll. 18-19. During this state, the child is “still going along with the business of life,” including school, visiting friends, participating in activities, doing chores, and otherwise acting normally. R. 416, ll. 19-25.

The “dynamics and the behavioral characteristics” described by Foster were not used as “a diagnostic tool,” but were used to “describe phenomenon that could otherwise seem illogical or counter intuitive.” R. 417, ll. 12-18. She posited that understanding “some of those behavioral dynamics that have to do with manipulation, coercion, the different sort of power

dynamics that are in relationships, it can assist the trier of fact in understanding the phenomenon.” R. 417, l. 22 – R. 418, l. 1.

On cross-examination, Foster revealed that the five factors identified in the Summit article comprising child sexual abuse accommodation syndrome were secrecy, entrapment, helplessness, delayed disclosure, and potential recantation. R. 418, ll. 13-21. According to Foster, studies following Summit’s article included those conducted in a clinical setting, but more involved “data analysis from forensic cases.” R. 419, ll. 1-6. When asked if the studies she referenced were “peer reviewed,” Foster responded they were “absolutely” “peer reviewed” because “[a]nything that’s published in a journal” is peer reviewed and she would not cite research unless it were the product of peer review and had been published in a journal or a book that would be considered a treatise edited by experts in their field. R. 419, ll. 13-23.

Argument on the motion to exclude

Defense counsel objected to the substance of Foster’s testimony because it would “bolster” the complaining witness in the case by stating that in “substantiated” cases of abuse, certain behavioral characteristics were noted and those characteristics are also exhibited by the complaining witness. R. 422, ll. 4-16. Further, defense counsel objected that using the word “phenomenon” to describe the conduct would bolster the complaining witness’s testimony because the very term phenomenon means an occurrence. R. 422, ll. 23-25; R. 423, ll. 17-20; R. 424, ll. 3-5.

Additionally, defense counsel objected to evidence of child sexual abuse accommodation syndrome because the so-called syndrome was not recognized in the scientific community. Specifically, counsel noted the studies referenced by Foster had not been “peer reviewed enough” to show “the dynamics that are definitely something that fall within Rule 702.” R. 423,

ll. 1-9. As Foster admitted, the behavioral characteristics comprising the syndrome were “not a diagnostic tool” and were “not tested in the clinical sense.” R. 423, ll. 13-16.

The solicitor argued Foster had not testified “anything about a syndrome,” “just ... as to behavioral characteristics that are often displayed in victims that have come forward related to sexual abuse.” R. 424, ll. 7-11. She further argued “this behavioral science ... fall[s] outside of the normal understanding or the general knowledge of the jury.” R. 424, ll. 12-18. Turning to the reliability of Foster’s testimony, the solicitor pointed to the testimony “that [for] over 30 years there have been studies conducted of victims that come forward with allegations of sexual abuse.” R. 424, ll. 21-25. She stated “that a portion of that sample that have been studied are further substantiated.” R. 425, ll. 1-2. The solicitor claimed “it is a recognized field” that “is heavily researched.” R. 425, ll. 8-9.

Ruling

In ruling on defense counsel’s objection to Foster’s testimony, the trial judge noted that everyone agreed Foster satisfied the qualifications requirement of the evidentiary rule. R. 426, l. 22 – R. 427, l. 1. The judge then found that “child abuse assessment is reliable” based upon the testimony of Foster that the behavioral characteristics “are based on 30 years of research,” of which “some” “are from a clinical setting” and “[m]any ... are from data analysis.” R. 427, ll. 2-7. She determined the “journal articles ... are peer reviewed” that discuss “this particular science.” R. 427, ll. 7-9.

Testimony before the jury

Thereafter, the solicitor called Foster as a witness in front of the jury. R. 430, ll. 17-18.³ Much of Foster's testimony mirrored her *in camera* testimony. In describing "child abuse assessment," Foster told the jurors that the field "encompasses a lot of things from understanding children and their developmental states [to] understanding how abuse can affect children at different developmental stages." R. 434, ll. 17-22. The "field" also included how children "can remember and relate information." R. 434, ll. 22-23. According to Foster, the "field" also encompassed the "[p]sychological effects of abuse depending on the relationship between the perpetrator and the victim and the age of the victim." R. 434, ll. 23-25. Related to all of this was "the process of how to gather information from children and understanding the process of disclosure. How children tell and when they tell and that sort of thing." R. 435, ll. 2-5.

She told the jurors about delayed disclosure and that according to the research, "two-thirds of [people known to have been victimized as children] won't come to anyone's attention until adulthood." R. 435, l. 20 – R. 436, l. 6; R. 439, ll. 7-10. Related to delayed disclosure, Foster explained stages of disclosure, including denial, tentative, and active. R. 439, l. 20 – R. 440, l. 14. She told the jurors about "entrapment" and "accommodation" during child abuse. R. 441, ll. 5-24. She also told the jurors about children of abuse entering a state of helplessness. R. 442, ll. 1-20. Those stages, she explained, were called "child sexual abuse accommodation dynamics." R. 442, ll. 16-18.

³Defense counsel did not object to Dr. Allison Foster's testimony contemporaneously. However, no objection was necessary to preserve this error for appellate review because the judge entertained the *in camera* testimony and ruled upon its admissibility immediately prior to the state calling Foster as a witness to testify before the jury. See *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); *State v. Govan*, 372 S.C. 552, 557, 643 S.E.2d 92, 94 (Ct. App. 2007).

Foster then told the jurors about the most common situation for child sexual abuse was for it to occur in the home. R. 442, l. 21 – R. 443, l. 2. Regarding whether all children in the home would be abused, Foster claimed that if the abuser were a parent, then the abuser would chose the child over whom the parent had a particular emotional and/or behavioral relationship. R. 443, ll. 3-17.

Importantly, Foster told the jury that her testimony was based upon the research in the “field” and from her experience as a psychologist who had “evaluated about 2000 children suspected of sexual abuse.” R. 446, ll. 2-8.

State’s closing argument

After defining the elements of the charged offenses, the solicitor told the jurors that the South Carolina “legislature recognizes that these are crimes of secrecy and they are shameful so unlike armed robberies and unlike murders, sometimes, oftentimes there are no other witnesses.” R. 491, ll. 5-10. Accordingly, “the law does state as it relates to criminal sexual conduct in the State of South Carolina, the testimony of the victim need not be corroborated.” R. 491, ll. 14-17. Thereafter, the solicitor used the testimony from Foster to bolster Complainant’s credibility and argue to the jury that she should be believed because her conduct mirrored the conduct of those individuals who suffered child sexual abuse, as described by Foster.

According to the solicitor, Appellant had selected Complainant because of his close relationship with her, “[j]ust like Dr. Foster said.” R. 504, ll. 17-21. To explain why Complainant did not tell about the alleged abuse earlier, the solicitor implored the jurors to rely on Foster’s explanation “that the large majority of people, of children do disclose a lot later.... Two-thirds of the population that has been studied relating to sexual abuse child victims come forward later. It is not an uncommon situation.” R. 510, ll. 2-12. She then talked to the jury

about “latent disclosure” and partial disclosures. R. 510, ll. 13-23. To explain why Complainant did not “tell the entire story” initially, the solicitor relied upon “the research, the studies” and told the jurors to rely on their “common sense and knowledge of human nature” to determine that “the very first time she’s not going to sit there and give it all out there.” R. 511, ll. 9-19. According to the solicitor, “[t]he first day she told what she needed to tell her. Not unusual. Dr. Foster’s been in this field for 30 years. Not unusual.” R. 511, ll. 20-23.

Next, the solicitor reminded the jury of “the factors that play into that delayed disclosure” as testified to by Foster. R. 511, ll. 24-25. Specifically, the solicitor talked about “helplessness and accommodation and the secrecy.” R. 511, l. 25 – R. 512, l. 1.

Helplessness. The family is all she had. ... [T]hey have had very few friends. They have moved over 20 times. They’re home schooled. They’re in that house. ... So when he threatens her, I’m gonna ruin you. You’re gonna ruin this family. You’re gonna have no one, why wouldn’t she believe that? That’s all she’s ever known is her family.

Accommodation. Dr. Foster ... talked about accommodation. What that means is that after the first couple of times that it happened, even if it’s against your will, even if you fight it off, but once it happens, you feel like it, she feels like it’s something that she just has to succumb to essentially. Blames herself. That is a factor that also comes into play with child sexual abuse of victims.

R. 512, ll. 2-23. Continuing to rely upon Foster’s testimony to bolster Complainant’s testimony, the solicitor noted that Foster “also testified ... that just because as far as who the particular perpetrator chooses, which child the perpetrator chooses has a lot to do with the relationship.” R. 512, l. 24 – R. 513, l. 2; see also R. 522, ll. 8-19.

The solicitor boldly told the jurors that Foster did not interview Complainant or watch the forensic interviews, and yet she “corroborate[d] everything” that was presented by the state. R. 513, ll. 2-6. The solicitor described Foster’s testimony concerning memory as corroborative of Complainant, especially in light of Complainant’s repeated testimony regarding events, not just

allegations of sexual abuse, that she could not remember. According to the solicitor, “Dr. Foster testified about the fact that the first memory is often very clear and [Complainant] has a very clear memory when that first time it happened.” R. 514, ll. 23-25. The solicitor offered nothing more than Foster’s testimony to explain away the inexplicable – why Complainant could not remember simple things like what she liked to hunt or why her testimony contrasted with that of others concerning whether she wore bikinis.

Discussion

The South Carolina Rules of Evidence and case law govern the admission and scope of expert testimony. Pursuant to the Rule, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE. In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court specified the following three-prong test for expert testimony:

[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted) (emphasis added). “All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court’s gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for

the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

A review of South Carolina's jurisprudence concerning the propriety of expert testimony in child sex abuse cases sheds light on the issue presented. Starting in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the South Carolina Supreme Court proclaimed: "[W]e state today that we can envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate." Id. at 357 n.5, 737 S.E.2d at 499 n.5. In State v. Douglas, 380 S.C. 499, 502-503, 671 S.E.2d 606, 608 (2009), the South Carolina Supreme Court found the trial court erred in qualifying a forensic interviewer as an expert because the testimony simply did not require expert qualification. The forensic interviewer's testimony concerned only "her personal observations and experiences, and her interview with the Victim in th[e] case." Id.

"It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded." Kromah, 401 S.C. at 358, 737 S.E.2d at 499. "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Portillo, 408 S.C. 66, 71, 757 S.E.2d 721, 724 (Ct. App. 2014)(quoting Kromah, 401 S.C. 340 at 358, 737 S.E.2d at 499). "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Therefore, it is improper for a witness to bolster the testimony or credibility of another witness. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010)(finding a "forensic interviewer's . . . opinion testimony improperly bolstered the victim's credibility").

In McKerley, the trial court allowed a witness to testify as an expert in “forensic interviewing and child abuse assessment.” 397 S.C at 463, 725 S.E.2d at 141. The witness had interviewed the alleged victim twice and concluded that both interviews were “compelling” for sexual abuse. Further, the witness determined that the alleged victim’s statements were consistent with other information in the case. Id. at 466, 725 S.E.2d at 142. The Supreme Court determined that there was no other way to interpret the language used in the expert’s testimony other than to mean she believed the victim was being truthful. The Court further held, “In light of [the expert’s] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot say the erroneous admission of [the expert’s] testimony did not contribute to the jury’s decision,” therefore finding harmful error. Id. at 467, 725 S.E.2d at 143.

The Supreme Court has also held that it is improper “for an expert to comment on the veracity of a child’s accusations of sexual abuse.” State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Jennings involved a challenge to the testimony of Shauna Galloway-Williams. Galloway-Williams interviewed the three alleged victims of sexual abuse and issued separate reports for each child that were admitted into evidence. She concluded in her reports that each child provided a “compelling” disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received. 394 S.C. at 476-481, 716 S.E.2d at 92-95. The Court held the conclusions in Galloway-Williams’ reports improperly vouched for the children’s veracity and thus the trial court abused its discretion by admitting the reports into evidence. It further held the error was not harmless because there was no physical evidence presented at trial and the children’s credibility was the sole issue in the case. Id. at 94-95, 716 S.E.2d at 480.

Recently, in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), the South Carolina Supreme Court held that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) should apply in qualifying child abuse assessment experts because their testimony is non-scientific. “Under White, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert’s testimony will be reliable.” Id. (citing White, 382 S.C. at 273, 676 S.E.2d at 688). The Court found that the trial court improperly qualified the child abuse assessment expert in Chavis because there was “simply no evidence that her conclusions or impressions taken from [the] interviews were accurate.” Id. Although the Court established “no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence,” the Court explained “evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.” Id.

The Court in Chavis found that one of the “expert” witnesses should not have been qualified as an expert because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAC protocol. Id. at 108, 771 S.E.2d at 339. The Supreme Court also found the testimony of the other so called “expert” that the child should not be allowed around Chavis anymore, for any reason, could only be interpreted as the “expert” believing the victim’s claim that Chavis sexually abused her. Id. at 109, 771 S.E.2d at 340.

Like the “experts” in Chavis, there was no evidence that Foster’s conclusions and claims were accurate or reliable. Foster admitted that her testimony was the product of what she had read and what she had learned from her experience as a psychologist who had “evaluated about 2000

children suspected of sexual abuse.” R. 446, ll. 2-8. The state presented no evidence regarding the methodologies employed by Foster in arriving at the conclusion she drew from her reading or from her own practice. In light of the dearth of evidence of the reliability of Foster’s conclusions and statements, the court failed to properly execute its gatekeeping function by qualifying her as an expert in “the dynamics of child sexual abuse.”

In closing argument, the prosecutor argued that the jury should believe Complainant because of Foster’s testimony. Specifically, the solicitor used Foster’s testimony regarding so-called “child abuse assessment” and “child abuse accommodation syndrome” to bolster Complainant’s credibility and argue to the jury that she should be believed because her conduct exactly mirrored the conduct of those individuals who were known to have suffered child sexual abuse and had been studied by a “field” of “experts,” as described by Foster. The solicitor used Foster’s testimony to describe and attempt to explain away why Complainant was the one who was allegedly abused and none of the other children in the home, including Complainant’s twin sister, were abused. R. 504, ll. 17-21. Unsurprisingly, the solicitor used Foster’s testimony to describe the Complainant’s delay in making an accusation as “not an uncommon situation.” R. 510, ll. 2-12. Foster was also used to explain why Complainant did not “tell the entire story” initially,” which, according to Foster, who has “been in this field for 30 years,” was “[n]ot unusual.” R. 511, ll. 9-23.

Using the testimony of Foster, the solicitor set up an image of the typical child victim of sex abuse and, then, told the jurors to believe Complainant when she claimed she suffered sex abuse because Complainant displayed the same behavioral characteristics as the typical child victims described by Foster. Specifically, she told the jurors about a typical child victim’s feelings of helplessness, and claimed Complainant felt helpless as well. R. 511, l. 25 – R. 512, l.

1; R. 512, ll. 2-23. Additionally, the solicitor claimed Complainant's failure to make the accusation earlier and her seeming to behave "normally" at times was due to "accommodation," another behavioral characteristic of typical child victims. R. 512, ll. 2-23. Finally, the solicitor claimed Complainant was believable because everyone agreed she and Appellant were close, which would explain why Appellant had chosen to prey upon her in light of Foster's testimony that a perpetrator selects an individual with whom the perpetrator has a close relationship. In sum, the solicitor told the jurors that Foster "corroborate[d] everything" Complainant claimed. R. 513, ll. 2-6.

The admission of this testimony in this case, where the jury's decision depended upon Complainant's credibility and the record evidence demonstrates the jury's struggle with rendering a verdict, was prejudicial error that requires reversal. The qualification of Foster as an "expert" in "child abuse assessment" was erroneous and prejudicial to Appellant. "The label of expert should be jealously guarded by the court and never loosely bandied about." Kromah, 401 S.C. at 357, 737 S.E.2d at 499. As our Supreme Court noted in Kromah, "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." Id. In light of the prosecutor's capitalization of the testimony during her closing argument to argue the jury should believe Complainant due to the testimony of an "expert" witness who had been doing this type of work for thirty years and described Complainant's situation without having any knowledge of Complainant, this Court must find the error was not harmless. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be

harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.”)(emphasis in original).

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of July, 2017.

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 20, 2017

Susan B. Hackett

Susan B. Hackett

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

RECEIVED

JUL 20 2017

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County

Tanya A. Gee, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

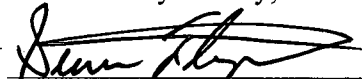
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of July, 2017.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of July, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

RECEIVED
JUL 20 2017
SC Court of Appeals

ORIGINAL⁷¹⁴

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Tanya A. Gee, Circuit Court Judge
Appellate Case No. 2016-000642

RECEIVED

JUL 06 2017

SC Court of Appeals

THE STATE,

Respondent,

v.

JAMES WAYNE MILLER,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, South Carolina 29202
(803) 576-1800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	10
I. The trial judge did not abuse her broad discretion by refusing to grant Appellant's continuance motion, where Appellant failed to present sufficient grounds that he was entitled to a continuance based on purported back injuries.	10
II. The trial judge did not abuse her broad discretion in permitting Dr. Allison Foster to testify as an expert in child abuse dynamics, where because the evidence and testimony presented during trial established Dr. Foster's testimony could assist the jury in understanding the issues raised in Appellant's case, Dr. Foster was personally qualified to testify as an expert, the subject matter of Dr. Foster's testimony met a threshold level of reliability in light of the her expert qualifications, and her testimony did not improperly bolster Victim's testimony. Furthermore, any error was harmless and had no impact on Appellant's case.....	19
CONCLUSION.....	32

TABLE OF AUTHORITIES

Cases

<u>Arnold v. State</u> , 309 S.C. 157, 420 S.E.2d 834 (1992)	29
<u>State v. Brown</u> , 411 S.C.332, 768 S.E.2d 246 (Ct. App. 2015).....	28
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	30
<u>Fields v. J. Haynes Waters Builders, Inc.</u> , 376 S.C. 545, 658 S.E.2d 80 (2008)	26
<u>Fields v. Reg'l Med. Ctr. Orangeburg</u> , 363 S.C. 19, 609 S.E.2d 506 (2005)	24
<u>Hernandez v. New York</u> , 500 U.S. 352 (1991).....	15
<u>Lee v. Suess</u> , 318 S.C. 283, 457 S.E.2d 344 (1995)	26
<u>State v. McDonald</u> , 343 S.C.319, 540 S.E.2d 464.....	18, 24
<u>Miller-El v. Cockrell</u> , 537 U.S. 322 (2003)	15
<u>Morris v. Slappy</u> , 461 U.S. 1 (1983).....	14
<u>State v. Anderson</u> , 413 S.C. 212, 776 S.E.2d 76 (2015).....	19, 22, 27
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006).....	23, 30
<u>State v. Bixby</u> , 388 S.C. 528, 698 S.E.2d 572 (2010).....	23
<u>State v. Bryant</u> , 369 S.C. 511, 633 S.E.2d 152 (2006)	31
<u>State v. Casey</u> , 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997).....	15
<u>State v. Cochran</u> , 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006)	15
<u>State v. Colden</u> , 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007)	13
<u>State v. Council</u> , 335 S.C. 1, 515 S.E.2d 508 (1999).....	26
<u>State v. Evans</u> , 316 S.C. 303, 450 S.E.2d 47 (1994).....	29
<u>State v. Fletcher</u> , 379 S.C. 17, 664 S.E.2d 480 (2008)	30
<u>State v. Gaster</u> , 349 S.C. 545, 564 S.E.2d 87 (2002).....	23
<u>State v. Henry</u> , 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1998).....	25
<u>State v. Irick</u> , 344 S.C. 460, 545 S.E.2d 282 (2001).....	25
<u>State v. Jones</u> , 273 S.C. 723, 259 S.E.2d 120 (1979)	25
<u>State v. Jones</u> , 343 S.C. 562, 541 S.E.2d 813 (2001)	25
<u>State v. Jones</u> , 417 S.C. 319.....	27, 28, 29
<u>State v. Kelley</u> , 319 S.C. 173, 460 S.E.2d 368 (1995).....	23
<u>State v. Key</u> , 256 S.C. 90, 180 S.E.2d 888 (1971).....	30
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490, (2013)	29
<u>State v. Lytchfield</u> , 230 S.C. 405, 95 S.E.2d 857 (1957).....	13, 18
<u>State v. Martin</u> , 391 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011).....	25
<u>State v. McMillan</u> , 349 S.C. 17, 561 S.E.2d 602 (2002)	17
<u>State v. Meggett</u> , 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012)	14
<u>State v. Mitchell</u> , 378 S.C. 305, 662 S.E.2d 493 (2008).....	30
<u>State v. Myers</u> , 301 S.C. 251, 391 S.E.2d 551 (1990)	24
<u>State v. Peer</u> , 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996)	25
<u>State v. Price</u> , 368 S.C. 494, 629 S.E.2d 363 (2006)	24
<u>State v. Ravenell</u> , 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010)	13
<u>State v. Schumpert</u> , 312 S.C. 502, 435 S.E.2d 859 (1993).....	27
<u>State v. Shuler</u> , 344 S.C. 604, 545 S.E.2d 805 (2001).....	15
<u>State v. Smith</u> , 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2015)	27
<u>State v. Squires</u> , 248 S.C. 239, 149 S.E.2d 601 (1966)	13

<u>State v. Tanner</u> , 299 S.C. 459, 385 S.E.2d 832 (1989)	17
<u>State v. Tapp</u> , 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2010)	26
<u>State v. Tapp</u> , 398 S.C. 376, 728 S.E.2d 468 (2012)	30
<u>State v. Torres</u> , 390 S.C. 618, 703 S.E.2d 226 (2010)	23
<u>State v. Tutton</u> , 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003)	15
<u>State v. Watts</u> , 321 S.C. 158, 467 S.E.2d 272 (Ct.App.1996)	29
<u>State v. Weaverling</u> , 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999)	26, 27, 29
<u>State v. White</u> , 361 S.E. 407, 605 S.E.2d 540 (2004)	27
<u>State v. White</u> , 382 S.C. 265, 676 S.E.2d 684 (2009)	24, 26
<u>State v. Williams</u> , 321 S.C. 455, 469 S.E.2d 49 (1996)	18
<u>State v. Williamson</u> , 115 S.C. 315	17
<u>State v. Yarborough</u> , 363 S.C. 260, 609 S.E.2d 592 (Ct. App. 2005)	13
<u>Varn v. Green</u> , 50 S.C. 403, 27 S.E. 862 (1897)	17
<u>Watson v. Ford Motor Co.</u> , 389 S.C. 434, 699 S.E.2d 169 (2010)	24
<u>Winkler v. State</u> , 418 S.C. 643, 795 S.E.2d 686 (2016)	15, 16

Statutes

S.C. Code Ann. § 17-27-160(C)	16

Rules

Rule 702, SCORE	25

STATEMENT OF ISSUES ON APPEAL

- I. The trial judge did not abuse her broad discretion by refusing to grant Appellant's continuance motion, where Appellant failed to present sufficient grounds that he was entitled to a continuance based on purported back injuries.**

- II. The trial judge did not abuse her broad discretion in permitting Dr. Allison Foster to testify as an expert in child abuse dynamics, where because the evidence and testimony presented during trial established Dr. Foster's testimony could assist the jury in understanding the issues raised in Appellant's case, Dr. Foster was personally qualified to testify as an expert, the subject matter of Dr. Foster's testimony met a threshold level of reliability in light of the her expert qualifications, and her testimony did not improperly bolster Victim's testimony. Furthermore, any error was harmless and had no impact on Appellant's case.**

STATEMENT OF THE CASE

On August 11, 2012, Appellant James Wayne Miller (“Appellant”) was arrested following the report of his sexual abuse of his seventeen-year-old daughter (“Victim”). During its October 2012 term of court, the Kershaw County Grand Jury indicted Appellant for second-degree criminal sexual conduct and incest. On March 14, 2016, Appellant proceeded to a jury trial in the Kershaw County Court of General Sessions with the Honorable Tanya A. Gee, circuit court judge, presiding. On March 18, 2016, the jury convicted Appellant as indicted. Judge Gee sentenced Appellant to twenty years’ imprisonment for second-degree criminal sexual conduct and ten years’ imprisonment for incest, with the sentences to be served consecutively. Thereafter, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

In July of 2011, Appellant and his wife Tammy, along with their five children, visited friends in Camden for the Fourth of July holiday. (R. 98-99, 104). After spending time in Camden, Appellant decided to move his family from Summerville to Camden and found a two-story house to rent on Lake Wateree. (R. 104-105). The home needed some work before the family would be ready to move in, so Appellant and his sixteen-year-old daughter (Victim) stayed behind to fix up the home while the rest of the family, including Victim's twin sister, returned to Summerville to pack up their home. (R. 106-107). Appellant, who worked in construction and as a day laborer, often had assistance from Victim when working. (R. 102-106). Appellant and Victim stayed in the family's camper while fixing up the home. (R. 106-107).

One evening after a long day of working on the new home, Victim went inside the camper to go to bed while Appellant remained outside by a bonfire, drinking and socializing with a friend. (R. 107-108). Victim eventually fell asleep and woke up to her father performing oral sex on her. (R. 108). Appellant had Victim's legs pulled apart and pinned down so she could not move. (R. 108). She was able to shove him off and when she freed herself, she ran to the bathroom. (R. 108-109). Appellant apologized, said it was an accident, and promised it would not happen again. (R. 109-110). He pleaded with her to come out and go back to bed, promising he would remain on the couch. (R. 109-110). Victim finally acquiesced and returned to the bed, where she eventually fell asleep again. (R. 109-110). A short time later, Victim woke up to Appellant on top of her, pinning her down. (R. 110). Victim tried to break free, but was unable to get away. (R. 110-111). Appellant said he needed to finish what he started and vaginally penetrated Victim. (R. 110-111). After Appellant finished raping her, Victim fled to the

bathroom, where she remained for the rest of the evening. (R. 111). Appellant fell asleep as if nothing had happened. (R. 111).

The next morning, Appellant told Victim their family would be ruined if she told anyone about the abuse. (R. 111). He told her he had taken a pill in addition to drinking and was unable to control himself. (R. 112). He threatened that she needed to keep the assault a secret while forcefully grabbing her arm. (R. 112-113). Victim, afraid of Appellant and fearing the potential consequences to the rest of her family, made a decision not to tell her family about the abuse. (R. 112, 116). That night, Appellant again raped Victim, this time in the family's new home. (R. 113). Victim again tried to fight Appellant off but Appellant had pinned her down and she was unable to break free. (R. 113-14). Appellant continued to rape Victim several more times while the rest of the family was still in Summerville. (R. 114). Each time, Victim unsuccessfully tried to fight Appellant off. (R. 114). After each rape, Appellant threatened Victim that their family would be ruined if she told anyone. (R. 114, 116).

Victim hoped her father's sexual assaults would stop when the family moved into the new home, but Appellant continued to rape her. (R. 116). Initially, Victim and her twin sister shared a room in the new house. (R. 116-117). While her sister was asleep, Appellant would sneak into his daughters' bedroom, rape Victim, and then leave. (R. 117). After a few months, Appellant decided it would be good for Victim to have her own room due to on-going disputes with her twin sister. (R. 118, 120-21). As soon as Victim had her own room, Appellant began sleeping in Victim's room nightly. (R. 121, 209). This made Appellant's wife, also Victim's mother, upset and confused. (R. 121-122, 209). She confronted Appellant about the inappropriate sleeping arrangement and demanded Appellant return to their marital bed. (R. 209). In response, Appellant accused her of having perverted thoughts and said she was jealous of Appellant's close

relationship with Victim. (R. 210-211). Appellant refused to stop sleeping in Victim's bed. (R. 122, 211).

Appellant continued to rape Victim constantly in the family home. (R. 122). After a few months, Victim stopped physically resisting Appellant's constant rapes. (R. 122). Additionally, shortly after moving to Camden, Appellant began wearing a gun constantly, which he kept on a holster on his belt. (R. 123-124). Appellant routinely kept the gun attached to his pants while he was assaulting Victim. (R. 123-124). Appellant never had gun before he started raping Victim. (R. 123, 128, 214). In addition to assaulting Victim at the family home, Appellant also raped Victim when she accompanied him to jobsites for work. (R. 124-128). Victim did not want to continue assisting Appellant with work, but felt like she did not have a choice as her family depended on Appellant exclusively for money and he needed her help. (R. 124-125).

Appellant continued to threaten Victim to keep her from reporting the abuse. (R. 128-129). Victim routinely had bruising on her body from Appellant pinning her down while raping her. (R. 133-135). In addition to vaginally penetrating Victim, Appellant would also digitally penetrate her and fondle her breasts. (R. 135-136). When Appellant raped Victim, he would usually pull out and ejaculate to the side of her, but occasionally would wear condoms or ejaculate inside of her. (R. 138-139).

In August of 2012, Appellant had been raping Victim constantly for thirteen months. (R. 152). Victim felt increasingly helpless and withdrew from the rest of her family. (R. 151, 153-154). She feared the abuse would never end. (R. 151). On August 11, 2012, Victim eventually told her mother that Appellant had been touching her inappropriately. (R. 152, 154-157, 227). Victim's mother became hysterical and immediately called her sister to tell her about the abuse and request that she call law enforcement. (R. 158, 228). She did not tell Appellant she knew of

the abuse, concealed that she had called her sister, and made an excuse for why law enforcement was arriving. (R. 228-230).

Law enforcement officers from the Kershaw County Sheriff's Office arrived a short time later. (R. 159). When Appellant saw law enforcement approaching, he told Victim he wished she had warned him so he could say goodbye to the rest of the family. (R. 160). He then turned to law enforcement, and without any commands, unhooked his belt, emptied his pockets, and placed his hand behind his head. (R. 53, 75, 84). Law enforcement detained Appellant and walked him to a waiting patrol car. (R. 53). When Appellant walked by his wife, he told her it "wasn't all [his] fault" and he asked for one more kiss. (R. 236). After being detained, Corporal Houser of the Kershaw County Sheriff's Office advised Appellant of his right pursuant to Miranda and asked him if he wished to make a statement. (R. 54). Appellant responded that he understood his rights and then stated, "Whatever she says, that's what happened. If she said it, it's not a lie." (R. 54, 76, 93). At this point, Appellant had not yet been informed of the allegations made against him or why he was being placed under arrest. (R. 76, 84).

Thereafter, Appellant was transported to the Kershaw County Sheriff's Office, where he met with the investigator on call, Investigator Dill. (R. 53, 55, 92-93, 453-465). Appellant and Investigator Dill spoke in an interview room equipped with audio and visual recording devices that recorded their entire conversation. (R. 455-456). Investigator Dill advised Appellant of his right pursuant to Miranda and Appellant signed a waiver indicating he understood his rights and wished to speak with law enforcement. (R. 456-460, 595, State's Ex. No. 46). Appellant didn't deny the allegations and stressed he needed to make sure his story was "on the same page" as Victim's report because he did not want his statement to differ from hers. (R. 461). The

interview ended shortly thereafter and Appellant was transported to the detention center. (R. 462-463).

Upon arriving at the detention center, Appellant asked to speak with Investigator Dill again. (R. 463). Investigator Dill went to the detention center, asked Appellant if he wished to speak with him, and when Appellant answered affirmatively, transported Appellant back to the sheriff's office for another interview. (R. 463-464). When they returned to the sheriff's office, Investigator Dill brought Appellant into the same interview room equipped with recording equipment, advised him of his rights, and Appellant again signed a waiver indicating he understood his rights and wished to speak with law enforcement. (R. 464-468, 596, State's Ex. No. 47). In this second interview, Appellant admitted to placing his hand inside of Appellant's leg while she slept and telling his wife that "this is not all my fault." (R. 468, State's Ex. No. 47).

Appellant proceeded to a jury trial before the Honorable Tanya A. Gee on March 14, 2016. Prior to jury selections, Appellant moved for a continuance, citing debilitating back pain. (R. 9-15). The trial judge, noting Appellant failed to present any documentation supporting his assertion that he could not proceed forward with his trial based on a medical condition, denied his motion for a continuance. (R. 9-15). Following pre-trial motions and jury selection, the State presented testimony from various law enforcement officers as well as fact witnesses who knew Appellant and Victim.

One such witness was Victim's mother, who testified she had known Appellant since third grade and had been married to him for twenty years. (R. 197-198). She testified she had five children with Appellant, including Victim and her twin sister. (R. 197-198). She testified her and Appellant moved approximately thirty times throughout their marriage, including a final move to Camden July, 2011. (R. 201, 204). She testified she began noticing a change in Victim

when the family moved to Camden. (R. 203, 207-209). Additionally, she testified Appellant stopped sleeping in bed with her and she would routinely find him sleeping in Victim's bed. (R. 209-210). She testified she tried to physically remove Appellant from Victim's bed and told him she thought he was behaving inappropriately. (R. 209-210). Appellant responded by telling her she was jealous of Victim and how close they were. (R. 211). Additionally, she testified Appellant stopped regularly having sex with her when the family moved to Camden and only slept with her a couple of times during the thirteen-month period when he was raping Victim. (R. 213-214). She testified she tried to talk with Victim about the changes in her behavior and whether Appellant was abusing her and Victim denied any abuse and refused to speak with her. (R. 215-216). She testified she also noticed Appellant being inappropriate with Victim, including untying her swimsuit top, wrapping his legs around her, and feeling her breast. (R. 220-221). She testified Victim eventually confided in her on August 11, 2012 that Appellant had been touching her and she immediately got law enforcement involved. (R. 225-228).

Victim's twin sister also testified about inappropriate behavior between Appellant and Victim, including Appellant sharing a bed with Victim nightly and snuggling. (R. 269-270). She also testified Victim's behavior changed dramatically when the family moved to Camden. (R. 296). She also testified Appellant began carrying a gun in a holster on his belt when the family moved and that he had not done this with prior to living in Camden. (R. 298).

The family's next-door neighbor, Martha Penrod, also testified regarding the inappropriate behavior between Appellant and Victim. She recounted times she saw them behaving oddly together in the water and seeing them snuggling on a hammock. (R. 373). She further testified she had previously informed law enforcement twice that she was concerned Appellant was sleeping with Victim. (R. 387).

The State presented Dr. Susan Luberoff, who treated Victim and was admitted as an expert in child abuse pediatrics. (R. 269-285). Dr. Luberoff testified she examined Victim on August 17, 2012. (R. 272-273). Dr. Luberoff testified she noticed a notch on the seven o'clock position on Victim's hymen, which was consistent with penetrating trauma and finding of sexual abuse. (R. 277-285). The State also presented expert testimony on child abuse assessment from Dr. Allison Foster, a licensed clinical psychologist with extensive experience studying and treating child victims of sexual abuse, over Appellant's objections. (R. 396-451). Following deliberations, the jury convicted Appellant as indicted of second-degree criminal sexual conduct and incest.

ARGUMENT

I. The trial judge did not abuse her broad discretion by refusing to grant Appellant's continuance motion, where Appellant failed to present sufficient grounds that he was entitled to a continuance based on purported back injuries.

At the outset of his trial, Appellant, through defense counsel, moved for a continuance, citing chronic¹ back problems that had “escalated to the point that he need[ed] surgery.” (R. 9).

Defense counsel offered the following in support of Appellant's motion for a continuance:

He went to the doctor, Dr. Julie Taylor on March 3rd of 2016, Your Honor, regarding some of his pain. At that time she medicated him with hydrocodone, Your Honor, and ordered an MRI. His MRI was conducted last Wednesday which was March 8th of 2016 and I would like to make this a court exhibit. It indicates that he has five different things wrong with his back and lumbar spine.

(R. 9). Defense counsel also presented an email sent from an unknown party (Scott Kerns) to “Julie Taylor” with a carbon copy to another unknown party (Suzie Kerns) with the subject listed as “MRI lumbar spine.” (R. 9-10; 595). The only mention of Appellant's name is in a handwritten notation on the email, along with “DOS 3/8/16,” but it is unclear who added the notations to the email. As the trial judge correctly noted, the parties to this email were all unknown, not present in court, and no affidavits were presented in support of Appellant's medical condition. (R. 14-15). Defense counsel asserted Appellant had been “blacking out” due to the pain associated with his condition based on accounts from Appellant's aunt and girlfriend. (R. 10). Defense counsel asserted she was concerned Appellant would not be able to aid her in any way, particularly noting he would not be able to assist in her formulation of questions for cross-examination of the State's lay witnesses. (R. 10-11). Defense counsel acknowledged the

¹ Appellant, both at trial and now on appeal, characterized his back pain as “chronic.” However, the testimony presented at trial refutes this contention, as Victim and Appellant's former wife testified he was not previously in a wheelchair. (R. p. 102, 200). Furthermore, Appellant presented no documentation to show this was a longstanding or persistent problem. On the contrary, the prosecuting assistant solicitor noted Appellant's back problems seem to have first appeared on the eve of trial. (R. 13-14).

case had been pending for three years, but argued the delay was caused by the State's need to test additional evidence and coordinate the schedules of out-of-state witnesses. (R. 11).

The State objected to Appellant's continuance motion, noting while the case had been delayed due to the need for more testing at SLED and the coordination of out-of-state witnesses, both Appellant and the State had agreed to the trial's start date as a date certain in early January. (R. 12). Additionally, the State noted it had flown in multiple witnesses from out of state. (R. 12). Furthermore, the State highlighted Appellant did not have a history of back pain and this recent pain appeared to have materialized within the past week. (R. 12-13). Moreover, the State stressed Appellant did not provide anything from his medical providers indicating he needed emergency back surgery or that he was incapable of standing trial. (R. 13).

In response, the following exchange occurred between the trial judge and defense counsel:

THE COURT: Do you have any affidavits from a doctor?

MS. GOOD: No, I don't. No, I don't, you Honor.

THE COURT: Okay. All right. Anything other than this exhibit which, I mean, again it's an e-mail that has handwritten on it James Miller and it has a numerical list up to five that states things like this is an inflammatory response and can cause pain, facets, DJD, can cause pain. There is compression on a nerve root that's described as right-sided radiculopathy. Other than these five findings, is there anything that you have about his medical health that would prevent him from having a trial today?

MS. GOOD: No, ma'am, Your Honor. Just the fact that he's on these two medications and he's set to go see a neurosurgeon.

(R.14-15). Thereafter, the trial judge denied Appellant's continuance motion, noting she would accommodate Appellant's back issues as much as necessary with breaks. (R. 15).

At the start of the second day of trial, defense counsel again moved for a continuance citing Appellant's back issues. (R. 33). The trial judge inquired as to whether Appellant had an affidavit from a treating physician and defense counsel replied she did not. (R. 33). The trial judge again denied the continuance motion. (R. 33).

Following the State's case, defense counsel requested the trial judge order he be allowed to take his prescribed medications at the detention center, noting Appellant had not been allowed to take his medications since entering the detention center the day prior. (R. 482). The trial judge inquired to counsel what medications Appellant wished to take. (R. 482). At that point, Appellant interjected, "Oxycontin, Lortab, a steroid pill and two of the muscle swelling, makes the muscles go down or whatever. I don't know exactly what you call it. Something that reduces the swelling or whatever." (R. 482). When the trial judge expressed some concern over the multitude of medications, Appellant again interjected, "That's what they prescribed. I'm not taking any more than they're prescribing." (R. 482). The trial judge then asked to see Appellant's prescriptions. (R. 482). Upon her review, the trial judge noted the documentation for at least two of the prescriptions did not establish they were prescribed for Appellant. (R. 483). The trial judge noted the documentation clearly established the hydrocodone and the oxycontin were prescribed to Appellant and allowed the medication to be administered as prescribed, with Appellant taking one of the pills in the courtroom at 4:30 p.m. (R. 483-484).

On appeal, Appellant contends the trial judge abused her discretion by refusing to grant a continuance based on his purported back pain. In support of that contention, Appellant maintains he established good cause for a continuance, noting his physical, mental, and cognitive capacity was impaired by his back pain and the medication he was prescribed to treat it, thereby rendering him unable to assist counsel during his trial. Contrary to Appellant's contentions, Appellant failed to present the trial court with sufficient grounds to establish he could not assist with his

defense or proceed forward with his trial. Accordingly, the trial judge did not abuse her broad discretion in refusing to grant a continuance in Appellant's case. Appellant's convictions should be affirmed.

In South Carolina, trial judges are vested with broad discretion when faced with a decision as to whether to grant or deny a motion for a continuance, and such decisions are ordinarily left solely to the trial judge's discretion. State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005); see State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966) ("It is well settled in this jurisdiction, as well as in most others, that the trial court's refusal of a motion for continuance in a criminal case will not be disturbed in the absence of a clear and conclusive abuse of discretion."). On appeal, appellate courts typically show great deference to a trial judge in regard to such a decision. State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). As a result, the denial of a continuance motion will not be disturbed on appeal absent a clear, prejudicial abuse of discretion. State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010); see State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) ("The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of appellant."). Significantly, "reversals of refusal of continuance **are about as rare as the proverbial hens' teeth.**" Lytchfield, 230 S.C. at 409, 95 S.E.2d at 859 (emphasis added).

Here, Appellant has failed to establish sufficient grounds that he was entitled to a continuance directly before trial. The only evidence Appellant presented in support of his motion for a continuance was an email sent from an unknown person purportedly to Appellant's doctor, carbon copying another unknown person of the same last name, listing five back problems. The

email does not state Appellant suffers from these five conditions, and, in fact, the only reference to Appellant is that his name appears to have been hand written on a printout of the email after it was sent. Moreover, Appellant did not submit any medical records summarizing the findings of his MRI or any other medical records to support his allegedly debilitating condition. The trial court noted the lack of documentation when denying Appellant's continuance motion. (R. 14-15). In light of Appellant's lack of documentation, the fact that the trial was set for date certain and numerous witnesses had traveled from various other regions of the country to testify, the trial judge did not abuse her broad discretion by refusing to grant a continuance and delay the trial. See State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) ("The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice."); see also Morris v. Slappy, 461 U.S. 1, 11-12 (1983) ("Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." (citation omitted)).

Furthermore, the trial judge was in the best position to evaluate Appellant and determine whether he could proceed forward with trial. The trial judge, after personally observing Appellant both prior to trial and again after a full day of testimony, determined Appellant had the capacity to proceed forward and assist counsel with his defense. Now, Appellant is asking the

Court, based on a cold record, to overrule the trial judge's and substitute its discretion for hers. As the trial judge was able to personally observe and interact with Appellant and was in the best position to evaluate the credibility of Appellant and his claims of medical incapacity, her determination should not be overruled. See State v. Cochran, 369 S.C. 308, 317–18, 631 S.E.2d 294, 299–300 (Ct. App. 2006) (holding the trial judge determines the credibility of counsel and his or her arguments). See also Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) (“Deference is necessary because a reviewing court, which analyzes only the transcripts . . . is not as well positioned as the trial court is to make credibility determinations.”); Hernandez v. New York, 500 U.S. 352, 364–66 (1991) (holding that evaluation of a prosecutor's credibility “lies ‘peculiarly within a trial judge's province’”); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) (“The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.”); State v. Shuler, 344 S.C. 604, 615–16, 545 S.E.2d 805, 810–11 (2001) (“Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and ‘evaluation of the prosecutor's mind lies peculiarly within a trial judge's province.’”) (quoting Hernandez, 500 U.S. at 364–66); State v. Casey, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997) (“The trial court must often base its decision on credibility determinations, and its rulings on discrimination are accorded great deference on appeal.”).

In arguing the trial judge abused her discretion by refusing to grant a continuance, Appellant contends his case is similar to Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016), a capital post-conviction relief action where the South Carolina Supreme Court held the post-conviction relief court abused its discretion in denying Winkler's second motion for additional time. In Winkler, Winkler twice moved to amend the post-conviction relief court's scheduling

order to allow post-conviction relief counsel more time to obtain and analyze MRI and PET scans of his brain to investigate the possibility of brain damage. Id. at 647, 795 S.E.2d at 688. The court granted the first motion and extended the deadline for filing an amended application, but refused to extend all other deadlines, including the hearing date; the court denied Winkler's second motion entirely. Id. On review, the Supreme Court, relying on the Uniform Post-Conviction Procedure Act, specifically section 17-27-160(C), found the post-conviction relief court abused its discretion in denying Winkler's second motion for additional time because his counsel had established "good cause [was] shown to justify a continuance." Id. at 663, 795 S.E.2d at 697. See also S.C. Code Ann. § 17-27-160(C) ("Not later than thirty days after the filing of the state's return, the judge shall convene a status conference to schedule a hearing on the merits of the application for post-conviction relief. The hearing must be scheduled within one hundred eighty days from the date of the status conference, unless good cause is shown to justify a continuance.")

