

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Robin B. Stilwell, Circuit Court Judge

S.C. Supreme Court

Case No. 08-CP-23-3131

Court of Appeals Case No.: 2010-175426

SC Sup Ct No: 2015-001984

Robert Duncan McCall, ... Petitioner,

v.

State of South Carolina, ... Respondent.

APPENDIX VOLUME I

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DENIAL OF REHEARING.....	A
OPINION OF COURT OF APPEALS.....	B
PETITION FOR REHEARING.....	C

INDEX

Order of Dismissal	1
Memorandum of Applicant	13
Memorandum of State	22
Application for Post Conviction Relief	33
Return and Partial Motion to Dismiss	42

TRANSCRIPT FROM PCR

Court Reporter's Index	48
Tim Sullivan, Esq.	
Direct	50
Cross	71
Redirect	77
Dr. Allison Foster	
Direct	81
Cross	103
Redirect	110

DIRECT APPEAL MATERIAL

Opinion of Court of Appeals from Direct Appeal	118
Brief of the Appellant	121
Brief of the Respondent	133

EXHIBITS FROM PCR

Applicant's Exhibit 1	162
(Includes transcript from Pre-trial In re Michael H. Motion 191)	
Applicant's Exhibit 2	207
Applicant's Exhibit 3 (Dr. Allison Foster's CV)	217

RECORD ON APPEAL -TRANSCRIPT FROM THE CRIMINAL TRIAL

Original Index to the Record on Appeal	231
Motion made at trial by Defense	236
Court Reporter's Index to the Trial Transcript	257

SUPPLEMENTAL RECORD ON APPEAL - TRIAL TRANSCRIPT ... 477

Order by Trial Court on Pre-Trial Motion	468
Applicant's SCDC Records and Indictments	487

The South Carolina Court of Appeals

ad

Robert Duncan McCall, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-175426

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.

Paul E. Shultz, Jr.

J.

James E. Cook

J.

Stephen L. McCall

J.

Columbia, South Carolina

cc:

J. Falkner Wilkes, Esquire
Karen Christine Ratigan, Esquire
Alan McCrory Wilson, Esquire
John Walter Whitmire, Esquire

FILED

August 20, 2015

APP. "A"

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Robert Duncan McCall, Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Unpublished Opinion No. 2007-UP-453
Submitted October 1, 2007 – Filed October 10, 2007

AFFIRMED

J. Falkner Wilkes, of Greenville; for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott,
Assistant Attorney General David A. Spencer, of
Columbia; Robert M. Ariail, of Greenville; for
Respondent.

PER CURIAM: Robert Duncan McCall appeals his convictions for the offenses of criminal sexual conduct with a minor in the first degree and committing a lewd act upon a minor. At issue in this appeal is whether the trial judge erred in denying McCall's motion for an independent psychological examination of the victim. We affirm.[1]

FACTS

A grand jury in Greenville County indicted McCall for the offenses of criminal sexual conduct with a minor in the first degree and committing a lewd act on a minor. The victim was McCall's niece by marriage.

APP. B-1

On October 24, 2003, the trial court, Judge Edward W. Miller presiding, held a hearing on McCall's motion to have the victim undergo an independent psychological or psychiatric evaluation. In support of the motion, counsel for McCall noted the following: (1) the victim was a special needs student; (2) the victim went through two rounds of group therapy at a sexual trauma center and was told she could not do a third round; (3) the victim's mother once stated the victim wanted to recant her accusations against McCall; (4) the defense was willing to pay for the evaluation and had identified three psychiatrists who could perform it; (5) the charges against McCall were based in part on incidents allegedly occurring as long as six years before the victim came forward; (7) the indictments were based primarily on statements by the victim and her mother; and (8) there were possible "fantasy issues" between the victim and McCall. Counsel further submitted an affidavit with hearsay evidence that the victim engaged in masturbation and once allowed a cousin to shave off her pubic hair.

In response, the solicitor objected to the motion, noting the victim's handicaps were orthopedic rather than emotional and she was a mainstream student who had achieved good grades and did not have behavior problems. The solicitor further asserted the therapy the victim received was necessitated by the alleged sexual abuse on which the indictments were based and problems associated with her physical disabilities rather than on any emotional or psychological abnormalities. Similarly, the solicitor averred the excessive masturbation could be "associated with a history of sexual abuse." Finally, the solicitor dismissed the shaving incident as a "childhood antic" that was not indicative of any sexually deviant behavior on the victim's part.

By written order dated October 24, 2003, Judge Miller denied McCall's motion for an independent evaluation of the victim. In the same order, however, he ordered the State "to turn over any and all records of psychological evaluation of the Victim as soon as possible" and granted McCall "leave to revisit this issue if review of these documents shows a compelling need for psychological evaluation of the Victim."

Following a trial by jury before Judge C. Victor Pyle on January 12-15, 2004, McCall was convicted of both offenses and received concurrent sentences of twenty years on the charge of first-degree criminal sexual conduct with a minor and fifteen years on the charge of lewd act on a minor. This appeal followed.

LAW/ANALYSIS

Relying on In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004), both at trial and on appeal, McCall asserts his motion to have the victim undergo an independent evaluation should have been granted. In addition to the arguments he raised during the pre-trial hearing, he also argues on appeal that, during the trial, the victim's allegations changed dramatically from what she related during the investigation. Finally, McCall notes that, contrary to Judge Miller's instructions, no treatment records for the victim had been made available to him. We hold McCall failed to preserve his arguments for appellate review.

A trial judge has the discretion "to order a psychological examination in cases in which the child is the complaining victim" upon a showing of "compelling need." In re Michael H., 360 S.C. at 551-52, 602 S.E.2d at 735. The trial judge, however, must have the opportunity to determine whether such an examination is warranted in a particular case. Id. at 546, 602 S.E.2d at 732.

Like McCall, the defendant in Michael H. unsuccessfully moved before the final hearing took place to have the complaining witness submit to a psychological evaluation. Id. at 544, 602 S.E.2d at 731. Unlike McCall, however, the defendant in Michael H. moved again to have the complainant submit to a psychological evaluation after a clinical psychologist treating the complainant testified at trial and defense counsel discovered he had not received notes concerning reports by the complainant that "he [the complainant] had been hearing voices in his head for some time." Id. at 544-45, 602 S.E.2d at 731.

In contrast, during the jury trial in the present case, defense counsel made only a passing reference to his prior motion to have the victim evaluated, stating at the beginning of the hearing, "And just for the record I would like to note that I still objected to that ruling just to protect myself." At no time did defense counsel expressly argue that the inconsistencies between the victim's trial testimony and her statements during the investigation warranted an order for her to submit to a psychological evaluation, and we see no way to construe counsel's statements to encompass such an assertion. Similarly, the record does not show any attempt by the defense to compel the State to release the victim's treatment records. See State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005), cert. granted (Oct. 19, 2006) ("A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve the issue for review."). Because the trial judge never had the opportunity to consider, much less rule on, whether the information elicited during the trial would constitute a compelling reason to order a psychological evaluation of the victim or whether McCall was unjustifiably deprived of access to the victim's treatment records, we cannot address these issues on appeal.

