STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 2014-UP-187 (S.C. Ct. App. filed 5/7/2014)
10-GS-39-0846, 0847

THE STATE,

RESPONDENT,

V.

MARK STANLEY PETERS,

PETITIONER.

APPELLATE CASE NO. 2014-001507

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 6/13/2014.

QUESTION PRESENTED

Whether the Court of Appeals erred by finding the trial court properly qualified witness Galloway-Williams as an expert in the field of "counseling children who are victims of sexual abuse and their family members" since she was not qualified to testify as an expert, her opinion about child sex abuse cases in general would not assist the jury, the Court's reliance on State v. Weaverling was erroneous since it is no longer good law, and the "expert's" testimony was not reliable?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Pickens County Grand Jury for two counts of committing a lewd act upon a child. R. 239. His case was called to trial on December 13, 2011, before the Honorable G. Edward Welmaker, and a jury. Thomas Quinn represented petitioner. Jenny Hamaker Barwick represented the state. R. 1.

On December 14, 2011 the jury found petitioner guilty on both counts. R. 237, ll. 3-10. Judge Welmaker sentenced petitioner to concurrent terms of one hundred and fifty five months imprisonment. R. 238, ll. 11-15.

The Final Brief of Appellant was filed on October 22, 2013 and the Final Brief of Respondent was filed on October 4, 2013. Oral Argument was heard on March 5, 2014. The Court of Appeals affirmed in State v. Mark Stanley Peters, 2014-UP-187 (filed May 7, 2014). App. 1-3. The Petition for Rehearing was filed on May 22, 2014 and denied on June 13, 2014. App. 4-12.

This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by finding the trial court properly qualified witness Galloway-Williams as an expert in the field of "counseling children who are victims of sexual abuse and their family members" since she was not qualified to testify as an expert, her opinion about child sex abuse cases in general would not assist the jury, the Court's reliance on State v. Weaverling was erroneous since it is no longer good law, and the "expert's" testimony was not reliable.

Relevant Facts

Jacqueline Peters had been married to the petitioner for sixteen years. They were separated at the time of trial although they stayed in touch. R. 2, ll. 6-10; R. 105, ll. 1-8.

Mrs. Peters remembered the allegation of petitioner touching the then thirteen or fourteen-year-old Minor #1 in April, 2009. R. 108, ll. 7-20. Minor #1 was best friends with one of their daughters, Gabby Peters, and Minor #1 "called me Mom." It was common for Minor #1 to spend the night. "She would sleep on the floor, my fourteen-year-old would sleep on the bed. And that happened, nothing out of the sorts [in April, 2009]." R. 108, l. 13 – 109, l. 6.

She stated: "Mark slept downstairs. His office was down there. He went downstairs, I went to the back room, the kids went to bed, everything was fine." R. 109, ll. 20-23. "In the middle of the night, [Minor #1] came in, calm as calm can be, no tears, no fear, nothing. She said, Mark appeared in the doorway naked and said, would you please come downstairs and have sex with me. And I said, excuse me? And I said stay right here. Don't move. I went downstairs, and I'm sorry to say, but I did slap him across the face, and I said to him what's going on? He was fully clothed. He said, I don't know what you're talking about. So I told him. And he said, well, I still don't know what you're talking about. I said, stay down here." R. 109, l. 20 – 110, l. 8.

Mrs. Peters remembered:

> I went back up and I said, [Minor #1], sweet baby, do you want to go home to Mommy and Daddy. She said, no. Why? She said, I want to stay here with you. And I said, you sure? And she said, yeah. So she got in the bed. And I, you know, consoled her. And I said, you know, if you want to go home, I can take you home. Mark came back upstairs and used my bathroom. I had the master bedroom. And he turned and he said, [Minor #1], would you like me to take you home. And I said, please do not talk to her. Leave her alone. He left the room, went back downstairs. So once again, I said to him - - or said to [Minor #1], baby, do you want me to take you home? She's like, no, I'm fine. I said, okay. So we went to bed. The next morning she woke up, you know, it was Monday morning and I looked at her once again and I said to her, [Minor #1], you don't have to go to school if this bothers you. You do not have to go to school. I will take you home. She was like, well, why? I said, well, because of last night. She proceeded to go into the master bathroom, turn the shower on, got dressed, got in my car, because I brought her to school with my daughter everyday, turned on the radio and my daughter and her sang, and sang and sang, and she went to school. Then the next day after school, the phone rings at four o'clock like it always does, and she said, can I come over? I said, why would you want to come back over? You know, I'm thinking she would be scared. And I said, I don't think it's appropriate. And that's that.