Despite Appellant's attempts to glean similarities between his case and Winkler's, the two cases are readily distinguishable. Winkler is a capital post-conviction relief action and Winkler's capital post-conviction relief counsel requested a second continuance to further investigate Winkler's purported brain damage after detailed documentation of their investigation into the issue. In the present case, a general sessions criminal trial arising out of Appellant's year-long sexual assault of his daughter, Appellant failed to provide any reliable documentation to support his purported medical condition—a back injury. Furthermore, the Winkler decision is clearly based upon the scheduling standards for capital post-conviction relief actions as set forth in Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-160(C). Thus, Appellant's reliance on Winkler and its "good cause" standard are misplaced.

Appellant also cites to State v. McMillan, 349 S.C. 17, 561 S.E.2d 602 (2002), to support his argument the trial judge abused her discretion in denying his continuance motion. In McMillan, following an initial mistrial, defense counsel moved for a continuance to allow for additional time to receive and review an already requested transcript of McMillan's first trial for impeachment purposes, particularly to impeach the only neutral witness who testified at McMillan's first trial. Id. The trial court denied McMillan's continuance motion. Id. On appellate review, the Supreme Court found, "**under the limited circumstances of this case** . . . the trial court abused its discretion in denying McMillan's motion for a continuance," citing the paramount importance of the credibility of the only neutral witness to testify in McMillan's case. Id. at 24, 561 S.E.2d at 605.

Again, Appellant's reliance on McMillan is misguided as it is readily distinguishable from the present case. In McMillan, the Supreme Court expressly states its holding is limited to the unique circumstances presented in McMillan's case. Appellant's case is not akin to McMillan and the reasons behind his continuance request differ vastly from McMillan's.

Appellant's case is also readily distinguishable from the other cases he cites in support of his argument. In State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989), the Supreme Court held the trial judge abused his discretion in failing to grant a continuance to allow Tanner time to examine blood, skin, and hair samples that were not provided to the defense until ten minutes prior to a pre-trial hearing, citing the possible exculpatory value of the samples. In Varn v. Green, 50 S.C. 403, 27 S.E. 862 (1897), the Supreme Court determined the trial judge abused its discretion in refusing to continue a civil trial to recover damages based on the incapacity of counsel due to illness. In State v. Williamson, 115 S.C. 315, 105 S.E.697 (1921), the Supreme Court held the trial judge abused his discretion in denying the defendant's continuance motion

based on his wife's late-stage pregnancy, where his wife was a material witness who had witnessed the murder. None of these cases support the proposition that a trial judge commits an abuse of discretion when she denies a continuance motion based on a purported physical condition of the defendant raised without proper evidentiary support.

For all the foregoing reasons, the trial judge did not abuse her exceptionally broad discretion by denying Appellant's continuance motion, as the ruling is supported by the record and not controlled by an error of law. See State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) ("The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion."); Lytchfield, 230 S.C. at 409, 95 S.E.2d at 859 ("[R]eversals of refusal of continuance **are about as rare as the proverbial hens' teeth.**") (emphasis added). Appellant's convictions should be affirmed.

- II. The trial judge did not abuse her broad discretion in permitting Dr. Allison Foster to testify as an expert in child abuse dynamics, where because the evidence and testimony presented during trial established Dr. Foster's testimony could assist the jury in understanding the issues raised in Appellant's case, Dr. Foster was personally qualified to testify as an expert, the subject matter of Dr. Foster's testimony met a threshold level of reliability in light of the her expert qualifications, and her testimony did not improperly bolster Victim's testimony. Furthermore, any error was harmless and had no impact on Appellant's case.**

During pre-trial motions, the State announced its intention to present expert testimony on child abuse assessment from Dr. Allison Foster, a licensed clinical psychologist with extensive experience studying and treating child victims of sexual abuse. (R. 16-17; 406-410). The State informed the trial court Dr. Foster had never met or otherwise interacted with Victim and was completely unfamiliar with her case. (R. 16-17). The State explained her testimony would be limited to the "different range of responses and factors that play into victims of sexual abuse." (R. 17). In response, Appellant requested a proffer before Dr. Foster be allowed to testify before the jury, citing concerns over a lack of peer review and a non-clinical setting. (R. 18). The trial judge, citing State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), noted Dr. Foster was not being called as a forensic interviewer and had not met Victim, but agreed a proffer would be necessary to determine if Dr. Foster could testify as an expert witness. (R. 19).

During Appellant's trial, the State proffered the testimony of Dr. Foster. (R. 405-421). Dr. Foster testified she is the chief psychologist at the Assessment and Resource Center (ARC) in Columbia, one of seventeen centers throughout South Carolina that treats sexually abused children. (R. 406). Dr. Foster testified she had worked at ARC in various capacities for the past twenty years and also had her own private practice focusing on forensic work with children and families. (R. 407). She testified she graduated with a Ph.D. in clinical psychology in 1996 and is a Department of Mental Health Assistant Professor at the University Of South Carolina School Of Medicine. (R. 407-408). Additionally, Dr. Foster testified she is a senior faculty member at a

forensic interview training course established fifteen years ago. (R. 408). She testified she also acts as faculty at national conferences on physical, sexual, and psychological child abuse, as well as teaches “law enforcement, child protective services, professionals, children’s advocacy centers, forensic interviewers, therapists and other professionals.” (R. 408). Dr. Foster testified she published a “monograph for the American Prosecutors Research Institute on child development,” a chapter on the assessment of mental disorders in custody evaluations, and was in pre-publishing stages on research relating to forensic interview techniques. (R. 408).

Dr. Foster testified she had previously been qualified as an expert in child abuse assessment or dynamics of child abuse. (R. 409). She testified this field is studied, and this type of testimony is needed, because it explains behavioral and developmental issues the average lay person would not otherwise understand, such as delayed disclosure. (R. 409-410). The State moved to qualify Dr. Foster as an expert in child abuse assessment and Appellant had no objection. (R. 410-411).

Dr. Foster’s proffer continued and she testified she has never met or interviewed Victim and has otherwise had no involvement in this case. (R. 411-412). She testified about different factors prevalent in child sexual abuse, including the perpetrator usually being a family member or adult acting as a parental figure. (R. 412). She testified:

There are dynamics that the victims experience that typically capture under describing their feeling of helplessness, their sense of entrapment and the fact that they need to accommodate the abuse because they’re really in a situation that they feel powerless to change. So there could be a period of accommodation followed sometimes by a process of disclosure that they often reach an age of maturation. In other words, they reach an age where they can consider maybe that they have options to tell or to get out of the situation, options that they perhaps couldn’t recognize when they were younger.

(R. 413). When asked about delayed disclosure statistics, Dr. Foster testified over a thirty-year time span, researchers have concluded two-thirds of child sexual abuse victims in the United States do not come forward until adulthood. (R. 413-415). She testified delayed disclosure had been studied, and she cited numerous researchers and studies on the topic spanning thirty or more years. (R. 415-417). On cross-examination, Dr. Foster testified the research surrounding delayed disclosure had been peer-reviewed. (R. 419)

Following the proffer, Appellant objected to Dr. Foster's testimony, arguing it was intended to bolster Victim's credibility. (R. 422). Furthermore, Appellant claimed Dr. Foster's testimony would be pertaining to child sexual abuse accommodation syndrome, which had not been substantiated or peer reviewed. (R. 423-424).

The State replied Dr. Foster's testimony would be limited to behavioral characteristics often displayed by victims of sexual abuse that have come forward. (R. 424). The State asserted this testimony was outside the scope and general knowledge of the jury. (R. 424). Furthermore, the State argued this type of testimony was based on more than thirty years of studies and research in a widely-recognized field. (R. 424). The State again noted Dr. Foster has not met or otherwise interacted with the Victim. (R. 425).

The trial judge ruled

All right. Well, I appreciate both of y'all making such good arguments on this. Obviously as you both are aware our Supreme Court has had a lot to say about experts in child abuse cases. You all clearly have researched this issue as I have and I am going to allow Dr. Foster to testify.

In State versus Chavis which is a 2015 case from the Supreme Court, our Supreme Court acknowledged that expert testimony in child sexual assault cases is permissible so long as it meets the requirements of State versus White.

As Ms. Cavanaugh pointed out, State versus White has two threshold determinations. The first, that the qualifications of the expert must be sufficient. Everybody here has already conceded to the sufficiency of Dr. Foster's qualifications.

And the second determination that has to be made is reliability. I find that child abuse assessment is reliable based on Dr. Foster's testimony, that these factors that she testified to are based on 30 years of research. Some of those are from a clinical setting. Many of those are from data analysis. There are journal articles that are peer reviewed that discuss this particular science and again our Supreme Court in State versus Chavis acknowledge[d] that expert testimony in a child assault case is permissible.

State versus Schumpert, that was back in 1993, also allowed expert testimony in a child sexual assault case.

And I also want to note a couple of other cases. State versus Weaverling, and I'm going to quote from that case. There the Court of Appeals stated, "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault."

In State versus White, that's a Supreme Court case that we have referred to for the factors to be considered, it's a 2009 case from our Supreme Court, the court stated, "Expert testimony on rape trauma may be more crucial in situations where children are victims."

And then, of course, our most recent case from the Supreme Court, State versus Anderson, which confirmed all those findings of White and Weaverling and again recognized there is an expertise in child abuse assessment but explained that to avoid improper bolstering the better practice is to not have a forensic interviewer who examined the alleged victim as an expert but rather to call an independent witness to testify to the characteristics of the victim.

Here that's exactly what the State is doing with Dr. Foster. She testified that she had no involvement with the investigation of this case and therefore I find her testimony to be admissible.

(R. 426-428). Thereafter, Dr. Foster was admitted as an expert in child abuse assessment before the jury and testified in a similar manner to her proffered testimony, including testimony

pertaining to delayed disclosure and the behavioral patterns commonly associated with juvenile victims of sexual abuse. (R. 429-451).

On appeal, Appellant contends the trial judge abused her discretion in allowing Dr. Foster to testify because “there was no evidence that Foster’s conclusions and claims were accurate or reliable.” Additionally, Appellant claims Dr. Foster’s testimony was intended to improperly bolster Victim’s testimony. However, Appellant’s claims are without merit, as Dr. Foster testified regarding the reliability of her field of study and the testimony did not improperly bolster Victim’s testimony. Accordingly, the trial judge did not abuse her broad discretion allowing Dr. Foster to testify as an expert in child abuse assessment. Appellant’s convictions should be affirmed.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge’s ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.”); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (“[D]eference is due to the trial court’s admission of the evidence.”).

Likewise, a decision as to whether to admit or exclude expert testimony rests within the trial judge’s sound discretion and will not be reversed on appeal absent a prejudicial abuse of that

discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) (“A trial court’s decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.”). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (“A trial court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.”).

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). “Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.” Id. at 445-46, 699 S.E.2d at 175. “The qualification of a witness as an expert falls largely within the discretion of the trial judge.” State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCORE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert's testimony is admissible where "it is relevant and based on some factual predicate in the record"). Before admitting expert testimony, the trial court must find (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCORE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

A witness can properly be qualified as an expert where "the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) ("The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony."). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the

jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, “[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness’s reference to the subject[,]” and “defects in the amount and quality of education and experience go to the weight of the expert’s testimony and not its admissibility.” Lee v. Suess, 318 S.C. 283, 285-86, 457 S.E.2d 344, 346 (1995).

In addition to ensuring the expert is qualified, the trial court must also ensure the testimony “meets a threshold level of reliability, regardless of whether it is scientific or nonscientific.” State v. Tapp, 387 S.C. 159, 165, 691 S.E.2d 165, 168 (Ct. App. 2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) (“The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.”). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

In sexual assault cases, expert testimony concerning common behavioral characteristics of sexual assault victims, and the range of responses to sexual assault encountered by experts, is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787, 794 (Ct. App. 1999).

Notably, this type of expert testimony assists the jury in understanding some of the aspects of victims' behavior, and provides insight into a sexually abused child's often strange demeanor. Id. See also State v. Anderson, 413 S.C. 212, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise [child abuse assessment]: this is the type of expert who can, for example testify to the behavioral characteristics of sex abuse victims.") (citing State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859, 862 (1993); Weaverling, and State v. White, 361 S.E. 407, 605 S.E.2d 540 (2004)) ; State v. Smith, 411 S.C. 161, 767 S.E.2d 212, 217-18 (Ct. App. 2015) (cert. denied June 17, 2015) ("When sexual abuse occurs, particularly if the victim is a child, the victim may not be able to immediately disclose the abuse for numerous reasons, including the victim's feelings of shame over what happened and the victim's fear of or intimidation by the perpetrator. We find this was an appropriately general explanation [by an expert witness] of the medical or scientific reasons a child might not immediately disclose sexual trauma.")

This Court most recently addressed the propriety of expert testimony pertaining to child abuse assessment or dynamics in State v. Jones, 417 S.C. 319, 790, S.E.2d 17 (Ct. App. 2016), reh'g denied (Aug. 18, 2016), a case strikingly analogous to the case at bar. In Jones, Jones appealed his convictions for one count of first-degree criminal sexual conduct (CSC) with a minor, one count of second-degree CSC with a minor, and two counts of lewd act upon a child stemming for his years-long sexual abuse of his live-in girlfriend's two minor daughters. Id. During his trial, the State presented an expert witness who testified regarding child sex abuse dynamics; this expert had never met with any of the witnesses in this case, including law enforcement, and her only knowledge of the case came from discussions with the solicitor's office one month prior to trial. Id. at 326, 790 S.E.2d at 21. On appeal, Jones argued the circuit

court abused its discretion by allowing the State's witness to testify as an expert in child sex abuse dynamics because the subject matter of her testimony was not beyond the ordinary knowledge of the jury, the State failed to prove the reliability of the substance of her testimony, she improperly bolstered the victims' credibility, and her testimony was highly prejudicial. *Id.* at 323, 790 S.E.2d at 19. This Court rejected these arguments, finding the trial court properly admitted the expert's testimony. *Id.* Regarding Jones's challenge to the reliability of an expert witness, including that the State failed to prove the reliability of the expert's testimony—specifically whether it was subject to peer review, this Court rejected Jones's arguments (similar to the arguments Appellant raises in this case), finding the expert testimony regarding her methods were published in articles in professional journals and other publications, subjected to peer review, uniformly accepted and recognized within the area of child sex abuse experts and professionals, and relied upon for sexual abuse counseling and treatment, that the abuse center where the witness worked applied the same principles she explained in her testimony, and that those types of principles were being used by counselors across the country. *Id.* at 331-33, 790 S.E.2d at 23-25.

As to the Jones's claims the expert testimony improperly bolstered the victims' and their mother's testimony, this Court rejected his arguments, finding:

[The expert] never commented on the credibility of Mother or the Victims, but rather offered admissible expert testimony regarding the general behavioral characteristics of child sex abuse victims and nonoffending caregivers, we find her testimony did not improperly bolster their testimonies. The fact that her testimony corroborated some of the Victims' reasons for delaying disclosure of the abuse, or Mother's failure to act when she became aware of it, does not mean [the expert]'s testimony improperly bolstered their accounts. See [*State v. Brown*, 411 S.C.332, 345, 768 S.E.2d 246, 253 (Ct. App. 2015)] (stating "[t]he fact that [the expert's] testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony

improperly bolstered their accounts”); see also Weaverling, 337 S.C. at 474, 523 S.E.2d at 794 (“An expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical question that is based on facts supported by the record.” (quoting State v. Evans, 316 S.C. 303, 311, 450 S.E.2d 47, 52 (1994))). [The expert] merely offered reasons why children might delay disclosing instances of sexual abuse, as well as why a nonoffending caregiver may have an unusual reaction upon learning of the abuse, to assist the trier of fact’s understanding of the complex dynamics of sexual abuse cases. Accordingly, we find the circuit court properly admitted [The expert]’s expert testimony because she did not improperly bolster the Victims’ testimony, or Mother’s testimony, at trial.

Jones, 417 S.C. at 335–36, 790 S.E.2d at 26.

In the present case, similar to Jones, Dr. Foster testified that her methods had been published in professional journals and publications and were subject to peer review, and were nationally-recognized. Furthermore, Dr. Foster’s testimony never commented on the credibility of Victim, but rather, was limited “admissible expert testimony regarding the general behavioral characteristics of child sex abuse victims.” The trial judge did not abuse her broad discretion in admitting Dr. Foster’s testimony at trial. Appellant’s convictions should be affirmed.

Moreover, assuming *arguendo* that the trial judge abused her broad discretion allowing the expert testimony of Dr. Foster, such error is harmless and had no impact on the jury’s verdict, particularly in light of the overwhelming evidence the State presented establishing Appellant was guilty of second-degree criminal sexual conduct and incest. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, (2013) (subjecting the erroneous qualification of a forensic interviewer to a harmless error analysis); see also Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (stating error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained); State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct.App.1996) (“In applying

the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt.” (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))). The key factor for determining whether a trial error constitutes reversible error is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (internal citations omitted). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). “Whether an error is harmless depends on the circumstances of the particular case.” Tapp, 398 S.C. at 389, 728 S.E.2d at 475 (quoting State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008)). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it ‘could not reasonably have affected the result of the trial.’” Id. (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

In the present case, the State presented substantial evidence of Appellant’s guilt independent from the testimony of Dr. Foster, including: Victim’s testimony that Appellant sexually assaulted her continuously over a thirteen-month period, Appellant’s various statements admitting to various levels of culpability, Victim’s mother and twin sister’s testimony about Appellant sleeping in Victim’s bed nightly, Dr. Luberoff’s medical findings on Victim’s hymen consistent with sexual abuse, and neighbor Martha Penrod’s testimony about the inappropriate physical contact she observed between Appellant and Victim. Even assuming the trial judge

abused her broad discretion in allowing Dr. Foster to testify as an expert in child abuse assessment, Appellant's conviction should not be reversed because it could not have affected the result of Appellant's trial based on the vast and overwhelming evidence of guilt presented. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment and conviction of the lower court.

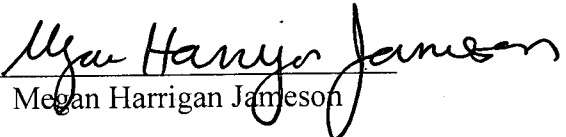
Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, South Carolina 29202
(803) 576-1800

BY: 
Megan Harrigan Jameson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 6, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2016-000642

THE STATE,

Respondent,

v.

JAMES WAYNE MILLER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, South Carolina 29202
(803) 576-1800

BY: Megan Harrigan Jameson

Megan Harrigan Jameson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 6, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2016-000642

RECEIVED

JUL 06 2017

SC Court of Appeals

THE STATE,

Respondent,

v.

JAMES WAYNE MILLER,

Appellant.

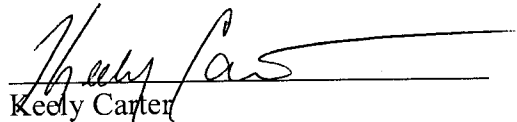
PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 6th day of July, 2017.


Keely Carter
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

**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.

James Wayne Miller, Appellant.

Appellate Case No. 2016-000642

Appeal From Kershaw County
Tanya A. Gee, Circuit Court Judge

Unpublished Opinion No. 2018-UP-121
Submitted February 1, 2018 – Filed March 21, 2018

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Megan Harrigan
Jameson, and Solicitor Daniel Edward Johnson, all of
Columbia, for Respondent.

PER CURIAM: James Wayne Miller appeals his convictions for second-degree criminal sexual conduct and incest, arguing the trial court erred by (1) denying his motion for a continuance and failing to order a competency examination to

determine if he was competent to stand trial and (2) permitting Dr. Allison Foster to testify as an expert in child abuse assessment because the subject matter of her testimony was unreliable and her testimony improperly bolstered the victim's credibility. We affirm.¹

1. We find the trial court did not abuse its discretion by denying Miller's motion for a continuance. *See State v. Yarborough*, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005) ("The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion."); *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) ("An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." (quoting *State v. Greer*, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010))); *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) ("There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."); *Yarborough*, 363 S.C. at 266, 609 S.E.2d at 595 ("Reversals of refusals of continuances 'are about as rare as the proverbial hens teeth.'" (quoting *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002))).

We also find the trial court did not abuse its discretion by failing to order a competency examination of Miller. *See* S.C. Code Ann. § 44-23-410(A) (2017) (providing a court shall order a competency evaluation whenever it "has reason to believe that a person on trial before [it], charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity"); *State v. Locklair*, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000) ("Despite the mandatory language of the statute requiring a [court] to order a competency examination if there is reason to believe that a person charged with a criminal offense is not fit to stand trial, ordering a competency examination is within the discretion of the trial [court] and a refusal to grant an examination will not be disturbed on appeal absent a clear showing of an abuse of discretion."); *State v. Burgess*, 356 S.C. 572, 575, 590 S.E.2d 42, 44 (Ct. App. 2003) ("Factors to be considered in determining whether further inquiry into a defendant's fitness to stand trial is warranted include evidence of his or her

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

irrational behavior, his or her demeanor at trial, and any prior medical opinion on his or her competence to stand trial.").

2. We find the trial court did not abuse its discretion by allowing Dr. Foster to testify as an expert witness in child abuse assessment. *See State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."); *State v. Strokes*, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."). First, based on Dr. Foster's testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony, we find the subject matter of Dr. Foster's testimony was reliable. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (stating before allowing a jury to hear expert testimony, the trial court must (1) "find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury," (2) "find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," and (3) "evaluate the substance of the testimony and determine whether it is reliable"); *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (providing to determine if scientific expert testimony is reliable, the trial court must consider "(1) the publications and peer review of the technique, (2) prior application of the method to the type of evidence involved in the case, (3) the quality control procedures used to ensure reliability, and (4) the consistency of the method with recognized scientific laws and procedures"); *White*, 382 S.C. at 274, 676 S.E.2d at 688 (stating in cases with nonscientific expert testimony, the factors applying to scientific testimony cannot be readily applied, and there is no formulaic approach to determine reliability); *State v. Jones*, 417 S.C. 319, 331, 790 S.E.2d 17, 23 (Ct. App. 2016), *cert. granted*, S.C. Sup. Ct. Order dated Aug. 22, 2017, ("[T]he testimony of child abuse assessment experts is nonscientific.").

Second, we find Dr. Foster's testimony did not improperly bolster the victim's credibility because she did not interview the victim prior to trial and did not comment on the victim's credibility during her testimony. *See State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible."); *id.* at 475, 523 S.E. 2d 794 ("Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault."); *id.* ("It assists the jury in understanding some of the aspects of the behavior of victims and

provides insight into the sexually abused child's often strange demeanor."); *State v. Brown*, 411 S.C. 332, 342, 768 S.E.2d 246, 251 (Ct. App. 2015) ("The general behavioral characteristics of child sex abuse victims are, therefore, more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony."); *State v. Kromah*, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013) ("[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter."); *State v. Barrett*, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016) ("[T]he practice of qualifying the forensic interviewer who conducted the alleged victim's forensic interview as an expert in child abuse assessment" has not been "prohibit[ed] outright."); *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert.").

AFFIRMED.

LOCKEMY, C.J., and WILLIAMS and KONDUROS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

APPELLANT

APPELLATE CASE NO 2016-000642

Appeal from Kershaw County

Tanya A. Gee, Circuit Court Judge

Opinion No. 2018-UP-121

PETITION FOR REHEARING

RECEIVED
APR 05 2018
SC Court of Appeals

On March 21, 2018, this Court affirmed Appellant's convictions in an unpublished *per curiam* opinion. State v. Miller, 2018-UP-121 (S.C. Ct. filed Mar. 21, 2018). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing in light of the points overlooked and/or misapprehended by this Court in arriving at its opinion. In addition to the points described below, Appellant further notes, as this Court did in rendering its opinion, that the South Carolina Supreme Court has granted certiorari in State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016), *cert. granted*, S.C. Sup. Ct. Order dated Aug. 22, 2017. Oral argument is scheduled for May 3, 2018, in Jones. The issues presented in Jones are very similar to the issues

raised on appeal by Appellant.¹ Thus, the South Carolina Supreme Court's ruling in Jones may impact any decision in the instant matter.

On appeal, Appellant challenged the trial court's erroneous decision to permit Allison Foster to testify as an expert in child abuse assessment where her testimony improperly bolstered the complaining witness's credibility. Additionally, Appellant challenged the trial court's erroneous decision to permit the expert qualification and testimony where there was insufficient evidence of the reliability of the subject matter of her testimony. This Court held "the trial court did not abuse its discretion by allow Dr. Foster to testify as an expert witness in child abuse assessment." Specifically, this Court found (1) "Dr. Foster's testimony did not improperly bolster the victim's credibility because she did not interview the victim prior to trial and did not comment on the victim's credibility during her testimony" and (2) "based on Dr. Foster's testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony," "the subject matter of Dr. Foster's testimony was reliable." This was error.

Foster's testimony

When called as a witness by the state during an *in camera* hearing, Allison Foster explained that she was a licensed clinical psychologist employed as the chief psychologist at the Assessment and Resource Center (ARC), a children's advocacy center, and as a psychologist in private practice. R. 406, ll. 10-19. Additionally, she served as "senior faculty for a five day forensic interview training course called Child First," which had been in existence for fifteen years. R. 408, ll. 4-6. According to Foster, she had "been conducting forensic interviews of

¹ The issues presented in Jones concern whether a trial judge properly qualified an individual as an expert in child abuse dynamics where the testimony improperly bolstered the complainants' credibility and whether the individual could have been qualified at all because there was insufficient evidence of reliability of the subject matter of her testimony and whether those matters had ever been subjected to peer review. These issues are substantially similar to the issue raised on appeal in the instant matter.

children who are suspected of being victims for 21 years.” R. 407, ll. 7-14. When asked if she developed training and programs for different agency personnel regarding suspected child abuse, Foster responded that she trained “in national conferences,” developed “the curriculum for the Child First forensic interview training course,” and taught others, including other forensic interviewers, regarding the techniques. R. 408, ll. 7-15. Regarding her publications, Foster explained she had “published a monograph for the American Prosecutors Research Institute on child development,” published “a book chapter” “about the assessment of mental disorders in custody evaluations,” and had “research in preparation on a couple of matters involving forensic interview techniques,” which were not published. R. 408, ll. 16-25.

Foster claimed the “subject” of her “field” of study was “child abuse assessment or dynamics of child abuse.” R. 409, ll. 11-14. She further claimed the field is studied because “there are a lot of factors that are not necessarily a lay person, within a lay person’s understanding and also because it’s important for us to understand children’s development, linguistics, how memory works, how processes like coercion, parent/child relationships or offender/child relationships, how those play into the dynamics of abuse.” R. 409, ll. 15-23. Foster claimed “there are a lot of behavioral issues as well as developmental issues that are researched in the behavioral science literature to help us understand the best way to evaluate these situations as well as the best way to explain to lay people dynamics that they might not otherwise understand.” R. 409, l. 23 – R. 410, l. 3.

An example of “dynamics” included “things like the fact that delay in reporting by victims is a very robust finding in the research.” R. 410, ll. 4-7. Foster claimed, “We know behaviorally that the majority of substantiated cases of child sexual abuse include a very large delay even into adulthood before victims often report childhood sexual abuse.” R. 410, ll. 7-10.

Such was “not necessarily logical to somebody who is not trained in the field,” she asserted. R. 410, ll. 10-12. Other examples of the “dynamics” were “[s]ome of the ways children accommodate abuse in situations they can’t control,” and “recantation,” which “jurors might not otherwise understand if they didn’t have the benefit of education.” R. 410, ll. 15-18. Finally, “secrecy” was a dynamic. R. 410, ll. 19-20.

Continuing with the proffer of testimony, Foster testified regarding what she claimed were some of the behavioral characteristics not known to the average individual, including that “a lot of child sexual abuse occurs at the hands of a family member, an adult who is in a role of an authority figure, a parental figure or step parent figure.” R. 412, ll. 8-20. In those situations,

[T]he abuse tends to be chronic meaning that it occurs over a sustained period of time and so for that relationship to be sustained without the offending behavior being detected there are certain dynamics that are known to occur in those cases along the lines of how an offender exploits his authority, the sense of love, dependency, the complexities of that kind of relationship and how they can manipulate that to maintain a victim’s secrecy and cooperation or compliance.

R. 412, l. 20 – R. 413, l. 3. She continued to explain they “dynamics that the victims experience,” typically described as “helplessness,” “entrapment and the fact that they need to accommodate the abuse because they’re really in a situation that they feel powerless to change.” R. 413, ll. 4-8.

Next, Foster delved into “about 30 years of ... retrospective research.” R. 413, ll. 19-21. She described this as “where researchers have looked back over a 30 year time span of studies that conclude that two-thirds of child sexual abuse victims in America don’t come to anybody’s attention until adulthood.” R. 413, ll. 21-24. She claimed these “statistics [] come from cases that have been well substantiated.” R. 414, ll. 3-12. This led her to draw the conclusion that “delayed disclosure is a common aspect to the experience of child sexual abuse.” R. 414, ll. 1-2. When questioned about the “reliability of the behavioral science” on which she was basing her

testimony, she claimed there were “a lot of studies,” but she mentioned only “a meta analytic study that was published a few years ago by Steven Ceci, Carl London, Maggie Roth,” which involved the review of “research spanning this 30 plus year time frame” with any specificity. R. 415, ll. 9-22. She then shifted to discuss the work of Roland Summit on “the phenomenon of chronic sexual abuse and delayed disclosure.” R. 416, ll. 6-8. In this publication, Summit explained “the manner in which children become trapped first by a stage of secrecy ... they are manipulated, lured, threatened into believing they need to keep the behavior secret.” R. 416, ll. 8-12. According to Foster, the child enters a “stage of helplessness,” which causes the child to “live in some period of time that’s described as a state of entrapment and accommodation.” R. 416, ll. 18-19. During this stage, the child is “still going along with the business of life,” including school, visiting friends, participating in activities, doing chores, and otherwise acting normally. R. 416, ll. 19-25.

The “dynamics and the behavioral characteristics” described by Foster were not used as “a diagnostic tool,” but were used to “describe phenomenon that could otherwise seem illogical or counter intuitive.” R. 417, ll. 12-18. She posited that understanding “some of those behavioral dynamics that have to do with manipulation, coercion, the different sort of power dynamics that are in relationships, it can assist the trier of fact in understanding the phenomenon.” R. 417, l. 22 – R. 418, l. 1.

On cross-examination, Foster revealed that the five factors identified in the Summit article comprising child sexual abuse accommodation syndrome were secrecy, entrapment, helplessness, delayed disclosure, and potential recantation. R. 418, ll. 13-21. According to Foster, studies following Summit’s article included those conducted in a clinical setting, but more involved “data analysis from forensic cases.” R. 419, ll. 1-6. When asked if the studies

she referenced were “peer reviewed,” Foster responded they were “absolutely” “peer reviewed” because “[a]nything that’s published in a journal” is peer reviewed and she would not cite research unless it were the product of peer review and had been published in a journal or a book that would be considered a treatise edited by experts in their field. R. 419, ll. 13-23.

Thereafter, the solicitor called Foster as a witness in front of the jury. R. 430, ll. 17-18. Much of Foster’s testimony mirrored her *in camera* testimony. In describing “child abuse assessment,” Foster told the jurors that the field “encompasses a lot of things from understanding children and their developmental states [to] understanding how abuse can affect children at different developmental stages.” R. 434, ll. 17-22. The “field” also included how children “can remember and relate information.” R. 434, ll. 22-23. According to Foster, the “field” also encompassed the “[p]sychological effects of abuse depending on the relationship between the perpetrator and the victim and the age of the victim.” R. 434, ll. 23-25. Related to all of this was “the process of how to gather information from children and understanding the process of disclosure. How children tell and when they tell and that sort of thing.” R. 435, ll. 2-5.

She told the jurors about delayed disclosure and that according to the research, “two-thirds of [people known to have been victimized as children] won’t come to anyone’s attention until adulthood.” R. 435, l. 20 – R. 436, l. 6; R. 439, ll. 7-10. Related to delayed disclosure, Foster explained stages of disclosure, including denial, tentative, and active. R. 439, l. 20 – R. 440, l. 14. She told the jurors about “entrapment” and “accommodation” during child abuse. R. 441, ll. 5-24. She also told the jurors about children of abuse entering a state of helplessness. R. 442, ll. 1-20. Those stages, she explained, were called “child sexual abuse accommodation dynamics.” R. 442, ll. 16-18.

Foster then told the jurors about the most common situation for child sexual abuse was for it to occur in the home. R. 442, l. 21 – R. 443, l. 2. Regarding whether all children in the home would be abused, Foster claimed that if the abuser were a parent, then the abuser would chose the child over whom the parent had a particular emotional and/or behavioral relationship. R. 443, ll. 3-17.

Importantly, Foster told the jury that her testimony was based upon the research in the “field” and from her experience as a psychologist who had “evaluated about 2000 children suspected of sexual abuse.” R. 446, ll. 2-8.

Improper bolstering

In ruling upon the issue concerning improper bolstering, this Court relied solely upon two points. The first was that Foster did not interview the complaining witness prior to trial. The second was that Foster did not comment directly on the credibility of the complaining witness during her testimony. These points simply cannot support this Court’s holding.

Starting in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the South Carolina Supreme Court proclaimed: “[W]e state today that we can envision no circumstance where [a forensic interviewer’s] qualification as an expert at trial would be appropriate.” Id. at 357 n.5, 737 S.E.2d at 499 n.5. In State v. Douglas, 380 S.C. 499, 502-503, 671 S.E.2d 606, 608 (2009), the South Carolina Supreme Court found the trial court erred in qualifying a forensic interviewer as an expert because the testimony simply did not require expert qualification. The forensic interviewer’s testimony concerned only “her personal observations and experiences, and her interview with the Victim in th[e] case.” Id.

“It is undeniable that the primary purpose for calling a ‘forensic interviewer’ as a witness is to lend credibility to the victim’s allegations. When this witness is qualified as an expert the

impermissible harm is compounded.” Kromah, 401 S.C. at 358, 737 S.E.2d at 499. “[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others.” State v. Portillo, 408 S.C. 66, 71, 757 S.E.2d 721, 724 (Ct. App. 2014)(quoting Kromah, 401 S.C. 340 at 358, 737 S.E.2d at 499). “The assessment of witness credibility is within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Therefore, it is improper for a witness to bolster the testimony or credibility of another witness. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010)(finding a “forensic interviewer’s . . . opinion testimony improperly bolstered the victim’s credibility”).

In McKerley, the trial court allowed a witness to testify as an expert in “forensic interviewing and child abuse assessment.” 397 S.C at 463, 725 S.E.2d at 141. The witness had interviewed the alleged victim twice and concluded that both interviews were “compelling” for sexual abuse. Further, the witness determined that the alleged victim’s statements were consistent with other information in the case. Id. at 466, 725 S.E.2d at 142. The Supreme Court determined that there was no other way to interpret the language used in the expert’s testimony other than to mean she believed the victim was being truthful. The Court further held, “In light of [the expert’s] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot say the erroneous admission of [the expert’s] testimony did not contribute to the jury’s decision,” therefore finding harmful error. Id. at 467, 725 S.E.2d at 143.

The Supreme Court has also held that it is improper “for an expert to comment on the veracity of a child’s accusations of sexual abuse.” State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Jennings involved a challenge to the testimony of Shauna Galloway-Williams. Galloway-Williams interviewed the three alleged victims of sexual abuse and issued separate

reports for each child that were admitted into evidence. She concluded in her reports that each child provided a “compelling” disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received. 394 S.C. at 476-481, 716 S.E.2d at 92-95. The Court held the conclusions in Galloway-Williams’ reports improperly vouched for the children’s veracity and thus the trial court abused its discretion by admitting the reports into evidence. It further held the error was not harmless because there was no physical evidence presented at trial and the children’s credibility was the sole issue in the case. *Id.* at 94-95, 716 S.E.2d at 480.

Recently, in *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015), the South Carolina Supreme Court found the testimony of one of the state’s purported “expert” witnesses that the child should not be allowed around Chavis anymore, for any reason, could only be interpreted as the “expert” believing the victim’s claim that Chavis sexually abused her. *Id.* at 109, 771 S.E.2d at 340.

The solicitor’s closing argument exemplified how Foster’s testimony improperly bolstered Complainant’s testimony and allegations. More specifically, the solicitor used the testimony from Foster to bolster Complainant’s credibility and argue to the jury that she should be believed because her conduct mirrored the conduct of those individuals who suffered child sexual abuse, as described by Foster.

According to the solicitor, Appellant had selected Complainant because of his close relationship with her, “[j]ust like Dr. Foster said.” R. 504, ll. 17-21. To explain why Complainant did not tell about the alleged abuse earlier, the solicitor implored the jurors to rely on Foster’s explanation “that the large majority of people, of children do disclose a lot later.... Two-thirds of the population that has been studied relating to sexual abuse child victims come forward later. It is not an uncommon situation.” R. 510, ll. 2-12. She then talked to the jury

about “latent disclosure” and partial disclosures. R. 510, ll. 13-23. To explain why Complainant did not “tell the entire story” initially, the solicitor relied upon “the research, the studies” and told the jurors to rely on their “common sense and knowledge of human nature” to determine that “the very first time she’s not going to sit there and give it all out there.” R. 511, ll. 9-19. According to the solicitor, “[t]he first day she told what she needed to tell her. Not unusual. Dr. Foster’s been in this field for 30 years. Not unusual.” R. 511, ll. 20-23.

Next, the solicitor reminded the jury of “the factors that play into that delayed disclosure” as testified to by Foster. R. 511, ll. 24-25. Specifically, the solicitor talked about “helplessness and accommodation and the secrecy.” R. 511, l. 25 – R. 512, l. 1.

Helplessness. The family is all she had. ... [T]hey have had very few friends. They have moved over 20 times. They’re home schooled. They’re in that house. ... So when he threatens her, I’m gonna ruin you. You’re gonna ruin this family. You’re gonna have no one, why wouldn’t she believe that? That’s all she’s ever known is her family.

Accommodation. Dr. Foster ... talked about accommodation. What that means is that after the first couple of times that it happened, even if it’s against your will, even if you fight it off, but once it happens, you feel like it, she feels like it’s something that she just has to succumb to essentially. Blames herself. That is a factor that also comes into play with child sexual abuse of victims.

R. 512, ll. 2-23. Continuing to rely upon Foster’s testimony to bolster Complainant’s testimony, the solicitor noted that Foster “also testified ... that just because as far as who the particular perpetrator chooses, which child the perpetrator chooses has a lot to do with the relationship.” R. 512, l. 24 – R. 513, l. 2; see also R. 522, ll. 8-19.

The solicitor boldly told the jurors that Foster did not interview Complainant or watch the forensic interviews, and yet she “corroborate[d] everything” that was presented by the state. R. 513, ll. 2-6. The solicitor described Foster’s testimony concerning memory as corroborative of Complainant, especially in light of Complainant’s repeated testimony regarding events, not just

allegations of sexual abuse, that she could not remember. According to the solicitor, “Dr. Foster testified about the fact that the first memory is often very clear and [Complainant] has a very clear memory when that first time it happened.” R. 514, ll. 23-25. The solicitor offered nothing more than Foster’s testimony to explain away the inexplicable – why Complainant could not remember simple things like what she liked to hunt or why her testimony contrasted with that of others concerning whether she wore bikinis.

The admission of this testimony in this case, where the jury’s decision depended upon Complainant’s credibility, was prejudicial error that requires reversal. The qualification of Foster as an “expert” in “child abuse assessment” was erroneous and prejudicial to Appellant. “The label of expert should be jealously guarded by the court and never loosely bandied about.” Kromah, 401 S.C. at 357, 737 S.E.2d at 499. As our Supreme Court noted in Kromah, “although an expert’s testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.” Id. In light of the prosecutor’s capitalization of the testimony during her closing argument to argue the jury should believe Complainant due to the testimony of an “expert” witness who had been doing this type of work for thirty years and described Complainant’s situation without having any knowledge of Complainant, this Court must find the error was not harmless. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)(“Improper corroboration testimony that is *merely cumulative to the victim’s testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.”)(emphasis in original).

Thus, while it is true that Foster did not interview Complainant prior to trial and Foster did not comment directly on the credibility of Complainant, Foster’s testimony improperly

bolstered Complainant's credibility. The image painted by Foster of an individual suffering sexual abuse was a mirror image of what Complainant alleged and the solicitor capitalized on the testimony to convince the jury that Complainant was telling the truth. Foster's failure to interview Complainant and her failure to comment directly on Complainant's credibility did not inhibit Foster's testimony from being a comment on Complainant's veracity. Simply requiring the purported "expert" to not interview the complaining witness prior to trial is not a panacea for the afflictions of permitting opinion testimony from individuals who are essentially forensic interviewers.

Lack of reliability

In ruling upon this issue, this Court found the subject matter of Foster's testimony was reliable based on her "testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony." This holding is not supported by the law.

The South Carolina Rules of Evidence and case law govern the admission and scope of expert testimony. Pursuant to the Rule, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court specified the following three-prong test for expert testimony:

[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify

as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted) (emphasis added). “All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration.” State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

Recently, in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), the South Carolina Supreme Court held that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) should apply in qualifying child abuse assessment experts because their testimony is non-scientific. “Under White, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert's testimony will be reliable.” Id. (citing White, 382 S.C. at 273, 676 S.E.2d at 688). The Court found that the trial court improperly qualified the child abuse assessment expert in Chavis because there was “simply no evidence that her conclusions or impressions taken from [the] interviews were accurate.” Id. Although the Court established “no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence,” the Court explained “evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.” Id. Put simply, the “expert” witness should not have been qualified as an expert because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAC protocol. Id. at 108, 771 S.E.2d at 339.

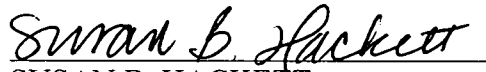
This Court found the subject matter of Foster's testimony was reliable based on her "testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony." However, this was legal error because none of those factors indicated Foster's conclusions or impressions were correct. Like the "expert" in Chavis, there was no evidence that Foster's conclusions and claims were accurate or reliable. Foster admitted that her testimony was the product of what she had read and what she had learned from her experience as a psychologist who had "evaluated about 2000 children suspected of sexual abuse." R. 446, ll. 2-8. The state presented no evidence regarding the methodologies employed by Foster in arriving at the conclusion she drew from her reading or from her own practice. In light of the dearth of evidence of the reliability of Foster's conclusions and statements, the court failed to properly execute its gatekeeping function by qualifying her as an expert in "the dynamics of child sexual abuse."

In her closing argument, the solicitor explained that the state had presented "several expert witnesses" during the trial. R. 508, l. 7. Then, the solicitor described the testimony by an "expert in the field of serology." R. 508, ll. 19-21. Next, the solicitor discussed the testimony of "child abuse pediatric specialist." R. 509, ll. 18-19. Finally, the solicitor delved into the testimony of Foster, an "expert" placed into the same category as a serologist and a physician by the solicitor. Thereafter, the solicitor went through Foster's testimony in painstaking detail to arrive at her ultimate coup de grâce – "Foster didn't interview [Complainant]. She didn't review the forensic interviews. She testified as what's called a blind expert. She's talking about her knowledge of the field. But she corroborates everything that everyone has told you." R. 513, ll. 2-6.

In conclusion, Appellant respectfully requests hearing concerning the second issue presented in his brief in light of the significant points overlooked and/or misapprehended by this

Court as well as the potential impact the Supreme Court's opinion in State v. Jones may have on Appellant's case.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Susan B. Hackett", is written over a horizontal line.

SUSAN B. HACKETT

Appellate Defender

This 5th day of April, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
Tanya A. Gee, Circuit Court Judge

RECEIVED
APR 05 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

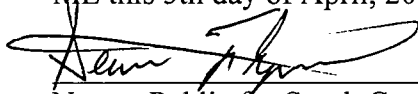
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and James Wayne Miller, #367454, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of April, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of April, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

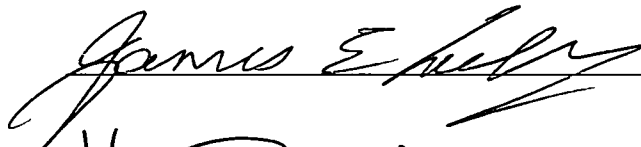
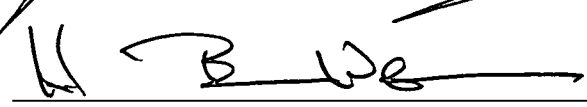
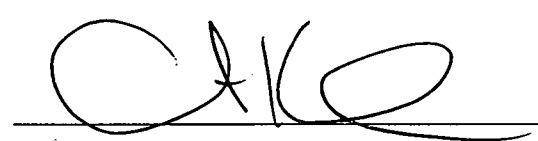
v.