AFFIRMED.

ANDERSON and THOMAS, JJ., and GOOLSBY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2010-175426
Circuit Court Case No. 08-CP-23-3131

Robert Duncan McCall, ... Petitioner,
v.
State of South Carolina, ... Respondent.

PETITION FOR REHEARING

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Counsel for Petitioner

PETITION

Now comes the Petitioner who moves this Court to reconsider its decision in this case and grant a rehearing based on the following:

The Petitioner respectfully submits that this Court has misapprehended the testimony of Dr. Foster, the Petitioner's expert witness. Petitioner further respectfully submits that this Court's opinion fails to properly apply the Supreme Court's ruling in the case of In re Michael to the facts of this case.

The Court's opinion draws an improper distinction between the nature of the evaluation to which Dr. Foster testified as necessary in this case, and the evaluation held to be necessary under In re Michael. The testimony of Dr. Foster clearly indicated that the prosecutrix should have been subject to a thorough evaluation *as was sought by the defense through the pre-trial motion*. (App. p. 103, l. 4-16). The pretrial motion explicitly sought an evaluation under In re Michael. (App. p. 236). This Court, as did the PCR court, focused on the use of the term forensic evaluation, and misapprehends the nature and purpose of the term as Dr. Foster used it. The term forensic evaluation as used by Dr. Foster included the initial psychological evaluation that the defense sought to have under In re Michael. Dr. Foster testified that the forensic evaluation to which she referred was the question raised in the defense's In re Michael motion. (App. 103, l. 12-16). Dr. Foster also went into detail as to the applicability of In re Michael to the facts of the present case. Dr. Foster further testified that the purpose of a forensic interview included the mental status concern as addressed in In re Michael. (App. 96). Dr. Foster further explained that the forensic evaluation explored cognitive issues as well as potential psychological issues. (App. 96, l. 3-8). This is precisely the examination addressed in In re Michael, and exactly the examination sought by the defense in this case.

Dr. Foster addressed the factual basis which necessitated further examination of the prosecutrix in this case.¹ At the PCR it was made clear that the questions Dr. Foster were being asked were directed to show the need for the evaluation the defense sought by way of the In re Micheal motion. (App. 102, l. 16-21). Obviously, Dr. Foster could not give an opinion as to how much testing might be required or, what an evaluation of the prosecutrix would reveal, without actually doing an initial evaluation. Nevertheless, the record shows that based on the evidence available at the time of the pre-trial hearing and later at the trial, that an initial evaluation was appropriate and necessary. (App. 102, l. 16-App. 102, l. 2).

Q. Now, to be clear, my questions are trying to drive at the ability or the factors that are relevant to a determination whether the motion was necessary. There's no way for me to ask you what the results would be, correct?

A. Correct.

Q. But at the time from the things that you have heard today and the things that you have seen that we put into evidence, would there have been enough basis for an expert to opine that a forensic evaluation was appropriate and necessary?

A. I believe that to be the case, yes.

(App. P. 102, l. 16-P. 103, l. 2).

Based on the evidence existing prior to the trial, Dr. Foster opined that a thorough expert evaluation, *as was sought by Mr. Sullivan's motion*, was necessary in this case. (App. 103, l. 4-16). Dr. Foster clearly understood the case of In re Micheal, and the nature of the evaluation it required. Dr. Foster's use of the broad term of forensic evaluation clearly encompassed the psychological evaluation contemplated under In re Micheal.

¹Appellant's Brief sets forth the detailed factual analysis.

In this case the Court erred in drawing an unnecessary distinction between the term “forensic evaluation” as used by Dr. Foster, and the evaluation required under In re Micheal. Dr. Foster clearly was testifying that an evaluation of the prosecutrix was appropriate given her understanding of the evidence, and the issues addressed in the In re Michael case. Dr. Foster testified that the prosecutrix should be evaluated by a licensed Master’s level or Doctorate level individual “who could have met this child would have been able to appraise the need for further evaluation such as neuro-psychological testing or a psychiatric consult or whatever that evaluator might have deemed appropriate, but at least that way a mental health professional who specializes in this are would have been able to make that determination about what else is needed if anything.” (App. 108, l. 2-12). Dr. Foster indicated that she had reviewed material that would have been available to the defense at the time of the pre-trial motion, and other material that would have become available at the time of the trial. Dr. Foster testified that the information available at the time of the pretrial was sufficient to opine that an evaluation was necessary in this case. (App. 104-105;).

Q. So based on the lack of a video taped interview, the police report, Dr. Henderson’s reports and the IEP’s, looking at all that in toto, if you had been consultant, you would have said you need an evaluation. That’s basically what you’re saying?

A. Yes.

(App. 106, l. 3-8).

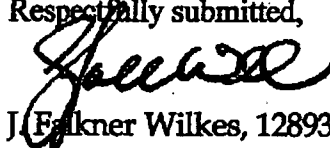
The forensic evaluation, as explained by Dr. Foster, is the initial evaluation of the prosecutrix by an Master’s or Doctorate level expert to evaluate the cognitive, psychological, and other factors involving the prosecutrix that might affect her ability to testify accurately. This is

the initial step, and integral part, of the evaluation contemplated under In re Michael. (App. 108).

Dr. Foster was speaking to the same process afforded in In re Michael. This Court therefore errs in making a distinction between the evaluation Dr. Foster indicated was necessary in this case and the relief provided in In re Michael.

Wherefore, the Petitioner moves this Court to reconsider its decision and grant a rehearing in this case.

Respectfully submitted,



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July 29, 2015.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Robert Duncan McCall,)
S.C.D.C. No. 299164,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2008-CP-23-3131

ORDER OF DISMISSAL

FILED
JUL 1 2008
CLERK OF COURT
GREENVILLE COUNTY
SOUTH CAROLINA

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 28, 2008. The Respondent made a return and partial motion to dismiss on August 6, 2008. An evidentiary hearing was held on May 25, 2010, at the Greenville County Courthouse. The Applicant was present and represented by J. Falkner Wilkes, Esquire. Karen Ratigan, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Dr. Allison Foster and the Applicant's trial counsel, C. Timothy Sullivan, Esquire, testified at the PCR hearing. The Court had before it the trial transcript, records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, the Respondent's return and the appellate records. Also before the Court were post-trial memoranda submitted by the parties at the Court's request.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the February 2003 term of the Greenville County Grand Jury for first-degree criminal sexual conduct (CSC) with a minor (2003-GS-23-1234) and at the October 2003 term for lewd act upon

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a child (2003-GS-23-7589. He was represented by C. Timothy Sullivan, Esquire.

After the State called the case to trial, the Applicant was found guilty. On January 15, 2004, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty (20) years for first-degree CSC with a minor and fifteen (15) years for lewd act upon a child.