R. 110, l. 8 – 111, l. 10.

Mrs. Peters "treated [Minor #1] like she was my daughter" and strongly asserted that [Minor #1] was not telling the truth when she told the police that she was scared or screamed that night. R. 113, l. 14 – 114, l. 14.

Petitioner and his wife said that the allegations of another neighbor's daughter, Minor #2, arose after petitioner was arrested for committing a lewd act upon Minor #1, and it made the news. Mrs. Peters recalled the night Minor #2 alleged petitioner touched her. Minor #2 woke up crying in the middle of the night, and she said she was scared and wanted to go home. She would not allow Minor #2 to go home "due to the fact that I know her father really well, and he bragged a lot that he slept with a gun. And he said that if anybody ever knocked on the door in the middle of the night,

he would not even look, he would shoot. I'm not sending a child into that situation." R. 114, l. 11 – 116, l. 2.

Mrs. Peters and petitioner both told her: "Baby, you're going to be all right. Go back to sleep." She told the minor: "You go back to sleep and tomorrow we can get up, use the pool, just like a normal day. [She] spent the night, woke up the next day, had cereal, put on a bathing suit and we all went swimming." R. 116, ll. 9-15. She continued:

> Ms. Barwick (solicitor): Okay. Shifting gears a little bit. [Minor #1] had never made any accusation like this to you before?
>
> Mrs. Peters: Never.
>
> Ms. Barwick: And [Minor #2] never made an accusation before this either, did she?
>
> Mrs. Peters: Those kids always wanted to be at my house, all the time.
>
> Ms. Barwick: They enjoyed all of their time there, right?
>
> Mrs. Peters: All the time. And they always - - after these allegations were said, they wanted to come back, so . . .
>
> Ms. Barwick: You don't remember saying that [Minor #1] had actually told you that the Defendant touched her vagina?
>
> Mrs. Peters: Never.
>
> Ms. Barwick: Okay. She never told you that?
>
> Mrs. Peters: Never.
>
> Ms. Barwick: You don't remember telling Michelle Gerald from DSS that she told you that?
>
> Mrs. Peters: On my kids' life, she never told me that, because I would have went crazy.

Ms. Barwick: Okay. So I want to be clear. You never told Michelle Gerald that [Minor #1] told you that your husband touched her on her vagina?

Mrs. Peters: No. She told me he stood in the doorway.

R. 117, l. 20 – 118, l. 17.

She acknowledged petitioner was drunk on the night of these allegations, and that petitioner never said he did anything improper with either of the girls. Petitioner later testified that he drank beer every day and while it had an effect on him, he still had his wits about him. R. 126, l. 4 – 127, l. 19.

Fifteen-year-old Minor #1 testified that Gabby Peters was her best friend. Minor #1 said she usually spent the night "every time I went over there." R. 2, l. 6 – 3, l. 24. Minor #1 went to Florida with petitioner's family for Thanksgiving and she went to Carowinds with them. She liked to swim at their house. Petitioner's wife picked her up from school in April of 2009. Gabby lived with petitioner, his wife, and their younger daughter MacKenzie. R. 3, l. 21 – 4, l. 25.

Minor #1 said after they got back from Carowinds in April, 2009, "I spent the night both nights." Her claim was "when we came back that night we got ready for bed and that's when I woke up and he was touching me." R. 5, ll. 1-6.

Earlier in the day "Mark was kind of drunk. He was being real loud and he was wrestling with Gabby and he was - - tried to with me, but he was kind of tickling me and stuff, but I didn't let him because I didn't feel very comfortable." Minor #1 said she went to bed in Gabby's room and she claimed when she woke up "Mark was touching me" as Gabby was "laying in her bed." R. 4, l. 10 – 8, l. 21.