James Wayne Miller, Appellant.

Appellate Case No. 2016-000642

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
 Susan Barber Hackett, Esquire
 Megan Harrigan Jameson, Esquire
 Daniel Edward Johnson, Esquire
 Janet C. Hasty

FILED

May 24, 2018

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Kershaw County
Tanya A. Gee, Circuit Court Judge

RECEIVED

JUL 05 2018

S.C. SUPREME COURT
Opinion No. 2018-UP-121 (S.C. Ct. App. filed Mar. 21, 2018)

2012-GS-28-1381; -1382

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

PETITIONER

APPELLATE CASE NO 2018-001178

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

INDEX	i
CERTIFICATE OF COUNSEL	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE.....	3
ARGUMENT	
The Court of Appeals erred by concluding the testimony provided by Allison Foster in the area of child abuse assessment was reliable.....	9
CONCLUSION.....	23

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 24, 2018. App. 21.

QUESTION PRESENTED

Did the Court of Appeals err by concluding the testimony provided by Allison Foster in the area of child abuse assessment was reliable?

STATEMENT OF THE CASE

Petitioner met his future wife, Tammy, in third grade. R. 198, ll. 1-2. At the age of seventeen, Tammy gave birth to twins, the couple's first children. R. 198, ll. 10-12. The pair went on to have three more children. R. 197, ll. 6-14.¹ Petitioner worked construction, providing for his growing family. R. 102, ll. 1-2; R. 200, ll. 8-12. Tammy stayed home with the children, and even homeschooled them for the most part. R. 101, ll. 1-21; R. 200, ll. 17-25.

The couple's twins were girls – Complainant and Breana. Breana was “[v]ery passive, quiet. A follower.” R. 203, ll. 7-9. She enjoyed “[d]rawing and painting” and being inside with her mother. R. 102, ll. 16-18; R. 203, ll. 14-16. Complainant preferred to be “outside,” “[c]limbing trees, skinning foxes.” R. 102, ll. 18-19; R. 203, ll. 20-24. Petitioner taught Complainant how to build things – “cut tile, cut wood, measure and put down laminate flooring.” R. 104, ll. 2-8; R. 204, ll. 1-6.

Around July 4, 2011, Petitioner and his family visited friends in Camden, and as a result of the visit, they decided to move from Summerville to Camden. R. 104, ll. 21-24; R. 204, ll. 11-20. The family found a house on the lake in which they could move, but it needed a little work. R. 205, ll. 1-13. Tammy and all the children except Complainant returned to Summerville to pack for the move. Petitioner and Complainant stayed in Camden in a camper preparing the house for the family's eventual return. R. 106, ll. 7-12; R. 205, ll. 14-19. Within two weeks, the entire family was re-united in the house on the lake in Camden. R. 208, ll. 3-6.

When the family first moved in, Complainant and Breana, who were sixteen-years old at the time, “shared the big room” upstairs, the youngest daughter had her own room, and the two boys shared a third bedroom. R. 208, ll. 7-12; R. 210, ll. 13-14; R. 116, ll. 11-16. However, this

¹ In 2006, Tammy's father went to prison when it was learned he had been sexually abusing one of the couple's sons.

arrangement did not last long because the twins could not get along. Eventually, Complainant got her own room, while Breana shared with her younger sister. R. 118, ll. 1-21; R. 208, ll. 13-21.

The allegations

On August 11, 2012, the family planned to visit their friends, the Harrelsons. R. 224, ll. 22-25. However, Petitioner and Complainant had an argument, and Petitioner said Complainant was not permitted to go to the Harrelsons' home. R. 226, ll. 5-13. Upset, Complainant walked to the end of the family's dock over the lake. R. 227, ll. 2-6. Tammy went to talk to Complainant who was crying. R. 227, ll. 7-25. When Tammy reached Complainant, Tammy asked, "[I]s he touching you?" R. 228, l. 1. Complainant responded, "[E]veryday." R. 228, l. 2. Tammy then called her sister, who called the police to report the allegations. R. 228, ll. 10-12.

Within two months of Petitioner's arrest, Tammy had sold everything the family owned and moved to Pensacola, Florida. R. 242, ll. 15-23. Two months later, she was dating Jason Price, the man who would eventually become her second husband. R. 266, ll. 12-17. Six months later, Tammy sent Breanna and two of the younger children to live with Tammy's sister. R. 244, ll. 16-21. In 2013, Price moved in with Tammy and Complainant. R. 267, ll. 1-2. Complainant continued living with Tammy until 2014, when she moved in with her boyfriend. R. 244, ll. 23-25; R. 245, ll. 4-10.

Eventually, Breana got married and moved to California. R. 246, ll. 5-9. Complainant married too, and moved to Virginia. R. 246, ll. 5-9; R. 97, ll. 16-25. Tammy filed for a divorce from Petitioner in 2014, and the pair was divorced in 2015. R. 266, ll. 4-11. Tammy married Price in June of 2015. R. 197, ll. 15-19.

The trial

A Kershaw County grand jury indicted Petitioner for criminal sexual conduct in the second degree (2012-GS-28-1381) and incest (2012-GS-28-1382).² R. 602-603; R. 605-606. The state, represented by Kathryn Cavanaugh and Karlen Senn, called the case for trial on March 14, 2016, before the Honorable Tanya A. Gee and a jury. R. 1. Anna Good represented Petitioner. R. 1.

At the trial, Complainant claimed Petitioner first sexually abused her while she and Complainant were staying in a camper in Camden while the rest of the family was in Summerville preparing for the move. She claimed she woke up “to [Petitioner] performing oral sex on” her. R. 108, ll. 12-13. After pushing Petitioner away, she ran to a bathroom. R. 108, ll. 17-20. She claimed Petitioner apologized so she exited the bathroom and went to the couch. R. 109, ll. 10-23. However, at some point, she returned to bed and fell asleep. R. 110, ll. 1-6. Nevertheless, according to Complainant, she woke up again – this time to find Petitioner on top of her trying to have sex with her. R. 110, ll. 6-7. According to Complainant, Petitioner had sex with her, despite her protests. R. 110, ll. 17-23.

Complainant alleged the sexual abuse continued, even when the family moved into the house on the lake. R. 113, ll. 5-7; R. 114, ll. 11-15; R. 116, ll. 9-10. According to Complainant, Petitioner had sex with her even while she was sharing a room with her twin sister, Breana. R. 117, ll. 9-19. Complainant alleged that when she got her own room, Petitioner slept in her room

² According to the face of the indictments, the grand jury convened on October 17, 2012. R. 602-603; R. 605-606. However, the signature lines indicating the grand jurors true-billed the indictments were dated March 9, 2016. R. 602-603; R. 605-606. Further, the indictments were filed on March 9, 2016, with the Kershaw County Clerk of Court. R. 602-603; R. 605-606. Although the indictments were marked “Amended,” there was nothing in the record to indicate why the indictments were amended or whether such an amendment required re-submission to a grand jury. Nevertheless, there were no objections made at the trial regarding the indictments or the grand jury process.

every night. R. 121, ll. 19-21. Incredibly, according to Complainant, Petitioner raped her in the houses where the two worked on remodeling projects, including when other people were present. R. 125, ll. 11-14; R. 126, ll. 2-21; R. 127, ll. 21-25. Essentially, Complainant alleged Petitioner had sex with her whenever the two were together and even the slightest opportunity presented itself. R. 132, ll. 1-5; R. 133, ll. 6-14; R. 136, ll. 7-12; R. 142, ll. 1-3; R. 142, ll. 15-23. Despite what Complainant alleged were very open and easily detectable acts of sexual abuse, no one in Complainant's family knew of the abuse or observed a sex act between the two. R. 124, ll. 21-23.

The jury began its deliberations on March 17, 2016, at 1:50 p.m. R. 558, ll. 9-11. Within an hour, the jury sent a note requesting transcripts of the testimony from the Complainant, Complainant's mother, Complainant's twin sister, from three police officers, a doctor, and the state's closing argument. R. 559, ll. 3-11; R. 598. The judge informed the jurors that transcripts could not be provided, but that testimony could be re-played. R. 560, l. 22 – R. 561, l. 3. She permitted the jury to discuss the request further, but did provide a computer so the jurors could watch videos as requested. R. 561, l. 24 – R. 562, l. 10. Approximately two hours later, the jury requested to hear the testimony from the Complainant, her mother, and three police officers, along with the law on reasonable doubt. R. 563, ll. 2-13; R. 599. The judge re-instructed the jury on reasonable doubt. R. 565, ll. 6-22. The court reporter began playing the testimony for the jurors at 5:55 p.m. R. 567, ll. 16-20. At 7 p.m., the judge ordered a break for the jury to have dinner. R. 567, ll. 21-25. At 8 p.m., the court reporter resumed playing the testimony. R. 568, ll. 7-9.

During this time, a juror asked what would happen if the jury could not reach a unanimous verdict. R. 568, ll. 12-21; R. 600. The judge instructed the jury "if it's not going to

be an all guilty or an all not guilty, if you can't come to a unanimous verdict, then I would have to declare a mistrial. When I declare a mistrial, nobody wins." R. 568, ll. 22-25. She further explained the case would have to be "retried" in front of twelve other people selected from the same county who would receive the same evidence. R. 568, l. 25 – R. 569, l. 5. The judge expressed her "hope" that the jury would "continue to deliberate" and instructed them "to keep an open mind, to listen to each other and to continue to try." R. 569, ll. 7-16. She told the jury to "try" their "hardest to come to a unanimous verdict because ... nobody wins when there's a mistrial." R. 570, ll. 17-19. At midnight, the judge allowed the jury to go home for the evening and reconvene the following day at noon. R. 571, ll. 5-9.

The following day, the jury requested to hear testimony from the doctor who examined Complainant, a hard copy of the definitions of the charges, and instructions on how to interpret the law. R. 572, l. 17 – R. 574, l. 6; R. 600. The judge provided the instructions to the jury in written form and then allowed the jury to hear the requested testimony. R. 578, l. 16 – R. 581, l. 6. Finally, at 3:45 p.m., the jury requested the definitions of cunnilingus and fellatio, which the judge provided. R. 581, l. 19 – R. 582, l. 3; R. 601. The jury returned with a verdict at 4:42 p.m. R. 582, ll. 19-20.

The jury found Petitioner guilty as charged. R. 583, ll. 7-19. After the jury returned its verdict, but prior to imposing the sentence, the judge noted that she thought her "sentence speaks for itself." R. 593, ll. 16-17. However, there was "one thing" she thought was "important" to say to Complainant: "I believe you. I believe you." R. 593, ll. 17-19. Thereafter, on March 18, 2016, the judge sentenced Petitioner to twenty years imprisonment for criminal sexual conduct and ten years imprisonment for incest. R. 593, l. 20 – R. 594, l. 1; R. 604; R. 607. She ordered the sentences to be served consecutively. R. 594, ll. 1-2; R. 604; R. 607.

The appeal

On March 24, 2016, Petitioner filed and served his notice of appeal. On appeal, Petitioner challenged the trial court's erroneous decision to permit Allison Foster to testify as an expert where there was insufficient evidence of the reliability of the subject matter of her testimony. On March 21, 2018, the Court of Appeals affirmed Petitioner's convictions in an unpublished *per curiam* opinion. State v. Miller, 2018-UP-121 (S.C. Ct. App. filed Mar. 21, 2018); App. 1-4. The court held "the trial court did not abuse its discretion by allowing Dr. Foster to testify as an expert witness in child abuse assessment." Specifically, the court found that "based on Dr. Foster's testimony regarding the field of child abuse assessment, her work in the field, and the sources of her testimony," "the subject matter of Dr. Foster's testimony was reliable." App. 1-4. On April 5, 2018, Petitioner filed a petition for rehearing. App. 5-20. On May 24, 2018, the Court of Appeals denied the petition. App. 21.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

The Court of Appeals erred by concluding the testimony provided by Allison Foster in the area of child abuse assessment was reliable.

Reasons to grant certiorari

In State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015), this Court held that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) should apply in qualifying child abuse assessment experts because their testimony is non-scientific. “Under White, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert’s testimony will be reliable.” Chavis, 412 S.C. at 106, 771 S.E.2d at 339 (2015). At the time, this Court acknowledged “no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence.” Id.

This Court should grant certiorari in this case to adopt an evidentiary framework, such as the one adopted in White, to guide the bench and bar and foster uniformity concerning the qualifications of child abuse assessment experts. The ever-increasing attempts by parties to qualify individuals as child abuse assessment experts or the like demonstrates the need for action.³

Petitioner humbly suggests that at a minimum, the framework should include (1) that the subject matter of the testimony is the topic of peer-reviewed research, (2) that the subject matter and research are based upon objectivity, and (3) that there exists the ability to draw reliable conclusions regarding the subject matter from the research. This case presents a good vehicle in which to establish this framework to assist the bench and bar when confronted with a request to qualify a witness as a child abuse assessment expert or the like.

³ On May 3, 2018, this Court heard argument in State v. Roy Jones, Appellate Case No. 2016-001933. One of the issues presented concerned the qualification of an expert in child sex abuse dynamics. The subject of an evidentiary framework was discussed during the argument.

Relevant facts

Motion to exclude

Prior to trial, the state informed the judge of its intent to call Dr. Allison Foster as an expert witness “in the field of child abuse assessment.” R. 16, ll. 19-22. According to the state, Foster was “a completely blind witness. She’s never met [Complainant], the victim, in this case. She has never reviewed any of The CARE House interviews or even seen those recordings so she has had no direct interaction with this case.” R. 16, l. 22 – R. 17, l. 2. The solicitor clarified the intent to “qualify her as an expert in child abuse assessment” to permit testimony on “just the different range of responses and the factors that play into victims of sexual abuse.” R. 17, ll. 7-24.

Defense counsel objected, explaining the state proposed to have the witness testify to “child sexual abuse accommodation syndrome,” which was not a recognized disorder. R. 18, ll. 1-19. Defense counsel explained the subject of Foster’s testimony was “not peer reviewed, ... not done in a clinical setting to determine how these different things affect children.” R. 18, ll. 19-22. The judge agreed to permit the state to proffer Foster’s testimony prior to ruling on its admissibility. R. 19, ll. 16-24.

Proffer

Later in the trial, the state proffered Foster’s testimony. Foster explained that she was a licensed clinical psychologist employed as the chief psychologist at the Assessment and Resource Center (ARC), a children’s advocacy center, and as a psychologist in private practice. R. 406, ll. 10-19. Additionally, she served as “senior faculty for a five day forensic interview training course called Child First,” which had been in existence for fifteen years. R. 408, ll. 4-6. According to Foster, she had “been conducting forensic interviews of children who are suspected

of being victims for 21 years.” R. 407, ll. 7-14. When asked if she developed training and programs for different agency personnel regarding suspected child abuse, Foster responded that she trained “in national conferences,” developed “the curriculum for the Child First forensic interview training course,” and taught others, including other forensic interviewers, regarding the techniques. R. 408, ll. 7-15. Regarding her publications, Foster explained she had “published a monograph for the American Prosecutors Research Institute on child development,” published “a book chapter” “about the assessment of mental disorders in custody evaluations,” and had “research in preparation on a couple of matters involving forensic interview techniques,” which were not published. R. 408, ll. 16-25.

Foster claimed the “subject” of her “field” of study was “child abuse assessment or dynamics of child abuse.” R. 409, ll. 11-14. She further claimed the field is studied because “there are a lot of factors that are not necessarily a lay person, within a lay person’s understanding and also because it’s important for us to understand children’s development, linguistics, how memory works, how processes like coercion, parent/child relationships or offender/child relationships, how those play into the dynamics of abuse.” R. 409, ll. 15-23. Foster claimed “there are a lot of behavioral issues as well as developmental issues that are researched in the behavioral science literature to help us understand the best way to evaluate these situations as well as the best way to explain to lay people dynamics that they might not otherwise understand.” R. 409, l. 23 – R. 410, l. 3.

An example of “dynamics” included “things like the fact that delay in reporting by victims is a very robust finding in the research.” R. 410, ll. 4-7. Foster claimed, “We know behaviorally that the majority of substantiated cases of child sexual abuse include a very large delay even into adulthood before victims often report childhood sexual abuse.” R. 410, ll. 7-10.

Such was “not necessarily logical to somebody who is not trained in the field,” she asserted. R. 410, ll. 10-12. Other examples of the “dynamics” were “[s]ome of the ways children accommodate abuse in situations they can’t control,” and “recantation,” which “jurors might not otherwise understand if they didn’t have the benefit of education.” R. 410, ll. 15-18. Finally, “secrecy” was a dynamic. R. 410, ll. 19-20.

Foster testified regarding what she claimed were some of the behavioral characteristics not known to the average individual, including that “a lot of child sexual abuse occurs at the hands of a family member, an adult who is in a role of an authority figure, a parental figure or step parent figure.” R. 412, ll. 8-20. In those situations,

[T]he abuse tends to be chronic meaning that it occurs over a sustained period of time and so for that relationship to be sustained without the offending behavior being detected there are certain dynamics that are known to occur in those cases along the lines of how an offender exploits his authority, the sense of love, dependency, the complexities of that kind of relationship and how they can manipulate that to maintain a victim’s secrecy and cooperation or compliance.

R. 412, l. 20 – R. 413, l. 3. She continued to explain the “dynamics that the victims experience,” typically described as “helplessness,” “entrapment and the fact that they need to accommodate the abuse because they’re really in a situation that they feel powerless to change.” R. 413, ll. 4-8.

Next, Foster delved into “about 30 years of ... retrospective research.” R. 413, ll. 19-21. She described this as “where researchers have looked back over a 30 year time span of studies that conclude that two-thirds of child sexual abuse victims in America don’t come to anybody’s attention until adulthood.” R. 413, ll. 21-24. She claimed these “statistics [] come from cases that have been well substantiated.” R. 414, ll. 3-12. This led her to draw the conclusion that “delayed disclosure is a common aspect to the experience of child sexual abuse.” R. 414, ll. 1-2. When questioned about the “reliability of the behavioral science” on which she was basing her

testimony, she claimed there were “a lot of studies,” but she mentioned only “a meta analytic study that was published a few years ago by Steven Ceci, Carl London, Maggie Roth,” which involved the review of “research spanning this 30 plus year time frame” with any specificity. R. 415, ll. 9-22. She then shifted to discuss the work of Roland Summit on “the phenomenon of chronic sexual abuse and delayed disclosure.” R. 416, ll. 6-8. In this publication, Summit explained “the manner in which children become trapped first by a stage of secrecy ... they are manipulated, lured, threatened into believing they need to keep the behavior secret.” R. 416, ll. 8-12. According to Foster, the child enters a “stage of helplessness,” which causes the child to “live in some period of time that’s described as a state of entrapment and accommodation.” R. 416, ll. 18-19. During this state, the child is “still going along with the business of life,” including school, visiting friends, participating in activities, doing chores, and otherwise acting normally. R. 416, ll. 19-25.

The “dynamics and the behavioral characteristics” described by Foster were not used as “a diagnostic tool,” but were used to “describe phenomenon that could otherwise seem illogical or counter intuitive.” R. 417, ll. 12-18. She posited that understanding “some of those behavioral dynamics that have to do with manipulation, coercion, the different sort of power dynamics that are in relationships, it can assist the trier of fact in understanding the phenomenon.” R. 417, l. 22 – R. 418, l. 1.

On cross-examination, Foster revealed that the five factors identified in the Summit article comprising child sexual abuse accommodation syndrome were secrecy, entrapment, helplessness, delayed disclosure, and potential recantation. R. 418, ll. 13-21. According to Foster, studies following Summit’s article included those conducted in a clinical setting, but more involved “data analysis from forensic cases.” R. 419, ll. 1-6. When asked if the studies

she referenced were “peer reviewed,” Foster responded they were “absolutely” “peer reviewed” because “[a]nything that’s published in a journal” is peer reviewed and she would not cite research unless it were the product of peer review and had been published in a journal or a book that would be considered a treatise edited by experts in their field. R. 419, ll. 13-23.

Argument on the motion to exclude

Additionally, defense counsel objected to evidence of child sexual abuse accommodation syndrome because the so-called syndrome was not recognized in the scientific community. Specifically, counsel noted the studies referenced by Foster had not been “peer reviewed enough” to show “the dynamics that are definitely something that fall within Rule 702.” R. 423, ll. 1-9. As Foster admitted, the behavioral characteristics comprising the syndrome were “not a diagnostic tool” and were “not tested in the clinical sense.” R. 423, ll. 13-16.

The solicitor argued Foster had not testified “anything about a syndrome,” “just ... as to behavioral characteristics that are often displayed in victims that have come forward related to sexual abuse.” R. 424, ll. 7-11. She further argued “this behavioral science ... fall[s] outside of the normal understanding or the general knowledge of the jury.” R. 424, ll. 12-18. Turning to the reliability of Foster’s testimony, the solicitor pointed to the testimony “that [for] over 30 years there have been studies conducted of victims that come forward with allegations of sexual abuse.” R. 424, ll. 21-25. She stated “that a portion of that sample that have been studied are further substantiated.” R. 425, ll. 1-2. The solicitor claimed “it is a recognized field” that “is heavily researched.” R. 425, ll. 8-9.

Ruling

In ruling on defense counsel’s objection to Foster’s testimony, the trial judge noted that everyone agreed Foster satisfied the qualifications requirement of the evidentiary rule. R. 426, l.

22 – R. 427, l. 1. The judge then found that “child abuse assessment is reliable” based upon the testimony of Foster that the behavioral characteristics “are based on 30 years of research,” of which “some” “are from a clinical setting” and “[m]any ... are from data analysis.” R. 427, ll. 2-7. She determined the “journal articles ... are peer reviewed” that discuss “this particular science.” R. 427, ll. 7-9.

Testimony before the jury

Thereafter, the solicitor called Foster as a witness in front of the jury. R. 430, ll. 17-18.⁴ Much of Foster’s testimony mirrored her *in camera* testimony. In describing “child abuse assessment,” Foster told the jurors that the field “encompasses a lot of things from understanding children and their developmental states [to] understanding how abuse can affect children at different developmental stages.” R. 434, ll. 17-22. The “field” also included how children “can remember and relate information.” R. 434, ll. 22-23. According to Foster, the “field” also encompassed the “[p]sychological effects of abuse depending on the relationship between the perpetrator and the victim and the age of the victim.” R. 434, ll. 23-25. Related to all of this was “the process of how to gather information from children and understanding the process of disclosure. How children tell and when they tell and that sort of thing.” R. 435, ll. 2-5.

She told the jurors about delayed disclosure and that according to the research, “two-thirds of [people known to have been victimized as children] won’t come to anyone’s attention until adulthood.” R. 435, l. 20 – R. 436, l. 6; R. 439, ll. 7-10. Related to delayed disclosure, Foster explained stages of disclosure, including denial, tentative, and active. R. 439, l. 20 – R.

⁴ Defense counsel did not object to Dr. Allison Foster’s testimony contemporaneously. However, no objection was necessary to preserve this error for appellate review because the judge entertained the *in camera* testimony and ruled upon its admissibility immediately prior to the state calling Foster as a witness to testify before the jury. See *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); *State v. Govan*, 372 S.C. 552, 557, 643 S.E.2d 92, 94 (Ct. App. 2007).

440, l. 14. She told the jurors about “entrapment” and “accommodation” during child abuse. R. 441, ll. 5-24. She also told the jurors about children of abuse entering a state of helplessness. R. 442, ll. 1-20. Those stages, she explained, were called “child sexual abuse accommodation dynamics.” R. 442, ll. 16-18.

Foster then told the jurors about the most common situation for child sexual abuse was for it to occur in the home. R. 442, l. 21 – R. 443, l. 2. Regarding whether all children in the home would be abused, Foster claimed that if the abuser were a parent, then the abuser would choose the child over whom the parent had a particular emotional and/or behavioral relationship. R. 443, ll. 3-17.

Importantly, Foster told the jury that her testimony was based upon the research in the “field” and from her experience as a psychologist who had “evaluated about 2000 children suspected of sexual abuse.” R. 446, ll. 2-8.

State’s closing argument

After defining the elements of the charged offenses, the solicitor told the jurors that the South Carolina “legislature recognizes that these are crimes of secrecy and they are shameful so unlike armed robberies and unlike murders, sometimes, oftentimes there are no other witnesses.” R. 491, ll. 5-10. Accordingly, “the law does state as it relates to criminal sexual conduct in the State of South Carolina, the testimony of the victim need not be corroborated.” R. 491, ll. 14-17. Thereafter, the solicitor used the testimony from Foster to bolster Complainant’s credibility and argue to the jury that she should be believed because her conduct mirrored the conduct of those individuals who suffered child sexual abuse, as described by Foster.

According to the solicitor, Petitioner had selected Complainant because of his close relationship with her, “[j]ust like Dr. Foster said.” R. 504, ll. 17-21. To explain why

Complainant did not tell about the alleged abuse earlier, the solicitor implored the jurors to rely on Foster's explanation "that the large majority of people, of children do disclose a lot later.... Two-thirds of the population that has been studied relating to sexual abuse child victims come forward later. It is not an uncommon situation." R. 510, ll. 2-12. She then talked to the jury about "latent disclosure" and partial disclosures. R. 510, ll. 13-23. To explain why Complainant did not "tell the entire story" initially, the solicitor relied upon "the research, the studies" and told the jurors to rely on their "common sense and knowledge of human nature" to determine that "the very first time she's not going to sit there and give it all out there." R. 511, ll. 9-19. According to the solicitor, "[t]he first day she told what she needed to tell her. Not unusual. Dr. Foster's been in this field for 30 years. Not unusual." R. 511, ll. 20-23.

Next, the solicitor reminded the jury of "the factors that play into that delayed disclosure" as testified to by Foster. R. 511, ll. 24-25. Specifically, the solicitor talked about "helplessness and accommodation and the secrecy." R. 511, l. 25 – R. 512, l. 1.

Helplessness. The family is all she had. ... [T]hey have had very few friends. They have moved over 20 times. They're home schooled. They're in that house. ... So when he threatens her, I'm gonna ruin you. You're gonna ruin this family. You're gonna have no one, why wouldn't she believe that? That's all she's ever known is her family.

Accommodation. Dr. Foster ... talked about accommodation. What that means is that after the first couple of times that it happened, even if it's against your will, even if you fight it off, but once it happens, you feel like it, she feels like it's something that she just has to succumb to essentially. Blames herself. That is a factor that also comes into play with child sexual abuse of victims.

R. 512, ll. 2-23. Continuing to rely upon Foster's testimony to bolster Complainant's testimony, the solicitor noted that Foster "also testified ... that just because as far as who the particular perpetrator chooses, which child the perpetrator chooses has a lot to do with the relationship." R. 512, l. 24 – R. 513, l. 2; see also R. 522, ll. 8-19.

The solicitor boldly told the jurors that Foster did not interview Complainant or watch the forensic interviews, and yet she “corroborate[d] everything” that was presented by the state. R. 513, ll. 2-6. The solicitor described Foster’s testimony concerning memory as corroborative of Complainant, especially in light of Complainant’s repeated testimony regarding events, not just allegations of sexual abuse, that she could not remember. According to the solicitor, “Dr. Foster testified about the fact that the first memory is often very clear and [Complainant] has a very clear memory when that first time it happened.” R. 514, ll. 23-25. The solicitor offered nothing more than Foster’s testimony to explain away the inexplicable – why Complainant could not remember simple things like what she liked to hunt or why her testimony contrasted with that of others concerning whether she wore bikinis.

Discussion

The South Carolina Rules of Evidence and case law govern the admission and scope of expert testimony. Pursuant to the Rule, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE. In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the South Carolina Supreme Court specified the following three-prong test for expert testimony:

[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted) (emphasis added). “All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration.” State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

As previously mentioned, in Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), this Court held that White, 382 S.C. 265, 676 S.E.2d 684 (2009) should apply in qualifying child abuse assessment experts because their testimony is non-scientific. This Court found that the trial court improperly qualified the child abuse assessment expert in Chavis because there was “simply no evidence that her conclusions or impressions taken from [the] interviews were accurate.” Id. Although this Court established “no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence,” this Court explained “evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.” Id.

This Court found that one of the “expert” witnesses should not have been qualified as an expert because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAC protocol. Id. at 108, 771 S.E.2d at 339. This Court also found the testimony of the other so called “expert” that the child should not be allowed around Chavis anymore, for any reason, could only be interpreted as the “expert” believing the victim's claim that Chavis sexually abused her. Id. at 109, 771 S.E.2d at 340.

While this Court expressed hesitancy to establish a “formulaic approach” to qualifying experts in the field of child abuse assessment or child abuse dynamics, the growing number of cases in which the parties attempt to qualify such an expert requires this Court establish an evidentiary framework to guide the bench and bar and to foster uniformity in the qualification of such individuals. In Chavis, this Court rejected the witness’s use of RATAC protocol during her interviews and the review of the witness’s use of RATAC protocol by one other interviewer to ensure she was using the protocol as sufficient to establish reliability. Id. at 108, 771 S.E.2d at 339. This Court explained “evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.” Id. Thus, a framework for determining the qualifications of child abuse assessment experts must include that the subject matter is the subject matter of peer-reviewed research and there exists the ability to draw reliable conclusions regarding the subject matter from the research.

In Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012), this Court examined whether the opinion testimony by several purported experts that a software defect caused an alarm to fail was reliable. The experts arrived at their opinions using “the best inference methodology” or a “differential diagnosis methodology.” Id. The experts opined that a software defect caused the alarm not to work by eliminating other potential causes. Id. This Court held that “an expert relying on a differential diagnosis must provide a reasonable, objective explanation for the rejection of possible alternative causes in order for the opinion to be admissible under Rule 702.” Id. at 76, 735 S.E.2d at 656. According to this Court, “this objective requirement” was “consistent with the quality control element” necessary for scientific testimony. Id. Thus, a framework for determining the qualifications of child abuse assessment experts must include that

the research is based upon objectivity and that the opinion proffered by the expert is based upon objectivity.

Petitioner respectfully requests this Court grant certiorari in this case to establish an evidentiary framework for the admissibility of child abuse assessment experts. Further, petitioner respectfully requests that at a minimum, the framework should include (1) that the subject matter of the testimony is the subject of peer-reviewed research, (2) that the subject matter and research are based upon objectivity, and (3) the ability to draw reliable conclusions regarding the subject matter from the research.

Like the “experts” in Chavis, there was no evidence that Foster’s conclusions and claims were accurate or reliable. Foster admitted that her testimony was the product of what she had read and what she had learned from her experience as a psychologist who had “evaluated about 2000 children suspected of sexual abuse.” R. 446, ll. 2-8. The state presented no evidence regarding the methodologies employed by Foster in arriving at the conclusion she drew from her reading or from her own practice. There was no testimony that the research was based upon objectivity or that Foster’s conclusions were based upon objectivity. Finally, there was no evidence that Foster, or anyone, could draw reliable conclusions regarding the subject matter from the research. In light of the dearth of evidence of the reliability of Foster’s conclusions and statements, the court failed to properly execute its gatekeeping function by qualifying her as an expert in child abuse assessment.

The admission of this testimony in this case, where the jury’s decision depended upon Complainant’s credibility and the record evidence demonstrates the jury’s struggle with rendering a verdict, was prejudicial error that requires reversal. The qualification of Foster as an “expert” in “child abuse assessment” was erroneous and prejudicial to Petitioner. “The label of

expert should be jealously guarded by the court and never loosely bandied about.” State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013). As this Court noted in Kromah, “although an expert’s testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.” Id. In light of the prosecutor’s capitalization of the testimony during her closing argument to argue the jury should believe Complainant due to the testimony of an “expert” witness who had been doing this type of work for thirty years and described Complainant’s situation without having any knowledge of Complainant, this Court must find the error was not harmless beyond a reasonable doubt.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Kershaw County
Tanya A. Gee, Circuit Court Judge

Opinion No. 2018-UP-121 (S.C. Ct. App. filed Mar. 21, 2018)
2012-GS-28-1381; -1382

THE STATE,

RESPONDENT,

V.

JAMES WAYNE MILLER,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and James Wayne Miller, #367454, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of July, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of July, 2018.

Marey M (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM KERSHAW COUNTY
Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2018-001178

RECEIVED

AUG 06 2018

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

JAMES WAYNE MILLER,

Petitioner.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, South Carolina 29202
(803) 576-1800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUE ON CERTIORARI.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT	10
The Court of Appeals correctly found the trial judge did not abuse her broad discretion in permitting Dr. Allison Foster to testify as an expert in child abuse dynamics where, because the evidence and testimony presented during trial established Dr. Foster's testimony could assist the jury in understanding the issues raised in Petitioner's case, Dr. Foster was personally qualified to testify as an expert, the subject matter of Dr. Foster's testimony met a threshold level of reliability in light of the her expert qualifications, and her testimony did not improperly bolster Victim's testimony. Furthermore, any error was harmless and had no impact on Petitioner's case.	19
CONCLUSION.....	23

STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals correctly determined the trial judge did not abuse her broad discretion in permitting Dr. Allison Foster to testify as an expert in child abuse dynamics where, because the evidence and testimony presented during trial established Dr. Foster's testimony could assist the jury in understanding the issues raised in Petitioner's case, Dr. Foster was personally qualified to testify as an expert, the subject matter of Dr. Foster's testimony met a threshold level of reliability in light of the her expert qualifications, and her testimony did not improperly bolster Victim's testimony. Furthermore, any error was harmless and had no impact on Petitioner's case.

STATEMENT OF THE CASE

Procedural History

On August 11, 2012, Petitioner James Wayne Miller (Petitioner) was arrested following the report of his sexual abuse of his seventeen-year-old daughter (“Victim”). During its October 2012 term of court, the Kershaw County Grand Jury indicted Petitioner for second-degree criminal sexual conduct and incest. On March 14, 2016, Petitioner proceeded to a jury trial in the Kershaw County Court of General Sessions with the Honorable Tanya A. Gee, circuit court judge, presiding. On March 18, 2016, the jury convicted Petitioner as indicted. Judge Gee sentenced Petitioner to twenty years’ imprisonment for second-degree criminal sexual conduct and ten years’ imprisonment for incest, with the sentences to be served consecutively.

Thereafter, Petitioner filed a timely notice of appeal. In his brief before the South Carolina Court of Appeals, Petitioner argued: (1) the trial court erred in denying Petitioner’s request for a continuance where “good cause” existed in light of a serious medical condition which rendered him unable to assist counsel¹; and (2) the trial court erred in permitting Dr. Allison Foster to testify as a expert in child abuse assessment where her testimony improperly bolstered the complaining witness’s credibility and there was insufficient evidence of the reliability of the subject matter of her testimony. Following briefing, the Court of Appeals affirmed Petitioner’s convictions and sentence by unpublished opinion. State v. James Wayne Miller, 2018-UP-121 (Ct. App. filed March 21, 2018). In its opinion, the Court of Appeals found Dr. Foster’s testimony reliable, citing to Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (stating before allowing a jury to hear expert testimony, the trial court must (1) “find that the subject matter is beyond the ordinary knowledge of the jury, thus

¹ Petitioner is not challenging the Court of Appeals affirmance of the trial court’s denial of his continuance motion on certiorari.

requiring an expert to explain the matter to the jury,” (2) “find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,” and (3) “evaluate the substance of the testimony and determine whether it is reliable”); State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (providing to determine if scientific expert testimony is reliable, the trial court must consider “(1) the publications and peer review of the technique, (2) prior application of the method to the type of evidence involved in the case, (3) the quality control procedures used to ensure reliability, and (4) the consistency of the method with recognized scientific laws and procedures”); State v. White, 382 S.C.265, 274, 676 S.E.2d 684, 688 (2009) (stating in cases with nonscientific expert testimony, the factors applying to scientific testimony cannot be readily applied, and there is no formulaic approach to determine reliability); State v. Jones, 417 S.C. 319, 331, 790 S.E.2d 17, 23 (Ct. App. 2016), cert. granted, S.C. Sup. Ct. Order dated Aug. 22, 2017, (“[T]he testimony of child abuse assessment experts is nonscientific.”).

Petitioner petitioned for rehearing, which the Court of Appeals denied on May 24, 2018. The petition for a writ of certiorari was filed on July 5, 2018.

Factual History

In July of 2011, Petitioner and his wife Tammy, along with their five children, visited friends in Camden for the Fourth of July holiday. (R. 98-99, 104). After spending time in Camden, Petitioner decided to move his family from Summerville to Camden and found a two-story house to rent on Lake Wateree. (R. 104-105). The home needed some work before the family would be ready to move in, so Petitioner and his sixteen-year-old daughter (Victim) stayed behind to fix up the home while the rest of the family, including Victim’s twin sister, returned to Summerville to pack up their home. (R. 106-107). Petitioner, who worked in

construction and as a day laborer, often had assistance from Victim when working. (R. 102-106). Petitioner and Victim stayed in the family's camper while fixing up the home. (R. 106-107).

One evening after a long day of working on the new home, Victim went inside the camper to go to bed while Petitioner remained outside by a bonfire, drinking and socializing with a friend. (R. 107-108). Victim eventually fell asleep and woke up to her father performing oral sex on her. (R. 108). Petitioner had Victim's legs pulled apart and pinned down so she could not move. (R. 108). She was able to shove him off and when she freed herself, she ran to the bathroom. (R. 108-109). Petitioner apologized, said it was an accident, and promised it would not happen again. (R. 109-110). He pleaded with her to come out and go back to bed, promising he would remain on the couch. (R. 109-110). Victim finally acquiesced and returned to the bed, where she eventually fell asleep again. (R. 109-110). A short time later, Victim woke up to Petitioner on top of her, pinning her down. (R. 110). Victim tried to break free, but was unable to get away. (R. 110-111). Petitioner said he needed to finish what he started and vaginally penetrated Victim. (R. 110-111). After Petitioner finished raping her, Victim fled to the bathroom, where she remained for the rest of the evening. (R. 111). Petitioner fell asleep as if nothing had happened. (R. 111).

The next morning, Petitioner told Victim their family would be ruined if she told anyone about the abuse. (R. 111). He told her he had taken a pill in addition to drinking and was unable to control himself. (R. 112). He threatened that she needed to keep the assault a secret while forcefully grabbing her arm. (R. 112-113). Victim, afraid of Petitioner and fearing the potential consequences to the rest of her family, made a decision not to tell her family about the abuse. (R. 112, 116). That night, Petitioner again raped Victim, this time in the family's new home. (R. 113). Victim again tried to fight Petitioner off but Petitioner had pinned her down and she was

unable to break free. (R. 113-14). Petitioner continued to rape Victim several more times while the rest of the family was still in Summerville. (R. 114). Each time, Victim unsuccessfully tried to fight Petitioner off. (R. 114). After each rape, Petitioner threatened Victim that their family would be ruined if she told anyone. (R. 114, 116).

Victim hoped her father's sexual assaults would stop when the family moved into the new home, but Petitioner continued to rape her. (R. 116). Initially, Victim and her twin sister shared a room in the new house. (R. 116-117). While her sister was asleep, Petitioner would sneak into his daughters' bedroom, rape Victim, and then leave. (R. 117). After a few months, Petitioner decided it would be good for Victim to have her own room due to on-going disputes with her twin sister. (R. 118, 120-21). As soon as Victim had her own room, Petitioner began sleeping in Victim's room nightly. (R. 121, 209). This made Petitioner's wife, also Victim's mother, upset and confused. (R. 121-122, 209). She confronted Petitioner about the inappropriate sleeping arrangement and demanded Petitioner return to their marital bed. (R. 209). In response, Petitioner accused her of having perverted thoughts and said she was jealous of Petitioner's close relationship with Victim. (R. 210-211). Petitioner refused to stop sleeping in Victim's bed. (R. 122, 211).

Petitioner continued to rape Victim constantly in the family home. (R. 122). After a few months, Victim stopped physically resisting Petitioner's constant rapes. (R. 122). Additionally, shortly after moving to Camden, Petitioner began regularly wearing a gun, which he kept on a holster on his belt. (R. 123-124). Petitioner routinely kept the gun attached to his pants while he was assaulting Victim. (R. 123-124). Petitioner never had a gun before he started raping Victim. (R. 123, 128, 214). In addition to assaulting Victim at the family home, Petitioner also raped Victim when she accompanied him to jobsites for work. (R. 124-128). Victim did not want to

continue assisting Petitioner with work, but felt like she did not have a choice as her family depended on Petitioner exclusively for money and he needed her help. (R. 124-125).

Petitioner continued to threaten Victim to keep her from reporting the abuse. (R. 128-129). Victim routinely had bruising on her body from Petitioner pinning her down while raping her. (R. 133-135). In addition to vaginally penetrating Victim, Petitioner would also digitally penetrate her and fondle her breasts. (R. 135-136). When Petitioner raped Victim, he would usually pull out and ejaculate to the side of her, but occasionally would wear condoms or ejaculate inside of her. (R. 138-139).

In August of 2012, Petitioner had been raping Victim constantly for thirteen months. (R. 152). Victim felt increasingly helpless and withdrew from the rest of her family. (R. 151, 153-154). She feared the abuse would never end. (R. 151). On August 11, 2012, Victim eventually told her mother that Petitioner had been touching her inappropriately. (R. 152, 154-157, 227). Victim's mother became hysterical and immediately called her sister to tell her about the abuse and request that she call law enforcement. (R. 158, 228). She did not tell Petitioner she knew of the abuse, concealed that she had called her sister, and made an excuse for why law enforcement was arriving. (R. 228-230).

Law enforcement officers from the Kershaw County Sheriff's Office arrived a short time later. (R. 159). When Petitioner saw law enforcement approaching, he told Victim he wished she had warned him so he could say goodbye to the rest of the family. (R. 160). He then turned to law enforcement, and without any commands, unhooked his belt, emptied his pockets, and placed his hands behind his head. (R. 53, 75, 84). Law enforcement detained Petitioner and walked him to a waiting patrol car. (R. 53). When Petitioner walked by his wife, he told her it "wasn't all [his] fault" and he asked for one more kiss. (R. 236). After being detained, Corporal

Houser of the Kershaw County Sheriff's Office advised Petitioner of his rights pursuant to Miranda and asked him if he wished to make a statement. (R. 54). Petitioner responded that he understood his rights and then stated, "Whatever she says, that's what happened. If she said it, it's not a lie." (R. 54, 76, 93). At this point, Petitioner had not yet been informed of the allegations made against him or why he was being placed under arrest. (R. 76, 84).

Thereafter, Petitioner was transported to the Kershaw County Sheriff's Office, where he met with the investigator on call, Investigator Dill. (R. 53, 55, 92-93, 453-465). Petitioner and Investigator Dill spoke in an interview room equipped with audio and visual recording devices that recorded their entire conversation. (R. 455-456). Investigator Dill advised Petitioner of his rights pursuant to Miranda and Petitioner signed a waiver indicating he understood his rights and wished to speak with law enforcement. (R. 456-460, 595, State's Ex. No. 46). Petitioner didn't deny the allegations and stressed he needed to make sure his story was "on the same page" as Victim's report because he did not want his statement to differ from hers. (R. 461). The interview ended shortly thereafter and Petitioner was transported to the detention center. (R. 462-463).

Upon arriving at the detention center, Petitioner asked to speak with Investigator Dill again. (R. 463). Investigator Dill went to the detention center, asked Petitioner if he wished to speak with him, and when Petitioner answered affirmatively, transported Petitioner back to the sheriff's office for another interview. (R. 463-464). When they returned to the sheriff's office, Investigator Dill brought Petitioner into the same interview room equipped with recording equipment, advised him of his rights, and Petitioner again signed a waiver indicating he understood his rights and wished to speak with law enforcement. (R. 464-468, 596, State's Ex.

No. 47). In this second interview, Petitioner admitted to placing his hand inside of Victim's leg while she slept and telling his wife that "this is not all my fault." (R. 468, State's Ex. No. 47).