A notice of appeal was filed at the South Carolina Court of Appeals. J. Faulkner Wilkes, Esquire, perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. McCall, Op. No. 2007-UP-453 (S.C. Ct. App. filed October 10, 2007).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failed to "properly prepare, present, raise and preserve the issue of psychological examination of a minor witness."
 - b. Failed to "properly investigate, present, raise and preserve the issues relating to the competency of a minor witness."
 - c. Failed to "properly investigate the facts of the case, prepare and present pre-trial motions, and present a viable defense."
 - d. Failed to "properly object to improper questioning of the minor witness and to further move for appropriate relief on such questioning including requesting relief at the time that a jury question arose."
 - e. Failed to "properly object to the improper testimony relating to Sybil Hill as well as any records relating to Hill."
 - f. Failed to properly investigate the case and "effectively cross-examine the witnesses."
 - g. Failed to object to "the use of a 'translator' for the minor child where the translator neither took . . . nor complied with the oath or obligation to translate accurately and verbatim."
 - h. Failed to "properly object and preserve the issue of the prosecution's leading questions to the minor child."
 - i. Failed to "properly object to the admissibility of evidence relating to Sybil Hill, her report, analysis, or statements."
2. Failure of the State to provide discovery:
 - a. "Failure to comply with rules of discovery and prior orders of the Court by failing to obtain and provide material and information

which the State was obligated to disclose including information relating to facts surrounding the condition of the minor witness and subject of the Defendant's motion for examination."

- b. "Failure to comply with the rules of discovery and prior orders of the Court by failing to obtain and provide material and information which the State was obligated to disclose including information relating to Sybil Hill, her report, analysis or statements, including but not limited to any statements or information which Hill might have provided any agent of the State."

At the PCR hearing, the sole issue the Applicant proceeded upon was whether trial counsel properly argued and addressed whether the minor victim should have received a psychological evaluation. As none of the other issues raised in the PCR application were corroborated with evidence or testimony at the PCR hearing, this Court finds the Applicant has abandoned those issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under

prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

A. Pre-Trial Motion and Trial Testimony

The Applicant was indicted for sexually abusing his physically disabled niece over the course of seven years. In the course of the investigation, the victim indicated the Applicant digitally penetrated her vagina and inserted his penis into her rectum on several occasions. The Applicant gave a statement in which he admitted one instance of digital penetration.

On September 5, 2003, trial counsel filed a motion for "an Order requiring the victim to submit to an individual psychological evaluation," and a hearing was held on October 24, 2003, before the Honorable Edward W. Miller. Trial counsel asked for "a psychological and psychiatric exam of the victim" because he believed the victim had some fantasy issues related to the Applicant. (Hearing transcript, p.4; pp.5-6; pp.9-10). Trial counsel argued the defense would pay for the evaluation and that he had the names of three psychiatrists who could potentially perform the evaluation. (Hearing transcript, p.7). Trial counsel argued he wanted to have the victim evaluated because he was "not sure how much of this is the girl and how much is outside influence. I'd like to have an exam without the family there where she and somebody could talk about it." (Hearing transcript, p.9). The assistant solicitor countered that while the

victim had physical and speech disabilities, she was competent and did not have any mental disabilities. (Hearing transcript, pp.12-15). The assistant solicitor stated that Linda Hutton, a social worker who had worked with the victim, indicated she had not referred the victim for any psychological testing. (Hearing transcript, pp.16-17). Judge Miller denied the motion for an independent psychological examination of the victim. (Hearing transcript, p.19; pp.21-22).

The case was called to trial less than three months later. Prior to opening arguments, trial counsel informed the trial judge of the motion hearing for "having a independent psychological evaluation on the victim and Judge Miller denied that motion. And just for the record I would like to note that I still objected to that ruling just to protect myself." (Trial transcript, pp.61-62). After the trial began, the victim testified the Applicant touched her in her "front place" and "put his penis in [her] butt" several times. (Trial transcript, pp.84-87; pp.89-91; pp.96-97; pp.99-101). The victim's cousin testified she saw the victim and the Applicant alone in a room together after one of these incidents and that the victim "seemed scared. She was kind of upset." (Trial transcript, pp.112-16). Investigator Henderson, Sergeant Hudgins, and the Applicant testified about the statement he gave police in which he admitted to digitally penetrating the victim. (Trial transcript, pp.208-15; pp.237-39; pp.294-301).

B. Post-Conviction Relief Hearing Testimony

Trial counsel testified he submitted a pre-trial motion for a psychological evaluation of the victim. Trial counsel testified he filed this motion based on the victim's age and what the Applicant had told him – that the victim had a crush on him and engaged in excessive masturbation. Trial counsel testified he did not attach any medical records (from the discovery materials) to the motion because those records detailed possible sexual abuse, not potential psychological issues. Trial counsel testified that at the time of the motion hearing, he did not

5
132

have Linda Hutton's report. Trial counsel stated that, regardless, Hutton's report did not include a finding of sexual abuse. Trial counsel testified he did not hire an expert to review the victim's school and medical records. Trial counsel stated there was nothing in any of the discovery materials that positively indicated sexual abuse. Trial counsel stated he did not formally renew his motion – or expand upon it – before Judge Pyle because he believed one judge could not overrule the holding of another. In any event, trial counsel testified he could not say whether an evaluation would have helped in this case, as it would not have changed the victim's testimony.

Dr. Allison Foster, who has a Ph.D. in clinical psychology, testified as an expert witness for the Applicant. Dr. Foster reviewed several records in this case, including: the incident and supplemental reports, the summary of the interview with the victim, Dr. Henderson's report, Hutton's report, trial testimony regarding the victim's competency, the victim's school records and the juror note given to the trial judge. Dr. Foster stated that in her opinion, if an expert witness had reviewed these documents before the trial, they would have recommended a forensic evaluation of the victim. Dr. Foster stated she believed the requirements of In re Michael H¹ would have been met in this case. Dr. Foster stated that as the victim had some handicaps, it elevated the need for a forensic evaluation. Dr. Foster also stated that both the victim's school records and comments in the reports about the victim's mother indicated a need for a forensic evaluation. Dr. Foster specifically stated she was testifying regarding a forensic evaluation, not a psychological evaluation. Dr. Foster also specifically stated she had no opinion as to what the results of a forensic evaluation would be.

C. Findings and Conclusions

This Court finds trial counsel's testimony is credible. Regarding the issue argued by the

¹ 360 S.C. 540, 602 S.E.2d 729 (2004).

Applicant in the evidentiary hearing, this Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation and was thoroughly competent in his representation.

This Court finds the Applicant did not meet his burden of proving trial counsel failed to make a proper, comprehensive argument in moving for a psychological evaluation of the victim. This Court finds trial counsel did not err in how he handled this issue. Trial counsel testified he requested the evaluation – not because of anything in the discovery materials – but based on information relayed to him from the Applicant. This Court notes there nothing in the discovery materials that could have been – but was not – argued in support of the request for an evaluation of the victim.

