RECEIVED
Jun 10 2024
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County Court of Common Pleas
The Honorable R. Scott Sprouse, Circuit Court Judge

App. Case No. 2024-000090

David Quintan Jones, #00391227,..Petitioner,

v.

State of South Carolina,..Respondent.

BRIEF OF PETITIONER PURSUANT TO *WHITE v. STATE*

WILLIAM G. YARBOROUGH, III
LAUREN CAROLE HOBBIS

WGY Law
308 West Stone Avenue
Greenville, South Carolina 29609
(864) 331-1612 | F: 864-271-0711

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Table of Authorities....................2

Statement of Issues on Appeal....................3

Statement of the Case....................4

Statement of the Facts....................5-16

Standard of Review....................17

Argument....................18-26

Conclusion....................27

TABLE OF AUTHORITIES

State v. Adams, 430 S.C. 420, 845 S.E.2d 217 (Ct. App. 2020)..23

State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) 17, 25

State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) 17, 25

State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990) 22

State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011)..22–23

State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018)..25

State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) 22

State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) 24

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 17

State v. White, 416 S.C. 135, 784 S.E.2d 695 (Ct. App. 2016)...25

<u>Statutes and Court Rules:</u>

S.C. Code Ann. § 17-23-175..18

Rule 702, SCRE...25

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING THE VIDEO RECORDING OF THE CHILD'S FORENSIC INTERVIEW WHEN THE TOTALITY OF THE CIRCUMSTANCES FAILED TO ESTABLISH PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS, AS REQUIRED BY S.C. CODE ANN. § 17-23-175.

II. WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF A "BLIND" EXPERT WITNESS IN THE FIELD OF "CHILD SEX ABUSE DYNAMICS" IN LIGHT OF THE EXPERT'S INESCAPABLE BIAS AS THE CEO OF THE JULIE VALENTINE CENTER AND WHEN THE REQUIREMENTS OF RULE 702, SCRE WERE NOT MET.

STATEMENT OF THE CASE

In May 2019, Petitioner David Quintan Jones was arrested on five charges of first-degree criminal sexual conduct (victim under the age of eleven) ("CSC") of his biological daughter and was later indicted by the Greenville County Grand Jury. (App. pp. 515–527). He was tried by jury before the Honorable Perry H. Gravely on June 5th through 8th, 2023. The jury ultimately found him guilty on all charges. (App. p. 478, line 7—p. 479, line 15). Judge Gravely imposed a concurrent sentence of forty-five (45) years on each charge with 1496 days credit for time-served. (App. p. 490, lines 19-23; pp. 528–537).

On June 16th, 2023, Petitioner filed a Notice of Appeal with the South Carolina Court of Appeals (*State v. David Quintan Jones*, App. Case No. 2023-000987). On June 21st, 2023, Petitioner served the Notice of Appeal upon the State by hand delivery and filed a copy with the Greenville County Clerk of Court. On June 22, 2023, the appeal was dismissed pursuant to Rule 203(b)(2), SCACR for service of the Notice of Appeal upon the State outside of the ten day time frame. Petitioner's subsequent motion to reinstate was denied and the Remittitur was issued on September 7, 2023.

Petitioner through Counsel filed a post-conviction relief application on July 31, 2023 seeking a belated direct appeal pursuant to *White v. State,* 263 S.C. 110, 208 S.E.2d 35 (1974) on the basis that his appellate rights were not knowingly, intelligently, or voluntarily waived. (App. pp. 538–546). After conferring with Counsel for Respondent, Assistant Attorney General William Joseph Maye, a consent order granting the PCR application for a belated direct appeal was issued by the Honorable R. Scott Sprouse on January 17, 2024. (App. pp. 547–548). A notice of appeal was accordingly filed with this Court on January 19, 2024. This appeal follows and a Petition for Writ of Certiorari accompanies this Brief pursuant to Rule 243(i)(1), SCACR.

STATEMENT OF THE FACTS

The charges arose following allegations of sexual abuse made by Petitioner's eight-year-old daughter ("Child"). Her accusations happened to occur during a particularly stressful time for the entire family; their home had burned down[1] just two weeks before on April 1, 2019.[2] They lost everything in the fire and were living in close quarters at a hotel and later with Child's disabled grandparents. (App. p. 101, line 2; pp. 287–288; p. 378, line 25—p. 379, line 7; p. 387). Child had first told her brother, "ZJ", that she was being touched in her private area but did not get into specifics or identify the perpetrator. (App. p. 192; p. 157, line 5—p. 158 line 14). ZJ, who was fifteen years old by the time of trial, testified his reaction to Child's disclosure was shock and disbelief. (App. p. 148, line 1; p. 157, lines 12-17).