Petitioner proceeded to a jury trial before the Honorable Tanya A. Gee on March 14, 2016. Prior to jury selections, Petitioner moved for a continuance, citing debilitating back pain. (R. 9-15). The trial judge, noting Petitioner failed to present any documentation supporting his assertion that he could not proceed forward with his trial based on a medical condition, denied his motion for a continuance. (R. 9-15). Following pre-trial motions and jury selection, the State presented testimony from various law enforcement officers as well as fact witnesses who knew Petitioner and Victim.

One such witness was Victim's mother, who testified she had known Petitioner since third grade and had been married to him for twenty years. (R. 197-198). She testified she had five children with Petitioner, including Victim and her twin sister. (R. 197-198). She testified her and Petitioner moved approximately thirty times throughout their marriage, including a final move to Camden July, 2011. (R. 201, 204). She testified she began noticing a change in Victim when the family moved to Camden. (R. 203, 207-209). Additionally, she testified Petitioner stopped sleeping in bed with her and she would routinely find him sleeping in Victim's bed. (R. 209-210). She testified she tried to physically remove Petitioner from Victim's bed and told him she thought he was behaving inappropriately. (R. 209-210). Petitioner responded by telling her she was jealous of Victim and how close they were. (R. 211). Additionally, she testified Petitioner stopped regularly having sex with her when the family moved to Camden and only slept with her a couple of times during the thirteen-month period when he was raping Victim. (R. 213-214). She testified she tried to talk with Victim about the changes in her behavior and whether Petitioner was abusing her and Victim denied any abuse and refused to speak with her.

(R. 215-216). She testified she also noticed Petitioner being inappropriate with Victim, including untying her swimsuit top, wrapping his legs around her, and feeling her breast. (R. 220-221). She testified Victim eventually confided in her on August 11, 2012 that Petitioner had been touching her and she immediately got law enforcement involved. (R. 225-228).

Victim's twin sister also testified about inappropriate behavior between Petitioner and Victim, including Petitioner sharing a bed with Victim nightly and snuggling. (R. 269-270). She also testified Victim's behavior changed dramatically when the family moved to Camden. (R. 296). She also testified Petitioner began carrying a gun in a holster on his belt when the family moved and that he had not done this with prior to living in Camden. (R. 298).

The family's next-door neighbor, Martha Penrod, also testified regarding the inappropriate behavior between Petitioner and Victim. She recounted times she saw them behaving oddly together in the water and seeing them snuggling on a hammock. (R. 373). She further testified she had previously informed law enforcement twice that she was concerned Petitioner was sleeping with Victim. (R. 387).

The State presented Dr. Susan Luberoff, who treated Victim and was admitted as an expert in child abuse pediatrics. (R. 269-285). Dr. Luberoff testified she examined Victim on August 17, 2012. (R. 272-273). Dr. Luberoff testified she noticed a notch on the seven o'clock position on Victim's hymen, which was consistent with penetrating trauma and finding of sexual abuse. (R. 277-285). The State also presented expert testimony on child abuse assessment from Dr. Allison Foster, a licensed clinical psychologist with extensive experience studying and treating child victims of sexual abuse, over Petitioner's objections. (R. 396-451). Following deliberations, the jury convicted Petitioner as indicted of second-degree criminal sexual conduct and incest.

ARGUMENT

The Court of Appeals properly found the trial judge did not abuse her broad discretion in permitting Dr. Allison Foster to testify as an expert in child abuse dynamics where, because the evidence and testimony presented during trial established Dr. Foster's testimony could assist the jury in understanding the issues raised in Petitioner's case, Dr. Foster was personally qualified to testify as an expert, the subject matter of Dr. Foster's testimony met a threshold level of reliability in light of the her expert qualifications, and her testimony did not improperly bolster Victim's testimony. Furthermore, any error was harmless and had no impact on Petitioner's case.

On certiorari, Petitioner contends the Court of Appeals erred in concluding the testimony of Dr. Foster in the area of child abuse dynamics was reliable. Petitioner urges this Court to grant certiorari to adopt an evidentiary framework for the admissibility of child abuse assessment experts to guide the bench and bar and foster uniformity concerning the qualifications of child abuse assessment experts. This Court should deny certiorari because the Court of Appeals properly found the trial judge did not abuse her broad discretion in permitting Dr. Foster to testify as an expert in child abuse dynamics. The evidence and testimony presented during trial established Dr. Foster's testimony could assist the jury in understanding the issues raised in Petitioner's case, Dr. Foster was personally qualified to testify as an expert, the subject matter of Dr. Foster's testimony met a threshold level of reliability in light of the her expert qualifications, and her testimony did not improperly bolster Victim's testimony. Furthermore, any error was harmless and had no impact on Petitioner's case. Moreover, Petitioner's argument that this Court should grant certiorari for the benefit of the bench and the bar is unwarranted, as the Court addressed this issue in the recent published decision of State v. Roy Jones, Op No. 27822 (S.C. Sup. Ct. filed July 5, 2018) (Shearouse Adv. Sh. No. 27 at 15)², which is strikingly similar to the present case.

² This Court's opinion in Jones was filed the same day Petitioner filed his petition for certiorari.

During pre-trial motions, the State announced its intention to present expert testimony on child abuse assessment from Dr. Allison Foster, a licensed clinical psychologist with extensive experience studying and treating child victims of sexual abuse. (R. 16-17, 406-410). The State informed the trial court Dr. Foster had never met or otherwise interacted with Victim and was completely unfamiliar with her case. (R. 16-17). The State explained her testimony would be limited to the “different range of responses and factors that play into victims of sexual abuse.” (R. 17). In response, Petitioner requested a proffer before Dr. Foster be allowed to testify before the jury, citing concerns over a lack of peer review and a non-clinical setting. (R. 18). The trial judge, citing State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), noted Dr. Foster was not being called as a forensic interviewer and had not met Victim, but agreed a proffer would be necessary to determine if Dr. Foster could testify as an expert witness. (R. 19).

Later, during Petitioner’s trial, the State proffered the testimony of Dr. Foster. (R. 405-421). Dr. Foster testified she is the chief psychologist at the Assessment and Resource Center (ARC) in Columbia, one of seventeen centers throughout South Carolina that treats sexually abused children. (R. 406). Dr. Foster testified she had worked at ARC in various capacities for the past twenty years and also had her own private practice focusing on forensic work with children and families. (R. 407). She testified she graduated with a Ph.D. in clinical psychology in 1996 and is a Department of Mental Health Assistant Professor at the University Of South Carolina School Of Medicine. (R. 407-408). Additionally, Dr. Foster testified she is a senior faculty member at a forensic interview training course established fifteen years ago. (R. 408). She testified she also acts as faculty at national conferences on physical, sexual, and psychological child abuse, as well as teaches “law enforcement, child protective services, professionals, children’s advocacy centers, forensic interviewers, therapists and other

professionals.” (R. 408). Dr. Foster testified she published a “monograph for the American Prosecutors Research Institute on child development,” a chapter on the assessment of mental disorders in custody evaluations, and was in pre-publishing stages on research relating to forensic interview techniques. (R. 408).

Dr. Foster testified she had previously been qualified as an expert in child abuse assessment or dynamics of child abuse. (R. 409). She testified this field is studied, and this type of testimony is needed, because it explains behavioral and developmental issues the average lay person would not otherwise understand, such as delayed disclosure. (R. 409-410). The State moved to qualify Dr. Foster as an expert in child abuse assessment and Petitioner had no objection. (R. 410-411).

Dr. Foster’s proffer continued and she testified she has never met or interviewed Victim and has otherwise had no involvement in this case. (R. 411-412). She testified about different factors prevalent in child sexual abuse, including the perpetrator usually being a family member or adult acting as a parental figure. (R. 412). She testified:

There are dynamics that the victims experience that typically capture under describing their feeling of helplessness, their sense of entrapment and the fact that they need to accommodate the abuse because they’re really in a situation that they feel powerless to change . So there could be a period of accommodation followed sometimes by a process of disclosure that they often reach an age of maturation. In other words, they reach an age where they can consider maybe that they have options to tell or to get out of the situation, options that they perhaps couldn’t recognize when they were younger.

(R. 413). When asked about delayed disclosure statistics, Dr. Foster testified over a thirty-year time span, researchers have concluded two-thirds of child sexual abuse victims in the United States do not come forward until adulthood. (R. 413-415). She testified delayed disclosure had been studied, and she cited numerous researchers and studies on the topic spanning thirty or

more years. (R. 415-417). On cross-examination, Dr. Foster testified the research surrounding delayed disclosure had been peer-reviewed. (R. 419)

Following the proffer, Petitioner objected to Dr. Foster's testimony, arguing it was intended to bolster Victim's credibility. (R. 422). Furthermore, Petitioner claimed Dr. Foster's testimony would be pertaining to child sexual abuse accommodation syndrome, which had not been substantiated or peer reviewed. (R. 423-424).

The State replied Dr. Foster's testimony would be limited to behavioral characteristics often displayed by victims of sexual abuse that have come forward. (R. 424). The State asserted this testimony was outside the scope and general knowledge of the jury. (R. 424). Furthermore, the State argued this type of testimony was based on more than thirty years of studies and research in a widely-recognized field. (R. 424). The State again noted Dr. Foster has not met or otherwise interacted with the Victim. (R. 425).

The trial judge ruled

All right. Well, I appreciate both of y'all making such good arguments on this. Obviously as you both are aware our Supreme Court has had a lot to say about experts in child abuse cases. You all clearly have researched this issue as I have and I am going to allow Dr. Foster to testify.

In State versus Chavis which is a 2015 case from the Supreme Court, our Supreme Court acknowledged that expert testimony in child sexual assault cases is permissible so long as it meets the requirements of State versus White.

As Ms. Cavanaugh pointed out, State versus White has two threshold determinations. The first, that the qualifications of the expert must be sufficient. Everybody here has already conceded to the sufficiency of Dr. Foster's qualifications.

And the second determination that has to be made is reliability. I find that child abuse assessment is reliable based on Dr. Foster's testimony, that these factors that she testified to are based on 30 years of research. Some of those are from a clinical setting. Many

of those are from data analysis. There are journal articles that are peer reviewed that discuss this particular science and again our Supreme Court in State versus Chavis acknowledge[d] that expert testimony in a child assault case is permissible.

State versus Schumpert, that was back in 1993, also allowed expert testimony in a child sexual assault case.

And I also want to note a couple of other cases. State versus Weaverling, and I'm going to quote from that case. There the Court of Appeals stated, "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault."

In State versus White, that's a Supreme Court case that we have referred to for the factors to be considered, it's a 2009 case from our Supreme Court, the court stated, "Expert testimony on rape trauma may be more crucial in situations where children are victims."

And then, of course, our most recent case from the Supreme Court, State versus Anderson, which confirmed all those findings of White and Weaverling and again recognized there is an expertise in child abuse assessment but explained that to avoid improper bolstering the better practice is to not have a forensic interviewer who examined the alleged victim as an expert but rather to call an independent witness to testify to the characteristics of the victim.

Here that's exactly what the State is doing with Dr. Foster. She testified that she had no involvement with the investigation of this case and therefore I find her testimony to be admissible.

(R. 426-428). Thereafter, Dr. Foster was admitted as an expert in child abuse assessment before the jury and testified in a similar manner to her proffered testimony, including testimony pertaining to delayed disclosure and the behavioral patterns commonly associated with juvenile victims of sexual abuse. (R. 429-451).

On certiorari, Petitioner contends the Court of Appeals erred in concluding the trial court properly found the testimony of Dr. Foster in the area of child abuse dynamics was reliable.

Petitioner urges this Court to grant certiorari to adopt evidentiary framework for the admissibility of child abuse assessment experts to guide the bench and bar and foster uniformity concerning the qualifications of child abuse assessment experts. However, this Court should deny certiorari, as the trial court did not abuse her discretion in admitting the testimony of Dr. Foster. Moreover, this Court's recent decision in Jones addresses the very issues on which Petitioner asserts guidance is needed.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence.").

Likewise, a decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by

an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (“A trial court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.”).

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). “Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.” Id. at 445-46, 699 S.E.2d at 175. “The qualification of a witness as an expert falls largely within the discretion of the trial judge.” State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCORE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert’s testimony is admissible where “it is relevant and based on some factual predicate in the record”). Before admitting expert testimony, the trial court must find (1) the expert’s testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C.

508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) (“Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.”).

A witness can properly be qualified as an expert where “the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.” State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness’s knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) (“The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.”). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, “[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness’s reference to the subject[,]” and “defects in the amount and quality of education and experience go to the weight of the expert’s testimony and not its admissibility.” Lee v. Suess, 318 S.C. 283, 285-86, 457 S.E.2d 344, 346 (1995).

In addition to ensuring the expert is qualified, the trial court must also ensure the testimony “meets a threshold level of reliability, regardless of whether it is scientific or nonscientific.” State v. Tapp, 387 S.C. 159, 165, 691 S.E.2d 165, 168 (Ct. App. 2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) (“The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.”). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

In sexual assault cases, expert testimony concerning common behavioral characteristics of sexual assault victims, and the range of responses to sexual assault encountered by experts, is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787, 794 (Ct. App. 1999). Notably, this type of expert testimony assists the jury in understanding some of the aspects of victims’ behavior, and provides insight into a sexually abused child’s often strange demeanor. Id. See also State v. Anderson, 413 S.C. 212, 776 S.E.2d 76, 79 (2015) (“Certainly we recognize that there is such an expertise [child abuse assessment]: this is the type of expert who can, for example testify to the behavioral characteristics of sex abuse victims.”) (citing State v.

Schumpert, 312 S.C. 502, 435 S.E.2d 859, 862 (1993); Weaverling, and State v. White, 361 S.E. 407, 605 S.E.2d 540 (2004)) ; State v. Smith, 411 S.C. 161, 767 S.E.2d 212, 217-18 (Ct. App. 2015) (cert. denied June 17, 2015) (“When sexual abuse occurs, particularly if the victim is a child, the victim may not be able to immediately disclose the abuse for numerous reasons, including the victim’s feelings of shame over what happened and the victim’s fear of or intimidation by the perpetrator. We find this was an appropriately general explanation [by an expert witness] of the medical or scientific reasons a child might not immediately disclose sexual trauma.”)

This Court most recently addressed the propriety of expert testimony pertaining to child abuse assessment or dynamics in State v. Roy Jones, Op No. 27822 (S.C. Sup. Ct. filed July 5, 2018) (Shearouse Adv. Sh. No. 27 at 15), a case strikingly analogous to the case at bar. In Jones, Jones appealed his convictions for one count of first-degree criminal sexual conduct (CSC) with a minor, one count of second-degree CSC with a minor, and two counts of lewd act upon a child stemming for his years-long sexual abuse of his live-in girlfriend’s two minor daughters. Id. During his trial, the State presented an expert witness who testified regarding child sex abuse dynamics; this expert had never met with any of the witnesses in this case, including law enforcement, and her only knowledge of the case came from discussions with the solicitor’s office one month prior to trial. Id. On appeal, Jones argued the circuit court abused its discretion by allowing the State’s witness to testify as an expert in child sex abuse dynamics because the subject matter of her testimony was not beyond the ordinary knowledge of the jury, the State failed to prove the reliability of the substance of her testimony, she improperly bolstered the victims’ credibility, and her testimony was highly prejudicial. Id. On certiorari, this Court affirmed the Court of Appeals, finding the trial court properly admitted expert testimony on

delayed disclosure and the behavior of nonoffending caregivers where the expert's testimony was reliable. Id. This Court found,

Unlike the proposed expert in Chavis, Galloway-Williams did not testify about forensic interviewing methods nor the use of the RATAC protocol. Instead, her testimony focused on explaining the concept of delayed disclosure and the role of nonoffending caregivers in the dynamics of sexual abuse. Although Galloway-Williams did not identify by name the articles serving as the basis for her opinions, she indicated she could provide citations if given an opportunity to gather them. Additionally, she explained her opinions were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals. Galloway-Williams also testified she participates in the peer review process and has given numerous presentations on the subject. When questioned on cross, she testified she was unaware of any organizations that found her methods unreliable and that, out of all cases involving delayed disclosure of child abuse, statistically two to four percent are considered false allegations.

We find Jones's argument conflates reliability with perfection. There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence. Here, Galloway-Williams met the threshold reliability requirement when she testified her methods were published in professional articles and trade publications, subject to peer review, and uniformly accepted and relied upon by other professionals in the field. Accordingly, we affirm the trial judge's finding.

Id.

In the present case, similar to Jones, Dr. Foster testified that her methods had been published in professional journals and publications and were subject to peer review, and were nationally-recognized. Furthermore, Dr. Foster's testimony never commented on the credibility of Victim, but rather, was limited "admissible expert testimony regarding the general behavioral

characteristics of child sex abuse victims.” The trial judge did not abuse her broad discretion in admitting Dr. Foster’s testimony at trial. Petitioner’s convictions were properly affirmed.

Moreover, assuming *arguendo* that the trial judge abused her broad discretion allowing the expert testimony of Dr. Foster, such error is harmless and had no impact on the jury’s verdict, particularly in light of the overwhelming evidence the State presented establishing Petitioner was guilty of second-degree criminal sexual conduct and incest. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *See State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490, (2013) (subjecting the erroneous qualification of a forensic interviewer to a harmless error analysis); *see also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (stating error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained); *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct.App.1996) (“In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt.” (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))). The key factor for determining whether a trial error constitutes reversible error is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (internal citations omitted). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. *State v. Baccus*, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). “Whether an error is harmless depends on the circumstances of the particular case.” *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475 (quoting *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d 493, 499

(2008). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it ‘could not reasonably have affected the result of the trial.’” Id. (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

In the present case, the State presented substantial evidence of Petitioner’s guilt independent from the testimony of Dr. Foster, including: Victim’s testimony that Petitioner sexually assaulted her continuously over a thirteen-month period, Petitioner’s various statements admitting to various levels of culpability, Victim’s mother and twin sister’s testimony about Petitioner sleeping in Victim’s bed nightly, Dr. Luberoff’s medical findings on Victim’s hymen consistent with sexual abuse, and neighbor Martha Penrod’s testimony about the inappropriate physical contact she observed between Petitioner and Victim. Even assuming the trial judge abused her broad discretion in allowing Dr. Foster to testify as an expert in child abuse assessment, Petitioner’s conviction should not be reversed because that testimony could not have affected the result of Petitioner’s trial based on the vast and overwhelming evidence of guilt presented. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (“[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result.”). The Court of Appeals properly affirmed Petitioner’s convictions and this Court should deny certiorari.

CONCLUSION

For all the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

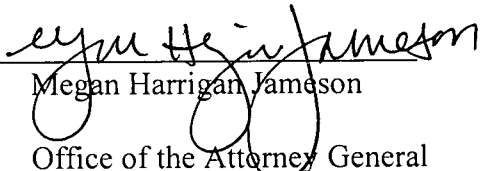
ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, South Carolina 29202
(803) 576-1800

BY:


Megan Harrigan Jameson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

August 6, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2018-001178

RECEIVED
AUG 06 2018
S.C. SUPREME COURT

THE STATE,

Respondent,

v.

JAMES WAYNE MILLER,

Petitioner.

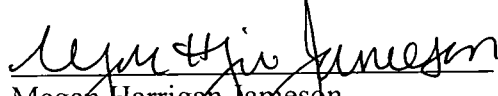
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Return to Petition for a Writ of Certiorari on Petitioner by depositing two copies of the same in the interagency mail, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 6th day of August, 2018.


Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

The Supreme Court of South Carolina

The State, Respondent,

v.

James Wayne Miller, Petitioner.

Appellate Case No. 2018-001178

The Honorable Tanya A. Gee
Kershaw County
Trial Court Case No. 2012GS2801381 and
2012GS2801382

ORDER

Based on the vote of the Court, the petition for a writ of certiorari to the Court of Appeal is denied.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

September 21, 2018

cc:

Susan Barber Hackett, Esquire

Megan Harrigan Jameson, Esquire

Daniel Edward Johnson, Esquire

The Honorable Janet C. Hasty

The Honorable Jenny Abbott Kitchings



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 01, 2018

The Honorable Janet C. Hasty
PO Box 1557
Camden SC 29021-8557

REMITTITUR

Re: The State v. James W. Miller
Lower Court Case No. 2012GS2801381, 2012GS2801382
Appellate Case No. 2016-000642

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Returned are the following exhibits:

State's Exhibit #46 and State's Exhibit #47 - CD Interview Redacted

Please sign below acknowledging receipt of these exhibits and return the acknowledgement to this office.

Signature: _____ Date: _____

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Megan Harrigan Jameson, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

County of Kershaw)James Wayne Miller)

Full name and prison number (if any) of Applicant)

#367454)
v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2019-CP-28-236

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Inst
2. Name and location of Court which imposed sentence Kershaw County
Courthouse, Camden, S.C.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012-GS-28-1381
 - (b) 2012-GS-28-1382

 FILED FOR RECORD
 2019 MAR 11 PM 2:36
 JAMES C. HASTY
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) March 18, 2016 10 years + 20 years
 (b) _____
 (c) _____
6. Check whether a finding of guilty was made:
 (a) after a plea of guilty _____
 (b) after a plea of not guilty ☒ _____
 (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list:
 (a) the name of each Court to which you appealed:
 i. S.C. Court of Appeals
 ii. S.C. Supreme Court for Writ of Certiorari
 iii. _____
 (b) the result in each such Court to which you appealed:
 i. denied
 ii. denied
 iii. _____
 (c) the date of each such result:
 i. 5-24-2018
 ii. 9-21-2018
 iii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. unknown
 ii. _____
 iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
 (a) _____
 (b) _____

FILED FOR RECORD
 2019 MAR 11 PM 2:26
 JAMIE C. HASTY
 CLERK OF COURT
 WENDELL COUNTY, S.C.

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: see attachments (8 pages)
- (a) unlawful arrest / police brutality
- (b) ineffective counsel
- (c) judge bias
11. State concisely and in the same order the facts which support each of the grounds set out in (10): see attachments (8 pages)
- (a) _____
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

FILED FOR RECORD
19 MAR 11 PM 2:26
JAMES J. HASTY
CLERK OF COURT
SOUTH CAROLINA, S.C.

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) my appellate attorney said these issues were
 (b) more for PCR than the direct appeal.
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes - Appeal

FILED FOR RECORD
 2010 MAR 11 PM 2:26
 JACOB D. HASTY
 CLERK OF COURT
 Kershaw County, S.C.

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Neil Riley - (Public Defender)
Kershaw County Courthouse Camden, SC
 ii. Anna Rawl Good, LLC - (Trial Court)
Law Ofc of Victor Li, 2127 Park St, Columbia, SC 29201-213
 iii. Susan Barber Hackett Appellate Defender
P.O. Box 11589, Columbia, SC 29211-1589
 (b) the proceedings at which each such attorney represented you:
 i. initial Bond hearings
 ii. Trial Court
 iii. Appellate Defender

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress:
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

James W Miller
Applicant

SWORN or affirmed to and subscribed before me this

6th day of March, 2019.

Jerry A. Warf
Notary Public

My Commission Expires: March 8, 2028

FILED FOR RECORD
2019 MAR 11 PM 2:26
JANET C. HASTY
CLERK OF COURT
Kershaw County, S.C.

19. State clearly the relief you seek in filing this application:

I am requesting Post Conviction Relief for a new & fair trial with proper and thorough representation of my innocence.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of _____)

VERIFICATION

FILED FOR RECORD
2019 MAR 11 PM 2:26
JANET C. HASTY
CLERK OF COURT
Kershaw County, S.C.

I, _____, 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.

James W Miller

SWORN to and subscribed before me this 6th
day of March 2019.

Jennifer Wasfi (L.S.)
Notary Public

My Commission Expires: March 8, 2020

10

- a. I believe that my arrest was unlawful and that I experienced police brutality.
- b. My counsel did not advocate for my basic civil rights inside the court room
- c. My counsel did not defend that my basic needs be met in the court room
- d. My counsel did not plan or prepare for my defense
- e. My counsel did not meet with me to prepare and counsel me for my defense
- f. My counsel failed to investigate or call witnesses at hand for my defense
- g. My counsel would not allow me to testify for my defense
- h. My counsel erroneously allowed my police interrogation video to be submitted to the court.
- i. My counsel failed to object to statements in closing argument by the solicitor or present my requested statements/questions in her closing argument.
- j. The judge showed bias to my defense.

FILED FOR RECORD
2019 MAR 11 PM 2:26
JAMIE C. HASTY
CLERK OF COURT
Kershaw County, S.C.

11.

a.

1. I was arrested without probable cause, and due only to an accusation made by my angry and very upset 17 year old daughter, and the officers assuming that I was guilty because I surrendered voluntarily. There were 3 officers walking briskly toward me with their hands on their guns and my Daughter said to me that they were there for me. I had a holster on and I wanted to make sure that they knew that I was not armed. The officers said that I acted as if I knew why they were there. My wife had just told me that they were there so she could file a report on a gun that we had lost while horseback riding and that she would take care of it. She even went out with the gun box in her hand. I had no reason to think otherwise. She testified to this along with other statements that would have validated my actions if my counsel would have re-cross examined her and the officers. I thought that I or we, were in trouble for the lost gun since I, and those in my house were not allowed to have guns present. My wife purchased the guns.

2. The RO put me in the back of the police car in August with the windows up. He then proceeded to turn the heat on and left me locked in. (He offered testimony without being ask, that the air was on). I had on long jeans and apparel suited for horseback riding. I still

have the clothes in reserve. I asked my counsel repeatedly to get the dash cam video. The light was blinking. I also was not read my Miranda Rights in the car as the RO claimed.

b.

My counsel failed to request specific instructions concerning my appearance in the courtroom. I was taken back into custody at the start of the trial without warning, even though I had not violated my probation for 3 years, with and without an ankle monitor. I was not given fresh clean clothes or grooming items for the entire duration of the trial. I wore the same dirty suit every day in court. The jail put me in the drunk bin with another man with only a metal or concrete bench. I slept in my wheelchair sitting up. I was not given a shower or any grooming items. I could not shower, shave, or brush my teeth for the entire week. My clothes and beard were unkempt and my hair was dirty. They also took the band that held back my hair causing it to randomly fall in wiry strings. It was as if they all wanted me to look like a dirty man. I was dirty, tired, hungry, and in severe pain.

c.

1. My counsel failed to make sure that my basic needs be met in the courtroom. I was in severe pain from a recent back injury that occurred while I was hauling lumber and building a two story deck. I had a Doctor's note to excuse me from work and school that my attorney withheld from the judge. The judge ordered a shock belt to be put on my waist for no apparent reason, further intensifying my pain. I was already in a wheel chair and could not walk. I was given no breaks even though the judge said at the beginning, that she would take frequent breaks in order for me to be more comfortable. No one followed through on this. When there were breaks, I sat in the courtroom alone (except for the guard) with no water, food, or bathroom breaks, causing me much discomfort and constipation, which further intensified my pain. My attorney ask if I was getting lunch on the first day and the judge said that it would have to come from the jail, but no one followed through. The last day after observing me, my aunt stayed in the courtroom while the others left. She loudly asks me if I had eaten anything. I discreetly shook my head fearing that I would get shocked. (I had only 2 small breakfasts at the jail for the entire week, no lunch, and no supper since it had already been served when I got back to the jail.) She then asks the officer why I was not getting food, for which he replied, "That he had no orders for food or breaks for me". She then demanded that it was my basic civil right to be provided food. He left and came back approx. 30 minutes later with a brown paper bag containing 2 bologna sandwiches. I had started eating one when the judge entered and the court was in session, so I could not finish. Please check the courtroom video.

2. The judge said that I could only have one of the 4 medications that my doctor had prescribed but the jail would not release it saying that they don't administer narcotics at the jail. It wasn't until the last day before deliberations began, that my attorney asks that I be allowed something for my pain. The judge replied that while she wasn't a doctor, she "knew" that those meds should not be taken together (even though they were legally prescribed) and allowed me to take one of my prescribed meds before I left.

d.

1. My Counsel had a large file of pictures, social media posts, private messages, and letters from people (describing to me what was going on) that were presented to her from family and friends that would have called the victim's and her mother's credibility into question. These items would have contradicted many inconsistent statements that my accusers made while testifying, had she presented them. One example was that my accusers claimed that they were isolated and had no friends. They had many friends and were supervised, not isolated, which the many pictures would have revealed. She also withheld pictures, comments and private messages that would have raised doubt regarding the other testimonies of my accuser's. My counsel failed to investigate other concerns that she was made aware of through the years. I preserve other examples that were withheld in court to discuss with counsel.

2. My counsel waited until the Friday before court was to begin on Monday to get the discovery. I had requested for her to release the discovery documents throughout the 3 years for my family and I to review in order to offer important information. She ignored my requests. There are many statements that I and others could have challenged if we had been given access to the discovery. From what I remember, the judge ruling at my bond hearing told the solicitor to have the full discovery and DNA investigation available in 30 days. That was 3 years prior. My attorney never followed through on this order. In court it was clear that my attorney had not spent much time reviewing the discovery contents, or the other information that she was given in detail. My aunt received a copy several weeks after trial. I still have not seen the discovery.

3. My counsel failed to seek records from DSS, Hospital Visits, or follow up exams.

4. My attorney went to trial with no co-counsel. She had said before that she would have assistance. My aunt told her on the first day (Monday) that she (attorney) was not prepared and needed help especially since there were 2 working for the prosecution and that they were prepared. She replied "it's okay; the jury will see the 2 solicitors as bullying since I am alone." This can be confirmed.

e.

1. My counsel had 3 years to prepare me for a defense. She waited until the Thursday before court to make a morning appointment, even though we kept inquiring to meet with her over the years. That Thursday morning, I could not stand, walk or drive. My aunt sent repeated requests to give us another time to come so that she could drive from Charlotte, N.C., to pick me up in Camden, and then drive me to Columbia. She (my aunt) also asks if she could come and consult with my attorney herself and have me on audio or video. She did not respond except to say that she had to pick up the discovery the next day (Friday).

2. During the trial breaks, she (attorney) did not consult with me in preparation, ask questions, or review my files. Instead she was reading a book.

f.

1. My counsel would not contact or prepare any witnesses for my defense. This was requested along with a list of people, several times during the 3 years, and again on the first day of court. During the trial, there were people present, (family and friends) who were willing to testify on my behalf. The first day of court, my aunt told her that the prosecution was prepared and that she (attorney) was not, and that she needed to call witnesses. My aunt also mentioned that the social worker from DSS was not there and that she needed to be subpoenaed. She replied something to the effect of, their case being weak and her strategy was to challenge their evidence. The state did not call DSS to testify. All of this can be confirmed.

2. My attorney failed to subpoena Sally Williamson, the forensic interviewer. The statements that were made to her by both daughters were different than in the testimonies that they gave in court and could have brought such testimony into question. The state did not call Sally Williamson.

3. My attorney failed to advise me, and schedule a polygraph and mental exam, even though she was requested to by my aunt. I also requested a polygraph several times while being held in detention after my arrest.

Note: The only witness that the prosecution could find to testify against me was my next door neighbor who also hated me due to property disputes. There were several witnesses in court that loved me, and my family, that would have testified on my behalf.

g.

1. My counsel would not allow me to testify even though I made several requests to do so. She also told my supporters in the courtroom to convince me to not get on the stand due to

my condition and because I was not prepared (this can be confirmed). She had just ask the judge to allow my pain meds due to my discomfort (pg 555 556).

2. The jury did not have the needed opportunity to hear me declare and argue for my innocence, where there was no evidence, only negative DNA, and where the circumstantial evidence was not overwhelming, and mainly based on opinions, hypothesis, and phenomenon. I preserve further details to discuss with counsel.

h.

My counsel allowed my police interrogation video to be presented as evidence even though I had requested an attorney, lawyer or counselor (counsel) several times in the interview while continuing to be interrogated. She also did not object to a redacted version of the interview to be shown to the jury, where as my request for help, a lawyer, attorney, and counselor was redacted.

i.

1. My counsel failed to re-cross examine witnesses after inaccuracies were made.

2. My counsel failed to bring up comments made by the investigators in my case and discrepancies in their testimony and written statements.

3. My counsel failed to question diagnostic comments from the medical doctor, Dr. Susan Luberoff, or to seek other expert opinion in the matter.

4. My counsel failed to ask Dr. Susan Luberoff very obvious questions as to this accusation and the physical exam or seek other expert opinions. She said she was saving the obvious questions to bring up in her closing statements, which she did not.

5. My counsel failed to re-cross examine Dr. Susan Luberoff after she changed her statement (pg 355, 356) from saying that her diagnosis was based on what she was told and not from the exam evidence itself. There are more matters concerning this exam that I would like to discuss with counsel.

6. My counsel failed to re-cross examine the police officers comments that were based on assumptions, after the testimony of the accuser and her mother, that would have brought their credibility and actions into question. I would like to discuss this further with counsel.

7. My counsel did not object to inaccuracies (falsehoods and misquotes) presented in the solicitor's closing arguments. I would like to further approach this with counsel.

8. My counsel did not object to the prosecutor emphasizing to the juror's, in her closing statement that my accuser did not need to corroborate her story by additional evidence. I believe that this statement took the burden to consider unreasonable doubt away from the jurors.

9. My counsel did not object to my accuser's twin sister testifying in the presence of her mother in the courtroom. This twin daughter was initially in support of me. She was afraid of her mother finding out that she had called her aunt and my aunt to tell them what was happening. (These witnesses would have testified to such if they had been allowed). My attorney was aware of this due to an email and a phone conversation that was sent to her, (attorney) concerning this before my bond hearing, which my daughter attended. She also visited me in jail. I believe her testimony was a result of her being intimidated with her mother's presence in the courtroom. (The judge did allow the victim and her mother to be sequestered from each other's testimony).

10. In closing argument, we had requested that my attorney add a very important question to her argument, for which she left out. After the closing argument, my aunt asks her why she left out the most obvious and important "piece of the puzzle" of the entire trial. She replied, "I forgot, but the jurors will figure it out". They didn't.

11. My counsel seemed disinterested in my defense and treated me with disregard at trial. She frequently brought up questions while cross examining witnesses and then just dropped the matter, and moved on without pause. She also failed to recognize the many contradictory statements that she could have revisited during cross or used in re-cross examinations had she sought them. At the beginning of trial, she commented to me that she and the solicitor were neighbors and played ball together. She, the solicitor and the judge were friends on social media. I believe this affected her performance in my defense and I (and others) viewed her actions as seeming to not want the judge or solicitors to be upset with her.

J.

1. I believe that the judge was biased toward me from the beginning with regard to my treatment, my appearance, my basic needs, and comments made.

2. I believe that the jurors were pressured to save time and come to a verdict before going into weekend deliberations. To begin with the judge commenting to the jurors before deliberation "I do not anticipate this trial going beyond this week if anyone was concerned about it bleeding over into Monday, that's not any sort of anticipation. That's not on the radar screen that that would happen in this case". (pg 552, line 18-21)

3. The jurors were struggling. They came back with a request (2:45, pg 636) to see the transcripts of mother Tammy and daughter Britly and daughter Breana, the interview videos, State's comments from closing statements, Officer Dill's testimony, Officer Houser, and Arc's doctor statement. She commented that that was a lot of testimony that would take a lot of time, and perhaps they could whittle it down. (My counsel failed to argue this). The judge told the juror's that that would be hours of testimony and sent them back to review their request. They came back with a smaller requests thereby deleting all above, except for Britly and the mothers testimony, and the first 3 arresting officers. I believe that it would have been favorable to my defense for the juror's to review the Arc doctor, Breana, and Officer's Dill's testimony. My attorney failed to object.

4. At 5:05 the jurors requested to "SEE" the laws for reasonable doubt (pg 640, 641). The judge again discouraged this by saying that she was suppose to send the entire charge but she had a lot of scratch outs that she would have to go edit, and that there's nothing wrong with her just rereading the reasonable doubt portion to them. My counsel failed to argue this even though the jurors requested to seeing it on paper. Some people (like me for instance) understand writing better than listening. The jurors also questioned how long they would be staying tonight. The judge told the jurors that we are here for the long haul as long as it takes until you come to a verdict. (pg 644 6-11)

5. 8:00 the jurors ask what if you don't feel persuaded and your decision is final (pg 645, 14-15). The judge seemed agitated, and replied, "When I declare a mistrial, nobody wins. It means that this case is going to be retried and 12 other people will sit in the very same seats that ya'll are sitting in and hear the same testimony and evidence that ya'll received, and there's no reason to think that they would be smarter or more capable to reach a verdict." (pg 646, 1-10). She then later reneged on staying for the long haul, and said that they would break at midnight, until noon the next day.

She later said, again, (pg 647, 19) "Like I said, Nobody wins when there is a mistrial, okay"? I think that the jurors were intimidated by these comments. (I later found out that she was not well during my trial.)

6. Next day. A request was made for more testimony regarding Dr. Luberoff findings and what the findings say equivocally (pg 649, 18-22.) and the hard copy of the definitions of the charges. One juror was reported for writing notes outside of the courtroom. The judge said well, I don't need to see your notes as long as they are just your feelings and thoughts (pg 653, 25). The notes were neither examined nor recorded. My attorney failed to inspect the notes.

7. Around 4:15-4:30 my attorney said that the judge was going to talk to the jurors one more time. At 4:42, on Friday evening, they came back with a verdict, as predicted by the judge, before the deliberations began. What did she say to the jurors on her last visit.

8. Page 670, 14-19. After the verdict was read and before sentencing, the judge quoted, "I think my sentence speaks for itself, but I do want to say one thing that I think is important and that is to Ms. Maynard. "I believe you. I believe you." Some of the jurors were viewed as being distressed outside of the court by others. I request that the jurors be interviewed regarding feeling pressured to come to a verdict before Friday evening and what did the judge say during her last visit to them, on Friday evening before the 5:00 closing.

I believe and preserve, that there are additional claims with supporting evidence for PCR but I do not have collateral counsel, or the funds for expert services and investigative claims that were neglected to be done before trial.

This PCR claim is later than I would have liked to submit, due to frequent extended lockdowns, preventing me from gathering info, communicating, and seeking advice. I am innocent. I have never touched or been accused of touching anyone inappropriately in my entire life of 42 years. Please send counsel.

FOR RECORD
2019 MAR 11 PM 2:26
JAMES C. HASTY
CLERK OF COURT
SARASOTA COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	FIFTH JUDICIAL CIRCUIT
 JAMES MILLER,	)	CASE NO.: 2019-CP-28-00236
	)	
Applicant,	)	
	)	
v.	)	AMENDMENT TO APPLICATION
	)	FOR POST CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

FILED FOR RECORD
2022 MAR 21 AM 11:29
JAMES C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief. This amended complaint adopts and includes all grounds in the original application filed March 11, 2019, by Applicant. Applicant further alleges as additional grounds regarding his claim of ineffective assistance of counsel as to Anna Good and Susan B. Hackett as follows:

1. Applicants counsel Good failed to get trial continued due to applicants pain medication from Dr. Julie Taylor and failed to present paperwork related to this to the trial judge.

2. Appellate counsel raise the issue of judge allowing hearsay from Cpl. Brooks Houser re victims mothers statement to him re victims statements (p122, line14).
3. Applicants counsel Good failed to object to hearsay testimony from Officer Houser regarding CAD information “mother had found out recently that her husband had forced their daughter to have sexual intercourse” (p120, Line 11-13) and defendants statement “whatever she says, that’s what happened. If she said it, it’s not a lie”. (P.125, Line 17-19 p.133, Lines 9-10).
4. Applicants counsel Good failed to object to hearsay testimony from Officer Houser regarding victims statement.(p131, Line 24-25, p132, Lines 1-8).
5. Applicants counsel Good failed to object to hearsay testimony from Officer Scott regarding defendants statement “whatever she says, that’s what happened. If she said it, it’s not a lie”. (P.147, Line 19-20).
6. Applicants counsel Good failed to object to hearsay and to object to the solicitor misstating testimony by asking Officer Hathaway about defendant stating “whatever she says is true” (166,Lines 14-15) following testimony by Hathaway defendant stated “whatever she said” (p164, Lines 5-6).
7. Applicants counsel Good failed to object to testimony from the victim regarding the Applicant showing her a “porn video” as evidence of other crimes that the Applicant was not on trial for (p 217, Line 16-21).

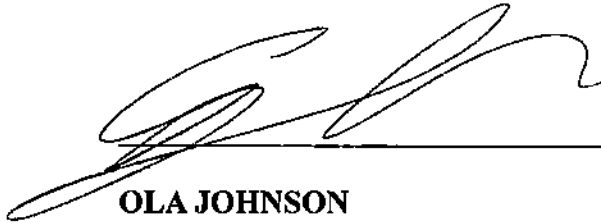
8. Applicants counsel Good failed to object to hearsay testimony from Tammy Price regarding victim answer to the question “is he touching you”, “every day” (p 299, Lines1-2) and statements from victim regarding the assault (p310, Lines 17-21, (p 311 Lines 10-18).
9. Applicants counsel Good failed to object to hearsay testimony from Tammy Price regarding defendants statement “it wasn’t all his fault” (307, Lines 3-5).
10. Applicants counsel Good failed to object to hearsay testimony from Tammy Price regarding defendants statements as hearsay and evidence of other crimes stating “just make it go away. I will pay you whatever you want” (p311 Lines25, p312 Lines 1-3).
11. Applicants counsel Good failed to object to hearsay testimony from Tammy Price regarding defendants statements as hearsay and prejudicial regarding statements religious views and reading the Bible (p313, Lines 5-14).
12. Applicants counsel Good failed to object to improper bolstering offered by the states witness Dr. Susan Luberoff regarding her review of a medical examination of the victim along with “her (victims) history” to be “consistent with sexual abuse” (p. 352, Lines 12-14). (*Farid A. Mangal v. State of South Carolina*, 781 S.E.2d 732).
13. Applicants counsel Good failed to object to a leading question and prejudicial statement calling for speculation by the witness Martha Penrod “what part of James body was touching (victim) ?” “So would that be his genitalia?” Followed by the answer “yes I guess you could say that” (p 452, Lines 9-10,14-15).

14. Applicants counsel Good failed to object to hearsay by Capt. Steven Knafelc "I received a phone call from Tammy, She just told me of something on some carpeting some bed spreads" (p465, Line 3-5).
15. Applicants counsel Good failed to call an expert in child abuse assessment or child abuse pediatrics to counter the opinions of the states witnesses in these areas. *Bobby Joe Reeves v. State of South Carolina* 782 S.E. 2d 747.
16. Applicants counsel Good failed to object to the admissibility of defendants statement and to a leading question to Inv. Dill by the state, "did he say he needed to get his story on the same page as hers ?" (p532, Lines 21-23).
17. Applicants counsel Good failed to object to the jury charge as unconstitutionally coercive for failing to instruct the jury that they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict . Also the charge mentioned that the case would have to be retried in the event of a mistrial (p. 645, Line 24,25 to p. 646 Lines 1) and did not advise the jury that they have a right to not reach a verdict. *The State v. Billy Lemurces Taylor*, 829 S.E.2D 723.
18. Applicants counsel Good failed to object to the states closing as instructing the jury as to the law under S.C. Code Sec. 16-3-657 as prejudicial and as it caused confusion and an unconstitutional comment on the facts not allowed in a jury charge. (p.568, Lines 14-17) *State v Witherspoon* 795 SE2d 685 (S.C. 2016).

19. Applicants counsel Good failed to call character witnesses for the defense including Michael B. Norwood.

20. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



OLA JOHNSON

Attorney for Applicant

P.O. Box 549

Lexington, SC 29071

803-360-8692 Phone

olajohnsonlaw@gmail.com

This 18 day of March, 2022

STATE OF SOUTH CAROLINA)
)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF KERSHAW)
) FIFTH JUDICIAL CIRCUIT

JAMES WAYNE MILLER,) **CASE NO.: 2019-CP-28-00236**

Applicant,)

v.)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)

Respondent.)