This Court finds Dr. Foster's testimony cannot be given much weight. Several documents relied upon by Dr. Foster in reaching her conclusion that an evaluation was necessary were not in existence at the time of the motion hearing. Dr. Foster admitted she had examined social worker Linda Hutton's findings – which evaluated the victim's social interactions. Hutton's report and/or conclusions, however, were not available when trial counsel argued his motion.² Further, Dr. Foster admitted she reviewed portions of the trial transcript and a note sent from a juror to the trial judge. Clearly, these items were not available at the time of the pre-trial motion hearing.

Furthermore, this Court finds Dr. Foster improperly characterized the items that were available at the time of the motion hearing – the victim's school records, Dr. Henderson's report, and the incident and supplemental reports – when stating trial counsel should have more aggressively referenced those items at the motion hearing.

² Further, while Dr. Foster repeatedly stated Hutton did not perform a forensic evaluation of the victim, it should be noted Hutton never testified she performed such an evaluation. Rather, Hutton stated she counseled the victim in her capacity as a clinical social worker. (Trial transcript, pp.176-78).

1. School records. The Individualized Education Program (IEP) records indicate the victim had received grades of As and a B in a nine-week period. Dr. Foster stated the IEP records, however, indicated the victim had performed below grade level in the areas of reading recognition, reading comprehension and written expression in an achievement battery test. Dr. Foster stated the scores indicated the victim needed a forensic evaluation. This Court finds this is a misinterpretation of the IEP records. Under the "Findings" section, it noted that "[b]ased on her report card grades and her performance in her academic classes, [the victim] is working at a higher grade level than these achievement scores indicate. [The victim]'s teachers feel that her difficulties with attention and distractability affect her performance on tests. For this reason, there is some inconsistency in her test scores." Therefore, there was no reason for trial counsel to reference the IEP records to Judge Miller to buttress his argument for a psychological evaluation. Further, this Court does not find compelling Dr. Foster's assertion that the fact that the victim was special-needs in some way elevated the need for an evaluation.
2. Dr. Nancy Henderson's report. Trial counsel testified this report concerned possible sexual abuse of the victim, not potential psychological issues. The report noted the victim's mother was present during the interview. The report also noted the victim's mother said that after the victim had a vaginal infection 6 years earlier, the prior doctor had "concerns" of possible abuse. Dr. Foster indicated her concerns about the mother's comment and that it was another potential red flag that would merit a forensic evaluation. This Court finds no such conclusion should be drawn from that document. The victim in this case has, in addition to

her orthopedic disability, neuromuscular issues that affect her speech. It was proper, therefore, for the victim's mother to be present during the interview and assist Dr. Henderson in gathering information. Dr. Henderson even noted in her report that the victim "agreed to help by letting us no [sic] if any changes needed to be made" to the information.

3. Incident and supplemental reports. The incident and supplemental reports noted the incidents of abuse that were relayed to Investigator Henderson. The reports stated the victim was taken to a doctor 6 years earlier and the possibility of sexual abuse was raised. The reports stated the victim's mother took her to two doctors at that time and that the second doctor stated "they might be talking to [sic] much around the victim." Dr. Foster indicated this was a potential problem because the victim's mother could have been shaping the victim's testimony. This Court finds it unlikely this one statement in the report would have alerted an expert that an evaluation of the victim should be performed. If this were the standard for ordering such evaluations, it seems likely one would be ordered for every child who complained of being sexually abused. Further, this Court finds it also unlikely that the outcome of the motion hearing would have been different if trial counsel had pointed out this statement to Judge Miller.

When taken together with her misinterpretation of the facts in the discovery materials, it is clear Dr. Foster's conclusions are purely speculative.

This Court also notes that, while trial counsel moved for a psychological evaluation, Dr. Foster testified she could not opine whether the victim should have received such an evaluation. Rather, Dr. Foster stated she believed the victim should have received a forensic evaluation. By

Dr. Foster's own testimony, these are not interchangeable examinations.

Dr. Foster testified that in her opinion, the Michael H factors were satisfied in this case and that if she had reviewed these materials, she would have opined that a forensic evaluation of the victim was necessary. Initially, this Court notes that Dr. Foster is not qualified to give a legal conclusion about whether a court would have found the Michael H criteria were satisfied in this case. Regardless, this Court finds those criteria were not met. In re Michael H held that in determining whether a criminal defendant has a compelling need for an examination of a child sexual assault victim, the court must consider:

- (1) nature of examination requested and intrusiveness inherent in that examination,
- (2) victim's age,
- (3) resulting physical and/or emotional effects of examination on victim,
- (4) probative value of examination to issue before court,
- (5) remoteness in time of examination to alleged criminal act, and
- (6) evidence already available for defendant's use.

360 S.C. at 547, 602 S.E.2d at 732-33. At least two of these factors would have weighed against ordering an evaluation of the victim. Such an exam would have been of little probative value in a case where the Applicant gave a voluntary statement that he had digitally penetrated the victim's vagina. Further, at the time the case was brought to trial, the first incident of abuse occurred approximately 7-8 years before. As such, the issue of remoteness would have come into play.

This Court notes that Dr. Foster was not able to provide an opinion regarding what the results of a forensic evaluation of the victim would have been. As such, the Applicant failed to prove how the lack of such evaluation prejudiced his case and whether, if trial counsel had presented the issue differently, the outcome of the proceedings would have been different. As discussed supra, there was nothing in the discovery materials available at the time of the motion hearing that trial counsel should have placed additional emphasis upon when arguing the motion to Judge Miller. Further, Dr. Foster's testimony is largely speculative because it is based upon

numerous documents not in existence at the time of the motion hearing.

Accordingly, the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. The Applicant has also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. The Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules

for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 3 day of September, 2010.



Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

IN THE STATE OF SOUTH CAROLINA	) COURT OF COMMON PLEAS
IN THE COUNTY OF GREENVILLE	) 2008-CP-23-03131
	) POST CONVICTION RELIEF
Robert Duncan McCall, 299164,	)
	) MEMORANDUM OF APPLICANT
v.	)
	)
State of South Carolina.	) ENTERED COMPUTER

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11

This matter came to Court by way of a timely application for post conviction relief. The matter was heard in Greenville County Court of Common Pleas on May 25, 2010. The Applicant was represented by J. Falkner Wilkes of Greenville. The State was represented by Karen Ratigan, Assistant Attorney General. The Applicant seeks relief from conviction and sentence for the offense of Criminal Sexual Conduct with a Minor and Lewd Act on a Minor. The Applicant was represented at trial by Timothy Sullivan of Greenville. The trial concluded on January 15, 2006 with the Applicant's conviction on both charges. A sentence of twenty years on the charge of Criminal Sexual Conduct with a Minor and a concurrent fifteen year sentence on the charge of Lewd Act on a Minor was imposed by the Hon. C. Victor Pyle. A direct appeal was timely filed. The Court of Appeals affirmed Applicant's convictions in an unpublished opinion. The Applicant is presently in the custody of the South Carolina Department of

Corrections.