On April 13, 2019, at ZJ's urging, Child told their mother, Marita Jones (Murray) about the abuse. (App. pp. 192–193; pp. 289–291). Marita did not call police at that time or even confront Petitioner. (App. pp. 291–292). She rather made an early Monday morning appointment with their pediatrician under the guise of complaints with Child's lymph nodes, ears, tonsils, and possible UTI related genital pain. (App. p. 118, lines 10-13; p. 117, lines 17-22; p. 121, lines 9-11; pp. 291–292). Dr. Erin Bhatia testified that Marita eventually revealed during the appointment that she was

[1] The cause of the fire may have been electrical, but the specific cause could not be determined. (App. p. 319). The insurance company did pay out on the claim to Marita as the house and insurance was in her name. (App. p. 319).

[2] Child made the allegations also during a time of conflict in his marriage over his prior affairs with other women. (App. p. 376–377; pp. 386–391). At trial, his wife Marita dismissed any suggestion that the recent events or the affairs, in particular, could have contributed to Child bringing this case against her father. (App. pp. 313–314; pp. 317–319). However, the tension in their marriage had recently resurfaced because a woman from his past had messaged Petitioner online. (App. p. 386). With palpable remorse and guilt, Petitioner testified about the impact their marriage issues and arguments had on their children and how their view of him as a father changed during this time. (App. p. 386; p. 391).

really there to see if the doctor could tell whether Child was indeed being sexually abused. (App. p. 120, lines 13-22; p. 119, lines 5-25; pp. 291–292; p. 294). As a pediatrician, Dr. Bhatia was not specialized in this area to make such a determination, though she saw no indication of abuse or anything abnormal from her cursory look of Child's genitals. (App. pp. 114–115; p. 125, lines 5-16; p. 128, lines 8-14; p. 129, lines 2-4). But also as a pediatrician, Dr. Bhatia is a mandated reporter, and she was ultimately the one who reported Child's disclosure of sexual abuse to Department of Social Services (DSS) and authorities. (App. p. 129, lines 5-11; p. 136, lines 14-20; p. 120, line 23—p. 121, line 8; p. 125, line 25—p. 126, line 4). At trial, Marita confirmed Dr. Bhatia's testimony as to why she made a doctor's appointment and that she did not call authorities or even confront her husband after Child's disclosure. (App. pp. 291–292; p. 294). Marita also did not call police after the appointment either, and even though Dr. Bhatia explained that her office was going to report this, Marita did not realize authorities would be called until later on that afternoon when they called her. (App. p. 294, line 19—p. 295, line 3).

At around 4:30 pm that same day, DSS Investigator Dyneshia Kilgore arranged a meeting with the family and Greenville County investigators at the site of the former family home to begin their respective investigations. (App. p. 138; p. 295). Up until that point, Child had not disclosed the identity of the person abusing her. (App. p. 141, lines 14-20; p. 251; State's Ex. 22). Upon the family's arrival, Greenville County Investigator Shannon McHale first took Child aside to speak with her away from her parents and her brother, ZJ. (App. p. 140, line 20—p. 141, line 10; pp. 249–250). Child did not want to talk about it or reveal the perpetrator's identity because she felt uncomfortable getting anyone in trouble, and so she ultimately lied about a boy on the bus abusing her. (App. p. 195; p, 202; p. 253; p. 257; State's Ex. 22). At Investigator McHale's encouragement, she shortly thereafter gave more specific information, including the identity of the perpetrator.

(App. pp. 253–254). Child also disclosed to Investigator Kilgore that she had been abused for the last three years approximately. (App. p. 144, lines 15-20; pp. 194–195; p. 198). No arrest was made at that time and the family was permitted to leave together; but as part of DSS's safety plan, Petitioner was to stay elsewhere and would not have contact with either child. (App. p. 252; pp. 256–257; p. 257; pp. 301–302; State's Ex. 22). That day was ultimately the last day Petitioner had any contact with his daughter.

The DSS safety plan did not forbid the family from still attending the same church, and days later on Easter Sunday, Petitioner gave a plastic Easter egg to ZJ when they passed one another in church. (App. p. 270; pp. 298–299). ZJ testified that the Easter egg contained candy; Investigator McHale however, stated that there was also a note inside instructing ZJ to check his school email. (App. p. 161; pp. 270–271, p. 299). Regardless, Marita testified she deleted the email and did not alert DSS or police. (App. p. 300; p. 272, lines 3-7). According to Marita's recollection at trial, Petitioner's email instructed ZJ to have his sister "tell them it was all a dream and that she's not in trouble. Save me." (App. p. 300).[3] Marita explained that she deleted the email because Petitioner was not supposed to be talking to ZJ pursuant to the DSS safety plan. (App. p. 300).

Interestingly, however, Marita kept in communication with Petitioner and even went out to dinner and met him at Barnes and Noble—it was years earlier at a Barnes and Noble in the Christian books section where the couple first met and fell in love. (App. pp. 302–303; p. 279).

[3] Petitioner did not deny giving ZJ the Easter egg and note. He testified he had called ZJ while Marita was with him and gave it to him when they met up at the church and hugged one another. (App. p. 387). Additionally, Marita's recollection of the email's contents differs from Petitioner's: "On the email to [ZJ] I put greetings. I told him to tell the truth. I said, tell your sister to stop lying on daddy. And I told him to make sure he bring everything out in the open." (App. p. 387, line 22––p. 388, line 5). Petitioner explained that he simply wanted ZJ to tell the truth, that he did not do this. (App. p. 388).