She alleged petitioner touched her "on my private area and on my stomach . . . he ran his fingers through my hair and then he just got up and shut the door and walked out . . . I was really scared and I didn't know what to do so I sat there and prayed. And then he came back and that's when he was naked . . . he just stood at the doorway." Minor #1 testified she just turned over and watched the television, and "he asked me what I was watching. And I said, Lockwood Eric. And he was like, laying in the bed with Derek? And I just didn't say anything. And then he said that I could come downstairs with him and I didn't answer him." R. 10, l. 14 – 12, l. 4.

She claimed petitioner was kneeling by her when he touched her, but she said petitioner did not attempt to put his hands under her clothing or move her. R. 30, l. 3 – 31, l. 21.

When she heard the basement door shut where petitioner slept she went to Mrs. Peters' room. She shook Mrs. Peters to wake her up, and she claimed she told petitioner's wife: "[M]ark came in there touching me. And then she said that he came in there with her, too." R. 13, l. 4 – 14, l. 8.

Minor #1 said that Mrs. Peters went in the basement to talk with petitioner and she returned and said she was sorry it happened. Petitioner then came upstairs in his shorts. Petitioner argued with Jacqueline Peters, and he went to use the restroom in the bedroom. She testified: "Jackie got up and slammed the door. And she said, there you go using the bathroom in front of her. And he opened the door back up and used the restroom. And then he came back out and then he told me that he was sorry if he thought anything - - if I thought anything had happened. And he come over there and picked [his younger daughter] up and went downstairs." R. 15, l. 20 – 18, l. 5.

Minor #1 asserted she tried to go back to sleep that night. She told Mrs. Peters she did not want to go home because she was scared. Mrs. Peters took her to school the next day. She did not tell anyone at school what had happened because "me and Gabby had the same friends and I just

didn't want to bring it up. I'd just rather tell one of my parents than to tell people at school." R. 18, l. 19 – 19, l. 21.

Minor #1 talked to her mother after school on the phone as she did every day when she got home. She told her mother what had occurred. Her mother "called my Dad and told him that he needed to come home and told him a little bit about what happened. And then he said to call the police. So we did." The police arrived and Minor #1 gave them a statement. R. 19, l. 4 – 21, l. 19.

On cross-examination, she said petitioner was drunk that night. She had seen him drunk many times before. However, she admitted she went over to his house frequently. R. 22, l. 8 – 23, l. 19. She went with her mother to see a physician at Easley Pediatrics after the alleged incident. This visit was to help allow her to stay home and be homeschooled from that point. R. 27, l. 17 – 28, l. 19.

Ruth Jones, Minor #1's step-mother, remembered when Minor #1 called her after she got home from school as she did everyday. Jones said "her voice sounded a little crackly and I could tell she was upset about something." Mrs. Jones asked Minor #1 if she got into a fight with Gabby or if Mrs. Peters did something to hurt her feelings. When she asked if it was Mark she began to cry. She maintained that she went immediately. R. 38, l. 7 – 42, l. 16. Once home, she recalled that Minor #1 made her allegation about sexual abuse in Gabby's bedroom, and she called the police. R. 42, l. 11 – 44, l. 4.

Minor #2 was a friend of petitioner's younger daughter. She lived next door to petitioner. R. 48, l. 9 – 49, l. 25.

She was eleven-years-old at the time of trial. In December of 2008 she stayed overnight in the basement at petitioner's house with MacKenzie. R. 49, l. 3 – 51, l. 13. Minor #2 testified that

petitioner, his wife, his other daughter Gabby, and Minor #2's sister, Kaitlyn, all slept at petitioner's house that night. R. 52, ll. 4-16.

Minor #2'claimed that she woke up in the middle of the night and petitioner was touching her "in my private and like on my chest." Minor #2 maintained petitioner touched her over and under her clothing. R. 53, ll. 11-22. She said petitioner ran his hands through her hair, and she estimated the touching happened for probably "like a half hour or so." Minor #2 maintained that she pretended to be asleep the entire time. R. 54, l. 19 – 55, l. 24.

She claimed after petitioner left, she ran upstairs to Gabby's room, and woke her sister. She testified that she was crying at the time, and her sister "asked Mark and Jackie if we could go home." Minor #2 was told they could not go home because it was too dark, and because her parents were probably asleep. R. 56, l. 10 – 58, l. 19.