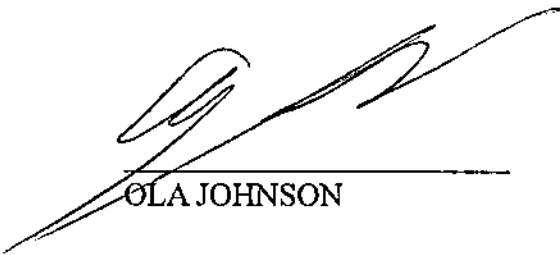
FILED FOR RECORD
 2022 MAR 21 AM 11:2
 JANET O. HASTY
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

I, Ola Johnson, hereby certify that on March 18, 2022, I served a copy of the
 AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF on William Blitch,
 Assistant Attorney General by email and by depositing the same in the U.S. mail to the following
 address:

William Blitch, Assistant Attorney General
 SC Attorney General's Office
 P.O. Box 11549
 Columbia, S.C. 29211

318-22

 Date



 OLA JOHNSON

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

James Wayne Miller, # 367454,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2019-CP-28-236

**RETURN, MOTION FOR MORE
DEFINITE STATEMENT, &
PARTIAL MOTION TO DISMISS**

FILED FOR RECORD
2021 DEC 10 PM 1:10
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

Respondent, making its Return to the Application for Post-Conviction Relief commenced by Applicant, James Wayne Miller, on March 11, 2019, would respectfully show this Court:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). In October 2012, the Richland County Grand Jury indicted Applicant for second-degree criminal sexual conduct (CSC) with a minor (2012-GS-28-1381) and incest (2012-GS-28-1382). Anna R. Good, now Anna Rawl Browder (Counsel), represented Applicant. Assistant Solicitors Kathryn Cavanaugh and Karlen Senn prosecuted the case.

On March 14–18, 2016, Applicant proceeded to a jury trial before the Honorable Tanya A. Gee. The jury convicted Applicant as indicted on both charges. Judge Gee sentenced Applicant to twenty years imprisonment for second-degree CSC with a minor and ten years imprisonment for incest, to be served consecutively. Applicant appealed.

Applicant was represented on appeal by Appellate Defender Susan B. Hackett. Applicant

raised the following issues on appeal:

1. The trial court erred in denying Applicant's request for a continuance where "good cause" existed in light of a serious medical condition which rendered him unable to assist counsel; and
2. The trial court erred in permitting Dr. Allison Foster to testify as an expert in child abuse assessment where her testimony improperly bolstered the complaining witness's credibility and there was insufficient evidence of the reliability of the subject matter of her testimony.

The Court of Appeals affirmed Applicant's conviction. *State v. Miller*, 2018-UP-121 (Ct. App. filed March 21, 2018). Thereafter, Applicant timely petitioned for rehearing, and the Court of Appeals denied rehearing on May 24, 2018. Applicant petitioned the South Carolina Supreme Court for a writ of certiorari on July 5, 2018. Respondent filed its return to the petition on August 6, 2018. The Supreme Court denied certiorari by written order on September 21, 2018. The case was remitted back to the circuit court October 1, 2018. Applicant timely commenced this PCR action on March 11, 2019.

II. FACTS

Applicant was convicted of raping his sixteen-year-old daughter (Minor 1). Applicant consistently raped Minor 1 for over a year. Applicant threatened Minor 1 not to disclose the abuse and constantly carried a gun on his belt, even while raping Minor 1. During this timeframe, Applicant openly chose to sleep in Minor 1's bed instead of his wife's bed. Additionally, Applicant did not attempt to hide the fact that he slept in Minor 1's bed, and was observed acting inappropriately with Minor 1. Applicant's neighbor twice reported to law enforcement her suspicions that Applicant was molesting Minor 1. Minor 1 eventually disclosed that Applicant inappropriately touched her to her mother. When law enforcement arrived at the home, Applicant openly stated to his wife in front of law enforcement "it's not all my fault." (Tr. 539).

In July 2011, Applicant, his wife (Mother), and their five children visited friends in Camden for the July 4th. (Tr. 169-70, 175). After spending time in Camden, Applicant decided to move his family from Summerville to Camden, and found a two-story house to rent on Lake Wateree. (Tr. 175-76). The home needed some work before the family would be ready to move in, so Applicant and his sixteen-year-old daughter (Minor 1) stayed behind to fix up the home while the rest of the family, including Minor 1's twin sister (Minor 2), returned to Summerville to pack up their home. (Tr. 177-78). Applicant, who worked in construction and as a day laborer, often had assistance from Minor 1 while working. (Tr. 173-77). Applicant and Minor 1 stayed in the family's camper while fixing up the home. (Tr. 177-78).

One evening, after a long day of work, Minor 1 went inside the camper to go to bed while Applicant remained outside by a bonfire, drinking and socializing with a friend. (Tr. 178-79). Minor 1 eventually fell asleep, but woke up to Applicant, her father, performing cunnilingus on her. (Tr. 179). Applicant had Minor 1's legs pulled apart and pinned down so she could not move. (Tr. 179). However, she was able to shove him off, and she ran to the bathroom. (Tr. 179-80). Applicant then apologized, claimed it was an accident, and promised Minor 1 it would not happen again. (Tr. 180-81). Applicant pleaded with her to exit the bathroom and go back to bed, promising he would remain on the couch. (Tr. 180-81). Minor 1 eventually acquiesced and returned to the bed, where she eventually fell back asleep. (Tr. 180-81).

However, Minor 1 again woke up to Applicant on top of her, pinning her down. (Tr. 181). Minor 1 tried to break free, but was unable to escape this time. (Tr. 181-82). Applicant said he needed to finish what he started, and then forcibly raped Minor 1. (Tr. 181-82). When Applicant finished raping her, Minor 1 fled to the bathroom, where she remained for the rest of the night. (Tr. 182). Applicant fell asleep as if nothing had happened. (Tr. 182).

The next morning, Applicant threatened Minor 1 their family would be ruined if she told anyone about the abuse. (Tr. 182). He told her that he had taken a pill in addition to drinking and was unable to control himself. (Tr. 183). He threatened that she needed to keep the rape a secret while forcefully grabbing her arm. (Tr. 183-84). Minor 1, afraid of Applicant and fearing the potential consequences to the rest of her family, decided not to tell her family about the abuse. (Tr. 183, 187).

However, that night, Applicant again raped Minor 1, this time inside the family's new home. (Tr. 184). Minor 1 again tried to fight Applicant off, but he had pinned her down, and she was unable to break free. (Tr. 184-85). Applicant continued to rape Minor 1 several more times while the rest of the family was in Summerville. (Tr. 185). Each time, Minor 1 unsuccessfully tried to fight Applicant off. (Tr. 185). After each rape, Applicant threatened Minor 1 that their family would be ruined if she told anyone. (Tr. 185, 187).

Minor 1 hoped her father's sexual assaults would stop when the family moved into the new home, but he continued to rape her. (Tr. 187). Initially, Minor 1 and her twin sister, Minor 2, shared a room in the new house. (Tr. 187-88). While Minor 2 was asleep, Applicant would sneak into his daughters' bedroom, rape Minor 1, and then leave. (Tr. 188). After a few months, Applicant decided it would be good for Minor 1 to have her own bedroom due to on-going disputes between her and Minor 2. (Tr. 189, 191-92). However, as soon as Minor 1 had her own bedroom, Applicant began sleeping in Minor 1's room nightly. (Tr. 192, 280). This made Mother upset and confused. (Tr. 193-94, 281). Mother confronted Applicant about the inappropriate sleeping arrangement and demanded Applicant return to their marital bed. (Tr. 281). In response, Applicant accused Mother of having perverted thoughts and said she was jealous of Applicant's close relationship with Minor 1. (Tr. 281-82). Applicant refused to stop sleeping in Minor 1's bed. (Tr. 193, 282).

Applicant continued to constantly rape Minor 1 in the home. (Tr. 193). After a few months, Minor 1 stopped fighting back. (Tr. 193). Additionally, shortly after moving to Camden, Applicant began regularly carrying a gun, which he kept on a holster on his belt. (Tr. 193-94). Applicant routinely kept the gun attached to his pants while he was raping Minor 1. (Tr. 194-95). Applicant never carried a gun before he started raping Minor 1. (Tr. 194, 199, 285). In addition to assaulting Minor 1 at the family home, Applicant also raped Minor 1 when she accompanied him to jobsites for work. (Tr. 195-99). Minor 1 no longer wanted to help Applicant with work, but she felt she did not have a choice because the family was financially depended on Applicant, and he needed her help. (Tr. 195-96).

Applicant continued threatening Minor 1 to keep her from reporting the abuse. (Tr. 199-200). Minor 1 routinely had bruising on her body from Applicant pinning her down while raping her. (Tr. 204-06). In addition to vaginally penetrating Minor 1 with his penis, Applicant would also digitally penetrate her and fondle her breasts. (Tr. 206-07). Usually, when Applicant raped Minor 1, he would pull out to ejaculate; however, occasionally, he would wear condoms or just inseminate her. (Tr. 209-10).

By August 2012, Applicant had been raping Minor 1 for thirteen months. (Tr. 223). Minor 1 felt increasingly helpless and withdrew from the rest of her family. (Tr. 222, 224-25). She feared the abuse would never end. (Tr. 222). Victim finally disclosed to Mother that Applicant had been inappropriately touching her on August 11, 2012. (Tr. 223, 225-28, 299). Mother became hysterical and immediately called her sister (Aunt) to tell her about the abuse and request that Aunt call law enforcement. (Tr. 229, 299). However, Mother did not confront Applicant about the abuse, tell him she called Aunt, but made an excuse for why law enforcement was coming to the house. (Tr. 299-300).

A short time later, law enforcement officers arrived at the home. (Tr. 230). When Applicant saw law enforcement approaching, he told Minor 1 he wished she had warned him so he could say goodbye to the rest of the family. (Tr. 231). Applicant then instinctively turned towards the officers, unhooked his belt, emptied his pockets, and placed his hands behind his head. (Tr. 124, 146, 155). Law enforcement detained Applicant and walked him to a waiting patrol car. (Tr. 124). When Applicant walked by his wife, he claimed it “wasn’t all his fault” and asked for one last kiss from her. R. 236.

After being detained, Corporal Houser of the Kershaw County Sheriff’s Office *Mirandized* Applicant and asked him if he wished to make a statement. (Tr. 125). Applicant responded he understood his rights, then stated, “Whatever she says, that’s what happened. If she said it, it’s not a lie.” (Tr. 125, 147, 164). At this point, Applicant had not yet been informed of the allegations made against him or why he was being placed under arrest. (Tr. 147, 155).

Thereafter, Applicant was taken to the Kershaw County Sheriff’s Office, where he met with the on call investigator, Investigator Dill. (Tr. 124, 126, 163-64, 524-36). Applicant and Dill spoke in an interview room equipped with audio and visual recording devices which recorded their entire conversation. (Tr. 526-27). Dill re-*Mirandized* Applicant, and Applicant signed a waiver indicating he understood his rights and wished to speak. (Tr. 527-31, ROA. 595). Applicant did not deny the allegations and stressed he needed to make sure his story was “on the same page” as Minor 1’s report because he did not want his statement to differ from hers. (Tr. 532). The interview ended shortly thereafter, and Applicant was taken to the detention center. (Tr. 533-34).

Upon arriving at the detention center, Applicant asked to speak to Dill again. (Tr. 534). Dill went to the detention center, asked Applicant if he wished to speak with him, and when Applicant answered affirmatively, Dill transported Applicant back to the sheriff’s office for another interview.

(Tr. 534-35). When they returned, Dill brought Applicant into the same interview room equipped with recording equipment, advised him of his rights, and Applicant again signed a waiver indicating he understood his rights and wished to speak with law enforcement. (Tr. 535-39, ROA. 596). In this second interview, Applicant admitted to placing his hand on the inside of Minor 1's leg while she slept and telling his wife that "this is not all my fault." (Tr. 539).

Mother testified she had known Applicant since third grade and had been married to him for twenty years. (Tr. 268-69). She testified she had five children with Applicant, including the twins, Minor 1 and Minor 2. (Tr. 268-69). She testified she and Applicant moved approximately thirty times throughout their marriage, including a final move to Camden in July 2011. (Tr. 271, 275). She testified she began noticing a change in Minor 1 when the family moved to Camden. (Tr. 274, 278-80). Additionally, she testified Applicant stopped sleeping in bed with her, and she would routinely find him sleeping in Minor 1's bed. (Tr. 280-81). She testified she tried to physically remove Applicant from Minor 1's bed and told him she thought he was behaving inappropriately. (Tr. 280-81). Applicant responded by telling her she was jealous of Minor 1 and how close they were. (Tr. 282). Additionally, she testified Applicant stopped regularly having sex with her when the family moved to Camden and only slept with her a couple of times during the thirteen-month period when he was raping Minor 1. (Tr. 284-85). She testified she tried to talk to Minor 1 about the changes in her behavior and whether Applicant was abusing her, but Minor 1 denied any abuse and refused to speak with her. (Tr. 286-87). She testified she also observed Applicant being inappropriate with Minor 1, including untying her swimsuit top, wrapping his legs around her, and feeling her breast. (Tr. 291-92). She testified Minor 1 eventually confided in her on August 11, 2012, that Applicant had been touching her and she immediately got law enforcement involved. (Tr. 296-300).

Minor 2, Minor 1's twin sister, also testified about inappropriate behavior she had observed between Applicant and Minor 1, including Applicant sharing a bed with Minor 1 nightly. (Tr. 340-41). She also testified Minor 1's behavior dramatically changed when the family moved to Camden. (Tr. 367). She testified Applicant began carrying a gun in a holster on his belt when the family moved, and he had not done this with prior to living in Camden. (Tr. 369).

The family's next-door neighbor, Martha Penrod, also testified regarding inappropriate behavior she observed between Applicant and Minor 1. She recalled times she saw them behaving oddly together in the water and seeing them snuggling on a hammock. (Tr. 444). Penrod further testified she had previously twice informed law enforcement of her concern that Applicant was molesting Minor 1. (Tr. 458).

The State presented testimony from Dr. Susan Luberoff, who treated Minor 1, and was admitted as an expert in child abuse pediatrics. (Tr. 340-56). Dr. Luberoff testified she examined Minor 1 on August 17, 2012. (Tr. 343-44). Dr. Luberoff testified she noticed notching at the seven o'clock position of Victim's hymen, which was consistent with penetrating trauma and finding of sexual abuse. (Tr. 348-56). The State also presented expert testimony on child abuse assessment from Dr. Allison Foster, a licensed clinical psychologist with extensive experience studying and treating child victims of sexual abuse, over Applicant's objections. (Tr. 467-522).

III. ALLEGATIONS

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Unlawful arrest/police brutality

- a. I was arrested without probable cause, and due only to an accusation made by my angry and very upset 17 year old daughter, and the officers assuming that I was guilty because I surrendered voluntarily. There were 3 officers walking briskly toward me with their hands on their guns and my Daughter said to me that

they were there for me. I had a holster on and I wanted to make sure they knew I was not armed. The officers said that I acted as if I knew why they were there. My wife had just told me that they were there so she could file a report on a gun that we had lost while horseback riding and that she would take care of it. She even went out with the gun box in her hand. I had no reason to think otherwise. She testified to this along with other statements that would have validated my actions if my counsel would have re-cross examined her and the officers. I thought that I or we, were in trouble for the gun I lost since I, and those in my house were not allowed to have guns present. My wife purchased the guns.

- b. The RO put me in the back of the police car in August with the windows up and proceeded to turn the heat on and left me locked in. (He offered testimony without being ask, that the air was on). I had on long jeans and apparel suited for horseback riding. I still have the clothes in reserve. I asked my counsel repeatedly to get the dash can video. The light was blinking. I also was not read my Miranda Rights in the car as the RO claimed.

2. Ineffective counsel

- a. My counsel failed to request specific instructions concerning my appearance in the courtroom. I was taken back into custody at the start of the trial without warning, even though I had not violated my probation for 3 years, with and without an ankle monitor. I was not given fresh clean clothes or grooming items for the entire duration of the trial. I wore the same dirty suit every day in court. The jail put me in the drunk bin with another man with only a metal or concrete bench. I slept in my wheelchair sitting up. I was not given a shower or any grooming items. I could not shower, shave, or brush my teeth for the entire week. My clothes and beard were unkempt and my hair was dirty. They also took the band that held my hair back causing it to randomly fall in wiry strings. It was as if they wanted me to look like a dirty man. I was dirty, tired, hungry, and in severe pain.
- b. My counsel failed to make sure that my basic needs be met in the courtroom. I was in severe pain from a recent back injury that occurred while I was hauling lumber and building a two story deck. I had a Doctor's note to excuse me from work and school that my attorney withheld from the judge. The judge ordered a shock belt to be put on my waist for no apparent reason, further intensifying my pain. I was already in a wheel chair and could not walk. I was given no breaks even though the judge said at the beginning that she would take frequent breaks in order for me to be more comfortable. No one followed through on this. When there were breaks, I sat in the courtroom alone (except for the guard) with no water, food, or bathroom breaks, causing me much discomfort and constipation, which further intensified my pain. My attorney ask if I was getting lunch on the first day and the judge said that it would have to come from the jail, but no one followed through. The last day after observing me, my aunt stayed in the courtroom while the other left. She loudly asks me if I had eaten anything. I discreetly shook my head fearing that I would get shocked. (I had only 2 small breakfasts at the jail for the entire week, no lunch, and no supper since it had

already been served when I got back to the jail.) She then asks the officer why I was not getting food, for which he replied, "That he had no orders for food or breaks for me". She then demanded that it was my basic civil right to be provided food. He left and came back approx. 30 minutes later with a brown paper bag containing 2 bologna sandwiches. I had started eating one when the judge entered and the court was in session, so I could not finish. Please check the courtroom video.

- c. My Counsel had a large file of pictures, social media posts, private messages, and letters from people (describing to me what was going on) that were presented to her from family and friends that would have called the victim's and her mother's credibility into question. These items would have contradicted many inconsistent statements that my accusers made while testifying, had she presented them. One example was that my accusers claimed that they were isolated and had no friends. They had many friends and were supervised, not isolated, which the many pictures would have revealed. She also withheld pictures, comments and private messages that would have raised doubt regarding the other testimonies of my accuser's. My counsel failed to investigate other concerns that she was made aware of through the years. I preserve other examples that were withheld in court to discuss with counsel.
- d. My counsel waited until the Friday before court was to begin to get the discovery. I had requested for her to release the discovery documents throughout the 3 years for my family and I to review in order to offer important information. She ignored my requests. There are many statements that I and others could have challenged if we had been given access to the discovery. From what I remember, the judge ruling at my bond hearing told the solicitor to have full discovery and DNA investigation available within 30 days. That was 3 years prior. My attorney never followed through on this order. In court it was clear that my attorney had not spent much time reviewing the discovery contents, or the other information that she was given in detail. My aunt received a copy several weeks after trial. I have still not seen the discovery.
- e. My counsel failed to seek records from DSS, Hospital Visits, or follow up exams.
- f. My attorney went to trial with no co-counsel. She had said before that she would have assistance. My aunt told her the first day (Monday) that she (attorney) was not prepared and needed help especially since there were 2 working for the prosecution and that they were prepared. She replied "it's okay; the jury will see the 2 solicitors as bullying since I am alone." This can be confirmed.
- g. My counsel had 3 years to prepare me for a defense. She waited until the Thursday before court to make a morning appointment even though we kept inquiring to meet with her over the years. That Thursday morning, I could not stand, walk or drive. My aunt sent repeated requests to give us another time to come so she could drive from Charlotte, N.C., to pick me up in Camden, and then drive me to Columbia. She (my aunt) also asks if she could come and consult with my attorney herself and have me on audio or video. She did not respond except to say that she had to pick up the discovery the next day (Friday).

- h. During the trial breaks, she (attorney) did not consult with me in preparation, ask questions, or review my files. Instead she was reading a book.
- i. My counsel would not contact or prepare any witnesses for my defense, this was requested along with a list of people, several times during the 3 years, and again on the first day of court. During the trial, there were people present, (family and friends) who were willing to testify on my behalf. The first day of court, my aunt told her that the prosecution was prepare and that she (attorney) was not, and that she needed to call witnesses. My aunt also mentioned that the social worker from DSS was not there and that she needed to be subpoenaed. She replied to something to the effect of, their case being weak and her strategy was to challenge her evidence. The state did not call DSS to testify. All of this can be confirmed.
- j. My attorney failed to subpoena Sally Williamson, the forensic interviewer. The statements that were made to her by both daughters were different than in the testimonies that they gave in court and could have brought such testimony into question. The state did not call Sally Williamson.
- k. My attorney failed to advise me, and schedule a polygraph and mental exam, even though she was requested to by my aunt. I also requested a polygraph several times while being held in detention after my arrest. The only witness the prosecution could find to testify against me was my next door neighbor who also hated my due to property disputes. There were several witnesses in court that loved me, and my family, that would have testified on my behalf.
- l. My counsel would not allow me to testify even though I made several requests to do so. She also told my supporters in the courtroom to convince me to not get on the stand due to my condition and because I was not prepared (this can be confirmed). She had just ask the judge to allow my pain meds due to my discomfort (pg. 555-556).
- m. The jury did not have the needed opportunity to hear me declare and argue for my innocence, where there was no evidence, only negative DNA, and where the circumstantial evidence was not overwhelming, and mainly based on opinions, hypothesis, and phenomenon. I preserve further details to discuss with counsel.
- n. My counsel allowed my police interrogation video to be presented as evidence even though I had requested an attorney, lawyer or counselor (counsel) several times in the interview while continuing to be interrogated. She also did not object to a redacted version of the interview to be shown to the jury, where as my request for help, a lawyer, attorney, and counselor was redacted.
- o. My counsel failed to re-cross examine witnesses after inaccuracies were made.
- p. My counsel failed to bring up comments made by the investigators in the case and discrepancies in their testimony and written statements
- q. My counsel failed to question diagnostic comments from the medical doctor, Dr. Susan Luberoff, or to seek other expert opinion in the matter.
- r. My counsel failed to ask Dr. Susan Luberoff very obvious questions as to this accusation and the physical exam or seek other expert opinions. She said she was saving the obvious questions to bring up in her closing statements, which she did

not.

- s. My counsel failed to re-cross Dr. Susan Luberoff after she changed her statement (pg. 355, 356) from saying that her diagnosis was based on what she was told and not from the exam evidence itself. There are more matters concerning this exam that I would like to discuss with my counsel.
- t. My counsel failed to re-cross examine the police officers comments that they were based on assumptions, after the testimony of the accuser and her mother, that would have brought their credibility and actions into question. I would like to discuss this further with counsel.
- u. My counsel did not object to the prosecutor emphasizing to the jurors, in her closing statement that my accuser did not need to corroborate her story by additional evidence. I believe this statement took the burden to consider unreasonable doubt away from the jurors.
- v. My counsel did not object to my accuser's twin sister testifying in the presence of her mother in the courtroom. This twin daughter was initially in support of me. She was afraid of her mother finding out that she had called her aunt and my aunt to tell them what was happening. (These witnesses would have testified to such if they had been allowed). My attorney was aware of this due to an email and a phone conversation that was sent to her, (attorney) concerning this before my bond hearing, which my daughter attended. She also visited me in jail. I believe her testimony was a result of her being intimidated with her mother's presence in the courtroom. (The judge did allow the victim and her mother to be sequestered from each other's testimony).
- w. In closing argument, we had requested that my attorney add a very important question to her argument, for which she left out. After the closing argument, my aunt asks her why she left out the most obvious and important piece of the puzzle of the entire trial. She replied, I forgot, but the jurors will figure it out. They didn't.
- x. My counsel seemed disinterested in my defense and treated me with disregard at trial. She frequently brought up questions while cross examining witnesses and then just dropped the matter, and moved on without pause. She also failed to recognize the many contradictory statements that she could have revisited during cross or used in re-cross examinations had she sought them. At the beginning of trial, she commented to me that she and the solicitor were neighbors and played ball together. She, the solicitor and the judge were friends on social media. I believe this affected her performance in my defense and I (and others) viewed her actions as seeming to not want the judge or solicitors to be upset with her.

3. **Judicial Bias**

- a. I believe that the judge was biased toward me from the beginning with regard to my treatment, my appearance, my basic needs, and comments made.
- b. The judge said that I could only have one of the 4 medications that my doctor had prescribed but the jail would not release it saying that they don't administer narcotics at the jail. It wasn't until the last day before deliberations began, that my attorney asks that I be allowed something for my pain. The judge replied that

while she wasn't a doctor, she knew those meds should not be taken together (even though they were legally prescribed) and allowed me to take one of my prescribed meds before I left.

- c. I believe the jurors were pressured to save time and come to a verdict before going into weekend deliberations. To begin with the judge commenting on the jurors before deliberation I do not anticipate this trial going beyond this week if anyone was concerned about it bleeding over into Monday, that's not any sort of anticipation. That's not the radar screen that would happen in this case. (pg. 552, line 18-21)
- d. The jurors were struggling. They came back with a request (2:45, pg. 636) to see the transcripts of mother Tammy and [Minor 1 and Minor 2], the interview videos, State's comments from closing statements, Officer Dill's testimony, Officer Houser, and Arc's doctor statement. She commented that that was a lot of testimony that would take a lot of time, and perhaps they could whittle it down. (My counsel failed to argue this). The judge told the jurors that that would be hours of testimony and sent them back to review their request. They came back with smaller requests thereby deleting all above, except for [Minor 1] and the mothers testimony, and the first 3 arresting officers. I believe that it would have been favorable to my defense for the jurors to review the Arc doctor, [Minor 2's], and Officer's Dill's testimony. My attorney failed to object.
- e. At 5:05 the jurors requested to "SEE" the laws for reasonable doubt (pg. 640, 641). The judge again discouraged this by saying that she was supposed to send the entire charge but she had a lot of scratch outs and that she would have to edit, and that there's nothing wrong with her just reading the reasonable doubt portion to them. My counsel failed to argue this even though the jurors requested to seeing it on paper. Some people (like me for instance) understanding writing better than listening. The jurors also questioned how long they would be staying tonight. The judge told the jurors that we are here for the long haul as long as it takes until you come to a verdict. (pg. 644, 6-11).
- f. 8:00 the jurors ask what if you don't feel persuaded and your decision is final (pg. 645, 14-15). The judge seemed agitated, and replied, "when I declare a mistrial, nobody wins. It means that this case is going to be retried and 12 other people will sit in the very same seats that y'all are sitting in and hear the same testimony and evidence that y'all received, and there's no reason to think that they would be smarter or more capable to reach a verdict." (pg. 646, 1-10). She then later reneged on staying for the long haul and said that they would break at midnight until noon the next day. She later said again, (pg. 647, 19) "Like I said, Nobody wins when there is a mistrial, okay"? I think that the jurors were intimidated by these comments. (I later found out that she was not well during my trial.)
- g. Next day. A request was made for more testimony regarding Dr. Luberoff findings and what the findings say equivocally (pg. 649, 18-22) and the hard copy of the definitions of the charges. One juror was reported for writing notes outside of the courtroom. The judge said well, I don't need to see your notes as long as they are just your feelings and thoughts (pg. 653, 25). The notes were neither

examined nor recorded. My attorney failed to inspect the notes.

- h. Around 4:15-4:30 my attorney said that the judge was going to talk to the jurors one more time. At 4:42, on Friday evening, they came back with a verdict, as predicted by the judge, before the deliberations began. What did she say to the jurors on her last visit.
- i. Page 670, 14-19. After the verdict was read and before sentencing, the judge quoted, "I think my sentence speaks for itself, but I do want to say one thing that I think is important and that is to Ms. Maynard. I believe you. I believe you." Some of the jurors were viewed as being distressed outside the court by others. I request that the jurors be interviewed regarding feeling pressured to come to a verdict before Friday evening and what did the judge say during her last visit to them, on Friday evening before the 5:00 closing.

Attached to this Return and incorporated by reference are the records of the Kershaw County Clerk of Court regarding the subject convictions, Applicant's SCDC records, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

IV. RESPONSE TO ALLEGATIONS OF UNLAWFUL ARREST

Respondent submits Applicant's claim that his arrest was unlawful should be summarily dismissed. Allegations 1(a-b) asserting that Applicant's arrest lacked probable cause raises a direct appeal issue that is procedurally barred by subsection 17-27-20(B) of the South Carolina Code (2014). PCR is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). PCR is only proper when the application collaterally attacks the validity of the conviction or sentence. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). "In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party's motions or objections. In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel." *Id.* at 363-64, 527 S.E.2d at 747. A PCR application cannot

assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal, and his failure to do so has waived these allegations as grounds for relief.

V. RESPONSE TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Applicant also asserts his trial counsel was ineffective for failing to adequately prepare for the trial and investigate the case; failing to call any witnesses; failing to re-cross examine or properly cross examine the State's witnesses; failing to object to the admission of the interrogation video into evidence; failing to object to mother's presence in the courtroom during twin daughter's testimony; failing to object to arguments made in the State's closing argument; failing to deliver an adequate closing argument; failing to have Applicant evaluated; advising him not to testify; conflict of interest; and failing to address his appearance and comfort in the courtroom.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional

norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 117-18, 386 S.E.2d at 625.

Failure to Adequately Prepare and Investigate Case

In allegations 2(c–h), Applicant asserts that trial counsel failed to adequately prepare for trial and investigate his case. Applicant supports these allegations by stating that trial counsel waited until the Friday before trial to get discovery; waited until the Thursday before trial to meet and prepare a defense; and proceeded to trial with no co-counsel after stating she would.

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To establish counsel failed to adequately prepare for trial, the applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. *Jackson v. State*, 329 S.C. 345, 353, 495 S.E.2d 768, 772 (1998); *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (stating failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result).

Here, Applicant claims potential witnesses, records, and photographs counsel could have used in preparing his defense and he communicated this information to trial counsel before the trial commenced, Applicant has failed to show how this evidence could have been used to make trial counsel more fully prepared. Moreover, Applicant ignores the possibility that trial counsel failed to use these materials as they were not valuable to her own trial strategy.

Also note that the “brevity of time spent in consultation,” without more, does not establish that counsel was ineffective. *Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008). When claims of ineffective assistance of counsel are based on lack of preparation time, an applicant challenging his conviction must show specific prejudice resulting from counsel’s lack of time to prepare. *Jackson*, 329 S.C. at 353-54, 495 S.E.2d at 772; *Skeen v. State*, 325 S.C. 210, 214-215, 481 S.E.2d 129, 132 (1997) (finding applicant was not entitled to PCR where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial). Applicant has failed to allege what specific prejudice resulted from counsel’s lack of time to prepare other than the overarching contention that he was unsatisfied with counsel.

Applicant cannot meet his requisite burden of proof necessary for relief. However, the allegations of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”).

Failure to Call Witnesses

In allegations 2(i)–(j), Applicant asserts that trial counsel failed to adequately prepare for his trial. To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. *Id.*

There is a "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2052). Conduct will not be deemed ineffective assistance of counsel when counsel is able to articulate a valid reason for employing their strategy. *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

Not calling these supposedly favorable witnesses as suggested by the Applicant could have been part of trial counsel's strategy for the case. However, even if the court finds trial counsel's strategy unsound, the Applicant must still meet the burden set forth in *Bannister* in order to show prejudice from the witness' failure to testify at the trial. Therefore, these witnesses must be produced at the PCR hearing and Applicant must demonstrate how their testimony would have impacted the trial. Applicant cannot satisfy either requirement of *Strickland*. However, the record likely does not refute or disprove Applicant's allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. See *Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR

application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”).

Failure to Object to the Admittance of the Redacted Interrogation Video

Applicant asserts in allegation 2(n) that trial counsel was ineffective for failing to object to the redacted interrogation video being played for the jury. The trial court held a *Jackson v. Denno* hearing on this matter in pre-trial, where trial counsel argued that the interrogation video should to be kept out, or in the alternative have the redacted version played for the jury. (Tr. 60-61).

Under *Jackson v. Denno*, a defendant is entitled to a “reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence.” *State v. Parker*, 381 S.C. 68, 85, 671 S.E.2d 619, 627 (2008) (citing *State v. Fortner*, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976)). “In South Carolina, the judge makes this initial determination of voluntariness required by *Jackson v. Denno*.” *Fortner*, 266 S.C. at 226, 222 S.E.2d at 510. Here, the trial judge determined that the statements given in the interrogation video were voluntary and any requests for counsel were ambiguous and not a violation of *Miranda*. (Tr. 87). However, in order to eliminate any prejudice to the defendant, the judge had the State play a redacted version of the video removing the ambiguous requests for counsel. This was a version of the interrogation video that trial counsel agreed with as she had been ruled against in keeping out the interrogation video and had already voiced her objections. While the Applicant takes issue with the redacted video being played for the jury without objection he has failed to show how this prejudiced the outcome of this case when the redactions made were for his benefit. In *Mazique*, the court held that because the police interviews were redacted for the defendant’s benefit there was no error in allowing the State to play only the redacted portions not prejudicial to the defendant. *State v.*

Mazique, 419 S.C. 282, 298, 797 S.E.2d 730, 738. This is akin to Applicant's case and refutes the possibility of any prejudice that may have come from playing a redacted version that benefitted him.

Failing to Object to Arguments Made in the State's Closing Argument

Applicant asserts in allegation 2(u) that trial counsel was ineffective for failing to object to the solicitor emphasizing the fact that the victim's story did not need to be corroborated by additional evidence. Trial counsel raised her objection in pre-trial motions when she asked the Court to prevent the State from referencing the statute that stated a victim's testimony does not need to be corroborated. (Tr. 93). The State then asked the Judge to charge the jury on this statute. (Tr. 94). The Judge responded by denying the State's request to charge the jury on the statute and denying the Defense's motion by allowing the State to argue that the victim's testimony does not need to be corroborated. (Tr. 94-95).

There is no *Stukes* issue in this case as the jury was never charged on the corroboration statute. It is not within the province of the court to express an opinion to the jury on its views of the facts. *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016). If the court addresses the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. *Id.* Here, the court never addressed the veracity of a victim's testimony in its instructions to the jury. The only mention of the veracity of the victim's testimony to the jury was by the State in their closing argument, which is well within their rights to comment on their interpretation of the facts of the case. Moreover, as trial counsel had already been ruled against during the pre-trial hearing on this matter, she may have believed she had no basis for a valid objection as this matter had already been argued.

Respondent contends Applicant cannot meet his requisite burden of proof necessary for relief. However, the allegations of ineffective assistance of counsel probably raises questions of fact

the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

Failing to Deliver an Adequate Closing Argument

As to allegation 2(w), Applicant asserts that trial counsel was ineffective for failing to deliver an adequate closing argument because she failed to “add a very important question to her argument” as suggested by Applicant. Applicant does not state with any certainty what he wanted counsel to say in her closing, but trial counsel did make a closing argument. Respondent hereby moves for a more definite statement as to what he wanted trial counsel to add to her closing argument. Applicant has failed to set forth any facts to “support each ground” or to explain with any specificity whatsoever the facts upon which his claim is based. The Uniform Post-Conviction Procedure Act requires the Applicant to “*specifically set forth the grounds upon which the application is based.*” S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claim is based.

Advice Not to Testify

Applicant asserts in allegations 2(l-m) trial counsel was ineffective because she did not “allow” him to testify even after several requests to do so. Applicant supports this allegation further by stating that trial counsel advised his supporters in the courtroom to “convince” him to not get on the stand. Generally, during trials the presiding judge will inquire of the defendant whether or not they want to testify and if this decision was their decision. While no specific inquiry must occur on

the record, the decision to testify or not to testify is ultimately up to the defendant. *See Horton v. State*, 306 SC 252, 255, 411 S.E.2d 223, 225 (1991).

While trial counsel may have advised the Applicant to not testify and expressed this advice to his supporters the ultimate decision to testify rested solely with the Applicant. Although not required, the Judge engaged in a colloquy with the Applicant inquiring if he wished to testify. Applicant was placed under oath and advised that the ultimate decision to testify rested with him and was given an additional opportunity in the courtroom to consult with his counsel, family, or anyone else about his decision not to testify. (Tr. 559). After this opportunity, the Judge once again asked Applicant if he wished to testify and he replied that he did not. (Tr. 559). Applicant was given every opportunity to decide if he wished to testify at trial and still elected not to testify on his own behalf. Applicant's allegations that trial counsel did not "allow" him to testify are clearly refuted by the record and should be summarily dismissed as there is no genuine issue of material fact.

Failing to have Applicant's Mental State Evaluated or Administering a Polygraph

As to allegation 2(k), Applicant asserts that trial counsel is ineffective for failing to conduct a mental examination or a polygraph. Applicant has failed to set forth any support for why his counsel should have conducted a mental examination and why this may have prejudiced the outcome of his trial. Additionally, while Applicant alleges trial counsel was ineffective for failing to administer a polygraph examination, he has also failed to set forth how this may have prejudiced the outcome of his trial.

Respondent contends Applicant cannot meet his requisite burden of proof necessary for relief. However, the allegations of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to “support each ground” or to explain with any specificity whatsoever the facts upon which his claim is based. The Uniform Post-Conviction Procedure Act requires the Applicant to “*specifically set forth the grounds upon which the application is based.*” S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claim is based.

Conflict of Interest

Respondent interprets allegation 2(k) as asserting a claim trial counsel was ineffective due to an alleged conflict of interest because trial counsel, the judge, and the solicitor were “friends on social media” and counsel’s conduct at trial seemed as though she did “not want the judge or solicitors to be upset with her.”

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest, a defendant who did not object at trial must show that a conflict of interest adversely affected his attorney’s performance. *Fuller v. State*, 347 S.C. 630, 633, 557 S.E.2d 664, 665. An actual conflict occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s. *Id.* at 633-34, 557 S.E.2d at 665. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. *Id.* In this case, trial counsel owed no duty to any adverse party that adversely affected her performance. Even if trial counsel, the Judge, and the Solicitor were friends on social media, as Applicant alleges, this by itself does not create a conflict of

interest. Respondent contends the trial record is conclusive and Applicant has presented no issue of material fact in dispute. As such, this allegation should be summarily dismissed as a matter of law.

Failing to Address Appearance and Comfort with the Court

Applicant asserts in allegations 2(a-b) that trial counsel was ineffective because she failed to address the Applicant's appearance and comfort with the Court. Applicant supports these allegations by stating that counsel failed to ensure he appeared well groomed and ensure that he received his prescription medication. Applicant's trial counsel ensured that he had clothes to wear other than his prison wardrobe to appear more personable in front of the jury. Applicant also admits in his application that he did receive some of his medication at the request of his counsel. While Applicant believes these failures made him appear "dirty" in front of the jury and left him in discomfort during the trial the allegations do not rise to the level of ineffective assistance of counsel.

Respondent contends Applicant cannot meet his requisite burden of proof necessary for relief. However, the allegations of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI. RESPONSE TO ALLEGATIONS OF JUDICIAL BIAS

Respondent submits Applicant's allegations of judicial bias, 3(a-c, f, and h-i), should be summarily dismissed. These allegations asserted that the judge did not like Applicant because of his appearance, refused to give him his prescribed medication, and pressured and intimidated the jury to finish deliberating. Applicant is asserting what he views as misconduct by the judge, which raises a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). PCR is only proper when the application collaterally attacks the validity of the

conviction or sentence. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). “In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party’s motions or objections. In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel.” *Id.* at 363-64, 527 S.E.2d at 747. A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal, and his failure to do so has waived these allegations as grounds for relief. Thereby Applicant has failed to state a claim for which relief can be granted and Respondent submits that Applicant’s allegations of judicial bias should be summarily dismissed as there is no genuine issue of material fact.

Alternatively, allegations 3(d, e, and g) frame the issue of judicial bias as something that trial counsel should have objected to and are asserting ineffective assistance of counsel in this regard. These allegations assert that trial counsel should have objected to the judge “pressuring” the jurors to reach a verdict because “no one wins in a mistrial.”

As to the assertion that the Judge pressured and intimidated the jury into reaching a verdict, these allegations are unfounded. Here, the Judge was simply replying to a juror question and her answer did not rise to the level of an *Allen* charge. There was no indication from the transcript that the jury alerted the Court that they were deadlocked and unable to reach a verdict. The Judge answered the question and the jury proceeded to deliberate until they were able to reach a verdict in their own time. A juror question was brought to the attention of the Court asking what would happen if you do not feel persuaded and your decision is final. (Tr. 645). In response to this question, the

Judge advised the jury as a whole that if the vote was not unanimous a mistrial would be declared. (Tr. 645). When a jury is deadlocked, a judge will issue an *Allen* charge to encourage an indecisive jury to “consider the opinions of their fellow jurors” and “approach the evidence with an open mind.” *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). An *Allen* charge is “an instruction advising deadlocked jurors to have deference to each other’s views, that they should listen, with a disposition to be convinced, to each other’s argument.” *State v. Lee-Grigg*, 374 S.C. 388, 418, 649 S.E.2d 41, 57 (Ct. App. 2007), *aff’d*, 387 S.C. 310, 692 S.E.2d 895 (2010). As such, these allegations should be summarily dismissed.

VII. FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, Respondent will request a continuance in the matter. *See id.* at 245, 834 S.E.2d at 203 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

Pursuant to section 17-27-150 of the South Carolina Code, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Further, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in

advance of the evidentiary hearing. As noted above, Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State. *See Love*, 428 S.C. 231, 834 S.E.2d 196.

VIII. ALL OTHER CLAIMS

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

IX. CONCLUSION

WHEREFORE, Respondent requests that the allegations designated above be summarily dismissed, and that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

YASMEEN E. KLEIN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

December 9, 2021

1 State of South Carolina) In the Court Of Common Pleas
2 County of Kershaw) Indictment No.: 2019-CP-28-00236
3 James Wayne Miller,)
4 Applicant,)
5 vs.) Transcript of Proceedings
6 State of South Carolina,)
7 Respondent.)
8 _____)

9
10 April 1, 2022
11 Columbia, South Carolina

12 BEFORE:

13 The Honorable Grace Gilchrist Knie, Judge.

14
15 APPEARANCES:

16
17 Ola Johnson, Esquire
18 Attorney for the Applicant

19 William Blitch, Assistant Attorney General
20 Megan Jameson, Assistant Attorney General
21 Attorneys for the Respondent

22 ALSO PRESENT:

23 James Wayne Miller
24
25

1	INDEX	
2	PCR HEARING	PAGE
3	OPENING STATEMENT	
4	By Mr. Johnson	7
5	By Mr. Blitch	9
6	WITNESS	PAGE
7	JAMES WAYNE MILLER	
8	Examination by The Court	8
9	Direct Examination by Mr. Johnson	14
10	Cross Examination by Mr. Blitch	32
11	Redirect Examination by Mr. Johnson	44
12	PAMELA EDWARDS	
13	Direct Examination by Mr. Johnson	53
14	MICHAEL NORWOOD	
15	Direct Examination by Mr. Johnson	66
16	Cross Examination by Mr. Blitch	68
17	Redirect Examination by Mr. Johnson	68
18	Recross Examination by Mr. Blitch	70
19	JAMES WAYNE MILLER (Recalled)	
20	Redirect Examination by Mr. Johnson	74
21	APPLICANT RESTS	75
22	SUSAN HACKETT	
23	Direct Examination by Mr. Blitch	76
24	Cross Examination by Mr. Johnson	80
25		

1	INDEX	
2	WITNESS	PAGE
3	ANNA BROWDER	
4	Direct Examination by Mr. Blicht	81
5	Cross Examination by Mr. Johnson	98
6	Redirect Examination by Mr. Blicht	115
7	Recross Examination by Mr. Johnson	117
8	RESPONDENT RESTS	118
9	CLOSING ARGUMENT	
10	By Mr. Johnson	119
11	By Mr. Blicht	121
12		
13	Certificate of Reporter	129
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1	EXHIBITS			
2	APPLICANT'S			
3	NO.	DESCRIPTION	ID	EVDS.
4	1	Sentinel Health Partners	18	48
5	2	Dr. Taylor Medical Records	48	49
6	3	" " " "		50
7	4	" " " "		51
8	5	Email Communication		65
9				
10	RESPONDENT'S			
11	NO.	DESCRIPTION	ID	EVDS.
12	1	Email Communication		88
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1 Thereupon, the following proceedings were had,

2 BAILIFF: Remain seated. Come to order please.

3 THE COURT: Good afternoon. I'm Judge Grace Knie,
4 K-n-i-e, from Spartanburg, the Seventh Judicial Circuit.
5 It is my sincere pleasure to be with you all this
6 afternoon here in Richland. To my left is my law clerk
7 Catherine Thompson and our court reporter is Steve
8 LeBlanc. We are on the record now with regard to the
9 matter of James Miller versus the State of South
10 Carolina, and I'm sorry, it is James Wayne Miller versus
11 the State of South Carolina. This is civil action number
12 19-CP-28-236. It is pending in Kershaw County. Counsel,
13 if you all will identify yourselves for the record
14 starting with counsel for the applicant.