Marita testified that while sitting on a park bench outside of the bookstore, Petitioner guessed that Child may have learned some sexual things from a comic book he had lying around. (App. p. 305). Petitioner also said he did not do this, but according to Marita, God told him he needed to confess to an incident where he slept naked and woke up to find Child with her mouth on his penis. (App. pp. 304–305). Marita further testified that Petitioner supposedly said he peed in Child's mouth when this happened out of surprise and that he "whipped her" for this behavior. (App. pp. 304–305). However, Child had no bruising from any such whipping, and Marita kept in contact with him despite her knowledge of this supposed incident, which continued even after his arrest through numerous jail calls and emails/letters. (App. p. 305, p. 307–308; State's Ex. 29–30). While listening to her jail calls to him on the witness stand, Marita acknowledged her puzzling support for her husband at that time and her encouragement to: "Don't break, we're going to stick together" in spite of what he was accused of. (App. p. 309–311; State's Ex. 29–30). Marita stated that her behavior stemmed from love, shock, stupidity, her faith in God, and that: "I'm trying to protect everybody." (App. pp. 309–311). Marita also testified that prior to Child's disclosure, she had no concern that Child was being abused by Petitioner. (App. p. 286).

A forensic interview was conducted on May 1, 2019 at the Julie Valentine Center. (App. p. 269). During her interview, Child made detailed allegations against Petitioner for several kinds of sexual abuse, including groping, digital penetration, and oral, vaginal, and anal sex. (State's Ex. 1, Ex. 31).[4] Her interview differs widely from the initial allegations she made as well as her trial testimony. The interview was recorded and was admitted into evidence at trial over Defense

[4] State's Ex. 1 comprises the unredacted video recording of the forensic interview and State's Ex. 31 is the redacted version played for the jury. (App. p. 34; p. 364). *See infra* pp. 18–23 herein.

Counsel's objections. (State's Ex. 1, Ex. 31; App. p. 72, line 15—p. 73, line 8; p. 75, lines 24-25; p. 76, lines 2-7).

Regarding the specifics of Child's allegations, the "Man Cave" became a central component of the State's case against Petitioner as the primary location for the alleged abuse. The "Man Cave" is a nickname given to his home office for his security business, which had several large contracts at the time of the allegations, including a security contract with his HOA. (App. p. 392). The Man Cave housed a lot of electronics, including his and the children's computers, as well as video games, board games, and a large collection of various books and comic books. (App. p. 395). The Man Cave was central part of the family's home life. The children started home schooling[5] in approximately 2018 and did their respective online school programs in that room. (App. p. 285). Petitioner worked alongside his children at his security business and oversaw their online schooling when Marita was at work. (App. p. 164, line 25—p. 165, line 2; p. 205; p. 150, lines 5-18; p. 151, lines 1-3, lines 13-17; p. 285, lines 14-18). Marita and the children all testified that this is also where they watched movies, played video games and other games, had family nights, and overall, they enjoyed doing a lot of things in there as a family. (App. p. 285; lines 14-18; p. 150, lines 16-18, lines 23-25; p. 164, lines 18-24; p. 191; p. 205). Indeed, despite the abuse she said to have endured in this room, Child described the Man Cave with enthusiasm and affection during her forensic interview and as well as at trial:[6] "So the Man Cave is this really cool room.

---

[5] The decision to home school their children came about because Child was first bullied in school, but then later became the bully to other children. (State's Ex. 27–28). The family also have a strong Christian faith.

[6] Child was twelve years old at the time of trial. (App. p. 176, line 3).

There were books, drawing, games, there was a lot of stuff you can just do in there. We usually just hang out in there and play games and such". (App. p. 182, lines 20-25; p. 191; p. 205). Although there was much testimony regarding how much time the siblings spent together playing video games in particular, she claimed that the privilege to play video games in the Man Cave was a grooming tactic Petitioner used to abuse her. Specifically, that in order to play video games, she would have to engage in sexual activity with Petitioner (App. p. 191).

Referring to him as "David", Child went on to testify that he abused her by having her perform oral sex on him and vice versa, and putting his penis and fingers inside her vagina (her "cauliflower") and her "butt" using Vaseline. (App. pp. 187–189; p. 191, line 24—p. 192, line 4; p. 205). When asked why she referred to her father as "David", Child flippantly explained it was because: "I have a different dad now, so." [7] (App. p. 185, lines 8-13; p. 183, lines 4-7, lines 20-24; p. 204).