On cross, Minor #2 denied she told petitioner's wife she had a bad dream. She did not tell anyone at school or her mother and father about the alleged incident. She admitted she did not tell anyone "about this until your dad came and asked you." However, she denied hearing news reports about Minor #1 allegedly being molested. R. 59, l. 6 – 60, l. 25.

Minor #2 did not remember when this incident occurred. She did not remember whether petitioner had been drinking that day. She admitted she did not recall if she told the police petitioner was allegedly breathing hard or rubbing his hands through her hair. R. 63, l. 10 – 65, l. 16.

Shane Gunter, Minor #2's mother, testified petitioner was her next door neighbor. She remembered when he was arrested for the sexual assault of Minor #1. "I looked it up on-line and printed the article out and then read it to each of our four oldest daughters." R. 75, l. 19 – 76, l. 20.

All of her daughters did not react to the news story, but Minor #2, "she kind of teared up, seemed like she was withholding something." Minor #2 started crying "when I read it to her." R.

78, ll. 7-22. She asked Minor #2 "if something like that had been done to her there," and she then called the Pickens County Police. R. 78, l. 19 – 79, l. 2.

The "expert" testimony

On the second day of trial, the state called Shauna Galloway-Williams as a witness.[1] Williams was the executive director of the Julie Valentine Center, formally the Greenville Rape Crisis and Child Abuse Center. Williams conducted forensic interviews and did "clinical work" there. R. 136, ll. 3-24.

Williams admitted that a forensic interview was not performed in this case. She had never met either alleged victim. R. 137, ll. 1-13.

She had a Bachelor's in psychology and a Master's in counseling. Her training focused on forensic interviews with "ties to sexual and child abuse." On cross, she admitted attending a seminar in 2008 put on by the National College of District Attorneys: "Child Abuse Summit, Working Together to Improve Child Abuse Prosecutions." R. 137, l. 11 – 138, l. 9; R. 156, l. 21 – 157, l. 8.

Williams had testified in criminal court eleven times and family court thirty times. The solicitor asked the judge to qualify her as an expert "in the field of counseling children who are victims of sexual abuse and their family members." R. 138, ll. 16-22.

Defense Counsel Quinn objected to her qualifications, and he said wanted to *voir dire* the witness. Counsel then asked Williams if she had ever been qualified in a case where she did not meet with the children or parties. Williams responded: "At least one other time in General Sessions." R. 138, l. 20 – 139, l. 10. Defense counsel stated his objections:

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[1] For ease of reference, Shauna Galloway-Williams is referred to as Williams.

> I do not believe she's qualified to testify in this case, because she's not able to assist this jury with any question before them, as she has not met any of the people involved in the case. And as I believe the standard for a juror - - I'm sorry, for an expert, **they may testify to scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or determine the fact at issue. She is not aware of any of the evidence in the case or any of the facts in issue.**

R. 139, ll. 14-23. (emphasis added).

That is, in substance, an objection to the reliability or her "scientific or technical" testimony. The Court of Appeals should not have found it procedurally barred as to reliability. App. 3, n. 1.

The solicitor said Williams could assist the jury in understanding why children delay in disclosing or make partial or accidental disclosures. R. 140, ll. 1-7. The judge ruled that, based upon her education and experience, she was qualified as a witness and that the subject matter was beyond the ordinary knowledge of a juror and he "believed" her testimony would be reliable. R. 140, ll. 8-21.

Williams then testified in the presence of the jury that the vast majority of children do not disclose sexual abuse after it happens. "The statistics say about **eighty percent** of children don't tell right after something has happened . . . but the main reason . . . **is fear**." R. 141, l. 7 – 142, l. 25. (emphasis added). Williams said:

> Ms. Barwick: In your experience, is it common or uncommon for children to be sexually abused by somebody they know and trust?
>
> Williams: Yeah. It's very common, more likely than not, about **eighty percent** of the time, children are being abused by someone they know, they love and they trust.

R. 149, ll. 18-23. (emphasis added).

Asked whether children fear "things like people at school finding out?" She said that "children fear that other people are going to find out what happened." "Accidental disclosure

means that children give out pieces of what occurred, and "we don't expect that when they finally do tell, that we're going to get all the details on all the specifics right away." R. 143, l. 22 – 146, l. 10.