The Applicant in this case alleges that trial counsel rendered ineffective assistance when he failed to properly raise and present evidence and argument to support an independent psychological evaluation of a minor under *In Re Micheal*. Although the Applicant's trial attorney attempted to raise the issue *in limine*, he failed to present critical information necessary to his motion. He further failed to seek the advice or testimony of an expert witness. Although denied *in limine*, the issue was left open sufficiently for counsel to pursue it further prior to trial. He did not do so. Counsel made a passing reference to the issue at trial but did not raise it in a meaningful manner. Although a direct appeal was pursued on the issue, the Court of Appeals ruled the issue not sufficiently preserved by trial counsel for appellate review.

At the post conviction relief hearing the Applicant presented evidence which was presented at the hearing *in limine*, as well as additional evidence which counsel could have, but clearly failed to present.

In re Michael sets forth the parameters for determining whether a psychological evaluation of a child witness is necessary in a criminal case. Applicant has established that such an evaluation was necessary in this case, and that it could have been established at the time of the *in limine* motion or at trial

had counsel properly pursued the issue.

Prior to the trial Applicant's counsel was provided with documentation which indicated that the minor child had exhibited unusual sexual behavior, had unusual behavior with another minor, had severe physical limitations as well as a severe speech impediment. Counsel also had been provided with school records which showed the child subject to an individual education plan. Records showed that although in the seventh grade, the minor child tested at grades three and four on standardized tests. Trial counsel also had in his possession prior to trial medical records which showed that the child had been taken to numerous doctors by the mother over a long period of time based on mother's belief of child abuse. Counsel had a police report which indicated that one doctor had even commented that the mother was talking to much in front of the child about her suspicion as to molestation of the minor. The medical records indicated that while one doctor noted no history of sexual abuse, the mother took the child to another doctor within days for a second opinion as to sexual abuse. Medical records further showed that the physician that performed the physical exam in this case failed to perform any forensic interview or evaluation based on a belief that such an evaluation was being performed by the social worker/therapist. The therapist testified that she never performed any forensic or psychological evaluation and she

saw her role as solely therapeutic. Presumably the therapist's testimony could have been discovered before the trial by Applicant's counsel.

The records clearly indicate the absence of any forensic or psychological evaluation. From the record it appears that the lack of any evaluation was the result of a misperception on the part of the physician, based apparently on the mother's statements. The physician's records further indicated that the mother related what she believed to be the facts of molestation to the physician and made the child confirm her statement. The physician never spoke with the minor child directly. Although of this information was available to the Applicant's trial counsel at the time of the hearing Counsel introduced only his own affidavit stating that he had been informed of some unusual behavior on the part of the child. Counsel failed to introduce any other evidence to support his motion under *In Re Michael*. The trial court left the issue open to allow counsel to present additional evidence. But despite that opportunity, counsel failed to offer any further evidence, or to have an expert assist him in the motion.

At the post conviction relief hearing in this case the Applicant offered the testimony of Dr. Allison Foster. Foster, an expert in psychology and forensic interview technique, is employed by the South Carolina Department of Mental Health in Columbia. She is regularly engaged in sexual abuse cases involving

minors and has been the State's expert witness in numerous cases. This is the first case in which Foster has ever testified on behalf of the defense. Dr. Allison was familiar with the *In re Michael* case and the criteria for its application. Dr. Foster testified that based on the information available at the time of the *in limine* hearing an examination as contemplated by *In re Michael* was appropriate and necessary in this case.

Dr. Foster testified as to what a forensic interview or evaluation is, how it is conducted, and why it is conducted. Dr. Foster testified that the absence of such an interview in this case was an important factor in determining that an *In re Micheal* evaluation was necessary in this case. Other important factors included the number of times the mother had taken the child to various doctors and the possibility that she repeatedly talked about her beliefs as to molestation in front of the child. Dr. Foster explained confabulation and the potential that a parent's repeated discussions in front of a child can create a memory of an event that never occurred. Dr. Foster also testified that the likelihood of confabulation is increased by having a parent, the mother in this case, state a scenario in front of the child and then make the child acknowledge that the parent's statement is correct.

Dr. Foster further testified that the standardized test scores of the child in this case showed a potential that the child could be functioning at a cognitive level

of a third or fourth grader in some areas. That the cognitive level of functioning being relevant to the child's ability to perceive, recall and relate facts. And that the child, if cognitively functioning at that level, would be highly susceptible to to parental influence and confabulation. Other facts, including the child's unusual behaviors and inability to communicate without a translator further supported an *In re Michael* evaluation in this case.

Dr. Foster, who teaches forensic interview technique, further testified that the documentation throughout the interview and evaluation process was lacking and not in conformity for the norm for such cases in South Carolina at the time of the allegations. That the absence of adequate documentation, as well as conflicting information in the documentation that did exist, further supported the need for an independent evaluation of the child in this case.

In this case the independent evaluation would have allowed an expert to explore the issue of competency. Specifically, such an evaluation would have allowed for an independent evaluation of the minor's capacity to perceive facts accurately, capacity to recollect and recall, capacity to distinguish truth from falsehood, fantasy from reality, comprehends duty to tell the truth, capacity to communicate based on personal knowledge of the facts.

From the evidence and documentation available none of the factors

supporting credibility are clearly evident. In this case the evidence shows a lack of spontaneity in the child's contact with those who questioned her, there was a lack of detailed description or narrative by the child, there was a lack of a realistic account with the different scenarios, a lack of idiosyncratic sensory detail, a lack of verbatim conversation, and a lack of much in the way of specific memories peripheral to the accusation, and there were hugely inconsistent accounts of the events.

Based on the record, Dr. Foster opined that a psychological evaluation as contemplated by *In re Michael* would have been necessary and appropriate in this case. Most importantly, Dr. Foster testified that Applicant's counsel could have offered expert testimony at the time of his motion *in limine* which would have supported his motion.

The Court in *In re Michael* held that fundamental fairness dictates a defendant be entitled to request a psychological evaluation of a child witness where there is compelling reason to question the complainant's psychological status. A child complainant who is incompetent to testify may not have the capacity to give an accurate account of the facts. Cases involving child victims present special concerns that weigh in favor of allowing judicial discretion to order psychological evaluations. Based on Dr. Foster's testimony regarding

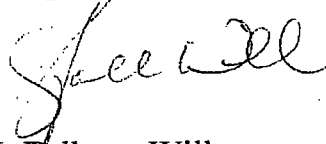
potential cognitive and psychological issues, the Applicant was entitled to request a psychological evaluation of the child. And although privacy of the minor is certainly a concern, as evidenced by the history of repeated examinations initiated by the mother, a single independent psychological examination presents little, if any, further intrusion into the child's privacy.

The requested examination in this case would be the only means by which the Applicant could have effectively made a meaningful determination as to competency of the child. Cross-examination of a complainant who is incompetent to testify, a condition that could be established through a psychological evaluation, would be wholly ineffective in protecting a defendant's right to a fair trial. A complainant who is incompetent to testify may not fully understand or convey the implications of his or her psychological condition on cross examination. *See In re Michael*. This is especially true in the present case as the child's speech impediment required a speech translator, which would only further frustrate meaningful cross-examination as to competency.