The alleged abuse occurred when her mother would be at work or out with friends somewhere and ZJ would be in his room or playing with friends. (App. p. 185, lines 15-22; p. 189). Child also stated Petitioner abused her in the Man Cave with the door shut, as well as in her parents' bedroom, the closet, and in her bedroom. (App. p. 186, line 25—p. 187, line 3, lines 16-20; p. 190). Being in the home virtually all day with Petitioner and Child, ZJ did not account for any of the instances that Child referred to happening in these rooms. In fact, ZJ testified twice that he could not remember any time where his sister and his father were ever alone together. (App. p. 154, lines 21-25). It was only when pressed further on direct examination that ZJ suddenly remembered them being alone in the Man Cave with the door shut, emitting "stepping" and "rattling" like sounds. (App. p. 155, lines 1-19). ZJ claimed the same scenario and similar noises occurred while living

[7] Referring to her stepfather.

with his grandparents after the fire. (App. p. 155, lines 1-19; p. 156, line 20—p. 157, line 4). This scenario at the grandparents' house is even more peculiar given that both Marita's parents were home all day due to her father's disability, in particular, as well as the "tight quarters" size of their house. (App. p. 163, lines 13-16; p. 404).

Child also testified that she remembered telling Investigator McHale that it was a boy on the bus who had been touching her, and State's Ex. 22 was introduced where she was said to be heard crying and saying: "I need to save my daddy." (App. p. 197, State's Ex. 22). Child also acknowledged that when initially speaking with her investigators, she told them that the abuse didn't happen. (App. p. 206). She explained she did not want to tell Investigator McHale or anyone else previously because she did not want her father to go to jail. (App. pp. 197–198). Her awareness at the age of just eight years old that what Petitioner was doing to her was not only abuse, but also a crime that would put him in jail flies in the face of other testimony and evidence in the record. For instance, Child acknowledged telling Investigator McHale that same day that she did not know that having sex with her father and while she was only eight years old was "bad". (App. p. 198, lines 12-23). Likewise, Marita testified that it took Child over a year after this happened to realize that what was done to her was wrong. (App. p. 310). Both parents also spoke of Child's naivety, and it is established that they raised their children in a sheltered, religious environment. It is also not as though Petitioner was alleged to have instilled in her a sense of guilt, fear, or betrayal that sending him to jail would be as a way to keep her quiet.

By the time of trial, Child had attempted suicide because she was "tired of all of it" and had been cutting herself to "punish" herself for it and for telling. (App. pp. 199–200). The impact these events had on Child, irrespective of their truth, is truly sad. Notwithstanding the emotional

aftermath of these events and despite the addition of her stepfather to the family, Child testified that she still considered Petitioner to be her father. (App. p. 183, lines 5-11).

Child underwent a chronic sexual abuse exam performed by Dr. Mary Ann Croswell of Prisma Health on April 24, 2019. (App. pp. 214–215). Dr. Croswell, who has extensive experience in the "capacity as a child abuse pediatrician", testified for the State as an expert witness[8] in the field of pediatric child sexual abuse. (App. pp. 209–213). Dr. Croswell explained that a chronic sexual abuse exam is an examination that along with a head-to-toe examination and lab work, thoroughly examines the genital area with use of colposcope, a powerful light and magnification system for photo documentation. (App. pp. 214–215; 216–217; p. 219). Child would not identify to Dr. Croswell the person sexually abusing her when her mother was of out the room. (App. p. 221, lines 14-25). Child did not feel comfortable speaking about the topic without her mother with her and only disclosed that she was indeed the victim of abuse and by whom once her mother returned to the room. (App. p. 221, line 19—p. 222, line 17; p. 227, line 24—p. 228, line 3). Dr. Croswell testified that it was very important to learn the specific type of suspected sexual trauma to guide her during the genitals examination and speaks with the child to gain an independent account and medical history for this purpose. (App. p. 219). Child informed Dr. Croswell of the specific type of physical contact involved in the abuse, including oral, vaginal, and anal penetration, including penile penetration and contact, with the last abuse occurring that same month of April 2019. (App. p. 223). As for the results, Dr. Croswell found no abnormalities in the

[8] Over Defense Counsel's objections, the State also called Shauna Galloway-Williams, a counselor and the current CEO of the Julie Valentine Center, to testify as a blind, expert witness in child sex abuse dynamics. (App. p. 350; pp. 345–346; pp. 65–68). *See infra* pp. 24–26 herein. Galloway-Williams testified regarding the behaviors of child victims of abuse and their non-offending family members, grooming, and delayed reporting. (App. p. 351–358).