15 MR. JOHNSON: Your Honor, my name is Ola Johnson. I
16 practice in Lexington. I'm representing James Miller.

17 THE COURT: Okay. Thank you. I note for the record
18 that James Miller, the applicant, is present in the
19 courtroom. Okay. And counsel for the respondent.

20 MR. BLITCH: My name is William Blitch on behalf of
21 the State with the South Carolina Attorney General's
22 Office.

23 THE COURT: Okay. Thank you. Good afternoon,
24 everyone. Okay. So upon my review of the public index
25 the last document that has been filed was on March the

1 21st of this year, an amended post conviction, or an
2 amendment to the post conviction relief application; is
3 that correct?

4 MR. JOHNSON: That is correct, Your Honor.

5 THE COURT: Okay. And is there anything else that
6 you all have exchanged between yourselves that may not
7 have made its way into the court's file yet?

8 MR. JOHNSON: Judge, I was just gonna point out some
9 case law that I have talked to the Attorney General
10 about. This was cited in my amended application. There
11 are four cases.

12 THE COURT: Okay. And I'm gonna let you argue all
13 of that, but I just want to make sure that sometimes
14 there's a slight delay in the documents being filed just
15 because this is a fluid matter and so anything else that
16 I need to be aware of from the respondent at this time?

17 MR. BLITCH: We did not file an amended return to
18 the amended application. I will note that the packet
19 that I just handed up, the hard packet, there is a copy
20 of the State's return to the petitioner, writ certiorari
21 that was inadvertently omitted from the electronic packet
22 that Your Honor received. That's the only distinction
23 between the hard copy that you got and the electronic.

24 THE COURT: Okay. Thank you all. And I have
25 learned to ask this this week before diving in. Are all

1 of y'all's folks here that you're expecting or do we need
2 for you all to step out and make a phone call?

3 MR. JOHNSON: My witnesses are all here, Judge.

4 MR. BLITCH: Mine are here as well.

5 THE COURT: Any motion to sequester witnesses?

6 MR. JOHNSON: No, Your Honor.

7 MR. BLITCH: No, Your Honor.

8 THE COURT: Okay. And so is my clerk here that
9 swears folks? I just want to make sure. Yes. He's
10 right here. Okay. That's good. All right. So the way
11 that I normally handle these types of actions or
12 proceedings, I will allow the applicant, of course, to
13 proceed first followed by the respondent's case and then
14 anything in reply that applicant feels is necessary, of
15 course, but I also welcome any opening comments that you
16 all, a summary that you all, if you all feel comfortable
17 making an opening statement for my benefit, and then I
18 will allow you all to make a summation. I know there's
19 no jury here, but I also know that you all know this
20 information a lot better than I do, okay? So if you all
21 want to make opening remarks, I'm happy for you to do so.
22 Mr. Johnson.

23 MR. JOHNSON: Yes, Your Honor. Thank you. I'll
24 just say briefly this is a case that's obviously very
25 serious where we have delved into the case law and the

1 transcript from the trial of Mr. Miller in Kershaw County
2 and this is something where I have listed allegations
3 regarding some errors, I believe, that existed at trial
4 by trial counsel and also by appellate counsel, trial
5 counsel Anna Good and appellate counsel Susan Hackett.
6 We do have some exhibits and I think that the exhibits
7 are all related to allegations about failure to retain or
8 bring in relevant files for the medical situation. My
9 client, Mr. Miller, I will put on the record at this time
10 my client Mr. Miller today is in a lot of pain and it's
11 my understanding that he had some painkillers that he did
12 not receive, but he has indicated that he wants to go
13 forward, Judge, so I'll put that on the record as well.

14 THE COURT: Why don't I go ahead and have the clerk
15 swear Mr. Miller and let me ask him about that, okay?

16 MR. JOHNSON: Yes, ma'am.

17 Thereupon,

18 JAMES WAYNE MILLER

19 after having been first duly sworn, testified as follows,

20 EXAMINATION

21 BY THE COURT:

22 Q. Okay. Mr. Miller, I'll let you remain seated for
23 these questions but, sir, you've heard the statements of your
24 counsel, Mr. Johnson. Do you agree with his statement that
25 you apparently are going without prescribed medication?

1 A. I don't have any prescribed medication, Your Honor.
2 Allendale facility, one of the nurses there called me a child
3 molester and told me that I had to do all this on my own so I
4 do not --

5 Q. Okay. Just listen to the question, all right? So
6 you are not taking prescribed pain medication at this time?

7 A. No, ma'am. Nothing.

8 Q. Okay.

9 A. I had a couple tylenol this morning.

10 Q. Okay. And, sir, do you wish to proceed with this
11 hearing?

12 A. Yes, ma'am. Yes, ma'am, please.

13 Q. Okay. And if you need a break --

14 A. No, ma'am.

15 Q. -- you let Mr. Johnson know and we can take a break
16 if you need one, okay?

17 A. Yes, ma'am.

18 THE COURT: All right. Thank you. Let me now hear
19 from counsel for the respondent, Mr. Blitch.

20 MR. BLITCH: Yes. This is a, just a kind of brief
21 procedural background first and foremost. Mr. Miller is
22 accused of raping his 16 year old daughter and charged
23 with csc with a minor second degree as well as incest.
24 He was represented at trial by Anna Good, now Anna
25 Browder. He proceeded to trial before the Honorable

1 Tanya Gee and a jury from March 14th through March 18th,
2 2016. He was convicted as charged and sentenced to 20
3 years imprisonment on the csc with a minor and 10 years
4 consecutive on the incest. Mr. Miller filed an appeal
5 that was handled by Susan Hackett of Appellate Defense.
6 The Court of Appeals affirmed his convictions and
7 sentences and the Supreme Court denied a petition for
8 writ of certiorari with remittitur being issued September
9 21st, 2018.

10 Mr. Miller then filed his initial application for
11 PCR on March 11th, 2019 raising numerous issues that
12 could be broken down basically into three general
13 categories. One, unlawful arrest, two, the ineffective
14 assistance of counsel, and three, claims related to
15 judicial bias. Subsequent to that on March 18th of this
16 year as Your Honor noted, there was an amended
17 application for post conviction relief by his current
18 counsel Mr. Johnson. That one raised 19 claims of
19 ineffective assistance of trial counsel and one claim of
20 ineffective assistance of appellate counsel.

21 In looking at the various claims that are raised,
22 the State did file an initial return to the original
23 application that was filed requesting a more definite
24 statement as to several of the issues in particular many
25 of the ones related to the judicial status and things.

1 THE COURT: Excuse me just one moment. I know
2 everybody is used to having a cell phone right with them,
3 but y'all are not allowed to have your cellular
4 telephones in here unless you're a lawyer, and if you are
5 a lawyer, you need to turn the cell phone off and so I
6 don't know whose that was. Whose cell phone was that?

7 PAMELA EDWARDS: Me.

8 THE COURT: Okay. Are you a lawyer?

9 PAMELA EDWARDS: No, ma'am.

10 THE COURT: Okay. Are you a witness?

11 PAMELA EDWARDS: I'm Mr. Miller's aunt.

12 THE COURT: Okay. Well, ma'am, welcome to the
13 courtroom, but if you're going to be in here, you have to
14 abide by the rules, okay?

15 PAMELA EDWARDS: I understand.

16 THE COURT: Can you just give the phone to the
17 bailiff then.

18 PAMELA EDWARDS: Absolutely. Here. No problem.

19 THE COURT: Okay. I didn't mean to embarrass you or
20 startle you.

21 PAMELA EDWARDS: Oh, no.

22 THE COURT: He'll give it back to you.

23 PAMELA EDWARDS: Okay. I trust him.

24 THE COURT: Okay. All right. Thank you, ma'am.
25 I'm sorry. Please continue.

1 MR. BLITCH: Not a problem. May it please the
2 Court. Your Honor, in looking at the various allegations
3 that have been made, many of them are purely legal
4 questions, not ones that require significant amount of
5 testimony so the State would submit at the end would like
6 to be able to make a brief legal argument in regards to
7 some of them as Your Honor noted in regards to closing.
8 Beyond that the State is prepared and has two witnesses
9 that it would present, the trial counsel and appellate
10 counsel.

11 THE COURT: Okay. All right. Anything else then
12 before we proceed with the testimony?

13 MR. JOHNSON: No, ma'am.

14 THE COURT: Okay. Mr. Johnson, sir, if you will
15 call your first witness.

16 MR. JOHNSON: Your Honor, I was gonna put on the
17 record these four cases because when I cited them, one of
18 them, I didn't cite the Supreme Court decision, and
19 I want to be accurate with the Court so I have the four
20 opinions. I could pass all of them up, but the one that
21 changed was in the Mangal v. State, M-a-n-g-a-l and that
22 referred, basically that refers back over to the Supreme
23 Court talking about failure to preserve an issue at PCR,
24 but it also did address that bolstering issue by an
25 expert, so I can pass that up if Your Honor doesn't have

1 it, but I just want to make it clear when I cited it, I
2 put that appellate number in there but I didn't put the
3 Supreme Court cite so this is the opinion. It does have
4 some stuff that obviously cuts back against my decision.

5 THE COURT: Well, I'm happy to take them if you're
6 ready to part with them. If you're not, my law clerk can
7 pull all that up for me.

8 MR. JOHNSON: Yes, ma'am.

9 THE COURT: If you will show them to opposing
10 counsel.

11 MR. BLITCH: I'm aware of them.

12 THE COURT: Okay. All right. That's fine.

13 MR. JOHNSON: Thank you, Judge (proffering.)

14 THE COURT: Thank you.

15 MR. JOHNSON: Your Honor, if it's appropriate, we'll
16 call Mr. Miller at this time.

17 THE COURT: Yes, sir. So, Mr. Miller, sir, I am
18 going to have you come up to the witness stand, all
19 right? You have already been sworn.

20 THE WITNESS: I can get up there.

21 THE COURT: Sir, you have already been sworn. Do
22 you think you can get up there?

23 THE WITNESS: Yes, ma'am. I can do anything you
24 need, ma'am.

25 THE COURT: Okay. Watch your step, okay?

JAMES MILLER - DIRECT BY MR. JOHNSON

14

1 THE WITNESS: With this officer's help here, I can
2 do anything. Okay. Yes, ma'am.

3 THE COURT: And I want to make sure that our court
4 reporter can understand you as well. If you could state
5 your full name for the record.

6 THE WITNESS: James Wayne Miller.

7 THE COURT: Okay. All right. Thank you. This is
8 direct examination.

9 MR. JOHNSON: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. JOHNSON:

12 Q. Mr. Miller, who represented you at the trial on
13 these charges?

14 A. Are you referring to the attorney that we paid money
15 for and hired, paid monies to?

16 Q. Is this the attorney that represented you at trial?
17 That's what I'm referring to.

18 A. What's the name?

19 Q. Ms. Anna Good.

20 A. That's the name. Yes, sir.

21 Q. Okay. Did Ms. Susan Hackett represent you on
22 appeal?

23 A. Yes, sir.

24 Q. And as we go through this, at the beginning of trial
25 was there a request by you, a medical complaint request to

1 have it continued?

2 A. Yes.

3 Q. Why was that?

4 A. I injured my back prior to court. I met with some
5 friends. They referred me to a doctor in Lugoff, South
6 Carolina and I believe her name was Dr. Julie Taylor. She
7 referred me to get an MRI which I did. They also instructed
8 me that I needed to pick up health insurance at this point
9 because I would need surgery so I did this. She referred me
10 to a neurologist, neurosurgeon in Columbia, South Carolina. I
11 would have to get in my emails. I'm not a hundred percent
12 certain, but I believe it was a Dr. Grabowski, but I cannot
13 promise that was the correct neurosurgeon that I spoke with.
14 He discussed with me over the phone what needed to be done and
15 he had several options. The following day I would guess it
16 was either a Wednesday or a Thursday he said that my health
17 insurance did not cover the amount of monies that it would
18 need to do my surgeon, so I recontacted Dr. Julie Taylor
19 again. She said that if I could find a doctor to see me, that
20 she would write an order for me to get my surgery or to meet
21 with them at whoever would accept my insurance. I had some
22 family do some research and we got an appointment made with
23 Charlotte, CNC Spine Center to meet with them on Wednesday.

24 THE COURT: Sir, please speak into the mic. If you
25 need to move it down a little bit.

JAMES MILLER - DIRECT BY MR. JOHNSON

16

1 BY THE WITNESS:

2 A. We were supposed to meet. Is that better?

3 THE COURT: Yes, sir.

4 BY THE WITNESS:

5 A. We were supposed to - I was supposed to meet with
6 the doctors at Charlotte, CNC Spine Center on Wednesday. They
7 were going to discuss my options. It was my understanding
8 that Thursday I was to not eat anything and then Friday
9 possibly that they would do the surgery.

10 Now, okay. Anna did mention these things to the
11 Court. Before all this had started, I had five pieces of
12 paper. She walked them over to the prosecutor. If you look,
13 there's a staple mark in the right hand corner. Her and the
14 prosecutor discussed the options on the papers. She withheld
15 four of them on that date and gave the one that was from Dr.
16 Suzy Kerns and Scott Kerns which are the people that referred
17 me to Dr. Julie Taylor originally and Dr. Kerns was a
18 radiologist at Kershaw County Medical Center.

19 So Anna Good and the prosecutor decided to withhold
20 the four pieces of paper. When Anna got back over to me, she
21 said that she didn't want to give the papers to the Judge
22 because on one of them it said that I was an everyday smoker
23 and she didn't want the Judge to see that. She thought that
24 it would make me look guilty.

25 Shortly after that she again raised the issue of

1 getting the court case continued so that I could get my
2 surgery I believe twice in the same day if I remember
3 correctly, I could be wrong, and the Judge denied it and she
4 asked if there were any doctors present that would testify
5 regarding the situation. Anna had said no. Later shortly
6 after that Anna leaned over to me and her exact words were,
7 Mr. Miller, I cannot ask you to fall out of that wheelchair,
8 but if you was to fall out of your wheelchair, it would be a
9 better chance for me getting this court case continued. I did
10 not say anything back to her. I just sat there. I just sat
11 there.

12 BY MR. JOHNSON:

13 Q. Okay. So the case was not continued?

14 A. The case was not continued. No, sir.

15 Q. And there was no doctor called by your trial
16 counsel?

17 A. No, sir. There should have been a neurosurgeon
18 called, not Dr. Julie Taylor. She's just a medical doctor.
19 She was the one that referred me to the neurosurgeon.

20 Q. But Dr. Taylor wasn't called either?

21 A. No, sir. No, sir. No doctors were called. The
22 Judge made that decision on her own, but she did not have all
23 the proper paperwork in front of her either to make that
24 decision. She should have had all the paperwork in front of
25 her for her to make the proper decision. She should not have

JAMES MILLER - DIRECT BY MR. JOHNSON

18

1 withheld the paperwork, excuse me, you know, and also two days
2 later, two days later my girlfriend had went back to the
3 medical doctors' office and she picked up another handful of
4 papers which I have and she also withheld those from the Judge
5 as well. If I remember correctly, I think there's 22 pieces
6 of paper there and on seven of them it refers me to a
7 neurosurgeon several times on them.

8 Q. All right. Now, Mr. Miller, I'm gonna hand you
9 something.

10 MR. JOHNSON: Judge, I'm gonna have this marked as
11 Applicant's Exhibit 1 if possible at this time.

12 THE COURT: What is it?

13 MR. JOHNSON: This is three pages from Sentinel
14 Health Partners and from the last page CNSA Charlotte
15 Medical Office. I have shared this and given a copy to
16 the Attorney General.

17 THE COURT: Any objection?

18 MR. BLITCH: No objection.

19 THE COURT: Okay.

20 (Whereupon, Applicant's Exhibit #1 marked for
21 identification.)

22 BY MR. JOHNSON:

23 Q. Mr. Miller, I'm gonna hand you Applicant's Exhibit
24 1. If you could review those three pages. Are those the
25 three pages you testified about with the doctor?

1 A. There was four pages. No, sir. These are not the
2 correct pages that was withheld from the doctor. I mean from
3 the Judge. There's one, this first one and the second one
4 here where it says, excuse me, where it says everyday smoker,
5 that's the one that's circled. That's why she withheld it,
6 but there are still two other pieces of paper missing and I
7 don't know what that is. I've never seen that before.

8 Q. Okay. And is that the CNSA, the printout from the
9 CNSA Charlotte printout for your appointment that would have
10 taken place the next day, the second day of trial?

11 A. I can't answer that honestly, sir, because that was
12 on a phone and I never seen it. I do know that the phone was
13 presented to the Judge. She dismissed it. The Judge said,
14 what is this? She could not accept this, but it was the best
15 we could do. If anybody has any understanding of how hard it
16 is to meet with a neurosurgeon, you would understand.

17 Q. The first page and that doctor listed, is that the
18 Dr. Taylor you were referencing with that work excuse?

19 A. Yes. That's the signature at the bottom. It's
20 matching mine.

21 Q. That was not passed up to the Judge?

22 A. No, sir. There are still two other pages missing
23 that I have that was part of it, but I don't -- in my opinion
24 -- yes, sir.

25 Q. All right. Mr. Miller, we're gonna move on and talk

1 about, was there testimony, do you recall there being
2 testimony about CAD information, hearsay testimony about
3 Officer Houser stating the mother had found out recently that
4 her husband had forced their daughter to have sexual
5 intercourse? Do you recall that and your attorney whether or
6 not she objected?

7 A. No, sir. I do not remember, I do not remember any
8 of those words ever being spoken.

9 Q. Okay. And let me jump over to the original
10 application that you filed. When you talk about -- Did you
11 have a claim here? You said your basic needs were not met in
12 the courtroom and your civil rights, talking about your basic
13 needs, what are you referring to?

14 A. Well, I was in a tremendous amount of pain. Dr.
15 Julie Taylor had prescribed me four or five medications. One
16 was Rambo or Rambro or something along those lines. I believe
17 it's on my paper. There's an anti-inflammatory, Prednisone,
18 steroid to try to, you know, get me over the hump or whatever.
19 There was also another type of inflammatory I believe and then
20 she prescribed me Lortab 7.5 for the direct pain which I took
21 for a few days and I did call her back. I was trying to head
22 back to the Kerns' Office on that particular day and I did
23 speak with her and I told her that I was eating two in the
24 morning, two at noon, and two in the evening and they just
25 weren't doing anything for the pain. And she said, well, give

1 me a little bit and we'll get you something else prescribed.

2 She then prescribe Oxycontin 30 or 40 which I had
3 never in my life taken and I only got to take two or three of
4 those in the three or four days that we had them. I had that
5 prescription filled at Fred's in Camden, South Carolina. The
6 lady that was working for me Susan Seager, she's actually the
7 one that drove to fill the prescription. I couldn't even get
8 the whole prescription filled. I only had to get half because
9 it was like \$364.00 for half of them.

10 Q. Mr. Miller, let me just -- I'm sorry to interrupt
11 you, but at trial were you receiving your proper medication?

12 A. No, sir. The Judge took all pain medication away
13 from me starting on the first day. She would not let me - she
14 -- No, sir. I received no pain medication. Even though the
15 doctor had prescribed me those medications to take, the Judge
16 took all that away from me and the attorney, my attorney
17 never, not to my knowledge that I remember, and I may be wrong
18 about this, but as far as my memory goes Anna Good did not
19 request one time for me to get my pain medication.

20 Q. Did you have sufficient food during the trial?

21 A. Food? No, sir. No, sir. They never fed me not
22 once during the morning, noon or evening. I was not given
23 showers. I was put in a shock vest and Lieutenant Cato in the
24 shower when he put that shock vest on me, he looked at me and
25 he asked me if the vest was too tight, and I said it's pretty

1 tight, sir. And he said look at me. He said, if you speak to
2 your family one time or if you take that stand in the
3 courtroom, I will shock you and he held a little clicker up in
4 his hand and he said, all I have to do is push this button,
5 Mr. Miller. Then he stuck it back in his pocket and him and
6 the other Officer Brown or Williams possibly was in the shower
7 room as well when they put the shock vest on me so I kept my
8 mouth shut, sir.

9 Q. Okay. Did your counsel Ms. Good, did she fail to
10 plan or prepare for your defense in any way?

11 A. I met with that woman once for just briefly. We
12 drove to Columbia. I tried calling her on several occasions
13 to get her to talk to people and to meet to get information
14 and to look at nude pictures of my daughter that was sent and
15 that somebody had showed me and she said that we did not need
16 none of that stuff; that if I tried to defend myself and
17 present any evidence, that it would just make me look
18 guilty.

19 Q. Okay. So you're indicating that counsel did not
20 meet with you a sufficient number of times?

21 A. No, sir.

22 Q. Okay.

23 A. I mean, unless once is sufficient after the amount
24 of money we paid.

25 Q. Well, can you explain, did your counsel fail to

1 investigate and call witnesses?

2 A. She did not call any witnesses even though I begged
3 her myself personally when I met her. She said we did not
4 need them. The prosecutor's case was weak and she was not
5 worried.

6 Q. Okay. Did you attempt to testify? Were you stopped
7 in any way from doing that?

8 A. I wanted to testify. I asked her several times, but
9 she said that I should not testify given the state of my
10 condition and she also asked, I can only, I guess the word
11 would be speculate, my family had mentioned this to me, that
12 Anna Good had spoken to them and told them or suggested to
13 them that I not take the stand. You would have to verify with
14 my family. I was not there for that conversation.

15 Q. Okay. And was there an issue about her allowing
16 your police interrogation video to be submitted to the
17 Court?

18 A. I - I don't know that. I don't know the answer to
19 that question, sir.

20 Q. Okay. And did you feel that there should have been
21 objections made to the closing argument by the Solicitor?

22 A. Everything should have been objected to, sir.

23 Q. Okay. Now, during your original application, did
24 you have some information about what you wanted to say about
25 details of why you felt the police were at the house regarding

JAMES MILLER - DIRECT BY MR. JOHNSON

24

1 a lost weapon and did you want to explain that to the jury to
2 help explain why things occurred the way they did? It was
3 really about a lost pistol.

4 A. I would have been glad to answer any and all
5 questions during the trial.

6 Q. Do you remember what that testimony would have been
7 about your wife making a report about a lost weapon?

8 A. Well, here's, okay, I have a felony, I believe two
9 if I'm not mistaken, one for LSD acid when I was 16 or 17
10 years old which the drugs were lost, but I still pled guilty
11 because I did have one hit of acid in my wallet and I got
12 caught with it at the beach and the other one was for after I
13 had my surgery on my stomach, I had to sell some marijuana and
14 I was not very good at it and I got busted but, you know, I
15 did what I had to do and I'm not ashamed of it, but I did have
16 a couple felonies. I was not supposed to have firearms.
17 There has been nothing but death in my family from firearms
18 and my friends.

19 Now, Tammy did buy the firearm. She had a XD40 that
20 she bought and I did like the gun. I'm not gonna lie to ya.
21 I enjoyed sort of having it around occasionally, but they
22 were, you know, they were not my guns. They were her guns.
23 She's the one that went and got the concealed weapons permit.
24 Now, we did have an XD40, a Springfield on the morning of the
25 arrest. She brought an LC9 while I was in the shower. That

1 was her pistol. As far as a gun being lost, that was on a
2 horseback prior to all of this. I know that I'm skipping
3 around. You have to excuse me.

4 Q. Just to pare it down, I don't want you to be
5 confused by my question. When the officer showed up and your
6 reaction, were you trying to testify so you could explain to
7 the jury why you had a reaction?

8 A. I was inside the house. Tammy had informed me that
9 the cops were coming to file a police report on a gun that I
10 had lost and, well, that was as much as I knew about it at the
11 time until everything started happening. I don't remember
12 exactly what I was thinking but I knew that I was gonna be in
13 trouble so yeah.

14 Q. Well, when you walked towards the police and the
15 report reflected that you made a statement about what she said
16 is true or if it was true, you wanted to explain that you
17 thought that they were there about a pistol?

18 A. I said whatever she said has to be true. She
19 wouldn't lie.

20 Q. And you were referencing this lost pistol you
21 thought that there was a charge and the police were there
22 about that?

23 A. Well, my wife. Yes, sir.

24 Q. And that's what you wanted to explain to the jury?

25 A. Yes. I probably could have done it a lot better

1 then.

2 Q. Okay.

3 A. I mean, the cops were on the hill talking to her the
4 entire time. The day before all this happened, and I know
5 this is not a question, but it needs to be known, this is
6 gonna be my chance to defend myself, the day before all this
7 happened, Henry's father had called me and said, James, we
8 need to talk. Henry and [REDACTED] you know, they kissed and
9 whatever and I didn't feel real comfortable about that. It
10 really, it really pissed me off to be frank because my
11 daughter was a little bit older and he was a little younger
12 and my daughter was supposed to be going into the Coast Guard.
13 That's all that she kept on talking about. That's all I
14 wanted for her.

15 Q. Okay, Mr. Miller, just to get onto my next question,
16 I don't mean to cut you off, let's stick with the questioning.
17 You indicated, was there a promise made about, or a ruling
18 that you were supposed to have frequent breaks during the
19 trial?

20 A. Uhm, I believe the Judge did say that. Yes, sir. I
21 believe she said it on more than one occasion possibly.

22 Q. Did you receive the water and the breaks and
23 bathroom breaks?

24 A. No, sir. But I also did not request it. I mean, I
25 am stubborn but, I mean, I should have been in surgery.

1 I should not have been there trying to question my mentality
2 in the amount of pain I was in. Yes, sir.

3 Q. Okay. And later on when the attorney raised the
4 issue about pain medications, you not receiving pain
5 medications, did she ever make a motion for a mistrial or
6 continuance on your behalf?

7 A. I don't remember, sir.

8 Q. Okay. And was there testimony that you wanted to
9 provide in response to a daughter's testimony about not having
10 friends or being able to associate with people and you wanted
11 to testify about that and call witnesses to explain that to
12 the jury?

13 A. I would have explained anything that was asked. My
14 daughter and my son had plenty of friends. They had more
15 friends than me. They always had them every weekend. I mean,
16 it was every weekend either at the Summerville house or the
17 lake house. There were friends and company and they were not
18 - they had friends.

19 Q. Okay. Did you feel that you received full discovery
20 or was there an issue with getting discovery?

21 A. I have never seen discovery. I've never seen one
22 piece of paper from discovery. Never. I requested it several
23 times in writing to the Sheriff's Office in Kershaw County
24 I've requested it to the Clerk of Court several times in
25 writing and I think I sent it to the Clerk of Court of

1 Richland County as well maybe once or twice it seems like.
2 But, no, sir, I've never read the discovery, I've never seen
3 it. I only know what my family has told me and what letters
4 friends and family have written and what I've had to
5 experience.

6 Q. Did your counsel, was there a request to seek DSS
7 records that counsel did not comply with?

8 A. I believe my family may have followed through with
9 something like that. I can't answer that question honestly.
10 I do not know, sir.

11 Q. Okay. And did your attorney have co-counsel, an
12 assistant with her during the trial?

13 A. Me.

14 Q. No. Was there another attorney assisting her?

15 A. No, sir.

16 Q. Okay. During the trial breaks, was your attorney
17 consulting with you or was she busy reading a book?

18 A. She was reading a book and playing on her phone
19 whenever she wasn't looking at the Judge.

20 Q. Okay.

21 A. And telling me to --

22 Q. Okay. Did she ever consult -- Go ahead. I'm sorry.

23 A. Most of the time she was telling me to be still.

24 Q. Okay. But she didn't consult with you, ask
25 questions, answer questions?

1 A. She wrote the word bullshit on one piece of paper
2 one time and slipped it to me, but other than that I believe
3 that's all she said to me during the whole week is what it
4 seems like to me.

5 Q. Okay.

6 A. And she wrote that word on a yellow piece of paper
7 and slipped it to me because of something somebody was saying
8 on the stand.

9 Q. Okay. And did your counsel have any type of expert
10 review your situation whether mental or medical at the time
11 due to all the pain that you were in and your inability to
12 assist her, you never got evaluated prior to trial or she
13 never made that request again in trial?

14 A. I had a doctor's referral to get my surgery and that
15 was my main mission. All I wanted was to get my back fixed
16 and that's all I still want.

17 Q. But your attorney did not make that review possible,
18 did not bring in an expert?

19 A. There was nobody there but me and her and my family
20 and friends.

21 Q. All right. Did your attorney fail to bring in any
22 experts to counter the State's expert Dr. Luberoff, any
23 medical doctor, anyone to testify about being an expert in
24 sexual assault, was that done?

25 A. It was only me and her, sir. I had friends and

1 family that were willing to speak up, but it seems that that
2 was not an option or possible.

3 Q. Okay. Do you remember an important question that
4 you discussed with your aunt you felt that counsel should have
5 asked, should have been asked the victim during the trial? Do
6 you remember that?

7 A. No, sir. There's a bunch of questions. I can sit
8 up here and look like a fool for the next four hours if y'all
9 allow it.

10 Q. Okay.

11 A. But everything I say would be the truth.

12 Q. Do you feel that the jury was pressured by the
13 Judge?

14 A. Absolutely. One hundred percent guaranteed.

15 Q. Okay. Was that by the charge given by the Judge and
16 interaction with the jury?

17 A. I don't know how to explain it, sir. I can tell you
18 that between right and wrong what was done was wrong and as
19 far as charges or whatever you're talking about, I can't
20 answer that question properly, sir. I don't - I don't
21 understand it. I don't. I read what has been written and I
22 tried to read all these reports and stuff that everybody has
23 written and submitted and none of it makes sense.

24 Q. Okay. I'll put it like this: Did you feel the jury
25 was intimidated or rushed by the Judge?

1 A. Yes. Yes. Yes. From what I seen visibly one
2 hundred percent absolutely. That's only the stuff that I got
3 to see and everything else was done, I believe the correct
4 word would be chambers, you know, whenever things were being
5 said that weren't supposed to be talked about like the guns
6 and everything, every time they started talking about the
7 guns, they had to go behind closed doors in chambers so...

8 Q. All right. Let me ask you, do you know, who is
9 Michael Norwood?

10 A. Michael Norwood is a friend. I think he's in the
11 courtroom. I think I glanced at him when I come in, but I'm
12 not sure. I've got a lot on my mind right now to deal with.

13 Q. Okay. Was he someone you wanted to testify on your
14 behalf?

15 A. He knows more about the situation than I do I would
16 imagine. He was there during all this and if he thinks he had
17 something to say, then I would say let him answer any
18 questions that anybody has to ask. Now, as far as what he
19 knows, I can't speak for him.

20 Q. Okay. But Pamela Edwards, is that your aunt?

21 A. Yes, sir.

22 Q. Did you want her to testify on your behalf?

23 A. Absolutely. Absolutely. She knows, she knows way
24 more than I do.

25 Q. Okay. Was Ms. Edwards or Mr. Norwood called by your

JAMES MILLER - CROSS BY MR. BLITCH

32

1 trial counsel to testify?

2 A. No, sir.

3 Q. Were they called at sentencing and mitigation?

4 A. No, sir. I mean, they weren't even called by
5 telephone.

6 Q. But they were present with you there at the
7 courthouse --

8 A. Yes, sir.

9 Q. -- and could have been called?

10 A. Yes, sir. Everyday and into the night before I
11 was.

12 Q. All right. Anything else you would like to share
13 regarding ineffective assistance of your trial counsel that I
14 did not cover?

15 A. No. I think I'll just sit back and watch and listen
16 for a little bit, sir.

17 MR. JOHNSON: All right. Judge, I have no more
18 questions.

19 THE COURT: Okay. Thank you, Mr. Johnson. Cross
20 examination, Mr. Blitch. This is cross examination.

21 CROSS EXAMINATION

22 BY MR. BLITCH:

23 Q. Good afternoon, Mr. Miller.

24 A. Yes, sir.

25 Q. William Blitch with the Attorney General's Office.

1 Just have a few questions for you. I'm gonna start where your
2 counsel started in regards to the continuance request that was
3 made with regard to your back.

4 A. Yes, sir.

5 Q. Ms. Good.

6 A. Good.

7 Q. Ms. Good, she's now Ms. Browder, did a pretty
8 effective job on arguing fairly strongly on your behalf
9 wouldn't you say with regard to that continuance? She talked
10 about the medications that you were on. She talked about the
11 blackouts that you said you were having and things of that
12 nature?

13 A. I mean, you used the word -- You have to remember,
14 sir, literally my last grade completed was eighth. Now you
15 say argue, now she didn't put up an argument with anybody in
16 that courtroom about nothing. She mentioned once or twice
17 very softly, you know, for the first couple days it seemed
18 like that to get the court case continued, but she withheld
19 the papers from the Judge to make a proper decision. That was
20 not Anna's decision to make. The Judge needed all the
21 information in front of her to make a proper decision and, you
22 know, not only those four pieces of paper that was withheld,
23 there's another 17 or 21 pieces of paper that my girlfriend
24 picked up.

25 Q. When did you give her that documentation?

1 A. It would have been -- I can't answer that question
2 honestly. I would say Wednesday.

3 Q. Do you know when you first mentioned to her the need
4 for the continuance?

5 A. It would have been the previous week. I don't know
6 an exact date, no, sir. I can't answer that question
7 honestly. Possibly one of my family members could. I don't
8 know. It would have been the previous week at the beginning
9 of it or toward Tuesday or Wednesday possibly --

10 Q. Okay. But she did --

11 A. -- but it was mentioned.

12 THE COURT: Okay. Just one second. Do allow the
13 applicant to respond in full so that Mr. LeBlanc can --

14 MR. BLITCH: I'm sorry, Your Honor.

15 THE COURT: -- keep the record clean, okay? I know
16 it's hard, but y'all just make sure that you allow each
17 other to state either the question or the answer fully.
18 Thank you.

19 MR. BLITCH: Thank you.

20 BY MR. BLITCH:

21 Q. Ms. Browder did present the Judge with the email
22 that indicated the types of injuries you've had to your back,
23 the information with regard to the back and she presented to
24 the Judge the fact that you were on the various medications;
25 is that correct?

1 A. I was not on any medication at the time of trial and
2 she presented the Judge with a piece of paper with my injuries
3 on it. She did not present the Judge with the referral to the
4 neurosurgeon. She did not present the Judge with the papers
5 that said that I was supposed to be home laying down and in
6 bed, not up walking around, not moving, not putting any
7 pressure on my spine. I was supposed to be on bed rest until
8 I got to meet with a neurosurgeon to discuss my options and
9 who knows, you know. Then my understanding was it could have
10 been a minor surgery. I believe the person that I spoke to
11 said that it was just gonna be a fusion and I could be back
12 moving around within three or four days so, no, Anna Good did
13 not argue the fact that I needed help. I'm still in a
14 tremendous amount of pain and I still need surgery. I
15 definitely did not feel that Anna Good did her job on that,
16 no, sir.

17 Q. Now, you indicated that you had all these papers.
18 Did you bring those papers with you today?

19 A. Yes, sir. I do.

20 Q. Okay. So you have them and can present them?

21 A. Yes, sir. I sure do.

22 MR. BLITCH: Your Honor, we have not received those
23 papers. I just want to note for the record the State has
24 not received anything other than the couple of papers
25 that were presented earlier.

JAMES MILLER - CROSS BY MR. BLITCH

36

1 THE COURT: Okay. And I don't believe that anyone
2 has made a motion or effort to introduce those into the
3 record as of yet, okay? Please continue.

4 BY MR. BLITCH:

5 Q. In regards to the medications, in the transcript it
6 verifies that your counsel specifically asked the trial Judge
7 about your ability to take medications. The trial Judge
8 specifically reviewed those medications. I believe it begins
9 on page 555, 556 of the transcript, it's part of the packet,
10 and the Judge reviewed various prescriptions that you were
11 getting, that you received and specifically allowed you to
12 take the hydrocodone and the oxycontin I believe were the two
13 that were actual prescriptions in your name. Do you remember
14 being able to take those and being allowed to take those?

15 A. This was done Friday night before I was handcuffed
16 and taken back to the jail and the Judge said I was only
17 allowed to take one of them. She said that even though she's
18 not a doctor, she knows that both of those prescriptions are
19 not supposed to be taken together at the same time. She's not
20 a doctor. She's a Judge. She had no right to make that
21 decision. She should have called a doctor. She should have
22 had a neurosurgeon present or in that case she should have,
23 they should have went back to their chambers like they do,
24 this is my opinion now, and they should have discussed it and
25 said, okay, let's get James's doctor up here and see why in

1 the world this woman wrote him two pain killer prescriptions
2 and see what the deal is. Now, You say that's on page 555,
3 right? That's literally like one of the last pages to the
4 whole thing, close. So what you're saying, you just made it
5 sound like this would have been at the beginning of the trial.
6 I had no pain medication all week long and I have got a lot of
7 damage in my back.

8 Q. Did you at any point in time ask the Court to have
9 your medication prior to that time that your counsel did?

10 A. I asked for medication everyday, morning, noon,
11 breakfast, dinner, whatever.

12 Q. So the answer to the question though --

13 A. My family wanted to give the jail the medication for
14 me to take before I come to court and the officer, I don't
15 remember the officer's name, but he said that they would just
16 take the medication and they would not give it to me because
17 it was a narcotic.

18 Q. Okay. And in regards to the review, the trial Judge
19 was told that you were on oxycontin, Lortab, a steroid pill
20 and either muscle relaxers or anti-inflammatories and she
21 specifically reviewed them and found only two of them that
22 were prescriptions in your name; is that correct?

23 A. All of them. I have the paperwork. All the
24 prescriptions are in my name prescribed to me by Dr. Julie
25 Taylor to take altogether.

1 Q. Did you present that paperwork to the Judge so that
2 she could see that those --

3 A. I presented it to Anna Good. Anna Good did not give
4 that paperwork to the Judge.

5 Q. How many times during trial did you request to take
6 a break besides the ones that were taken?

7 A. Honestly, I don't think I requested to take any
8 breaks. I just assumed that when everybody else took lunch or
9 a break and I was left sitting in the courtroom by myself,
10 that somebody would have the decency to bring me something to
11 eat or maybe before the jail sends me out, I figured they'd
12 give me something to eat or when everybody wanted a pizza and
13 chicken and went back and ate, I figured maybe the officer or
14 somebody would have brought me back in the back to eat, and
15 that happened on several occasions. But, no, sir, I did not
16 personally request because I thought, I mean, at the time I
17 was 40 years old. Normally I eat three or four times a day.
18 I've got a high metabolism. I just assumed that since I was
19 in custody and in handcuffs that -- I don't think it would
20 have made a difference if I did ask, sir, to be honest.
21 That's just me being honest. I'm not trying to be rude or
22 mean.

23 Q. Moving onto the discovery and that aspect in terms
24 of what was gotten, your counsel requested discovery early on
25 in the process and met with you with regard to the discovery

1 that she had received; isn't that correct?

2 A. Okay. You're asking me if I met with my attorney
3 when she had the discovery present with her?

4 Q. Yes. After she received discovery, you met with
5 your attorney?

6 A. She received the discovery the week before my
7 trial.

8 Q. That's the only time she received any discovery?

9 A. Yes, sir. As far as my knowledge goes. Now, as far
10 as meeting her and discussing or seeing any part of this so
11 called discovery that's supposed to exist, I have never seen
12 it. I never have touched it. I have never witnessed anybody
13 ever even seeing it. Now, my family says they have it, but I
14 have not seen it.

15 Q. Speaking of your family, you gave Ms. Good
16 permission to speak and to consult with Pam Edwards, your
17 aunt, in regards to your case and the discovery and things of
18 that nature, correct?

19 A. Yes, sir.

20 Q. Okay. And to your understanding did Ms. Edwards get
21 copies of the discovery and everything that was provided?

22 A. I don't know if she received them like three years
23 prior to all of this or if she received them, I want - I want
24 to speculate and I don't want to say I think my aunt received
25 a copy of the discovery after I was in prison.

1 Q. So after your conviction, not prior to trial?

2 A. I think. I can't answer that honestly, but that's
3 what I seem to be remembering. Now, I could be wrong. She
4 may have discussed some stuff, but as far as I remember Anna
5 Good did not get the discovery until the week or so before
6 trial. Now, whenever Anna Good had come to see me the first
7 time at the jail, I never met her, heard of her, talked to
8 her, another prisoner, James Kane, had come back to me and
9 said he had an attorney up front and she wanted to talk to me.
10 And I said, well, yeah, you know, tell her. And he said,
11 well, I think she's gonna call you, and whenever I went up
12 there and met Ms. Good, she had already had my file so somehow
13 or another she had caught wind and come to the Kershaw County
14 Jail with my file in hand. She said she had stopped by the
15 Sheriff's Office prior to coming to the Kershaw County Jail.

16 Q. Was she in prior contact with your aunt in regards
17 to being hired or retained?

18 A. No, sir. I met with her and then called my family
19 and asked my family to speak with her and that's when I
20 believe I spoke with my aunt one more time after that. She
21 asked me my opinion, but obviously my opinion is wrong, but
22 we, my family paid for the attorney. I had no part in paying
23 anyone involved in that situation.

24 Q. One of the items that you talked specifically about
25 in terms of requesting and not receiving are DSS files or DSS

1 reports. Do you have copies of those? Have you received
2 copies of those?

3 A. I spoke with the DSS agent Ella Chestnut. She come
4 to Kershaw County Jail. The only thing she wanted to know was
5 where the gun was that I had on me in the house that Tammy had
6 brought to me prior to me getting out of the shower because
7 there was a snake while on the horse that they had seen and
8 she told me that she wanted me wear the gun. When the police
9 showed up, I was on the couch typing to both of my girls
10 apologizing to them on Facebook because I jumped on both of
11 their asses because, pardon the language, because of what was
12 going on with the boys and I really, I overreacted and I was
13 trying to apologize to my daughter. Now, repeat the question
14 one more time. I'm sorry I got off track.

15 Q. I was just trying to verify whether you did or
16 didn't have the DSS reports. It sounds like your answer was
17 no?

18 A. Ella Chestnut. No. I didn't have no copies, but
19 she come to the prison and wanted to know where the gun was
20 and I asked her why the cops had come and she said they didn't
21 involve the cops and I told her where the gun was and I took
22 it off my hip. All I had was on a holster. I was supposed to
23 die that day. Those were the plans. Keep in mind all this
24 happened the day after my ex-wife got her concealed weapon
25 permit and the magical kiss that tore my daughter's heart

1 apart. Go ahead, sir. Next question please.

2 Q. I was gonna ask you about testifying. You indicated
3 that you had a desire to testify. Did you indicate that
4 desire? Did you have any discussions regarding testifying
5 with counsel?

6 A. I told her from day one I wanted to testify. I want
7 a polygraph test. The day I met her she said the State would
8 not pay for that. It would cost around five thousand dollars
9 and I could not afford that. I was in jail. How was I gonna
10 afford five thousand dollars for a polygraph. She, no. I
11 wanted to testify and she never prepared me. She never
12 talked, she never discussed the option of me testifying. The
13 only answer I got from her is that if I tried to defend
14 myself, it would make me look guilty.

15 Q. Now, during the discussion with the Court, Ms. Good
16 indicates that she's discussed that the testifying with you
17 and that it's your indication not to testify. Did you
18 interrupt the Court or do anything to indicate that that was
19 an inaccurate statement by Ms. Good?

20 A. So you're asking me at the end of the trial when the
21 Judge asked me if I wanted to testify, right?

22 Q. Correct.

23 A. Okay. The Judge asked me if I wanted to testify. I
24 looked at Anna. She said no. She had already instructed me
25 not to testify. I then, I actually, I think I want to say

1 that I stood up and I turned around and asked my family and
2 friends. Now, there's some discrepancy there that me and my
3 aunt was just talking about, I don't think we remember things
4 the same way, but it seems like I got a whole lot of shaking
5 heads and no. I do remember my girlfriend shaking her head
6 no, but I'm not pointing fingers. I can only tell you what I
7 remember and how I remember it.

8 So, the Judge did ask me if I wanted to testify, but
9 I wanted to. I didn't understand why nobody was allowed to
10 get up there and speak, you know. The trial, it's my
11 understanding that the trial went on for the longest in
12 Kershaw County history and they got up there and got to say,
13 y'all got to get up there and you got to say everything and
14 anything that you wanted, but no, I was not allowed to have
15 anybody. If I would have just had one person say one good
16 thing about me during that trial, everything would have been
17 different.