Counsel had the ability to present adequate evidence, including expert testimony, supporting the motion for an independent evaluation in this case. He failed to do so. Had he not failed in that regard the Applicant would have been granted the evaluation. The failure was therefore error. The error resulted in the

lack of an independent evaluation which fundamental fairness dictates in this case. Counsel's error therefore caused substantial prejudice to the Applicant. Applying *In re Michael and Strickland v. Washington*, Applicant's counsel failed to render effective assistance in this case. His conviction should therefore be reversed.

Respectfully submitted,



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(864) 271-6035 facsimile

Counsel for Applicant

June 4, 2010.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Robert Duncan McCall,)
S.C.D.C. No. 299164,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2008-CP-23-3131

MEMORANDUM OF LAW

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I. PROCEDURAL HISTORY

The Applicant is presently confined in the Perry Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Greenville County Grand Jury indicted the Applicant at the February 2003 term of General Sessions for first-degree criminal sexual conduct (CSC) with a minor (2003-GS-23-1234) and at the October 2003 term for lewd act upon a child (2003-GS-23-7589). He was represented by C. Timothy Sullivan, Esquire. The State called the case to trial and the Applicant was found guilty. On January 15, 2004, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty (20) years for first-degree CSC with a minor and fifteen (15) years for lewd act upon a child.

A notice of appeal was filed at the South Carolina Court of Appeals. J. Faulkner Wilkes, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. McCall, Op. No. 2007-UP-453 (S.C. Ct. App. filed October 10, 2007).

The Applicant filed this application for post-conviction relief (PCR) on April 28, 2008. The Respondent made its return and partial motion to dismiss on August 6, 2008. An evidentiary

hearing into the matter was convened on May 25, 2010 at the Greenville County Courthouse. The Applicant was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Dr. Allison Foster and the Applicant's trial counsel, C. Timothy Sullivan, Esquire.

II. ISSUES RAISED BY THE APPLICANT

In his PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failed to "properly prepare, present, raise and preserve the issue of psychological examination of a minor witness."
 - b. Failed to "properly investigate, present, raise and preserve the issues relating to the competency of a minor witness."
 - c. Failed to "properly investigate the facts of the case, prepare and present pre-trial motions, and present a viable defense."
 - d. Failed to "properly object to improper questioning of the minor witness and to further move for appropriate relief on such questioning including requesting relief at the time that a jury question arose."
 - e. Failed to "properly object to the improper testimony relating to Sybil Hill as well as any records relating to Hill."
 - f. Failed to properly investigate the case and "effectively cross-examine the witnesses."
 - g. Failed to object to "the use of a 'translator' for the minor child where the translator neither took . . . nor complied with the oath or obligation to translate accurately and verbatim."
 - h. Failed to "properly object and preserve the issue of the prosecution's leading questions to the minor child."
 - i. Failed to "properly object to the admissibility of evidence relating to Sybil Hill, her report, analysis, or statements."
2. Failure of the State to provide discovery:
 - a. "Failure to comply with rules of discovery and prior orders of the Court by failing to obtain and provide material and information which the State was obligated to disclose including information relating to facts surrounding the condition of the minor witness and

- subject of the Defendant's motion for examination."
- b. "Failure to comply with the rules of discovery and prior orders of the Court by failing to obtain and provide material and information which the State was obligated to disclose including information relating to Sybil Hill, her report, analysis or statements, including but not limited to any statements or information which Hill might have provided any agent of the State."

At the PCR hearing, the Applicant proceeded solely on the issue of whether trial counsel was ineffective in failing to properly present argument and testimony to support his pre-trial motion for an evaluation of the victim. This Court instructed both parties to prepare post-hearing memoranda on this issue.

III. FACTS

The Applicant was indicted for sexually abusing his physically disabled niece (the victim) from the time she was five years old until she was twelve. In the course of the investigation, the victim indicated that – on multiple occasions – the Applicant digitally penetrated her vagina and inserted his penis into her rectum. The Applicant gave a statement in which he admitted one instance of digital penetration.

On September 5, 2003, trial counsel filed a motion for "an Order requiring the victim to submit to an individual psychological evaluation." The motion hearing was held on October 24, 2003 before the Honorable Edward W. Miller. Trial counsel asked for "a psychological and psychiatric exam of the victim" because he believed the victim had some fantasy issues related to the Applicant. (Hearing transcript, p.4; pp.5-6; pp.9-10). Trial counsel argued the defense would pay for the evaluation and that he had the names of three psychiatrists who could potentially perform the evaluation. (Hearing transcript, p.7). Trial counsel argued he wanted to have the victim evaluated because he was "not sure how much of this is the girl and how much is outside influence. I'd like to have an exam without the family there where she and somebody

could talk about it.” (Hearing transcript, p.9). The assistant solicitor countered that, while the victim had physical and speech disabilities, she was competent and did not have any mental disabilities. (Hearing transcript, pp.12-15). The assistant solicitor stated that Linda Hutton, a social worker who had worked with the victim, indicated that she had not referred the victim for any psychological testing. (Hearing transcript, pp.16-17). Judge Miller denied the motion for an independent psychological examination of the victim. (Hearing transcript, p.19; pp.21-22).

The case was called to trial before the Honorable C. Victor Pyle, Jr. on January 12, 2004. Prior to opening arguments, trial counsel informed the court of the October 2003 motion hearing “about having a independent psychological evaluation on the victim and Judge Miller denied that motion. And just for the record I would like to note that I still objected to that ruling just to protect myself.” (Trial transcript, pp.61-62). The victim testified the Applicant touched her in her “front place” and “put his penis in [her] butt” several times. (Trial transcript, pp.84-87; pp.89-91; pp.96-97; pp.99-101). The victim’s cousin testified she saw the victim and the Applicant alone in a room together after one of these incidents and that the victim “seemed scared. She was kind of upset.” (Trial transcript, pp.112-16). Investigator Lorraine Henderson, Sergeant Tony Hudgins, and the Applicant testified about the statement he gave police in which he admitted to digitally penetrating the victim. (Trial transcript, p.208-15; pp.237-39; pp.294-301).

At the PCR hearing, trial counsel confirmed he had submitted a pre-trial motion for a psychological evaluation of the victim. Trial counsel testified he filed this motion based on the victim’s age and what the Applicant had told him – that the victim had a crush on him and engaged in excessive masturbation. Trial counsel testified he did not attach any medical records (from the discovery materials) to the motion because those records detailed possible sexual

abuse, not potential psychological issues. Trial counsel testified that, at the time of the motion hearing, he did not have Linda Hutton's report. Trial counsel stated that, regardless, Hutton's report did not include a finding of sexual abuse. Trial counsel testified he did not hire an expert to review the victim's school and medical records. Trial counsel stated there was nothing in any of the discovery materials that positively indicated sexual abuse. Trial counsel stated he did not formally renew his motion – or expand upon it – before Judge Pyle because he believed one judge could not overrule the holding of another. In any event, trial counsel testified he could not say whether an evaluation would have helped in this case, as it would not have changed the victim's testimony.