When the perpetrator was part of the child's life this went "back to the relationship dynamics." R. 148, ll. 10-13. Her organization recommended that there be no contact between the child and the person they accused of abuse. R. 148, l. 24 – 149, l. 17.

Williams told the jury that children were not "sophisticated liars." She added that some children are "groomed" for sexual abuse and that grooming can start by touching, tickling children, "and getting close to the private area . . . as sort of testing the waters to see how close they can get to that . . . how that child's going to respond. R. 151, l. 19 – 153, l. 12. Williams claimed that her figures showing eighty percent of children do not initially disclose abuse that occurred were "**substantiated cases of abuse**." R. 154, l. 7 – 155, l. 9. (emphasis added)

Petitioner took the stand in his own defense. He denied improperly touching either alleged victim. He testified that Minor #1 enjoyed spending time at his house, with his children, more than she did being home. Minor #1 had told them "she did not have a good home life" and that she would rather be over at his house cooking out and playing in the pool. R. 168, ll. 2-19.

Petitioner recalled that the Gunter's later moved in next door to him. MacKenzie, his younger daughter, and Minor #2 played together almost daily. R. 169, ll. 1-24. Petitioner said the alleged incident with Minor #2 occurred when his wife told him that Minor #2 had a bad dream, and that she was scared. Petitioner said he was not accused at the time of doing anything to Minor #2. R. 169, l. 22 – 170, l. 23.

On cross, petitioner said he treated the children the same way he treated his own daughters. R. 175, l. 23 – 176, l. 23. He did not remember his wife slapping him after Minor #1's allegation.

He did recall telling his wife that he did absolutely nothing to Minor #1. R. 178, l. 21 – 180, l. 15. Petitioner admitted he had argued with his wife over the allegation that he had gone upstairs without his clothes on. R. 181, ll. 2-14.

Petitioner told the solicitor his wife would not lie for him. He had not done anything improper in his treatment of either child. R. 184, l. 10 – 189, l. 1.

The Court of Appeals wrote, (App. 2-3):

> As we read Peters' objection to Williams's qualification as an expert at trial, his objection was premised upon the fact that Williams had not met the victims and knew nothing about the facts of the case. In *State v. Weaverling*, 337 S.C. 460, 473, 523 S.E.2d 787, 794 (Ct.App.1999), this court addressed a case similar to Peters' wherein a defendant challenged behavioral evidence testimony in a sex abuse case in which the expert had never interviewed or met the victim. In *Weaverling*, the trial court qualified a social worker as an expert in "the field of victims of sexual abuse." *Id.* The expert's knowledge of the case was limited to her discussions with the State. *Id.* The *Weaverling* court surveyed case law from this state and other jurisdictions and concluded the testimony was admissible notwithstanding the expert's failure to interview the child. *Id.* at 474–75, 523 S.E.2d at 794. Ultimately, the *Weaverling* court held "[t]here is no requirement the sexual assault victim be personally interviewed or examined by the expert before the expert can give behavioral evidence testimony. The fact that the expert does not personally interview the victim bears on the weight of the behavioral evidence not on its admissibility." *Id.* at 475, 523 S.E.2d at 794.
>
> We find no error in Williams's qualification as an expert. Williams testified she was a licensed professional counselor, with a bachelor's degree in psychology and a master's degree in counseling. She stated most of her training included working specifically with children and families in situations where there were allegations of abuse and neglect. She attended training seminars regarding sexual abuse survivors and worked on multiple cases involving sexually abused children.
>
> Although Williams testified she conducts forensic interviews as a part of her job duties, she confirmed she did not conduct a

> forensic interview in this case. Furthermore, the State did not proffer her as an expert forensic interviewer of children, and Peters repeatedly argued Williams did not conduct a forensic interview. The State did not call Williams as a forensic interviewer to lend credibility to the victims' allegations. *See* *Kromah*, 401 S.C. at 358, 737 S.E.2d at 499. In fact, Williams never directly or indirectly commented on the credibility of the victims' accounts of the alleged sexual assaults.
>
> Instead, Williams's testimony simply explained the effects a sexual trauma may have on a child's subsequent behavior following the trauma. We find the probative value of her testimony outweighed any alleged prejudicial effect. Moreover, the fact that Williams had never met either of the victims in this case, nor had she met any of the parties involved, goes to the weight of her testimony, not its admissibility. *Weaverling*, 337 S.C. at 475, 523 S.E.2d at 794.