18 Q. Do you remember the trial Judge, Judge Gee
19 indicating to you that the decision to testify was yours and
20 yours alone and no one else could make it for you?

21 A. I can't answer that question honestly, but if you
22 say that's what she said, I'm not gonna argue with you. The
23 paperwork was sent to me, but because of the charge and
24 everything that's happened to me in the prison, anything that
25 had stuff written on it I either tore up and flushed down the

JAMES MILLER - REDIRECT BY MR. JOHNSON

44

1 toilet or I had to send it back out in the mail so I can't
2 answer that question honestly. Not that I remember, but if
3 you say she did, I won't argue with you, you know. I'm
4 assuming that you would have physical evidence for saying
5 something like that, right? I mean, it's written down that
6 way, right?

7 MR. BLITCH: The transcript does reflect it, Your
8 Honor, on page 558 of the --

9 BY THE WITNESS:

10 A. Well, I can't answer the question honestly. I don't
11 remember her saying that personally, but I remember her asking
12 me if I wanted to testify. As far as the other stuff goes I
13 don't remember none of that. I was just following
14 instructions of the people I trusted.

15 MR. BLITCH: I don't believe I have any further
16 questions, Your Honor.

17 THE COURT: Thank you, sir. Any redirect Mr.
18 Johnson?

19 MR. JOHNSON: Just briefly, Your Honor.

20 THE COURT: Yes, sir. Take your time.

21 REDIRECT EXAMINATION

22 BY MR. JOHNSON:

23 Q. Mr. Miller, did you have some additional paperwork
24 regarding prescriptions that you wanted to present to the
25 Court?

1 A. I did. There's some stuff down there. I believe
2 it's 17 or 21 pieces of paper. I will submit everything I
3 have. I have nothing to hide. I have no secret in this whole
4 world and that's been taken away from me. Lord, have mercy.
5 This is stuff that you sent me, Mr. Johnson. And I also put a
6 request in with the prison system to get a copies of all my
7 medical records. They sent me everything but the referral to
8 the neurosurgeon both times with the nerve doctor and Richland
9 County emergency room and they also withheld the referral for
10 a cardiologist. Okay. I believe they have already seen that
11 one. Did you try that? I believe you want to submit that
12 stuff and then this is all -- Here's the request to the prison
13 system that I sent for the other medical records, but they
14 withheld those so that they would not be present during this
15 court date.

16 Q. Okay. This was previous, the previous trial. This
17 is dated June 16th --

18 A. Let's see what you got there. Yes. This is the
19 SCDC stuff.

20 Q. Right. But this stack that you've handed me, this
21 is information that you had with the trial counsel?

22 A. Wednesday.

23 Q. In trial?

24 A. In trial. Wednesday.

25 Q. And you wanted to submit it to the Court?

JAMES MILLER - REDIRECT BY MR. JOHNSON

46

1 A. Anna Good had that stuff and she said she didn't
2 need all that stuff and it explains that Dr. Julie Taylor.

3 Q. Okay. All right. And you wish to have that
4 submitted today?

5 A. Yes, sir.

6 MR. JOHNSON: All right. Your Honor, I'm gonna
7 share this with the Attorney General.

8 THE COURT: Any objection, counsel? I know you need
9 to take a look at it first.

10 MR. BLITCH: Your Honor, I need to. Let me take a
11 quick look at it and I will let you know.

12 THE WITNESS: I mean, may I speak?

13 THE COURT: No, sir. You need to wait until your
14 attorney asks you a question, okay?

15 THE WITNESS: Yes, ma'am.

16 MR. BLITCH: Your Honor, counsel and I have gone
17 through it. There's a couple of them dated after the
18 date of trial and a couple of them that are illegible.
19 It's my understanding he has agreed to withdraw those,
20 and the remainder of them we have no objection to.

21 THE COURT: Is that correct, Mr. Johnson?

22 MR. JOHNSON: I'm gonna return those other pages to
23 my --

24 THE COURT: Mr. Johnson, sir, is that correct?

25 MR. JOHNSON: Oh, that's correct, Your Honor.

1 THE COURT: Okay. Thank you. If you could identify
2 the documents that you're seeking to place into evidence,
3 that would be helpful.

4 MR. JOHNSON: Thank you, Your Honor. As my client
5 testified, these are documents related to his medical
6 treatment from Dr. Taylor regarding prescriptions and
7 reference a referral to a neurosurgeon and this paperwork
8 is related to that and Mr. Miller has testified, I can
9 clarify it a little bit more on the record if you like by
10 questioning my client, Your Honor.

11 THE COURT: Yes, sir. Are there dates?

12 MR. JOHNSON: These documents, well, there's
13 multiple documents. The date is in 2016, it's blurred
14 out by the top page on some of them, but some of them
15 show, it's my understanding this is right there before
16 trial, beginning of trial. This one says March 10th,
17 2016, 9th, and in some of them there's a hole punch copy
18 where you can't quite make out the month. Some of them
19 reflects that of March 9th, 2016, so these look to be
20 previous to trial or the day there right at trial because
21 I believe --

22 THE COURT: The trial dates were 3/14/16 through
23 3/18/16. Can you tell me the number of pages, sir, that
24 you have there?

25 MR. JOHNSON: Yes, ma'am.

1 BY THE WITNESS:

2 A. You want to submit this one. This is the one
3 discussing everything that had happened.

4 THE COURT: Sir, please don't make any comments on
5 the record until --

6 THE WITNESS: Yes, ma'am.

7 THE COURT: -- your attorney asks you the next
8 question please.

9 MR. JOHNSON: Excuse me, Your Honor. There appear
10 to be 16 pages and these appear to be on the 9th some
11 labeled, I can't quite read, say the 10th, some say what
12 appear to be the 15th of 2016. I'm assuming that's March
13 according to my client's testimony, but some of them are
14 blocked out.

15 THE COURT: Yes, sir.

16 MR. JOHNSON: Now, if the Court allows it, I'll mark
17 it as Applicant's Exhibit 2.

18 THE COURT: Yes, sir.

19 (Whereupon, Applicant's Exhibit #2 marked for
20 identification.)

21 THE COURT: Applicant's Exhibit number 2, Dr.
22 Taylor's medical record of 2016, 16 pages ranging from
23 March the 9th and March the 10th we believe of 2016.
24 Without objection.

25 MR. JOHNSON: Yes. And moving that into the record

1 as well as Applicant's 1. Your Honor, that's my only
2 question to establish that exhibit. I have no more
3 questions.

4 THE COURT: Okay. Admitted into evidence. Anything
5 else from the State regarding the records that have now
6 been placed into evidence?

7 MR. BLITCH: No, Your Honor.

8 THE COURT: Okay. Thank you. Then I will ask Mr.
9 Miller, sir, if you will please come down from the stand
10 and take your time. Wait for this gentleman to get over
11 here with your wheelchair, okay? And actually while Mr.
12 Miller is coming down from the stand, why don't we take
13 about ten minutes and have a recess, okay? And that way
14 he will not feel rushed. We will be at ease for ten
15 minutes. Thank you. Coming back by the clock on the
16 wall at five to three, all right?

17 (Short break.)

18 BAILIFF: Remain seated. Come to order please.

19 THE COURT: Okay. We may be a little bit early from
20 our break. Is everybody ready to go?

21 MR. JOHNSON: Yes, ma'am.

22 THE COURT: Okay. We are back on the record then
23 with regard to the matter of James Wayne Miller versus
24 the State, action number 19-CP-28-236, currently we are
25 now in applicant's case and so, Mr. Johnson, sir, I'm

1 ready for you to proceed.

2 MR. JOHNSON: Thank you, Your Honor. I'll just
3 bring to the Court's attention there are some additional
4 documents testified to by my client. One of these
5 documents is a single page at the top that has my
6 client's name, James Miller, and Julie Taylor, M.D. The
7 date on it is 3/22/16, but underneath it it reviews and
8 talks about the history of being seen on March the 3rd,
9 2016. According to my client's testimony this is a
10 document that did exist prior to trial. It did not have
11 this March 22nd date, that is something added to when
12 this was printed again or later so at this point I've
13 shown this to the Attorney Generals. Instead of trying,
14 I guess I cannot add this to an exhibit, but since this
15 would be related to Applicant's Exhibit 2 at this point
16 I'm simply going to ask the Court to allow me to enter it
17 as Applicant's Exhibit 3, if the Court --

18 THE COURT: Any objection?

19 MR. BLITCH: No objection, Your Honor.

20 THE COURT: Okay. And so Applicant's Exhibit number
21 3 will be entered without objection. It's additional
22 medical records from Dr. Taylor.

23 MR. JOHNSON: Thank you, Your Honor. Lastly, as far
24 as exhibits for this witness there is, there are three
25 pages, one of them is titled Kershaw Health Medical

1 Center and this is dated 3/8/16, a second page with Dr.
2 Julie Taylor's name at the top dated March the 3rd, 2016,
3 and the third page with Dr. Julie Taylor March the 3rd,
4 2016. As my client testified earlier that there were,
5 there was paperwork that was not handed up to the Judge
6 at trial, it's my understanding that these were those
7 three documents that were missing from Applicant's
8 Exhibit number 1, so I would like to add these at this
9 point as Applicant's Exhibit 4. I have shared these with
10 the Attorney General's Office.

11 THE COURT: Any objection?

12 MR. BLITCH: No objection, Your Honor.

13 THE COURT: Okay. Applicant's Exhibit number 4.
14 How many pages is that last one?

15 MR. JOHNSON: Three pages, Your Honor.

16 THE COURT: And number 3 is one page?

17 MR. JOHNSON: Yes, Your Honor.

18 THE COURT: Okay. So medical records of Dr. Taylor
19 as exhibit number 4 as well as three pages in length.
20 Thank you.

21 MR. JOHNSON: Thank you, your Honor. Your honor,
22 I'll call my next witnesses, if the Court allows.

23 THE COURT: Yes, sir.

24 MR. JOHNSON: At this time I would call Ms. Pamela
25 Edwards.

1 THE COURT: Ma'am, please come forward. You will be
2 sworn by our bailiff.

3 Thereupon,

4 PAMELA EDWARDS

5 after having been first duly sworn, testified as follows,

6 THE CLERK: State your full name and spell your last
7 name for the record.

8 THE WITNESS: Pamela B. Edwards, E-d-w-a-r-d-s.

9 THE COURT: Ma'am, you might just want to move that
10 mic up a little bit so you don't have to lean forward
11 like that. Can you state your name one more time for me?

12 THE WITNESS: Pamela Edwards, E-d-w-a-r-d-s.

13 THE COURT: Ms. Edwards, I haven't moved around.
14 Normally when I go to a new courtroom, I do kind of sit
15 in different places in the courtroom to see how it feels,
16 but is there a switch on that mic? Okay. Well, I could
17 certainly hear Mr. Miller just fine so. I haven't had
18 this problem before. You must be extremely soft spoken,
19 ma'am, but let's see if everyone can hear you again. If
20 you would state your full name.

21 THE WITNESS: You want me to talk into that? Okay.
22 Pamela Edwards, E-d-w-a-r-d-s.

23 THE COURT: Can everybody hear Ms. Edwards?

24 MR. BLITCH: Yes.

25 MR. JOHNSON: Okay.

1 THE COURT: All right. Thank you, ma'am. Please
2 answer Mr. Johnson's questions on direct examination.

3 DIRECT EXAMINATION

4 BY MR. JOHNSON:

5 Q. Ms. Edwards, are you related to Mr. James Miller?

6 A. Yes.

7 Q. How?

8 A. I am his aunt.

9 Q. Okay. Were you present for trial on his charges?

10 A. Yes.

11 Q. Okay. And tell me about, you were present for the
12 entire trial?

13 A. Yes.

14 Q. And you had conversations and meetings with the
15 trial attorney prior to trial?

16 A. Yes.

17 Q. For how many years did you communicate with Ms.
18 Good?

19 A. Three years.

20 Q. Okay. Who retained her?

21 A. I did.

22 Q. Okay. And when you witnessed the trial take place,
23 was there a problem with some basic needs for Mr. Miller that
24 you recognized and you tried to intercede? Tell me about
25 that.

1 A. Yes. I noticed that he wasn't getting any breaks
2 and he wasn't getting any food, so the last day I sat in when
3 everyone else went on their break and I asked him if he had
4 had anything to eat and he just slightly turned his head and
5 shook it and I asked the guard why he wasn't getting anything
6 to eat and he said he didn't have any orders for any break or
7 food for him, and I said that's his basic constitutional right
8 to have food on trial and I demanded that he get him something
9 to eat. So he left and he came back about 30 minutes later
10 with a brown paper bag with two baloney sandwiches in it.
11 James started eating one. He didn't finish and the Judge came
12 back in.

13 Q. Okay. Was there problem with getting medications
14 for Mr. Miller?

15 A. Yes. They weren't allowing his medication. I think
16 on the first day something was sent to the jail. The jail
17 refused, said they don't give narcotics at the jail and then
18 it was I think the last day when Ms. Good asked if before I
19 think the jury went in if he could have something for his pain
20 and that's when the Judge let him have one and I don't know
21 which one it was. She said he could take one and she picked
22 out the one that he could have, but I don't know which one it
23 was that she allowed him to have.

24 Q. Okay. I'm going to show you Applicant's Exhibit 1
25 and 4 and I'm going to ask you do recognize those documents?

1 A. Yes.

2 Q. Okay. What are those documents?

3 A. These are the documents from Julie Taylor from
4 Sentinel Health Partners.

5 Q. What are they detailing?

6 A. These are detailing what his active problems are,
7 the low back pain, the disk disease, the radiculopathies. It
8 says current everyday smoker. Then it has the medications on
9 the bottom.

10 Q. What are those medications that were listed for Mr.
11 Miller?

12 A. It says Lortab on this one and on here it says
13 something with an N, dose pack four milligrams but it's kind
14 of blurred out, then it says Lortab and I think this was on
15 one of the first visits and then I don't know what these other
16 ones are, but I actually have copies of the prescriptions.
17 They are in my bag up there.

18 Q. Well, I'm asking you though were those exhibits, is
19 that paperwork that the attorney had and failed to give up to
20 the Judge?

21 A. I'm assuming. I didn't look over the paperwork. I
22 wasn't up there beside her so I do not know.

23 Q. Okay. Fair enough.

24 A. (Proffering.)

25 Q. Thank you. And when there was testimony about the

1 victims, for example, previous testimony about the victims
2 testified they were isolated by Mr. Miller, or the victim, not
3 victims, the victim was isolated and didn't have any friends
4 because of the defendant, did you have some testimony that you
5 wanted to provide about that to the jury?

6 A. Yes. They had plenty of friends and I had a lot of
7 pictures of them with their friends and a lot of their
8 Facebook posts with them having friends and things. They
9 seemed to be a very active family, but that's not what was
10 presented, but I have other pictures and females and different
11 posts that would have proved otherwise.

12 Q. And did you talk to the trial attorney Ms. Good, did
13 you talk to her about that and your availability to testify
14 and your willingness to testify?

15 A. Yes.

16 Q. Okay. And was there a question you wanted her to
17 ask or bring up in front of the jury?

18 A. Yes.

19 Q. What was that?

20 A. Well, that was after the medical doctor that had
21 testified and I wanted her to ask what I thought was a very
22 important question, but she didn't ask it and I asked her why
23 and she said, well, I'm gonna bring that up in my closing.
24 And after the closing I said, why didn't you bring up that
25 most important question? And she said, well, I forgot, but

1 the jury will figure it out.

2 Q. What was that most important question?

3 A. The most important question to me was if [REDACTED]
4 was raped thousands of times as a healthy 17 year old girl why
5 did she not get pregnant.

6 Q. And the trial attorney indicated she would ask it
7 but she did not?

8 A. Yes. I mainly wanted it to be asked to the doctor
9 though.

10 Q. And it was not asked?

11 A. It was not asked.

12 Q. Okay. Did you feel that there was any pressure on
13 the jury placed there by the Judge or intimidation or pressure
14 from the Judge to the jury?

15 A. I did. I felt the Judge was unkind.

16 Q. Okay. What about, were there any motions made by
17 the trial attorney for a mistrial based on the treatment of
18 Mr. Miller's --

19 A. No.

20 Q. -- basic needs?

21 A. No.

22 Q. You never witnessed that. Was there a request by
23 you over the time that you hired trial counsel and
24 communicated requests about getting some DSS files?

25 A. Yes. I had spoken to the lady at DSS and I wanted

PAMELA EDWARDS - DIRECT BY MR. JOHNSON

58

1 Anna to talk to the lady at DSS and the first day of trial I
2 noticed that the lady from DSS was not there. I said, you
3 need to subpoena the lady from DSS. She needs to be here.

4 Q. Okay. Now, did you have email communication with
5 Ms. Good about these DSS files?

6 A. Yes.

7 MR. JOHNSON: Your Honor, I have a single page that
8 is an e-mail printout. I was going to have this marked
9 Applicant's Exhibit 5 and I have shared this with the
10 Attorney Generals.

11 THE COURT: Any objection, counsel?

12 MR. BLITCH: On the copy that I have I note it has
13 some handwritten commentary. I just ask that that would
14 be removed prior to admission as an exhibit, but
15 otherwise I don't have any objection to the email
16 itself.

17 THE COURT: Thank you, sir.

18 MR. JOHNSON: Your Honor, there are some handwritten
19 notes there I believe added so I don't know how you want
20 me to remove that, but I'll be happy to do whatever you
21 ask me to do.

22 THE COURT: Are they at the bottom of the page?

23 MR. JOHNSON: These are in the middle of the page.
24 They look to have been copied so I'm not sure how to
25 remove that.

1 THE COURT: What I'm wondering is if photocopies
2 could be made, my law clerk could possibly do that just
3 folding it.

4 MR. JOHNSON: That would work.

5 MR. BLITCH: Put a sticky note over it or something
6 of that nature, Your Honor.

7 MR. JOHNSON: I think that would be possible.

8 THE COURT: Okay. Madam law clerk, okay, let's just
9 have her do that real quick. Can we come back to that
10 possibly in your testimony?

11 MR. JOHNSON: Yes, ma'am.

12 THE COURT: Okay. Please continue. We'll take that
13 back up in just a moment.

14 MR. JOHNSON: Thank you, Your Honor.

15 BY MR. JOHNSON:

16 Q. Ms. Edwards, was there any additional testimony that
17 you wanted to provide at trial about the victim or the facts
18 of the case?

19 A. Well, I had several things that, uhm, I would have
20 testified to. One was the mother Tammy kept, she called me
21 like three times a day and she was always having different
22 scenarios about what was going on.

23 MR. BLITCH: Objection, Your Honor. Hearsay.

24 MR. JOHNSON: Don't talk about --

25 THE COURT: And so, Mr. Johnson, your response to

PAMELA EDWARDS - DIRECT BY MR. JOHNSON

60

1 that objection?

2 MR. JOHNSON: Well, it's hearsay, Judge. I'm gonna
3 instruct Ms. Edwards not to talk about what other people
4 said.

5 THE COURT: Okay. So that will be sustained.
6 Ma'am, I know that you probably aren't in a courtroom all
7 the time, but normally you can't say what someone else
8 has said in the courtroom so just look to guidance from
9 your attorney, okay?

10 BY MR. JOHNSON:

11 Q. Okay?

12 A. Okay.

13 MR. JOHNSON: Thank you, Judge.

14 BY MR. JOHNSON:

15 Q. Yes, ma'am. And, Ms. Edwards, please don't say what
16 other people said, but is there anything else that you felt
17 like you could have testified to?

18 A. It would be when I took Tammy a car. I don't
19 understand what hearsay is to tell you why I took her a car.

20 Q. Well, ma'am, you can testify about what you saw or
21 what you did. Is there anything that you witnessed that you
22 feel would be relevant in addition to --

23 A. When I took her a car, it seemed to me that no one
24 was upset. No one was traumatized. They were all happy.

25 Q. What time frame? Is this after the trial?

1 A. No. This is after the arrest.

2 Q. After the arrest. Go ahead.

3 A. The initial arrest.

4 Q. Okay.

5 A. They were excited about moving. My daughter and I
6 got in the car and we were like, well, they sure weren't very
7 upset and not acting like victims and we just started getting
8 very suspicious. That's when I started looking at all their
9 actions and how they were acting and what they were doing. I
10 started following what they were doing on Facebook and
11 interacting with them until I got upset and I blew it.

12 Q. Okay. Oh, well, at the end when there was a
13 sentencing, were you called to testify at mitigation for
14 sentencing?

15 A. At sentencing?

16 Q. When he was sentenced, were you allowed to speak to
17 the Court?

18 A. I was.

19 Q. Was anyone else called to testify?

20 A. No. No one was called. We were just, after the
21 sentencing, we were just asked if anyone had anything to say
22 and several of us stood up and had something to say.

23 Q. Okay. Do you have anything else you would like to
24 add regarding this subject of Mr. Miller's treatment or any
25 additional testimony that you wanted to provide?

PAMELA EDWARDS - DIRECT BY MR. JOHNSON

62

1 A. Well, I would have to look at my sheet because I'm
2 upset now and I can't think clearly.

3 Q. That's okay.

4 A. I can't remember. If you bring something up, I can
5 respond.

6 Q. Well, in reference to DSS files, you were never
7 presented with DSS files that you requested from the trial
8 attorney Ms. Good?

9 A. No.

10 Q. And you requested them?

11 A. Yes. I have another email where I asked her to call
12 DSS for me to testify and also on the first day of trial --
13 Can I tell you what I told her if it's me?

14 Q. You can say what you said.

15 A. Okay. I said, uhm, they are prepared and you're
16 not. You need to call witnesses. You need to talk to, the
17 DSS lady is not here. You need to call Mike and you need to
18 call Kathy and you need to call Debbie Perry which is Tammy's
19 sister.

20 Q. Mike, are you talking about Michael Norwood?

21 A. Michael Norwood. And then since then Debbie Perry
22 has died.

23 Q. Okay. Anything else?

24 A. Not that I just can bring up unless you ask me.

25 MR. JOHNSON: Your Honor, at this time I was going

1 to move the exhibit in.

2 THE COURT: Right. I know. Right on cue. Okay.
3 So thank you. Mr. Johnson, if you will show this first
4 to opposing counsel to make sure there's no other
5 objection and there's your original back, sir.

6 MR. JOHNSON: Yes, ma'am.

7 MR. BLITCH: No further objections, Your Honor.

8 THE COURT: Okay. And so this is going to be
9 Applicant's Exhibit number 5.

10 MR. JOHNSON: Your Honor, I was gonna to pass this
11 to the witness. You want me to have it marked first?

12 THE COURT: Let her identify it.

13 MR. JOHNSON: Okay.

14 BY MR. JOHNSON:

15 Q. Can you identify this document?

16 A. Yes.

17 Q. Okay. What is the document?

18 A. It's a reply to my email to Anna Good.

19 Q. What does it concern?

20 A. No, this isn't the reply. This is, it says, I just
21 wanted to touch base with you. I went and saw James today.
22 He's doing well. And what was the date on this? The date is
23 marked out. This is very early on. 2013. Is that what it
24 says? This was very early on. This was right after I hired
25 her so the date is important.

PAMELA EDWARDS - DIRECT BY MR. JOHNSON

64

1 MR. JOHNSON: Your Honor, there's a date on the
2 original document, but for some reason it's been cut off
3 when the copy was made to redact that bottom information
4 so there is a date at the top.

5 THE COURT: What is the date please?

6 MR. JOHNSON: The original, can I show her the
7 original document here?

8 THE COURT: Yes.

9 BY MR. JOHNSON:

10 Q. What's the date at the top?

11 A. February 25th, 2013. This was right after I hired
12 her.

13 Q. Okay. So this is something pertaining as you read
14 through it, what are you requesting from the attorney?

15 A. Uhm, she said, he is doing well. I also received
16 discovery from the Solicitor's Office. I haven't been through
17 it yet to see if anything is missing, but I plan to start
18 doing that in the next couple of days. We are going to try to
19 go up for a bond hearing the week of March 11th in front of
20 Judge Benjamin. Also mentioned to me he definitely - he also
21 has mentioned to me he is definitely interested in a polygraph
22 and Dr. McKee, but I told him we would try to deal with the
23 bond stuff first and then go from there. That will also give
24 me time to go through his discovery. I will also be
25 subpoenaing the Facebook information, the jail logs, the DSS

1 files. Let me know if you need anything in the meantime.

2 Thank you.

3 Q. Okay. Did the trial counsel ever produce these
4 files you requested?

5 A. No.

6 MR. JOHNSON: Your Honor, I'm going to leave
7 Applicant's Exhibit 5 here to be marked and I'm moving
8 that into the record along with all other exhibits that
9 they all be moved in at this time.

10 THE COURT: Okay. And exhibit number 5, an email
11 communication between, as I understand it, applicant's
12 defense counsel at his trial dated February the 25th,
13 2013 and his aunt Pamela Edwards, okay.

14 MR. JOHNSON: Yes, Your Honor. I don't believe
15 there's any objection from the Attorney General.

16 THE COURT: They did not object.

17 MR. JOHNSON: Yes, ma'am.

18 THE COURT: Okay. In without objection.

19 MR. JOHNSON: Your Honor, I have no more questions.

20 THE COURT: Ma'am, before you step down, is there
21 any cross examination?

22 MR. BLITCH: No questions, Your Honor.

23 THE COURT: Okay. Thank you, ma'am. Watch your
24 step. Yes, sir.

25 MR. JOHNSON: Thank you, Your Honor. The last

MICHAEL NORWOOD - DIRECT BY MR. JOHNSON

66

1 witness I'll call is Michael Norwood.

2 Thereupon,

3 MICHAEL NORWOOD

4 after having been first duly sworn, testified as follows,

5 THE CLERK: Have a seat in the witness box and state
6 your full name for the record and spell your last name.

7 THE WITNESS: Michael Benjamin Norwood,
8 N-o-r-w-o-o-d.

9 THE COURT: Okay. Direct examination,
10 Mr. Johnson.

11 MR. JOHNSON: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. JOHNSON:

14 Q. Mr. Norwood, how do you know Mr. Miller?

15 A. Uhm, I've known him since early 2000. We worked
16 together and we did carpentry work and et cetera.

17 Q. Okay. Did you know his family?

18 A. I did.

19 Q. Okay. And do you have children and have a family?

20 A. I do.

21 Q. Okay. And how frequently were you around Mr.
22 Miller?

23 A. There was a period we were together every weekend on
24 the lake boating, cooking out, my children stayed at his house
25 often together. Both families were friends.

1 Q. Okay. During this trial and his representation by
2 Ms. Good, were you present for that?

3 A. I was present for a portion of it, but I couldn't
4 bear to watch it and I left, but I did show up dressed
5 appropriately if I was needed, but I was never subpoenaed or
6 asked to testify. I did not volunteer because I wasn't
7 familiar with the process.

8 Q. Did Ms. Good question you about the case?

9 A. Not that I recall.

10 Q. Did she ever ask you to testify?

11 A. No.

12 Q. Not at trial or at sentencing?

13 A. Nope. I was not at sentencing. I had left by
14 then.

15 Q. Okay. And did you have any opinions about Mr.
16 Miller or whether or not you felt like he was safe to be
17 around your family that you wanted to express?

18 A. I trusted him with my family. My children spent the
19 night at his house often. I never had any second thoughts
20 about it.

21 Q. And were you able to provide testimony in detail
22 about what you observed over a long period of time between
23 interaction with Mr. Miller as his daughter, the victim?

24 A. I worked with him on occasion not full-time but hit
25 and miss.

MICHAEL NORWOOD - CROSS BY MR. BLITCH / REDIRECT BY MR. JOHNSON

68

1 MR. JOHNSON: No further questions, Your Honor.

2 THE COURT: Okay. Cross examination.

3 MR. BLITCH: Just a couple quick questions, Your
4 Honor.

5 THE COURT: Yes, sir. Cross examination.

6 CROSS EXAMINATION

7 BY MR. BLITCH:

8 Q. Good afternoon, Mr. Norwood. Couple of quick
9 questions for you. How often were you behind closed doors
10 with Mr. Miller and his 16 year old daughter?

11 A. I was not been behind closed doors. I don't know
12 what goes on behind closed doors.

13 Q. Do you have any kind of testimony to offer or any
14 type of alibi or anything that would actually provide any
15 explanation with regard to the allegations themselves?

16 A. No. It was a surprise to me that he was arrested.

17 MR. BLITCH: Those are the only two questions that I
18 have, Your Honor.

19 THE COURT: Okay. Redirect?

20 MR. JOHNSON: Your Honor, just briefly.

21 REDIRECT EXAMINATION

22 BY MR. JOHNSON:

23 Q. Mr. Norwood, in particular there was during the
24 trial allegations made by the victim against Mr. Miller
25 regarding assaults that took place in a house --

1 MR. BLITCH: Objection, Your Honor. This is beyond
2 the scope of cross examination.

3 MR. JOHNSON: Well, he asked about testimony.

4 THE COURT: Just let me --

5 MR. JOHNSON: I'm sorry.

6 THE COURT: I'm going to allow it, okay? I know
7 this is important to the applicant and I will let you
8 though, sir, go into any cross.

9 MR. BLITCH: Thank you, Your Honor.

10 THE COURT: Okay. Go ahead.

11 MR. JOHNSON: Thank you, Your Honor.

12 BY MR. JOHNSON:

13 Q. Just on the subject of testimony, was there a time
14 where Mr. Miller was performing work with you on your mother's
15 house.

16 A. There was.

17 Q. And during the testimony, was there an allegation
18 made about assaults taking place against the victim at her
19 house?

20 A. There were.

21 Q. And were you present when Mr. Miller was there
22 working on your mother's house?

23 A. Yes. I was. And so was another male as well and I
24 think my brother was upstairs and my mother was there a couple
25 of times, people working on her roof. There was pretty much a

MICHAEL NORWOOD - RECROSS BY MR. BLITCH

70

1 fairly good crowd there the whole time.

2 MR. BLITCH: Your Honor, I'm sorry. I could not
3 hear most of that answer.

4 BY THE WITNESS:

5 A. There were a number of people present while we were
6 doing the roof at my mother's house.

7 MR. BLITCH: Okay.

8 BY MR. JOHNSON:

9 Q. Okay. So you could have provided testimony that you
10 were there at this place where the victim claims she was
11 assaulted?

12 A. I could.

13 Q. Okay. But you were never questioned about that by
14 the trial attorney?

15 A. I was not.

16 MR. JOHNSON: Okay. Thank you. No more questions,
17 Your Honor.

18 THE COURT: Okay I will allow a cross examination.

19 MR. BLITCH: Thank you, Your Honor.

20 RECROSS EXAMINATION

21 BY MR. BLITCH:

22 Q. Were you with Mr. Norwood and his daughter at every
23 moment that they were at your mother's house?

24 A. I'm Mr. Norwood.

25 Q. I'm sorry. With Mr. Miller?

1 A. I was, I have a leg length discrepancy so I was not
2 on the roof with them so I was actually on the ground so they
3 were either on the ground - on the roof and I was on the
4 ground as support supervisor on the ground.

5 Q. What about when they were in the restroom or the
6 bathroom?

7 A. They did - everybody there did go in and use the
8 restroom there, but my mother was present and my brother was
9 there, but obviously no one followed them into the restroom.
10 If they had gone into the restroom together, I'm sure it would
11 raised some sort of suspicions.

12 MR. BLITCH: Okay. That's all the questions I have.
13 Thank you, Your Honor.

14 THE COURT: Okay. Anything else, Mr. Johnson, with
15 regard to that?

16 MR. JOHNSON: Nothing further, Your Honor.

17 THE COURT: Okay. All right. Thank you, Mr.
18 Norwood. Please step down. Watch your step, okay?

19 MR. JOHNSON: No more witnesses, Your Honor.

20 THE COURT: Okay.

21 MR. JOHNSON: We rest.

22 THE COURT: All right. I will now call upon the
23 respondent. Any witnesses, sir?

24 MR. BLITCH: One second, Your Honor, if I may.

25 THE COURT: Yes, sir.

1 MR. BLITCH: I just want to clarify with opposing
2 counsel whether he's abandoning the appellate counsel
3 claim. I didn't hear anything raised in regards to
4 that.

5 MR. JOHNSON: Your Honor, no, we are going to ask
6 that question. We put it in our application
7 specifically.

8 THE COURT: Okay.

9 MR. JOHNSON: So I was gonna question appellate
10 counsel if she's called because that's an allegation we
11 put in our application.

12 MR. BLITCH: Thank you, Your Honor. I just wanted
13 to verify whether it had been waived or not. Thank
14 you.

15 THE COURT: Okay. Apparently they're not waiving it
16 and --

17 MR. JOHNSON: Your Honor, can I recall my client,
18 Mr. Miller, regarding that to ask him, Your Honor?

19 THE COURT: Well, I don't - I'm not opposed to Mr.
20 Miller retaking the stand on that issue just so the State
21 knows what they're facing, respondent knows what they're
22 facing on that, if y'all don't have any objection to that
23 either?

24 MR. BLITCH: As long as it's going to be limited
25 solely to that, I don't have any objection, Your Honor.

1 THE COURT: Okay. So do y'all need to talk for a
2 minute?

3 MR. JOHNSON: No. Just briefly I can talk to him
4 right here.

5 THE COURT: Okay.

6 MR. BLITCH: That's fine, Your Honor.

7 THE COURT: Okay. All right. Does anybody need a
8 break? Okay.

9 MR. JOHNSON: Your Honor, he's having a tough time
10 moving. Can he testify from here, if it's allowed?

11 MR. MILLER: I can get up there.

12 THE COURT: My concern, sir, and I thought about it
13 at the very beginning, apparently there's not a mic at
14 that table to protect your privacy so you can have
15 conversations with counsel. I think, let me just ask the
16 court reporter, can you hear him okay?

17 COURT REPORTER: If he speaks loud enough, I'll hear
18 him.

19 THE COURT: Okay. But then on cross I will allow
20 opposing counsel to stand at counsel table rather than
21 having to turn your back to the Court.

22 MR. BLITCH: Thank you, Your Honor.

23 THE COURT: Okay. If y'all find that acceptable,
24 we'll try to do it that way.

25 MR. MILLER: I'll speak loudly.

JAMES MILLER - REDIRECT CONTINUED BY MR. JOHNSON

74

1 THE COURT: All right. So if y'all are ready, we
2 can proceed.

3 MR. JOHNSON: Yes, Your Honor. Thank you.

4 THE COURT: And so we are back on the record with
5 regard to the matter of James Wayne Miller versus the
6 State and this is extremely unusual, but I am allowing
7 the applicant to be recalled by his lawyer regarding
8 testimony that they did not present, okay? And this is
9 to be limited as to appellate counsel only; is that
10 correct?

11 MR. BLITCH: That's correct, Your Honor.

12 THE COURT: Okay. So if you can begin. Thank
13 you.

14 MR. JOHNSON: Thank you, Your Honor.
15 Thereupon,

16 JAMES MILLER
17 after having been previously duly sworn, testified further as
18 follows,

19 REDIRECT EXAMINATION CONTINUED

20 BY MR. JOHNSON:

21 Q. Mr. Miller, did you, did appellate counsel appeal
22 the issue of the Court overruling an objection regarding
23 testimony from the victim's mother where she related to the
24 officer on page 122, line 14, that Ms. Miller approached
25 saying, Ms. Miller approached me hysterical saying Mr. James

1 had forced her to have sexual intercourse. Did Ms., uh, his
2 appellate counsel, Ms. Hackett, appeal that in your case or
3 did she fail to appeal it?

4 A. I don't know how answer that question. Honestly, I
5 have no idea. I do not know. I don't know.

6 Q. Okay.

7 A. I'm not ignorant of the law, but I don't understand
8 - not to my knowledge. I don't remember any of that
9 conversation during court, period, so as far as somebody else
10 putting it on paper and showing it to me, if I did read it, I
11 don't remember it if I did read it. I still don't understand
12 it even as y'all are talking about it so I guess I need to
13 answer no.

14 Q. Well, whatever the truth is.

15 A. Well, I don't know or understand.

16 MR. JOHNSON: I have no further questions, Your
17 Honor.

18 THE COURT: Okay. So cross examination?

19 MR. BLITCH: No questions, Your Honor.

20 THE COURT: Okay. Mr. Johnson, anything else?

21 MR. JOHNSON: No, Your Honor.

22 THE COURT: Okay. And so now from the respondent.

23 MR. BLITCH: The respondent would call Ms. Susan
24 Hackett.

25 THE COURT: Okay. Please come forward.

SUSAN HACKETT - DIRECT BY MR. BLITCH

76

1 Thereupon,

2 SUSAN HACKETT

3 after having been first duly sworn, testified as follows,

4 THE CLERK: Please have a seat. Once you're seated,
5 state your full name spelling your last please.

6 THE WITNESS: My name is Susan Hackett. Last name
7 spelled H-a-c-k-e-t-t.

8 THE COURT: Okay. Direct examination. Thank you.

9 DIRECT EXAMINATION

10 BY MR. BLITCH:

11 Q. Good afternoon, Ms. Hackett. Where do you currently
12 work?

13 A. I work at the Office of Appellate Defense.

14 Q. Did you work there in 2016 and 2017?

15 A. I did.

16 Q. Did you have a occasion to handle an appeal for
17 Mr. James Wayne Miller?

18 A. I did.

19 Q. As part of that appeal did you file a brief in that
20 case?

21 A. I did.

22 Q. Did you file it as an Anders Brief?

23 A. I did not.

24 Q. So you raised issues that you believed had merit?

25 A. Yes, sir.

1 Q. Backing up, how long at the time in that 2016/2017
2 time range, how long had you been practicing law?

3 A. I graduated from law school in 2003. I was sworn
4 into the Bar in 2003, whatever the math is on that,
5 Mr. Blitch. 14, 15 years, I guess.

6 Q. And how much of that was in criminal law or
7 appellate law?

8 A. My first year out of law school was a judicial
9 clerkship. Thereafter I had three years in a small private
10 firm here in town doing criminal law exclusively. I was at
11 the Office of Disciplinary Counsel for three years, and then
12 I went to the Office of Appellate Defense where it's criminal
13 law exclusively. So that time period roughly 15 to 16 years,
14 take out four, and what is that? 11 or 12. 10, 11, 12.

15 Q. Have you had a chance to review the brief that you
16 filed in this particular case?

17 A. I did.

18 Q. And in that brief did you raise two issues?

19 A. Yes, sir.

20 Q. An both of those issues are ones that you felt had
21 merit?

22 A. Yes, sir.

23 Q. One of the issues related specifically to one of the
24 things that's been discussed significantly here today which is
25 the denial of his motion for a continuance; is that correct?

SUSAN HACKETT - DIRECT BY MR. BLITCH

78

1 A. Yes, sir.

2 Q. And you felt both of these were the most meritorious
3 issues as you went through the transcript?

4 A. Yes, sir.

5 Q. You also in regards to this, the Court of Appeals
6 ruled against you and affirmed the conviction and sentence
7 ultimately. Did you believe these issues that you raised to
8 be meritorious enough to file a petition for writ of
9 certiorari to the Supreme Court?

10 A. I did.

11 Q. And it was ultimately denied?

12 A. It was.

13 Q. You've heard the issue being discussed today
14 in regards to the hearsay that occurred at the time when the
15 officer testified about the mother presenting the, basically
16 the nature of the allegations in part and the allegation that
17 that was inadmissible hearsay. Did you consider raising that
18 as an issue?

19 A. I did. I have the notes that I took as I reviewed
20 the transcript and in preparation for today's hearing I
21 reviewed those notes and my notes indicate that I did consider
22 that issue and I decided that I would not raise it because I
23 did not believe that it was more meritorious than the other
24 issues.

25 Q. Did you have any specific considerations that you

1 made in regards to the nature of the allegation as far as why
2 you did not raise it as an issue?

3 A. I did and my notes indicate that I thought that the
4 State would argue that either it was not being offered as
5 hearsay because it was not being offered for the truth of the
6 matter asserted which was the argument that had been presented
7 at trial. I also felt that the State would argue on appeal
8 that it would fit within the excited utterance exception
9 because the testimony from the police officer was that the
10 mother was upset and I believe that stressed may have been the
11 word used, and then my final concern for that issue was that
12 when the mother testified later on in the trial to the same
13 thing, there was no objection, therefore, that testimony was
14 essentially cumulative so I thought we would have problems
15 both on the merits of the hearsay argument in addition to
16 whether it was, my be reversible error.

17 Q. And in other briefs and other filings that you've
18 made, you have raised issues related to hearsay before so it's
19 not something that you've never raised as an issue, correct?

20 A. Oh, yes, sir. I've raised hearsay.

21 Q. In regards to this one, when you're comparing and
22 looking at the issue that's been alleged that you failed to
23 raise with regard to hearsay as compared to the others, do you
24 feel that the hearsay issue is more or less meritorious than
25 the others?

SUSAN HACKETT - CROSS BY MR. JOHNSON

80

1 A. At this time then and now I thought that the hearsay
2 issue was less meritorious than the other issues for the
3 reasons I've previously stated.

4 MR. BLITCH: No further questions, Your Honor.

5 THE COURT: Okay. Thank you. Cross examination.

6 MR. JOHNSON: Just briefly, Your Honor.

7 CROSS EXAMINATION

8 BY MR. JOHNSON:

9 Q. Is it true the only way to be sure what would happen
10 if you appeal that issue is if you actually include it in the
11 appeal and get an opinion?

12 A. The only way to know what the Court of Appeals
13 thought of that issue would be for me to either file it in a
14 Merits Brief or to file it in an Anders Brief. Arguably you
15 still wouldn't know in an Anders Brief, but presumably they
16 read the entire record and make a decision.

17 Q. But since you didn't do that, you don't know?

18 A. We have no idea what the Court of Appeals thought on
19 that issue, only what I did.

20 MR. JOHNSON: Okay. Thank you. No more questions.

21 THE COURT: Any redirect?

22 MR. BLITCH: No, ma'am.

23 THE COURT: Okay. Any objection to this witness
24 being excused?

25 MR. BLITCH: None from the State.

ANNA BROWDER - DIRECT BY MR. BLITCH

81

1 MR. JOHNSON: No objection.

2 THE COURT: Okay. Thank you, ma'am. You may be
3 excused. Thank you. The next witness.

4 MR. BLITCH: The State would call Anna Browder
5 formerly Anna Good.

6 Thereupon,

7 ANNA BROWDER

8 after having been first duly sworn, testified as follows,

9 THE CLERK: Please have a seat. Once you're seated,
10 state your full name spelling your last please.

11 THE WITNESS: Anna Browder. Last name
12 B-r-o-w-d-e-r.

13 THE COURT: This would be direct examination.

14 MR. BLITCH: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. BLITCH:

17 Q. Good afternoon, Ms. Browder. At the time of the
18 trial of Mr. Miller you were Anna Good; is that correct?

19 A. Yes.

20 Q. How did you get involved in this case?

21 A. I was retained by Mr. Miller's aunt Ms. Edwards.

22 Q. And did she reach out to you or did you seek them
23 out?

24 A. I wouldn't have seeked them out. I can't remember
25 if Mr. Miller had written a letter to me from the jail or if

1 Ms. Edwards had reached out to me and that's why I initially
2 went to meet with him because I met him at the jail prior to
3 them retaining me.

4 Q. And that was only after you had had contact from Ms.
5 Edwards?

6 A. I can't remember, like I said, if he wrote a letter
7 to me because somebody had given him my name or if Ms. Edwards
8 had reached out to me.

9 Q. Okay. And at the time of the trial, how long had
10 you been practicing law?

11 A. When was the trial?

12 Q. 2016.

13 A. 2016, so 11 years.

14 Q. How much of that was criminal law?

15 A. All of it with the exception of my first year where
16 I was a judicial clerk.

17 Q. Tell me about your kind of employment background.
18 What's the sequence of events from where you have been?

19 A. When I graduated law school, I clerked for Judge
20 Johnson out in Laurens County for a year, then after that I
21 was at the Richland County Solicitor's Office for three and a
22 half years. I then went into private practice in the
23 beginning of 2010 doing criminal law and family law and then
24 in March 2018 I came back to the Solicitor's Office. Now I am
25 the team leader for our special victims unit.

1 Q. And in regards specifically with this case in
2 representing Mr. Miller, did you request, file a Rule 5 Brady
3 request for discovery and did you obtain discovery?