Dr. Allison Foster, who has a Ph.D. in clinical psychology, testified as an expert witness for the Applicant. Dr. Foster reviewed several records in this case, including: the incident and supplemental reports, the summary of the interview with the victim, Dr. Henderson's report, Hutton's report, trial testimony regarding the victim's competency, the victim's school records, and the juror note given to the trial judge. Dr. Foster stated that, in her opinion, if an expert witness had reviewed these documents before the trial, they would have recommended a forensic evaluation of the victim. Dr. Foster stated she believed the requirements of In re Michael H¹ would have been met in this case. Dr. Foster stated that, as the victim had some handicaps, it elevated the need for a forensic evaluation. Dr. Foster also stated that both the victim's school records and comments in the reports about the victim's mother indicated a need for a forensic evaluation. Dr. Foster specifically stated she was testifying regarding a forensic evaluation, not a psychological evaluation. Dr. Foster also specifically stated she had no opinion as to what the

¹ 360 S.C. 540, 602 S.E.2d 729 (2004).

results of a forensic evaluation would be.

IV. LAW/ANALYSIS

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Trial counsel did not err in how he handled this issue. Trial counsel testified he requested the evaluation – not because of anything in the discovery materials – but based on information relayed to him from the Applicant. And contrary to the Applicant’s argument, there was nothing in the discovery materials that could have been pointed out to Judge Miller in support of the request for an evaluation of the victim.

A.

1. School records. Trial counsel testified that, while he did not specifically recall receiving the victim’s school records (the Individualized Education Program records) he believed he would have received them. The Individualized Education Program (IEP) records indicate the

victim (who was in seventh grade at the time) had received an A in literature, mathematics, science, and social studies and a B in language arts for that nine-week grade period. Dr. Foster stated the IEP records, however, indicated the victim had performed below grade level in the areas of reading recognition, reading comprehension, and written expression in an achievement battery test. Dr. Foster stated the scores were a red flag, of sorts, that would have indicated the victim needed a forensic evaluation. This is a misinterpretation of the IEP records. Under the "Findings" section related to the low scores on the achievement battery test, it noted that:

[b]ased on her report card grades and her performance in her academic classes, [the victim] is working at a higher grade level than these achievement scores indicate. [The victim]'s teachers feel that her difficulties with attention and distractibility affect her performance on tests. For this reason, there is some inconsistency in her test scores.

It is doubtful, therefore, that trial counsel would have specifically referenced the victim's school/IEP records to Judge Miller in order to buttress his argument that the victim needed a psychological evaluation. Further, Dr. Foster's assertion that the fact that the victim was special-needs in some way elevated the need for an evaluation is preposterous. The victim in this case was making As and Bs as a mainstream middle school student. The fact that she was orthopedically – not mentally – disabled should not automatically warrant an intrusion into her privacy.

2. Dr. Nancy Henderson's report. Trial counsel testified he had this report before the motion hearing. Trial counsel testified it concerned possible sexual abuse of the victim, not potential psychological issues. The report noted the victim was "in process of Forensic Assessment with Linda Hutton" and that the victim's mother was present in the room during the interview. The report also noted the victim's mother told her that, after the victim had a vaginal infection approximately six years earlier, that doctor had "concerns" of possible abuse. Dr.

Foster indicated her concerns that – as noted in Dr. Henderson’s report – the victim’s mother mentioned the victim’s prior vaginal infection raised a suspicion of sexual abuse several years earlier. Dr. Foster seemed to indicate this was another potential red flag that would merit a forensic evaluation. That is not the conclusion that should be drawn from that document. The victim in this case has, in addition to her orthopedic disability, neuromuscular issues that affect her speech. It was entirely proper, therefore, for the victim’s mother to be present during the interview and assist Dr. Henderson in gathering information. Dr. Henderson even noted in her report that the victim “agreed to help by letting us no [sic] if any changes needed to be made” to the information.

3. Incident and supplemental reports. The incident and supplemental reports recounted the incidents of abuse – relayed by both the victim and her mother to Investigator Lorraine Henderson. The reports stated the victim was taken to a doctor approximately 6 years earlier and the possibility of sexual abuse was raised. The reports stated the victim’s mother took her to two doctors at that time and that the second doctor stated “they might be talking to [sic] much around the victim.” Dr. Foster indicated this was a potential problem because it indicated the victim’s mother could have been shaping the victim’s testimony. It strains credulity to think this one statement in the report would have alerted an expert that an evaluation of the victim should be performed. If this were the standard for ordering such evaluations, it seems likely one would be ordered for every child who complained of being sexually abused. Further, it is unlikely that if this single statement had been specifically pointed out to Judge Miller, it would have changed the outcome of the motion hearing.

B.

Dr. Foster’s testimony in this matter should not be given much – if any – weight by this

Court. It should be noted that several documents relied upon by Dr. Foster in reaching her conclusion that an evaluation was necessary were not in existence at the time of the motion hearing. Dr. Foster admitted that she had examined Hutton's findings – which evaluated the victim's social interactions. Hutton's report and/or conclusions, however, were not available when trial counsel argued his motion.² Further, Dr. Foster admitted she reviewed portions of the trial transcript and a note sent from a juror to the trial judge. Clearly, these items were not available at the time of the pre-trial motion hearing. When taken together with her misinterpretation of the facts in the discovery materials, it is clear Dr. Foster's conclusions are purely speculative.

In addition, while trial counsel moved for a psychological evaluation, Dr. Foster testified she could not opine whether the victim should have received such an evaluation. Rather, Dr. Foster stated she believed the victim should have received a forensic evaluation. By Dr. Foster's own testimony, these are not interchangeable examinations.

Dr. Foster testified that, in her opinion, the Michael H factors were satisfied in this case and that, if she had reviewed these materials, she would have opined that a forensic evaluation of the victim was necessary. Initially, it should be noted that Dr. Foster is not qualified to give a legal conclusion about whether a court would have found the Michael H criteria were satisfied in this case. Regardless, they were not. In re Michael H held that, in determining whether a criminal defendant has a compelling need for an examination of a child sexual assault victim, the court must consider:

² Further, while Dr. Foster repeatedly stated Hutton did not perform a forensic evaluation of the victim, it should be noted Hutton never testified she performed such an evaluation. Rather, Hutton stated that she counseled the victim in her capacity as a clinical social worker. (Trial transcript, pp.176-78).

(1) nature of examination requested and intrusiveness inherent in that examination, (2) victim's age, (3) resulting physical and/or emotional effects of examination on victim, (4) probative value of examination to issue before court, (5) remoteness in time of examination to alleged criminal act, and (6) evidence already available for defendant's use.

360 S.C. at 547, 602 S.E.2d at 732-33. At least two of these factors would have weighed against ordering an evaluation of the victim. Such an exam would have been of little probative value in a case where the Applicant gave a voluntary statement that he had digitally penetrated the victim's vagina. Further, at the time the case was brought to trial, the first incident of abuse occurred approximately seven or eight years before. As such, the issue of remoteness would have come into play.