App. 2-3.

Rehearing

Petitioner sought rehearing because the Court of Appeals may have overlooked the fact that State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (1999), upon which it relied in its opinion, is no longer good law as to the admission of expert testimony. Further, in Weaverling the Court noted that "Weaverling has not challenged Mooney's testimony by claiming the record lacked sufficient evidence to support her expert opinion in this case." State v. Weaverling, 337 S.C. 460, 474 523 S.E.2d 787, 794 (1999):

> Here, appellant **has** challenged the ruling qualifying witness Galloway-Williams as an expert in the field of "counseling children who are victims of sexual abuse and their family members" since she was not qualified to testify as an expert, and her opinion about child sex abuse cases in general would not assist the jury as required by rule where she had not met any of the parties involved in the case, and her testimony did not satisfy the requirements for scientific or other technical evidence under the South Carolina Rules of Evidence.

> In Weaverling, the Court also held that "After a witness has been qualified as an expert, any challenge to the adequacy of the expert's knowledge goes to *the weight of the testimony*, rather than its admissibility." State v. Weaverling, 337 S.C. 460, 474 523 S.E.2d 787, 794 (1999). (emphasis added). See, also, State v. Henry, 329 S.C. 266, 278, 495 S.E.2d 463, 468-469 (Ct.App. 1997)(if a witness is better qualified than the jury she is qualified to give expert testimony), which is also no longer good law.

App. 4-5.

Petitioner pointed out that in State v. White, 382 S.C. 265, 272-273, 676 S.E.2d 684, 687-688 (2009), this Court overruled State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct.App.1997), and held that non-scientific evidence must also satisfy Rule 702, SCRE prior to its admissibility." Petitioner argued: "State v. Kromah, 410 S.C. 340, 737 S.E.2d 490 (2013), also makes it apparent that Weaverling can no longer be good law," since it allowed back door bolstering of the alleged victim's testimony through nonscientific statistics among other things. App. 5.

Petitioner asked the Court of Appeals to "grant rehearing and respectfully decide this case under the modern correct legal standard set forth by our Supreme Court in White, Kromah and Tapp."[2] App. 10.

Rehearing was denied, and this case respectfully presents the opportunity for this Court to set the balance true, and provide for a fair trial where a blanket end run around Kromah attempted.

Discussion

Williams had not met or interviewed any of the parties involved in this case, including the two alleged victims. She testified that *eighty percent of victims* of sexual abuse delay disclosure of

[2] State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012).

that abuse. She also testified that eighty percent of children are sexually abused by someone they know. This was "substantiated," according to the "expert."

Defense counsel correctly objected that Williams should not be qualified as an expert. In addition, her testimony did not qualify as "expert" scientific, technical or other specialized knowledge testimony that would aid the jury under our rules of evidence. Williams had not even met the alleged victims or parties in this case. Defense counsel was correct in this objection to her qualifications, and the subject matter of her testimony.

Once clothed with the aura of an expert, Williams claimed that eighty percent of victims of abuse delay disclosure, and that eighty percent of victims are abused by someone they know. She further testified that children are "groomed" for sexual abuse by the perpetrator. This begins with touching or tickling and advances from there. There was, of course, testimony that petitioner wrestled with the children, played with them and tickled them in the swimming pool. The solicitor also asked if it was unusual for minors not to want people at school to know.

Williams also testified about "accidental disclosure," and she told the jury that her statistics had been "substantiated." Although Williams did not define substantiated, it seemingly includes alleged perpetrators convicted on pseudo-science testimony. Critically, she told the jurors that the complaining witnesses are not sophisticated liars.

The judges have "gatekeeper" function regarding the qualification and admission of expert testimony. State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Pursuant to Rule 702, SCRE, the reliability of non-scientific expert testimony is part of the gatekeeping function. Reliability should be determined prior to its admission.

The trial judge also has the responsibility to determine whether the "expert" testimony is reliable. Here, the judge incorrectly ruled the testimony was reliable. Defense counsel made the

Rule 702, SCRE objection about the proposed expert's testimony not meeting scientific or technical reliability standards that constitute the evidentiary predicate for its admissibility. R. 139.