examination of Child's mouth and her throat swab and lab work for sexual transmitted diseases were all negative. (App. pp. 222–223; p. 226, line 24—p. 227, line 5). Dr. Croswell testified that Child's anal/rectal examination and vaginal examination were also normal; her hymen was intact with no tearing or "separation" and was described in the report as "smooth, with uninterrupted margins" and "crescent shaped". (App. p. 224–226; p. 227; p. 228, line 9—p. 229, line 3; p. 231, line 24—p. 232, line 11). When asked how often such exams come back "normal, quote unquote" when there is a history of sexual abuse disclosed by the victim, Dr. Croswell opined that multiple studies show that an "overwhelming majority", even as high as 80 to 97% of the time, there will be no specific findings or physical evidence of sexual abuse during a genital examination. (App. p. 224, line 21—p. 225, line 6). Dr. Croswell pointed to several factors to account for these results: (1) the mucosal tissue and nature of the hymen and muscles that make up the genital and anal area, respectively, which can heal rather rapidly, and (2) the victim's perception of the physical contact. (App. pp. 225–226; pp. 233–234). Dr. Croswell was therefore unsurprised that Child's vagina, anus, rectum, etc. showed no evidence or any physical sign that she had been a victim of vaginal and anal sexual abuse. (App. pp. 225–226). On cross-examination, Dr. Croswell reiterated that it was normal and expected to have a normal exam and untorn hymen even when, as was alleged in this case, the victim is a small girl who has been raped umpteen times by a full-grown man for several years starting when she was just five years old. (App. pp. 229–231). For additional support for this position, Dr. Croswell cited a specific study in which a majority of pregnant teenagers were found to have intact hymens. (App. p. 230; p. 232, line 22—p. 233, line 6). She acknowledged however, that in contrast to the specific study she cited, that Child was only eight years old. (App. p. 234, lines 21-24).

Petitioner testified in his own defense and maintained as he always had done: that he did not abuse his daughter and that he loved his family. (App. p. 382, line 25—p. 383, line 2; p. 385, line 23—p. 386; p. 391). Despite the hurt he felt from being accused in this way, he tried to cooperate and assist the best he could with the investigation because he saw it as something he and his family were working through together. (App. pp. 379–380; p. 388). Petitioner was open and forthright during his interviews with police; he again denied touching his daughter and did not point the finger at anyone else for her allegations, as he could not think of another male consistently around Child. (App. p. 259; p. 267; p. 271). Petitioner had no problem coming in for an interview whenever investigators asked because he said he did not have anything to worry about:

> I didn't have nothing to worry about. Because my main thing was telling the truth and get everything in the open. My parents raised me if anything is wrong, let it be known. And that's what I did. I put everything out in the open and told them the truth[.]

(App. p. 380, line 24—p. 381, line 3; p. 271).

Petitioner again had no problem coming in for additional interview with Sergeant Laura Jones on May 2, 2019. (App. p. 325). He was familiar with police procedures from his prior employment as a Richland County's Sheriff patrol deputy, and therefore assumed the interview would be recorded and in fact was told it would be. (App. p. 381). However, Sergeant Jones testified the recording of their interview was ultimately lost due to a system malfunction, but she said she thankfully took notes during the interview and wrote up an incident report summarizing their discussion, though that was not until days later. (App. pp. 330–332).

Sergeant Jones testified that during their interview, he denied the allegations and made guesses about possible alternative sources of Child's sexual knowledge. (App. pp. 336–337; p. 399–402). One possibility was when after shortly after moving in, the couple was having sex ("christening the house") in their bedroom closet in order to be away from the children, but Child

still walked in on them. (App. pp. 336–337). Child had also looked at a sexually graphic adult comic book that included a depiction of oral sex, which was in the middle of a stack of Disney books and comics that he let Child have from his large collection. (App. pp. 336–337; p. 399–402). Petitioner did not know at the time that the stack contained any sexually graphic material because it was wrapped in plastic and had a Disney book on top and bottom, and he threw it away once he realized. (App. pp. 399–402). Moreover, although Petitioner denied the allegations throughout the interview, Sergeant Jones testified he told her essentially the same story Marita testified to where he woke up to find Child's mouth around his genitals. (App. p. 338). Sergeant Jones acknowledged this is not reflected in the notes she took during the interview. (App. pp. 340–341). Notably, Child does not mention this particular incident at her forensic interview or while testifying.

Petitioner took great issue with the summary Sergeant Jones gave of their interview on the witness stand, particularly the story about Child giving him oral sex when he was sleeping naked, because it did not represent what he actually said. (App. p. 382). Petitioner recounted what he actually told her during the interview:

> When I explained to the officer I said, when I woke up that Saturday morning, I saw [Child], I said I had to pee. And I said she had her tongue stuck out. And I even showed them my tongue being stuck out. I never said [Child] gave me a blow job or anything like that. I don't know how that got miss in construed [sic]...I told them, I told DSS the same thing about [Child] having her tongue stuck out. And I told Marita the same thing.

(App. p. 382, lines 10-17). He also explained that the Man Cave's door was never locked and was sometimes shut, but not because he was abusing his daughter in there, but because he would let his parrots out around the room with the cage open from time to time, and also often pet sat for others. (App. p. 383). Additionally, he did not tell Child to lie to investigators; the contention that he came up with the lie and urged Child to say she was abused by a boy on the bus made no sense because they had been homeschooled and it was Petitioner who oversaw their homeschooling.