4 A. Yes. I did.

5 Q. Do you remember about when you obtained discovery in
6 this case?

7 A. If I can check my file.

8 Q. Certainly. Do you have it here?

9 A. I do. I filed my Rule 5 on January 30th, 2013. I
10 received initial discovery by email on February 5th, 2013.

11 Q. Just to clarify it, do you have the date that you
12 were officially retained?

13 A. Yes. I was retained January 28th, 2013.

14 Q. So roughly two days after you filed your discovery
15 request and received it, roughly two weeks after that; is that
16 correct?

17 A. Approximately a week after.

18 Q. A week after?

19 A. Yeah.

20 Q. And at the time that you received that initial
21 discovery, did you receive all of the discovery or was
22 anything missing at that point?

23 A. There was some things missing so I wrote a letter
24 requesting additional discovery that I didn't believe was in
25 the discovery that was given to me initially.

1 Q. And ultimately received everything that you believe
2 should have been in the discovery?

3 A. Yes.

4 Q. Did you ever meet with Mr. Miller in regards to
5 discovery?

6 A. Yes.

7 Q. How often did you meet with him roughly?

8 A. The day that I received discovery I went to the jail
9 to meet with him and on that day he also told me it was okay
10 to tell his aunt everything about the case as well. I then
11 met with him again on February 20th, 2013 at the jail, and
12 then I met with him multiple times after that when it came to
13 motions we had filed and we had court and if we had additional
14 discovery, I would have shown it to him at that point too.

15 Q. Is it your practice to share discovery with your
16 clients?

17 A. Yes.

18 Q. And you would have shared discovery with Mr. Miller
19 in this particular case?

20 A. Yes.

21 Q. Would you have given him a copy of everything that
22 you received?

23 A. If he had requested it. If I can recall correctly,
24 when I first got discovery, in the jail he did not want a copy
25 of it because he did not want any other inmates to have a copy

1 of his discovery or be able to see it, but I believe I sent a
2 copy to Ms. Edwards.

3 Q. And when you're speaking about him giving you
4 permission to discuss the case with his aunt, that's his aunt
5 Ms. Pamela Edwards?

6 A. Yes.

7 Q. Did you provide discovery to her?

8 A. Yes. I believe I did.

9 Q. Did she have any discussions, provide you any kind
10 of notes or do anything in regards to that discovery?

11 A. Yes. She gave me a printout of bullet points in the
12 discovery that she felt we needed to ask questions about.

13 Q. After you had discovery and in your meetings with
14 Mr. Miller, did you talk about any specific defenses that
15 could be raised in regards to the allegations in this case?
16 Actually, before we get to that, you do recall what the
17 allegations in this case were, correct?

18 A. Yes.

19 Q. Okay. And did you have any discussions in regards
20 to the possible defenses?

21 A. Yes. The two main discussions we had, the real only
22 defense was he was saying that it didn't happen; that they
23 were lying because they wanted, his wife wanted out of the
24 marriage and his daughter wanted to be able to do whatever she
25 wanted to do because he had disciplinary rules for her. The

1 only other issue we brought up that I thought was a defense
2 was that he in my opinion asked for a lawyer multiple times
3 during his interrogation by law enforcement so I thought it
4 was potentially possible to get his statement suppressed.

5 Q. Did you move to suppress the statement?

6 A. I did during the Jackson v. Denno hearing.

7 Q. So is it safe to say that your overall strategy was
8 to basically discredit the daughter in terms of the
9 testimony?

10 A. Yes.

11 Q. At the beginning of trial did you seek a continuance
12 on behalf of Mr. Miller?

13 A. I did.

14 Q. Did he provide you any kind of significant notice in
15 regards to the need for that continuance?

16 A. The week before I had been trying to get him to come
17 into my office to try to go over trial prep and that sort of
18 thing, prepare for trial. I kind of kept getting pushed off.
19 He was talking about his back problem. I said you need to get
20 me whatever you can get me so I can address the Judge with it.
21 Finally I got some paperwork that Monday morning when we
22 walked into the courthouse and I showed the Judge whatever
23 paperwork he gave to me.

24 MR. BLITCH: Your Honor, may I approach and obtain
25 Applicant's Exhibits 1 through 5? I believe actually,

1 I'm sorry, it's 1 through 4 that relate to the
2 paperwork.

3 THE COURT: Yes, sir.

4 BY MR. BLITCH:

5 Q. I'm going to present to you first Applicant's
6 Exhibit 1. Do you recall seeing any of these documents or
7 being presented any of these documents by Mr. Miller?

8 A. I don't recall what was presented to me. I just
9 recall that what was presented to me I gave to the Judge and
10 made a court record.

11 Q. Okay. I just want to go through each of these.
12 This is Applicant's Exhibit 2, a series of emails and other
13 information.

14 A. I can say I did not receive this because I remember
15 what I did receive in the emails.

16 Q. I believe Applicant's Exhibit 3 ties into 2 and is
17 another one that was added later, but would have been part of
18 Applicant's Exhibit 2?

19 A. I don't recall what exactly was given to me, but
20 whatever it was I handed it to the Judge. I believe she had a
21 list of some sort, that list his conditions so there's a piece
22 of paper that lists his conditions and that's what I would
23 have handed up to her.

24 Q. If you would look at that. Is that the Court's
25 Exhibit 1 that you handed up in regards to the information

ANNA BROWDER - DIRECT BY MR. BLITCH

88

1 presented to, or by Mr. Miller to you for the Judge?

2 A. Yes.

3 Q. And can you tell the Court what that is?

4 A. It is an email from Scott Kerns to Julie Taylor
5 indicating five different conditions that he had regarding his
6 lumbar spine and the MRI.

7 MR. BLITCH: Your Honor, this is Court's Exhibit 1
8 from the trial. It's also in the record on appeal, but
9 the State would like to make that Respondent's 1.

10 THE COURT: Any objection?

11 MR. JOHNSON: No objection.

12 THE COURT: Respondent's Exhibit 1 in evidence
13 without objection.

14 BY MR. BLITCH:

15 Q. And so the Respondent's 1, that email that contained
16 the thing, that was what information you had available and
17 that was the information that you provided to Judge Gee?

18 A. Yes.

19 Q. Did you also have discussions with her in regards to
20 him being on medication and some of the effects of his
21 condition?

22 A. Yes. I was concerned during my continuance request
23 that he wasn't making sense, slurred some of his words and he
24 was on medication for his pain and that I didn't feel that he
25 could adequately assist me in his defense.

1 Q. Was he able ultimately to assist you in the
2 defense?

3 A. I don't recall if he spoke a lot during the trial.
4 I always give my clients during the trial a note pad, a piece
5 of paper so if they want to write anything during the trial
6 because I don't want them speaking over a witness obviously
7 for the jury to look over, to write it down and let me know so
8 I always keep those notes. I have no notes from him during
9 the trial so he did not write anything down.

10 Q. Did he ever ask you to ask the Judge for breaks
11 beyond the breaks that were already being taken by the
12 Court?

13 A. Not that I recall.

14 Q. During the proceedings, did you indicate a need for
15 him to be able to take medication that was being withheld by
16 the Kershaw County Detention Center?

17 A. I don't remember if I said anything about the
18 detention center specifically, but I did request that he be
19 allowed to take his medication for purposes of trial.

20 Q. Did Judge Gee review that medication and allow him
21 to take those that were actually prescribed to him?

22 A. Yes. I think in some modified fashion because she
23 was worried too much would make him unable to understand what
24 was going on.

25 Q. Did you feel like the accommodations that the trial

ANNA BROWDER - DIRECT BY MR. BLITCH

90

1 court made in regards to allowing him to stay seated at the
2 breaks and things of that nature were sufficient to allow him
3 to go forward?

4 A. Yes. I mean, of course, I still thought it was
5 meritorious enough to say we needed a continuance based on his
6 condition, but I was overruled on that.

7 Q. In the application there's numerous allegations in
8 regards to hearsay and hearsay that was admitted at trial. Do
9 you recall statements made by the defendant being admitted
10 through officers that whatever she said, it was the truth, or
11 something to that effect?

12 A. Yes.

13 Q. And did you consider that hearsay and consider
14 objecting on the basis of hearsay when the officers were
15 admitting the defendant's statement?

16 A. No, because it's not hearsay. It's considered a
17 statement of a party opponent.

18 Q. In regards to either his need for the continuance or
19 in regards to providing a defense to the experts that were
20 called by the State, did you ever consider calling and
21 bringing in your own experts?

22 A. I considered it and I had spoken with him about it,
23 however, because I was retained, they could not afford to pay
24 for an expert. However, I was familiar enough with, because I
25 had been doing csc with the Richland County Solicitor's Office

1 before I went into private practice, what an expert would
2 testify to so we got all the points we needed on cross
3 examination that any expert that we would have called would
4 have testified to.

5 Q. One of the experts, Dr. Luberoff, specifically
6 testified that what happened based on the history of the child
7 was consistent with sexual abuse. Was this something that you
8 considered objecting to or is there any particular reason why
9 you wouldn't have objected to that?

10 A. I considered it, but at the time I thought it would
11 bring more attention to the fact that she said that and in
12 addition she had testified that the injuries by themselves are
13 not enough. It was based on the history and our whole defense
14 was the history of the child. That was our whole defense.
15 You can't trust her; that she's lying. So we thought
16 objecting to that would bring more attention to it so on cross
17 examination we just brought up the points about the child's
18 credibility.

19 Q. So it's safe to say that your primary goal was to
20 tie basically all of the State's evidence to the credibility
21 of the child?

22 A. Yes.

23 Q. And in regards to Dr. Luberoff, I believe it's page
24 355 or thereabouts of the transcript, one of the things that
25 she says is based on just the finding without any history, I

1 would not be able to diagnose a penetrating trauma just with
2 that finding, and so that was basically the main point you
3 wanted to get across on cross examination in order to tie it
4 directly to the child and the child's statements?

5 A. Correct.

6 Q. Is that something that you utilized and exploited in
7 your closing argument?

8 A. I believe so. Yes.

9 Q. And did you have any kind of strategy in regards to
10 closing argument, anything that you wanted to necessarily
11 accomplish?

12 A. Basically just to show that, well, it's two fold, to
13 go at it two ways. One, to say that it didn't happen. The
14 credibility; that they were making it up and lying. And then
15 two, if the jury did believe what they were saying, that there
16 wasn't enough evidence beyond a reasonable doubt to prove him
17 guilty. It was mostly on the fact that they were lying and
18 creating this tale that grew further and further and bigger
19 and bigger each time they told it.

20 Q. In regards to possible witnesses, did you have
21 individuals that you had considered as possible witnesses
22 during trial?

23 A. We thought about calling witnesses potentially, but
24 none of them had any information about whether sexual abuse
25 actually occurred. It would have just been as to the

1 credibility again of the victim which we already brought out
2 on cross with all the information I had been given from Ms.
3 Edwards, Facebook posts, that sort of things, that they had to
4 admit to on cross examination, so it would have been
5 cumulative and we would have lost our last argument if we
6 called witnesses.

7 Q. Last argument. Tell me a little bit about why that
8 was important to you?

9 A. I guess, let me back up a little bit. When it came
10 to Mr. Miller testifying, I always give the client the option,
11 you know, it's your decision. I tell them what I think my
12 best legal opinion is on it, but ultimately it's their
13 decision and I remember him testifying, you know, whether he
14 wanted to, I do remember him turning around and looking at his
15 family and they said no, don't testify because we want to save
16 the last argument because we wanted the jury to hear us last
17 for purposes of whether the alleged victim was lying or not
18 lying. In addition, we were also concerned about his, how he
19 would do on the stand due to the fact of his mental
20 condition.

21 Q. So in regards to him testifying, correct me if I'm
22 wrong, with the kind of summary is that it was his
23 determination, but that you did provide a recommendation to
24 him?

25 A. Yes. But it was ultimately his decision. I have

1 done csc trials where the client wanted to testify so I let
2 them testify.

3 Q. And in your opinion today even looking back in
4 hindsight, would it have been a good idea for him to have
5 testified?

6 A. No. I don't believe so.

7 Q. Do you remember Judge Gee going through the colloquy
8 that's usually done in regards to whether or not he's going to
9 testify and her indicating that it was entirely within his
10 discretion and that nobody else could make that decision?

11 A. Yes.

12 Q. When the jury broke at one point in time, there was
13 a jury note that came back that asked a question about what
14 would happen if they were not unanimous. Do you recall
15 generally that occurring?

16 A. Vaguely just from reading the transcript.

17 Q. And one of the responses that was given by Judge Gee
18 was kind of akin to an Allen Charge in which she explained
19 that if the jury wasn't able to reach a verdict, it would be a
20 mistrial; that it would then be up to the prosecutor as to
21 whether to retry it and have a different jury come in, and
22 then she specifically indicated that they are to remain with
23 their convictions and that it's okay for any of them to remain
24 with their convictions. Did that instruction that she gave or
25 that information that she gave sound in any way intimidating

1 or anything of that nature such that the jury wouldn't have
2 understood their role?

3 A. No. And they had asked multiple questions
4 throughout the trial. I mean, throughout the jury
5 deliberations, so they clearly understood that they could ask
6 questions and get responses and understood what their role
7 was.

8 Q. And they did ask numerous questions and sent back
9 notes for additional testimony and things of that nature that
10 was all provided to them?

11 A. Yes. If I recall correctly, they were out for 15
12 hours. We left at midnight on Thursday night. They came back
13 at noon on Friday.

14 Q. Okay. As an experienced attorney here in the Fifth
15 Circuit both on defense and as a Solicitor, is it your
16 experience that Kershaw County routinely withholds basic
17 needs, food, substance, things of that nature from somebody,
18 you know, a defendant or a detainee that's there on trial?

19 A. Not that I'm aware of.

20 Q. Is that anything that was brought to your
21 attention?

22 A. No. I do believe the first day there was, because
23 they took him into custody for bond purposes once we started
24 trial, I do believe there was an issue about lunch that day
25 and we were able to get him two sandwiches, but after that

1 they would have fed him like any other inmate.

2 Q. So it was never brought to your attention other than
3 the one time that he was having to go without kind of any kind
4 of food or anything of that nature?

5 A. Correct.

6 Q. There was a discussion by Ms. Edwards in regards to
7 a question that she asked you to ask about pregnancy. Do you
8 recall being asked to ask the doctor how it is that the child
9 didn't become pregnant and is that something that you ever
10 considered asking?

11 A. I don't recall her asking that, however, I don't
12 believe that would have been relevant. I believe there was
13 even discussion on the record about her potentially having a
14 miscarriage and I made the point that I didn't think that she
15 should be able to testify to that because there was no record
16 whatsoever showing there was any sort of miscarriage and that
17 would be prejudicial to us and the Judge said they could not
18 go into that information.

19 Q. One of the other things had to do with DSS records.
20 Did you ever request, I know there was an e-mail between you
21 and Ms. Edwards in regards to some various records including
22 the DSS records, did you ever request anything from DSS?

23 A. I did. I did a subpoena for DSS. It was signed
24 February 7th, 2013 by the Clerk's Office and sent to Kershaw
25 County DSS. I never received any records from them.

1 Q. Were you ever given any indication that there was
2 anything in the records that would have been pertinent that
3 were necessary for trial?

4 A. No.

5 Q. One of the other allegations had to do with
6 basically you being inattentive and reading a book throughout
7 the trial. Can you tell me a little bit about what was going
8 on with regard to the book? Did you communicate with Mr.
9 Miller when he asked you to?

10 A. Uhm, during the trial, I certainly was not reading a
11 book during the trial. Any time Mr. Miller did have a
12 question, I spoke to him. Before trial in the morning I would
13 usually get there around 8:30. We normally wouldn't start
14 until 9:30, but I do not live in Camden. I live in the
15 Columbia area so I like to get there early ahead of traffic in
16 case there's an accident or something comes up first thing in
17 the morning. In addition, at lunch, of course, we have an
18 hour, an hour and a half for lunch. I didn't have an office
19 to go to to eat my lunch so I would read in the courtroom or
20 somewhere else, read my book during lunch break, but not
21 during trial or on breaks during trial.

22 Q. And it's safe to say that your overall trial
23 strategy was basically to try to create what amounted to a
24 house of cards, building everything upon a shaky foundation
25 that you could then pull out during that final or last closing

ANNA BROWDER - CROSS BY MR. JOHNSON

98

1 argument?

2 A. Yes.

3 Q. And that strategy, basically it kind of informed how
4 you proceeded throughout trial whether to call witnesses, the
5 recommendation that you gave in regards to Mr. Miller himself
6 testifying, things of that nature?

7 A. Yes.

8 MR. BLITCH: Your Honor, I don't believe I have any
9 other questions at this time.

10 THE COURT: Thank you. Cross examination.

11 MR. JOHNSON: Thank you, Your Honor.

12 CROSS EXAMINATION

13 BY MR. JOHNSON:

14 Q. It is Ms. Browder, correct?

15 A. Yes.

16 Q. I wanted to make sure I got that right. You
17 testified regarding the request for DSS files, you said you
18 received records?

19 A. I did not. I did a subpoena for them and sent it to
20 them, however, I did not receive them.

21 Q. You did not receive them?

22 A. Correct.

23 Q. Okay. Did you make a motion for continuance to
24 allow you time to get those records?

25 A. No. I did not.

1 Q. Do you remember a time where the defendant, Mr.
2 Miller, the applicant, and Ms. Pamela Edwards was in the
3 courtroom raising an issue of him getting food or medication?
4 Do you remember that?

5 A. I said I remember the one day. I think it was the
6 day that they actually took him into custody when the
7 testimony started that there was an issue with lunch because
8 they didn't have something, but after that, no, he was given
9 food, but I do remember the jail and the medications because
10 they had a policy that they didn't take medications from
11 outside, that they would medicate from within if they needed
12 to but, of course, we had the medications for her at trial in
13 the actual courtroom.

14 Q. Did you assist Mr. Miller in any way to allow him
15 better conditions to become more appropriate in his appearance
16 for trial and regarding any complaints where they were keeping
17 him in the drunk tank or not having access to a shower or
18 clean clothes?

19 A. No. I remember and I can't be sure about this, I
20 believe the first day that he came in he was in a sweatshirt
21 hoodie and he didn't want to change or anything like that
22 because he was uncomfortable. I believe the second day and
23 afterwards we had him in a suit.

24 Q. I'm sorry.

25 A. In a suit I believe.

1 Q. Did you provide a suit for him?

2 A. I think his aunt brought a suit. I can't be sure
3 about that though.

4 Q. Okay. Do you recall him asking for bathroom
5 breaks?

6 A. No. I mean, if he did, I would have asked the
7 Judge.

8 Q. Okay. Do you recall talking to his aunt regarding
9 her potential testimony?

10 A. We had talked about the case, but she didn't have
11 really anything to add other than basically trying to
12 discredit the victim which we had already done through cross
13 examination and it would have been cumulative and stuff that I
14 didn't believe was admissible and I do remember speaking with
15 her about, you know, last argument, that sort of thing, and
16 she was in agreement with that.

17 Q. She was in agreement with what?

18 A. Us having last argument.

19 Q. Okay. Do you recall her asking about DSS records?

20 A. I don't recall. She could have. I don't
21 remember.

22 Q. Okay. And the exhibit that is Applicant's Exhibit
23 5, is that an e-mail between you and Ms. Edwards?

24 A. Yes, sir.

25 Q. Okay. And so that's an accurate recording of the

1 email where she's requesting DSS records from you?

2 A. Right. And that's, I can't remember what the date
3 was, February 5th maybe, and that was after I met with him at
4 the jail and I did the DSS subpoena two days later.

5 Q. Okay. And she did provide you with information, for
6 instance, about the victim's testimony about not having
7 friends and being isolated. Since Ms. Edwards was a family
8 member, she would be able to, or she related to you that she
9 would be able to provide testimony that countered that, that
10 the victim had friends and associated with other people?

11 A. We got that out through the victim because she
12 agreed that she was friends with, I can't remember his name,
13 Harry or Henry, that he was her boyfriend, or that they were
14 kind of dating, and some other friends that she hung out with,
15 they hung out with.

16 Q. Okay. Did you have any co-counsel or any attorneys
17 sitting next to you assisting you?

18 A. No.

19 Q. How often or when did you deliver discovery to Mr.
20 Miller?

21 A. I don't remember. Like I said, I received discovery
22 February 5th, 2013 by email, the initial discovery, then
23 I went to the jail to see him that day. I would have gone
24 through that discovery that day with him. Other discovery
25 that I received later, like I said, I was trying to get him to

1 come in before trial to meet with him and kept getting pushed
2 off because that's when he was on bond once I got a bond for
3 him.

4 Q. Okay. Just referenc'ing on the amended application
5 you failed at the beginning of the trial to call an expert to
6 evaluate Mr. Miller or to call the doctor, Dr. Julie Taylor
7 listed in exhibits who treated Mr. Miller regarding his pain
8 medications and his back problems, you failed to call her or
9 any of the medical witnesses regarding your motion to
10 continue, correct?

11 A. I did not have any of that information until that
12 Monday morning when they gave me a piece of paper to hand up
13 to the Judge. I had been asking for the whole week give me
14 something. I need something to contact this person. I was
15 not given that information until that Monday morning.

16 Q. You had no issue or you had no information regarding
17 his medical treatment before that?

18 A. The week before is when I kept saying you need to
19 come in. You need to come in. He said he's having back
20 problems. I said I need some information so I can try to get
21 a continuance, that sort of thing. I wasn't given anything
22 until that Monday morning.

23 Q. Okay. Referencing the transcript, do you have a
24 copy of the transcript?

25 A. It's back there, if you get it. It's on the first

1 row.

2 Q. On page 120, lines 11 through 13, this is Corporal
3 Houser testifying. You failed to object to hearsay testimony
4 from Corporal Houser regarding CAD information. What is CAD
5 information?

6 A. CAD information is the call that comes out over the
7 911 line. It's not a 911 line. I guess it's dispatch between
8 law enforcement and I guess their call center.

9 Q. Okay. So under that it says, regarding CAD
10 information the statement, the testimony, mother had found out
11 recently that her husband had forced their daughter to have
12 sexual intercourse, lines 11 through 13, and the defendant's
13 statement, whatever she says, that's what happened. If she
14 said it, it's not a lie. Now, we'll stick with the first one
15 on page 120, the CAD information.

16 A. Yes.

17 Q. Sticking with page 120, what was the reason for not
18 objecting to that as hearsay?

19 A. Because in my opinion it wasn't for the truth of the
20 matter asserted, it was just the reason that they had been
21 called out there for them to go out there to investigate.

22 Q. And on page 125, line 17 through 19, defendant's
23 statement according to Corporal Houser, he testified that
24 defendant said, or he said, he stated, whatever she says,
25 that's what happened. She said it. It's not a lie. Do you

1 recall Mr. Miller attempting to tell you that he could provide
2 testimony about what that meant in reference to a lost pistol
3 in the conversation he had with his wife as the police showed
4 up and that he could provide testimony to explain that?

5 A. No. That's the first time I've heard that today
6 when he testified. In addition, he made those comments I
7 believe in his audio/video recorded statement when the sexual
8 assault was being asked about that he said that.

9 Q. He said that during the investigation --

10 A. That Brittany wouldn't lie. Whatever she said.

11 Q. Okay. Referencing page 131, counsel, you failed to
12 object to hearsay testimony from Officer Houser regarding
13 victim statement, lines 24 through 25, stated that, minor
14 stated that the incidents began around mid July last year, my
15 last year since this was 2012, then going into page 132, lines
16 1 through 8, question: Did she indicate where the sexual
17 assaults occurred? Yes. She stated the sexual assault
18 occurred while they were staying in the camper.

19 A. There's a hearsay exception for time and place for
20 sexual assault victims and they're not allowed to say who did
21 it to them, but somebody can testify as to what the victim
22 said regarding time and place. I forget exactly what the rule
23 is. It's one of the rules of evidence.

24 Q. Okay. And again on number 5, applicant's counsel
25 --

1 A. I'm sorry. Where?

2 Q. I'm jumping to, I referenced the number on mine. I
3 apologize. Page 147.

4 A. Okay.

5 Q. Line 19 and 20. Once again, the officer testified
6 about the statement made by defendant, whatever she said is
7 what happened. You did not object at that time?

8 A. No, because that's a statement of a party
9 opponent.

10 Q. Okay. And are you preserving your objection, when
11 you fail to make the objection, are you preserving it?

12 A. It's not an objection because it's a statement of a
13 party opponent. We went through -- I mean -- Okay. In the
14 sense that we went through Jackson v. Denno and objected to
15 the statement of him asking for an attorney during the
16 audio/video recorded one, of course, during my direct I
17 objected to that during the Jackson v. Denno and objected
18 again later in my directed verdict motion and at the end of
19 the trial and renewed all objections.

20 Q. But there was no information to you that there could
21 have been an alternative explanation for that?

22 A. Correct.

23 Q. That would render it hearsay?

24 A. It still wouldn't have been hearsay because it's his
25 statement, the statement of a party opponent, the defendant's

1 statement.

2 Q. Okay. Well, on page 131, wait a minute, I'm sorry,
3 I'm getting -- On page 166, lines 14 through 15, once again,
4 is this falling under that same exception regarding, would you
5 have the same answer regarding defendant's statement, whatever
6 she says is true?

7 A. Yes.

8 Q. Okay. And would that be something that you could
9 have objected to as cumulative because it's been repeated
10 so many times?

11 A. Uhm, I don't believe so because he said it multiple
12 times throughout the course of the investigation in
13 statements.

14 Q. Okay. On page 217 you failed to object to testimony
15 from the victim, lines 16 through 20, testimony on direct,
16 Brittany Maynard says, question: So you were getting ready to
17 say something about what he did one time before I interrupted
18 you. Can you explain that? And then on line 16. Yes. One
19 of my friends Carol Ann went on line, found a porn video,
20 referencing the defendant, Mr. Miller, the applicant, that
21 looked similar to my friend which he kind of convinced me that
22 she was doing porn and I couldn't talk to her anymore. So you
23 failed to make an objection. Would that be considered
24 potential evidence of other crimes since that would be
25 possibly disseminating obscene material and Mr. Miller was not

1 on trial for that?

2 A. It could have been. He wasn't charged with any of
3 that.

4 Q. Right. He wasn't charged with it and since he
5 wasn't on trial for it, shouldn't you have made that objection
6 that that was not relevant, it was prejudicial and it was
7 evidence of another crime?

8 A. I don't know. I mean, I didn't object to it.

9 Q. Did you think of that while it happened?

10 A. I can't recall if I thought of it or not.

11 Q. Okay. Now, on page 299 there was testimony, you
12 failed to object to testimony of Tammy Price regarding
13 victim's answer to the question, is he touching you every
14 day?

15 A. Where are we?

16 Q. Page 299, lines 1 through 2.

17 A. Okay.

18 Q. Are you, is it your position that falls under that
19 same exception?

20 A. The time and place.

21 Q. The time and place. And under statements from the
22 victim regarding the assault, page 310, lines 17 through 21,
23 relation to where she was assaulted, the victim related that.

24 A. Correct.

25 Q. Same exception?

1 A. Yes. Time and place.

2 Q. On page 307, testimony by Tammy Price, lines 3
3 through 5, she testified about what the defendant or the
4 applicant said. He said it wasn't all his fault and he asked
5 for one last kiss. Then it went through that without an
6 objection from you. Would that be hearsay?

7 A. No, because it's a statement of a party opponent.

8 Q. And if he was referring to this, but if he was
9 referring to something else, it wouldn't be a statement
10 related to this, correct? If there was some testimony brought
11 out that he was referring to something else, it would be
12 hearsay?

13 A. I suppose. Yeah. But...

14 Q. Would that be your same position on page 311, line
15 25, where she testified about the defendant, Mr. Miller, the
16 applicant, calling and saying, he would say, you know, just
17 make it go away. I'll leave you guys alone. I'll pay you
18 whatever you want. Would that be the same answer that you
19 felt that that was a statement by a party opponent that was
20 admissible?

21 A. Yes, because that was after his arrest that he was
22 calling her.

23 Q. Okay. On page 313, lines 5 through 14, there was
24 testimony from Tammy Price regarding the defendant. He had a
25 Bible in his hand. He told me that he found God and then a

1 discussion of religion. You failed to object. These are
2 objections that could have been, do you feel they could have
3 been statements of hearsay, prejudicial, regarding the
4 statements regarding the religious views that could have
5 possibly offended some jurors?

6 A. No. I mean, I didn't see a problem with the
7 testimony there.

8 Q. Okay. On page 352, lines 12 through 14, you failed
9 to make an objection to improper bolstering by Dr. Luberoff,
10 during her review of the medical examination of the victim
11 along, and she quoted, along with her victim's history to be
12 consistent with sexual abuse. Why did you fail to make that
13 objection?

14 A. Because I thought it would bring more notice to the
15 issue for the jury and she followed up with that, it's just
16 consistent with a healed injury, that there's no way to tell
17 that the injury by itself is sexual abuse. It's all based on
18 what the victim says and our whole strategy to that is what
19 the victim said is not true.

20 Q. Had there been some case law that allowed a
21 conviction to be overturned based on bolstering from an
22 expert?

23 A. I can't remember when the case law came out. I do
24 know that it had come out already, and the interviewer's
25 expert testimony had come out as well at that point.

1 Q. I'm gonna jump to page 452. You failed to object
2 regarding the question and answer, failed to object to the
3 leading question, prejudicial statement calling for
4 speculation by the witness Martha Penrod. Question: What
5 part of James's body was touching the victim? Would that be
6 his genitals? Followed by the answer, yes, I guess you could
7 say that. What was the reason for failing to object to that?

8 A. I don't believe it was leading. I think it's
9 clarifying because if you go back up, back to the, the
10 question was, back to the event that took place on the dock,
11 you testified that when you saw James with his legs around the
12 victim, you went inside. Why did you go inside? She said, it
13 seemed very private and I didn't want to see it. Then the
14 next question was, okay, what part of James's body was
15 touching the victim. So she had already said that she seen
16 the legs around and then she gave her answer saying, her side
17 would have been in between his legs. One leg was around her
18 back and one leg was hanging down from the dock. And so she
19 was clarifying saying that would be his genitalia, and then
20 she said she went inside.

21 Q. Page 465, lines 3 through 5, why did you not object
22 to hearsay regarding that saying testimony from Ms. Senn, or
23 excuse me, Captain Nyfelk (phonetic), I received a phone call
24 from Tammy. She just told me they took samples on some
25 carpeting and some bed spreads. How did you miss -- You did

1 not object to that based on hearsay. Why was that?

2 A. Because it wasn't for the truth of the matter
3 asserted. It just describes going out to get samples and then
4 they went out and got samples and the DNA and all of that.
5 That would have been where the testimony would have come in.
6 It would be the DNA expert.

7 Q. And you failed to call any expert on child abuse
8 assessment or child abuse pediatrics to counter the opinions
9 of the State's witnesses, correct?

10 A. I wouldn't say I failed to. I just decided we
11 didn't need it and we would get every point we needed out
12 through Dr. Foster on the cross examination.

13 Q. Okay. Page 532, lines 21 through 23, Justine Dill
14 testifying, you failed to object to the defendant's statement,
15 to a leading question to Investigator Dill by the State, Did
16 he say he needed to get his story on the same page as hers?
17 Would that be a leading question?

18 A. No. I mean, he answers yes and then he follows up
19 with more explanation to it.

20 Q. But on a direct examination you provide the answers.
21 Isn't that a leading question?

22 A. I guess you could say it was. I don't think you
23 need to object certainly to every single leading question that
24 happens especially if it's only one out of, you know, a
25 hundred something statements.

1 Q. Okay. Referencing page 645, going to the end of the
2 trial referencing I believe line 24 and 25 all the way to page
3 646, you failed to object to jury charges, unconstitutional,
4 coercive, failing to instruct the jury they should not
5 surrender their consciously held beliefs simply for the sake
6 of reaching a verdict. Also the charge mentioning this case
7 would have to be retried in the event of a mistrial, and did
8 not advise the jury that they have a right to not reach a
9 verdict. Is it true that the case would have to be retried if
10 there was a mistrial?

11 A. Is that true? That it would have to be?

12 Q. Yes.

13 A. It wouldn't necessarily have to be. I guess that
14 would be the State's decision.

15 Q. So since that charge was saying something, the Judge
16 was saying something to the jury that was not true, why did
17 you not object to that?

18 A. I mean, she went on to say stay with your
19 convictions and it's up to the State to decide whether to
20 retry it again later I believe.

21 Q. And on page, jumping back to 568, you failed to
22 object to the State's closing instructing the jury as to
23 16-3-675 prejudicial and could cause confusion and a
24 constitutional comment on the facts not allowed in a jury
25 charge because that's where I believe on lines 14 through 17

1 on 568 it references under criminal sexual conduct, the
2 testimony of the victim need not be corroborated. So isn't it
3 true that charge is not allowed, it's been deemed
4 unconstitutional?

5 A. I did a pretrial motion on that but the Judge
6 indicated that she would not charge that to the jury, but the
7 State could argue it in their closing argument.

8 Q. Did you renew your objection?

9 A. Not during the closing argument because I didn't
10 want to bring attention to it but I renewed all of my pretrial
11 objections and my DV motion at the close of the trial.

12 Q. Okay. Did you - why did you not call Mr. Michael
13 Norwood to testify at mitigation and sentencing?

14 A. At sentencing?

15 Q. Yes.

16 A. He wasn't there. Anybody who was there was able to
17 speak. I believe Pam Edwards spoke. I believe his aunt, I
18 don't know if it is an aunt, I don't know her relationship,
19 named Donna, and I believe his girlfriend spoke as well during
20 sentencing.

21 Q. Okay. Did you make any attempt to contact or given
22 information to contact Mr. Norwood?

23 A. No. He had been there throughout the week and Ms.
24 Edwards had his contact information.

25 Q. Were you aware of the fact that he had, that this

1 house where the victim reported being assaulted while working
2 with Mr. Miller, this was his mother's house, Mr. Norwood's
3 mother's house?

4 A. I don't know if I knew it was his mother's house.

5 Q. Okay. And were you aware of the fact that he was
6 actually physically present there along with other people
7 during this time period where the victim said she was
8 assaulted?

9 A. I can't recall if they told me that or not but, of
10 course, all the allegations were that nobody was around during
11 the actual assaults so there wouldn't have been any witnesses
12 whether it happened there or not.

13 Q. Did you research to discover the fact that this
14 house, the owner of this house was a family member connected
15 to this friend of the defendant who he had known for years?

16 A. No.

17 Q. They didn't tell you that?

18 A. The question was did I research that. I did not
19 research that.

20 Q. Okay. Did they advise you that Mr. Norwood, this is
21 his mother's house, he's good friends with Mr. Miller?

22 A. I don't know if I knew it was his mother's house. I
23 knew he was good friends with Mr. Miller. They had brought up
24 Mr. Norwood's name before.

25 MR. JOHNSON: Okay. Your Honor, I have no more

1 questions.

2 THE COURT: Redirect.

3 MR. BLITCH: Just briefly, Your Honor. May it
4 please the Court.

5 THE COURT: Yes, sir.

6 REDIRECT EXAMINATION

7 BY MR. BLITCH:

8 Q. You indicated that your strategy basically was to
9 indicate that the victim was trying to get rid of the
10 defendant, Mr. Miller, in part because of how controlling he
11 was and what he would or wouldn't let her do?

12 A. Correct. That he was the disciplinarian with the
13 rules.

14 Q. So with the testimony that Ms. Edwards and others
15 would have offered about how she had lots of friends and was
16 always with friends, would that have been beneficial for your
17 overall trial strategy?

18 A. I don't feel like it would because we had already
19 gotten all of that out through the witnesses that had already
20 testified for the State on cross examination.

21 Q. And the fact that she wouldn't have had any friends
22 would have gone towards how controlling Mr. Miller was?

23 A. Correct.

24 Q. In regards to the discussion of the pornography
25 video on page 217, was that something else that you used as

1 part of your example of how controlling he was, and it didn't
2 come in, did it for purposes of prior bad act. It came in to
3 show what he was doing or restricting.

4 A. Yes. It was during the whole colloquy about, kept
5 asking about a whole bunch of her friends and whether he was
6 allowing her to talk to them and trying to isolate her from
7 her friends.

8 Q. Which played directly into your strategy about how
9 controlling he was and how she would want to get him out of
10 the family picture?

11 A. Yes.

12 Q. In regards to the last corroboration charge, the
13 fact the victim's testimony need not be corroborated, is that
14 an accurate statement of the law?

15 A. It is.

16 Q. And in State v. Stuke which is a case that was
17 referenced by Mr. Johnson, it indicated that a trial Judge is
18 not to give that as part of their charge, but it says nothing
19 about the ability of counsel to argue that point during the
20 closing argument, does it?

21 A. Correct. It's at the discretion of the Judge and
22 the Judge specifically stated in this what she was gonna let
23 the parties argue in closings.

24 Q. And you specifically asked her to keep it out
25 especially out of the jury instructions themselves and so what

1 she did complied with what the law was at the time?

2 A. Yes.

3 MR. BLITCH: I don't believe I have any further
4 questions, Your Honor.

5 THE COURT: Okay. Thank you. Okay. Any objection
6 to this witness being released?

7 MR. JOHNSON: Well, can I ask one question?

8 THE COURT: Sir, if you do, then I am going to allow
9 counsel the opportunity to also question her regarding
10 that. He was on redirect, okay? But I'm happy since
11 she's here you can ask her and you indicated it's brief.

12 MR. JOHNSON: One question, Your Honor.

13 RECROSS EXAMINATION

14 BY MR. JOHNSON:

15 Q. Did you retain a private investigator to work on
16 this case?

17 A. No.

18 MR. JOHNSON: Okay. That's my only question.

19 MR. BLITCH: No further questions.

20 THE COURT: Okay. All right. Now, any objection to
21 Ms. Browder being released?

22 MR. JOHNSON: No, Your Honor.

23 MR. BLITCH: No, Your Honor.

24 THE COURT: Thank you, ma'am. You may step down.
25 You're free to go.

1 MR. BLITCH: No further witnesses from the State,
2 Your Honor.

3 THE COURT: Okay. Mr. Johnson, anything on reply?

4 MR. JOHNSON: `No, Your Honor.

5 THE COURT: Are you all ready to make your
6 summations for me?

7 MR. JOHNSON: Yes, ma'am.

8 THE COURT: Does anybody need a break?

9 MR. BLITCH: If there's any chance I could have just
10 a real short break.

11 THE COURT: Why don't we take about five minutes and
12 does Mr. Miller need a break? Do you need a break?

13 MR. MILLER: I would like to lay down for a few
14 minutes.

15 THE COURT: Well, I mean to use the restroom.

16 MR. MILLER: I'm sitting in pain so there's nothing
17 I can do. As far as a restroom break, no, ma'am, I'm
18 fine.

19 THE COURT: All right. Counsel, I'll let y'all take
20 about five minutes and then we'll come back if that's
21 enough time for you.

22 MR. JOHNSON: Thank you.

23 MR. BLITCH: That should be good. Thank you, Your
24 Honor.

25 THE COURT: Thank you all.

1 (Short break.)

2 BAILIFF: Remain seated. Come to order please.

3 THE COURT: We are back on the record with regard to
4 the matter of Mr. James Miller versus the State and this
5 is civil action number 19-CP-28-236. I guess that
6 I should have put on the record earlier that this matter
7 is actually out of Kershaw County but within the Fifth
8 Judicial Circuit and that it is customary as I understand
9 it for the PCR matters to be heard here as the location
10 for these hearings. Okay. So, are we ready to make your
11 summation?

12 MR. JOHNSON: Ready, Judge.

13 THE COURT: Okay.

14 MR. JOHNSON: Your Honor, just in summation I wanted
15 to point out some of the key facts brought out in the
16 testimony by the witnesses. There was testimony by
17 Michael Norwood. He testified that he was friends with
18 Mr. Miller for many years; that the house where the
19 victim said she had been assaulted by Mr. Miller, the
20 house they were working on was his mother's house and
21 that he had been there when they were working on the
22 house. I asked the trial attorney about that. She
23 indicated she wasn't sure that she was aware that
24 actually that house was owned by Mr. Norwood's mother and
25 that he was able to testify to that, indicating she had

1 not explored that or investigated that. I asked her if
2 she had an investigator. She said no. She did not
3 retain one.

4 I would also point out the fact that there was a
5 statement, evidence of other crimes accusing the
6 defendant of showing pornography to the victim and was
7 not objected to during the trial. I believe it would
8 have been highly prejudicial, something that was brought
9 out in front of the jury that there was no objection made
10 by trial counsel following that. There were other
11 objections that, of course, I won't go into each one, but
12 objections she could have made and there was testimony
13 from Ms. Pamela Edwards. Ms. Edwards talked about the
14 fact she had requested, and provided an email, just put
15 in the record, about requesting DSS files trying to
16 explore potential defenses or information that could
17 help. Trial counsel testified she did not receive those
18 files. She did not make a motion for continuance to get
19 those files in defense of Mr. Miller.

20 Also, Ms. Edwards testified that she was there, that
21 there was an issue going on through trial with Mr. Miller
22 not having access to food, water, bathroom breaks. She
23 raised it herself by trying to question someone in the
24 courtroom and that the attorney was not doing a
25 sufficient job of helping him and putting him in a very

1 tough situation making it difficult for him to assist in
2 his own defense. Also, the issue of whether or not he
3 could go forward and assist in his own defense since the
4 very beginning. Ms. Edwards indicated she gave documents
5 that are in the record regarding medications for severe
6 medical problems Mr. Miller is obviously facing to this
7 very day regarding surgeries and back problems and giving
8 him a great deal of pain as he testified to that
9 occurred.

10 She made a motion but, however, she did admit she
11 did not bring forth any of these doctors to testify to
12 give additional information. In the transcript the Judge
13 references I believe a single email he received. He did
14 not -- I think in the transcript he actually - there was
15 actually a point where he asked about doctors, anybody to
16 testify. The trial counsel said no. She admitted here
17 today she called no one to testify to that issue which
18 could have continued the matter and possibly got Mr.
19 Miller some relief and put him in a much better condition
20 to assist and participate in the trial instead of being
21 in pain.

22 We point that out and all the other testimony
23 together, Your Honor, and that's all I have.

24 THE COURT: Thank you, Mr. Johnson. Mr. Blitch.

25 MR. BLITCH: May it please the Court. As this Court

1 is well aware, it's the applicant's burden to establish
2 in a PCR action both deficiency and prejudice. Generally
3 speaking when trial counsel articulates a valid trial
4 strategy that is reasonable, then there is no deficiency
5 in their actions. In this particular case counsel went
6 above and beyond in explaining exactly what her trial
7 strategy was, she articulated a valid trial strategy for
8 why she did not want to call the various witnesses that
9 are brought in, and articulated how their testimony would
10 have actually been counter to their trial strategy.
11 Their trial strategy being building up a house of cards,
12 setting it up so that the credibility of the child, the
13 child wanting the defendant out of the house and that
14 being why she's bringing this case against him, why she
15 made the allegations and testimony that would have been
16 brought out about how she had lots of friends and she was
17 this fun loving kid and everything else would have gone
18 directly to counter the trial strategy that was being
19 articulated and that she said she talked about with the
20 applicant and his family.

21 Both counsel, trial counsel and appellate counsel,
22 are eminently credible. Both of them have been long
23 standing either appellate or trial attorneys in this area
24 almost exclusively doing criminal law. Both of them have
25 well established backgrounds in terms of understanding

1 the various issues that are being presented. As trial
2 counsel articulated as it related to the vast majority of
3 the allegations that are raised in the amended complaint
4 regarding hearsay, none of that was actually really even
5 hearsay. It's all under 801(D) of the rules of evidence.
6 Most of it was statements by the defendant or it was
7 statements related to time and place none of which is
8 hearsay and objectionable. Other aspects were not
9 admitted for the truth of the matter asserted. She
10 didn't believe it was worth going through the trouble of
11 doing an objection only to have it denied or overruled on
12 the basis that it wasn't actually hearsay.

13 In terms of the prejudice that's here, you know,
14 this is not what we typically see in a case involving csc
15 with a minor. This is not an absolute he said she said
16 with no other evidence involved. We have testimony in
17 this record from three other witnesses that all
18 corroborate the story of the victim in this particular
19 case. We've got the sister who specifically testified
20 that dad had basically selected the victim as his
21 favorite child and that dad spent nights in the victim's
22 bed. We have the mom who testified significantly in
23 regards to the defendant spending nights in the victim's
24 bed, her confronting him about being in the victim's bed
25 at night, and his response basically being that you're