In State v. Tapp, supra, the judge erred by leaving the reliability determination for the jury. Here, as petitioner argued to the Court of Appeals, there was no evidence to support the judge's determination that Williams' expert testimony was reliable.

It is apparent, beyond any possible dispute, that some solicitors are presenting the "experts" as a "back door" way around Kromah. The "expert" is re-titled, and does not interview the children. Regardless, testimony about eighty percent of sexual abused minors not reporting or delaying disclosure accomplishes the same impermissible result. The same is true of testimony of patterns of sexually abused minors **in general** that mirrors the alleged victim's testimony during the state's case-in-chief during **this case.** And the assertion that the child witnesses are not "sophisticated liars" prejudicially invades the province of the jury.

In overruling State v. Morgan, in State v. White, 382 S.C. 265, 272-273, 676 S.E.2d 684, 687-688 (2009), this Court wrote:

> We overrule Morgan the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence. **The familiar tenet of evidence law that a continuing challenge to evidence goes to "weight, not admissibility" has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability. Nonscientific expert testimony must satisfy Rule 702both in terms of expert qualifications and reliability of the subject matter.** (emphasis added).
>
> Courts are often presented with challenges **on both fronts-qualifications and reliability**. The party offering the expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experience, training or education." Rule 702, SCRE. With respect to qualifications, a

> witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that "defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." State v. Myers, 301 S.C. 251, 256, 391 S.E.2d 551, 556 (1990). Turning to the reliability factor, a trial court may ultimately take the same approach, but only after making a threshold determination for purposes of admissibility.
>
> State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) is often cited for the gatekeeping role of the trial court with regard to expert testimony under Rule702 as well as the standard reliability factors for scientific evidence. The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council[3] factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony. We have set forth above foundational requirements for Rule 702 expert testimony concerning dog tracking evidence.
>
> We do not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence. Consequently, we offer no formulaic approach that will apply in the generality of cases. Yet the trial court in the discharge of its gatekeeping role in determining admissibility must initially answer the always present threshold questions of qualification and reliability.

State v. Kromah, 410 S.C. 340, 737 S.E.2d 490 (2013), also makes it apparent that Weaverling can no longer be good law.

As seen, the judge asked Defense Counsel Quinn if he had any *voir dire* or objection. Defense Counsel Quinn testified he **objected to her qualifications**, and he wanted to *voir dire* the witness. Counsel then asked Williams if she had ever been qualified in a case where she did not

[3] The State v. Council factors for scientific expert testimony are: (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.

meet with the children or parties. Williams responded: "At least one other time in General Sessions." R. 138, l. 20 – 139, l. 10. Defense counsel then stated his objections:

> I do not believe she's qualified to testify in this case, because she's not able to assist this jury with any question before them, as she has not met any of the people involved in the case. And as I believe the standard for a juror - - I'm sorry, for an expert, *they may testify to scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or determine the fact at issue. She is not aware of any of the evidence in the case or any of the facts in issue.*

R. 139, ll. 14-23. (emphasis added)

The solicitor said Williams could assist the jury in understanding why children delay in disclosing or make partial or accidental disclosures. R. 140, ll. 1-7. The judge then ruled that, based upon her education and experience, she was qualified as a witness **and that the subject matter was beyond the ordinary knowledge of a juror and he believed her testimony would be reliable**. R. 140, ll. 8-21.

Williams then testified in the presence of the jury that the vast majority of children do not disclose sexual abuse after it happens. "The statistics say about **eighty percent** of children don't tell right after something has happened . . . but the main reason . . . **is fear**." R. 141, l. 7 – 142, l. 25. (emphasis added). The following occurred on direct examination of Williams:

> Ms. Barwick: In your experience, is it common or uncommon for children to be sexually abused by somebody they know and trust?
>
> Williams: Yeah. It's very common, more likely than not, about **eighty percent** of the time, children are being abused by someone they know, they love and they trust.

R. 149, ll. 18-23. (emphasis added).

Williams was asked whether children fear "things like people at school finding out?" She answered that "children fear that other people are going to find out what happened." Williams

testified that accidental disclosure means that children give out pieces of what occurred, and "we don't expect that when they finally do tell, that we're going to get all the details on all the specifics right away." R. 143, l. 22 – 146, l. 10.