(App. p. 405; pp. 407–408). Petitioner had told all of this to investigators and at the time, he felt like they were attentive and listening but after everything, he thought the investigators did not look at all the facts or investigate thoroughly to discover the truth. (App. pp. 383–384). In fact, he told investigators numerous times that he had numerous Cloud Cameras set up all throughout the house, including two in the Man Cave, and that the video could be accessed whenever they wanted even after the fire because it was backed up to an online portal as well as to a SD card. (App. p. 377, p. 384, line 6—p. 385, line 20). Petitioner offered this access to investigators from the start and told them to look at the video and see for themselves that he did not do this. (App. p. 384, lines 10-13, line 19). The video footage is not mentioned by investigators and there is no indication in the record that investigators ever took him up on the offer.

STANDARD OF REVIEW

The trial court's decision to admit evidence "is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

The decision to admit or exclude the testimony of an expert witness is within the sound discretion of the trial court. *State v. Brown*, 411 S.C. 332, 338–39, 768 S.E.2d 246, 249 (Ct. App. 2015), *abrogated on other grounds by State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018) (citing *State v. Price,* 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)). On appellate review, the trial court's decision to admit expert testimony will be reversed upon "'a manifest abuse of discretion accompanied by probable prejudice.'" *Id*. (quoting *State v. Douglas,* 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). An abuse of discretion in this context occurs when the trial court's conclusions "'either lack evidentiary support or are controlled by an error of law'" and where "'the ruling is manifestly arbitrary, unreasonable, or unfair.'" *Id.* (first quoting *State v. Kromah,* 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) then quoting *State v. Grubbs,* 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003)). *See also State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) ("An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions.") (citations omitted). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Brown,* 411 S.C. at 338–39, 768 S.E.2d at 249 (quoting *Fields v. Reg'l Med. Ctr. Orangeburg,* 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING THE VIDEO RECORDING OF THE CHILD'S FORENSIC INTERVIEW BECAUSE THE TOTALITY OF THE CIRCUMSTANCES FAILED TO ESTABLISH PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS, AS REQUIRED BY S.C. CODE ANN. § 17-23-175.

An out of court statement made by a child under the age of twelve is admissible in a CSC case if:

> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
> (3) the child testifies at the proceeding and is subject to cross- examination on the elements of the offense and the making of the out-of-court statement; and
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175(A)(1)-(4). Because the statute serves as an exception to the rules against hearsay, the trial court must find that the statement otherwise possesses " particularized guarantees of trustworthiness", upon consideration of the following factors:

> (1) whether the statement was elicited by leading questions;
> (2) whether the interviewer has been trained in conducting investigative interviews of children;
> (3) whether the statement represents a detailed account of the alleged offense;
> (4) whether the statement has internal coherence; and
> (5) sworn testimony of any participant which may be determined as necessary by the court.

§ 17-23-175(B)(1)-(5). *See also Id.* (providing that the trial court is not limited to only the list of factors enumerated by the statute).

Here, prior to trial, Defense Counsel had filed a motion to exclude the video on the basis that due to leading questions in particular, the forensic interview lacked the particularized guarantees of trustworthiness required by statute and a hearing outside of the presence of the jury was held. (App. pp. 30–39; State's Ex. 1). Melissa Collins, who interviewed Child at the Julie

Valentine Center, testified in camera regarding her training and experience conducting forensic interviews as well as the interview method utilized. (App. pp. 30–38). Ms. Collins testified forensic interviews involve "rapport building and then transition to the topic of concern, exploring the narrative of the report, if any. And then there's a closure at the end." (App. p. 32, lines 15-23). Ms. Collins explained that in order to yield the most reliable information, forensic interviews use neutral, non-leading, open-ended questions that if needed, would be "followed by more specific clarifying questions", which is what she later called a "closed question necessary for clarification" with a return to open-ended. (App. p. 33, lines 1-9; p. 36, lines 10-20; pp. 37–38).

The State submitted proposed redactions to the video that would be published to the jury to prevent unduly influencing the jury, including Child's statement that her mother told her to tell the truth and the rapport building portion where it is explained to the Child the importance of telling the truth. (App. p. 75, lines 6-16). Defense Counsel argued that the forensic interview was inadmissible even with certain portions of the video redacted because the interviewer's leading and inappropriate statements and questions effected the Child's responses and tainted the entire interview. (App. p. 72, line 15—p. 73, line 8; p. 75, lines 24-25; p. 76, lines 2-7). Over Defense Counsel's objections, the trial court ultimately found the video met the requirements of the statute in light of the portions redacted from the video, and was therefore admissible. (App. p. 68, line 23—p. 69, line 23; pp. 71; p. 74, line 10—p. 75, line 4; p. 76). The trial court explained the ruling and reasoning as follows:

> But I just think that maybe the way the statute is written, it specifically allows for not only the testimony but also the forensic interview. Although, there may have been some leading questions in there. I think with some of the redactions that had been provided and also I don't think that they're the type of leading questions that was in the form manipulating and takes away from the trustworthiness of the interview. It clearly - - the factors that I need to look at, I think that they properly established her training and investigative interviews. I think overall the questions as to the event were of a nature that were not leading and were open ended. There's

> definitely a detail[ed] account of the offense. I think it has an internal coherence, her overall testimony. And I think that overall it has a guarantee of trustworthiness and I'm going to allow it subject to the reactions [sic] [redactions].

(App. p. 74, line 10—p. 75, line 4). The redacted version of the video was ultimately played for the jury later on in the trial. (App. pp. 363–364; State's Ex. 31)

The admission of Child's forensic interview into evidence constituted as prejudicial, reversible error because the totality of the circumstances fail to establish particularized guarantees of trustworthiness. (State's Ex. 1). First, the interviewer gave instructions to Child regarding how she is to respond when she does not have or know an answer to a question or does not understand a word or question. These instructions conveyed that if Child did not know or have an answer to a question, the interviewer would continue to ask a question in different ways until a response was elicited. Leading and suggestive questions are already tempting to any child, and this technique was even more problematic in this case as Child is noticeably a child that is particularly eager to please and attention-seeking. One example of this improper questioning and prompting occurs when the interviewer asks whether Child was made to do anything to her father sexually, which was asked in several different ways despite Child prior lack of answers. Details were also suggested to Child at the end of questions, such when she was asked how often the alleged abuse occurred: "Did that stuff happen *like some days or every day or something else*?" The interviewer would also ask for more and more detail even though a question had already been answered. For example, Child was asked twice "Did he say anything else?" after she asked whether her father said anything while abusing her. Other examples of leading or suggestive questions include when, without the need for clarification or a reference to a specific prior statement by Child, the interviewer asked series of questions attempting to elicit whether her father ejaculated: "Did

anything ever happen with your daddy's penis?...Like did any...Was there ever anything on his penis?...Was there ever anything like around his penis?...Like, did he ever put anything around it?...Okay, um, did anything ever come out of his penis?" The interview also fails the internal coherence prong because Child often interjects with other unrelated subjects and leads the line of questioning off track.

The interview also lacks the requisite particularized guarantees of trustworthiness and failed to produce reliable information as forensic interviews were designed to do because of indications of outside influence that possibly border upon coaching. For instance, Child was the first to refer to what she alleged happened as "sexual abuse" and "sex" in the interview. When asked what "sex" is, Child did not remember but upon being questioned regarding her inability to remember, she did describe it as "Well...when the....well, when a boy who puts his penis in a girl's cauliflower." "Sexual abuse" and "sex" are not terms that eight-year-olds are independently familiar with, and the possibility of interference or improper influence upon Child in this case is even more clear when considering that she did not use either of these terms when describing the allegations to investigators, her pediatrician, her mother, or brother. Child also noted another topic usually foreign to a child, in that during the interview she said that her father faced jail over what she disclosed, specifically that: "*We're* still going through with...[inaudible]... he's going to go to jail or not go to jail. It's their choice". Child also stated that in speaking with her mother prior to the interview, her mother told her not to tell lies, but also told her of an incident where her grandmother may have witnessed the abuse. These instances of outside influence and possible coaching further diminishes the overall trustworthiness of the interview and reliability of the Child's interview statements.

The admission of the video was an error as a matter of law also because the trial court considered the applicable factors and determined the video's admissibility in light of the redactions to the video. Redactions made after the fact do not cure an interview tainted by improper suggestion and leading. Moreover, the determination to be made for admission of the video is for the forensic interview to examined as a whole under the factors enumerated by statute and factors otherwise applicable. The test provided by the statute does not permit room for admission of a video that would otherwise fail to establish a particularized guarantee of trustworthiness but for redactions made to the video. In other words, the statute does not permit evaluation of a video with consideration of or subject to the redactions of leading questions or otherwise improper questions or instructions by the interviewer.

The trial court thus abused its discretion by admitting the video. This error was not harmless and was particularly prejudicial given that Child's interview overall helped corroborate the State's case against Petitioner. Her interview also provided more sensory details and disturbing, inflammatory details that differed from her testimony and prior statements. For instance, during her interview, Child recalled an occasion where her father tried to entice her to eat a piece of Lucky Charms cereal on his penis and another occasion where they peed on one another because her father told her to. The improper prejudice in the erroneous admission of the video was compounded by the State's reliance upon the Child's forensic interview during closing statements. *See generally State v. King*, 334 S.C. 504, 515-15, 514 S.E.2d 578, 583-84 (1999) (holding it was impossible to conclude the improper admission of certain evidence did not influence the jury's verdict where the State stressed the improper evidence during its closing argument); *see also State v. Douglas*, 302 S.C. 508, 511, 397 S.E.2d 98, 99 (1990). The prejudice is further heightened by the fact that the State's case centered around Child's statements as there were no eyewitnesses (apart from her

remark during the interview about her grandmother), there was no physical or forensic evidence, and her sex abuse exam was normal. *See generally State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) (holding the improper admission of the forensic interviewer's report was not harmless considering the lack of physical evidence in the case and the State's reliance upon the child's allegations and credibility to prove the charges).

The improper admission of the video of the forensic interview thus violated Petitioner's right to a fair trial and due process. *See generally, State v. Adams*, 430 S.C. 420, 427, 845 S.E.2d 217, 220 (Ct. App. 2020) ("Due process prevents the State from using evidence so unreliable it offends fundamental conceptions of justice and ordered liberty.") (citing *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012)).

II. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF A BLIND EXPERT WITNESS IN THE FIELD OF "CHILD SEX ABUSE DYNAMICS" DUE TO THE EXPERT'S INESCAPABLE BIAS AS THE CEO OF THE JULIE VALENTINE CENTER AND BECAUSE THE REQUIREMENTS OF RULE 702, SCRE WERE NOT MET.

In this State, the differentiation between "treating" and "blind" expert witnesses has been heavily litigated in CSC cases due to the inherent danger of bolstering and the potentiality to invade the province of the jury. Specific parameters for the qualification of both types of experts and admission of their testimony have been created through precedent and expanded upon through the cases presented for appellate review. However, what occurred in this case improperly straddled the distinction between expert types and muddied the line of precedent on the subject when not just a biased witness, but an interested witness, was permitted over Defense Counsel's objection to testify as a blind expert witness in the field of "child sex abuse dynamics." (App. pp. 358–360). Specifically, Shauna Galloway-Williams, the current CEO of the Julie Valentine Center, provided information on: delayed reporting of abuse, the frequency at which children are abused by family members, the issues non-offending family members experience once the abuse is revealed, grooming, the recantation of allegations, and other features of child sexual abuse. (App. p. 351–358). Although she had not met with the victim in this case, because of her position and inescapable bias, Galloway-Williams as an expert witness strayed outside of the "blind" expert witness category. Permitting her "blind" expert witness testimony on these topics, which only served to improperly corroborate Child's otherwise uncorroborated allegations, violated Petitioner's right to a fair trial and offended principles of fundamental fairness and due process. This is particularly true given the inherent influence that the label of "expert witness" inherently carries in the eyes of the jury. *See State v. Kromah,* 401 S.C. 340, 357, 359, 737 S.E.2d 490, 499 (2013) ("[A]lthough 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.”).

What's more, Galloway-Williams was permitted to testify as a blind expert witness in contravention of the requirements of Rule 702. This Rule provides that a witness may be qualified as an expert to testify on a particular subject if scientific, technical, or otherwise specialized knowledge will assist the jury in understanding the evidence or determining a fact in issue. Rule 702, SCRE. Before an expert can testify on either scientific or non-scientific subjects:

> First, the [circuit] 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 [circuit] 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 [circuit] court must evaluate the substance of the testimony and determine whether it is reliable.

Brown, 411 S.C. at 340, 768 S.E.2d at 250 (citing *Watson v. Ford Motor Co*., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (affirming the admission of expert testimony on child sex abuse dynamics when the foundation was properly laid under *Watson*). *See also State v. White*, 416 S.C. 135, 138-39, 784 S.E.2d 695, 696-97 (Ct. App. 2016); *Chavis*, 412 S.C. at 107-08, 771 S.E.2d at 339. *See also State v. Jones*, 423 S.C. 631, 638–39, 817 S.E.2d 268, 272 (2018) (“While both scientific and nonscientific expert testimony require the trial court [to] make a finding of reliability, there is no formulaic approach for determining the reliability of nonscientific testimony.”).

Here, precedent has established that the subject matter that Galloway-Williams would be testifying were beyond the ordinary knowledge of the jury. There is also no contest to Galloway-Williams's impressive individual qualifications and her extensive experience, training, and education in this area. The issue here is rather the failure to establish reliability of the substance of

the testimony. There was no testimony regarding Galloway-Williams's methods or protocol, quality control methods, peer review, let alone rate of error. She also did not provide the citation of one study, text, or publication that she reviewed or relied upon to underlie her testimony. Thus, there was no basis for the trial court to have found the reliability prong met.

In addition to the inherent weight the expert witness has in the eyes of the jury, Galloway-Williams's expert testimony was prejudicial and unduly influenced the jury's verdict. Galloway-Williams offered potential explanations and alternatives to explain away otherwise confusing and contradictory behavior on the part of Child, Marita, and even ZJ in the face of Child's disclosures against her father. Her testimony served to reconcile the inconsistencies between Child's pretrial statements to others, her forensic interview, and testimony. Galloway-Williams's ultimately testimony served to salvage any slight to Child's credibility, and thus her testimony was particularly prejudicial in light of the lack of direct or physical evidence in this case.

Therefore, it was a prejudicial abuse of discretion to permit Galloway-Williams to testify as a blind expert witness in the area of child sex abuse dynamics.

CONCLUSION

In light of the foregoing, the Petitioner respectfully urges this Court to vacate his conviction and sentence and remand for a new trial. Petitioner also respectfully requests that oral argument be held in this case if the Court believes it would aid in deciding the issue raised herein.

Respectfully Submitted,

William G. Yarborough, III

Lauren C. Hobbis

By: s/ Lauren C. Hobbis
South Carolina Bar # 103190

WGY Law
308 West Stone Avenue
Greenville, South Carolina 29609
(864) 331-1612

ATTORNEYS FOR PETITIONER