Williams said when the perpetrator was part of the child's life this involved "relationship dynamics." R. 148, ll. 10-13. She said her organization recommended that there be no contact between the child and the person they accused of abuse. R. 148, l. 24 – 149, l. 17.

Williams also opined that children were **not "sophisticated liars**." She added that some children are "groomed" for sexual abuse and that grooming can start by touching, tickling children, "and getting close to the private area . . . as sort of testing the waters to see how close they can get to that . . . how that child's going to respond. R. 151, l. 19 – 153, l. 12. Williams said her figures that eighty percent of children do not initially disclose abuse that occurred were "**substantiated cases of abuse**." R. 154, l. 7 – 155, l. 9. (emphasis added).

In this case one alleged victim said she did not initially disclose because she had common friends with petitioner's daughter there. The "grooming" testimony matched that of petitioner allegedly wrestling and tickling the young girls. The fact that eighty percent of alleged "similarly situated" victims did not initially disclose was meant to allay any reservations that jury had about the alleged victims in this case not disclosing the abuse.

Counsel in this case was appellate counsel in Kromah. He understands the distinctions between this case and Kromah, but when it comes to back door bolstering of the alleged victim they are distinctions without a difference. This Court should respectfully speak to the back door evasion of the clear holding of Kromah. Morgan had been overruled, and petitioner asserts that Weaverling sshould be also to prevent this abusive use of expert testimony to convince jurors that the alleged

victim in this case is acting in conformity with other victims of sexual abuse – eighty percent of them, in fact.

In Mitchell v. Commonwealth, 777 S.W2d 930 (Ky. 1989) the Supreme Court of Kentucky excluded evidence regarding "child sexual abuse accommodations syndrome." This syndrome involved delay of disclosure in abuse, secrecy, helplessness, entrapment and accommodation, and retraction. The alleged victim in Mitchell told Richard Welch, who held a Masters degree in clinical social work, that she did not report the sexual abuse immediately because she was afraid.

The Kentucky Supreme Court held that he state had failed to prove that the "so called Sexual Abuse Accommodation Syndrome" had attained a scientific acceptance. Mitchell, 777 S.W.2d at 932. The Court noted there was no testimony that sexual abuse by persons other than the accused could have produced the same symptoms in the victims.

The Kentucky Court noted there was no testimony that all children who are sexually abused exhibited these symptoms, nor was there testimony that children who have not been sexually abused do not exhibit similar elements of the syndrome. The Court found reversible error because: (1) there was no medical testimony that the syndrome is a generally accepted medical concept and, (2) the testimony had no substantial relevance to the issue of the defendant's guilt or innocence. Mitchell v. Commonwealth, 777 S.W.2d at 933.

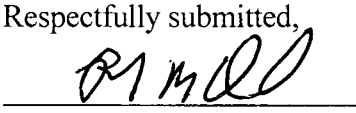
Williams testified that eighty percent of abused children do not report sexual abuse "right away." Williams also told the jury that eighty percent of sexually abused children are abused by someone they know. The supposed relevance of this must be that the alleged victims in this case did not report the alleged abuse right away, and they knew petitioner. Apparently, therefore, there was an eighty percent chance based on these two significant factors that they were actually sexually abused, and petitioner was **the** someone whom they knew. This, of course, reveals the fallacy and

the danger of non-scientific pseudo-science that this Court repeatedly has warned against in child sexual abuse cases. In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499 (2013), this Court held that forensic interviewers testimony could be important in the investigative process but were not proper where they run afoul of evidentiary rules. The testimony in this case, admitted under Weaverling, was improper because Williams was not qualified, and the testimony was not reliable. Such testimony would be admissible in each and every child sexual abuse case if this Court does not intervene. This is but the latest end run around the logic and reasoning set forth in State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012); and State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of August, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 2014-UP-187 (S.C. Ct. App. filed 5/7/2014)
10-GS-39-0846, 0847

THE STATE,

RESPONDENT,

V.

MARK STANLEY PETERS,

PETITIONER.

APPELLATE CASE NO. 2014-001507

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals this 25th day of August, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of August, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021