Dr. Foster was not able to provide an opinion regarding what the results of a forensic evaluation of the victim would have been. As such, the Applicant failed to prove how the lack of such evaluation prejudiced his case and whether, if trial counsel had presented the issue differently, the outcome of the proceedings would have been different.

C.

As discussed supra, there was nothing in the discovery materials available at the time of the motion hearing that trial counsel should have placed additional emphasis upon when arguing the motion to Judge Miller. Further, Dr. Foster's testimony is complete speculation that is based upon numerous documents not in existence at the time of the motion hearing.

Accordingly, the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. The Applicant has also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

The Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

V. CONCLUSION

Based upon the foregoing, the Applicant has not met his burden of proving trial counsel was ineffective. The Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, the Applicant has also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. Accordingly, this PCR application should be denied and dismissed with prejudice.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

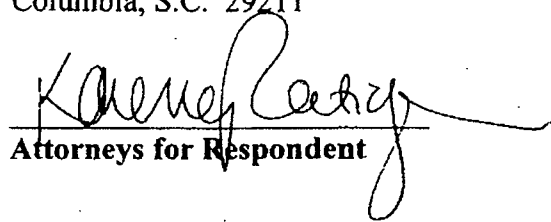
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Columbia, S.C. 29211

By:


Attorneys for Respondent

June 9, 2010

2008-CP-23- 3131

FORM 5

STATE OF SOUTH CAROLINA

County of Greenville

Robert Duncan McCall, 299164

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - 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 Perry Correctional Facility
430 Oaklawn Road, Pelzer, South Carolina
2. Name and location of Court which imposed sentence General Sessions
Greenville County, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 03-GS-23-01234 Committing A Lewd Act on a Minor
 - (b) 03-GS-23-07589 Criminal Sexual Conduct with a Minor, 1st Degree

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence: January 15, 2006.
- (a) Criminal Sexual Conduct with a Minor - twenty years
- (b) Lewd Act on a Minor - fifteen years concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty jury trial _____
- (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. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Attachment A
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attachment 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? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
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. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

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?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

(b) the proceedings in which each ground was raised:

i. N/A

ii. N/A

iii. N/A

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) The grounds alleged herein are properly alleged here and not on direct appeal.
- (b) _____
- (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

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. Timothy Sullivan
- ii. J. Falkner Wilkes, 638 East Washington St. Greenville, SC 29601
(864) 282-1292; (864) 271-6035 facsimile
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Timothy Sullivan - pre-trial through sentencing
- ii. J. Falkner Wilkes - direct appeal, present proceedings for PCR
- iii. _____

19. State clearly the relief you seek in filing this application:
Reversal of the convictions and sentences of the Applicant.

20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Robert Duncan McCall, 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.

Robert Duncan McCall

SWORN to and subscribed before me this 11th
day of March, 2008.

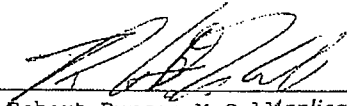
Steven T. McLauchly (L.S.)
Notary Public

My Commission Expires: April 7, 2016

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Robert Duncan McCall, 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.



Robert Duncan McCall Applicant

SWORN or affirmed to and subscribed before me this
11th day of March, 2008.

Steven T. McCauley

Notary Public

My Commission Expires: November 7, 2016

1000 APR 28 P 3:37

Attachment A

1. Ineffective assistance of counsel:

- a. Failure of trial counsel to properly prepare, present, raise and preserve the issue of psychological examination of a minor witness. Counsel failed to discover and/or present evidence supporting a motion for evaluation of a minor witness. Counsel failed to discover and/or present evidence which would further support the motion to evaluate the minor witness which would have been discovered had counsel made a diligent discovery attempts.
- b. Failure of the State to provide discoverable material including the material indicated above of which the State had reasonable notice was related to the Defendant's pre-trial motion(s).
- c. Failure of trial counsel to properly investigate, present, raise and preserve the issues relating to the competency of a minor witness;
- d. Failure of trial counsel to properly investigate the facts of the case, prepare and present pre-trial motions, and present a viable defense in the case;
- e. Failure of trial counsel to properly object to improper questioning of the minor witness and to further move for appropriate relief on such questioning including requesting relief at the time that a jury question arose;
- f. Failure of trial counsel to properly object to the improper testimony relating to Sybil Hill as well as any records relating to Hill;
- g. Failure of trial counsel to properly investigate the case, present evidence, effectively cross-examine the witnesses, and further present a defense in the case.
- h. Failure of trial counsel to object to use of a "translator" for the minor child where the translator neither took neither took nor complied with the oath or obligation to translate accurately and verbatim. Violation of due process based on the foregoing.
- i. Failure of trial counsel to properly object and preserve the issue of the prosecution's leading questions to the minor child. Leading questions were in violation of the rules of procedure as well as a violation of due process and were so egregious to cause a jury question to that effect.
- j. Failure of the trial attorney to properly object to the admissibility of evidence relating to Sybil Hill, her report, analysis, or statements.

2. Failure of the State to provide discovery:

- a. Failure to comply with rules of discovery and prior orders of the Court by failing to obtain and provide material and information which the State was obligated to disclose including information relating to facts surrounding the condition of the minor witness and subject of the Defendant's motion for examination.
- b. Failure to comply with the rules of discovery and prior orders of the Court by failing to obtain and provide material and information which the State was obligated to disclose including information relating to Sybil Hill, her report, analysis or statements, including but not limited to any statements or information which Hill might have provided any agent of the State.

3. Applicant reserves the right to amend his application.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2008-CP-23-3131
COUNTY OF GREENVILLE	)	
	)	
Robert Duncan McCall,	)	
S.C.D.C. No. 299164,	)	
	)	
Applicant,	)	
	)	RETURN AND PARTIAL
v.	)	MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed April 28, 2008, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the February 2003 term of General Sessions for first-degree criminal sexual conduct (CSC) with a minor (2003-GS-23-1234) and at the October 2003 term for lewd act upon a child (2003-GS-23-7589). C. Timothy Sullivan, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On January 15, 2004, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty (20) years for first-degree CSC with a minor and fifteen (15) years for lewd act upon a child.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. J. Faulkner Wilkes, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. McCall, Op. No. 2007-UP-453 (S.C. Ct. App.

filed October 10, 2007).

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failed to "properly prepare, present, raise and preserve the issue of psychological examination of a minor witness."
 - b. Failed to "properly investigate, present, raise and preserve the issues relating to the competency of a minor witness."
 - c. Failed to "properly investigate the facts of the case, prepare and present pre-trial motions, and present a viable defense."
 - d. Failed to "properly object to improper questioning of the minor witness and to further move for appropriate relief on such questioning including requesting relief at the time that a jury question arose."
 - e. Failed to "properly object to the improper testimony relating to Sybil Hill as well as any records relating to Hill."
 - f. Failed to properly investigate the case and "effectively cross-examine the witnesses."
 - g. Failed to object to "the use of a 'translator' for the minor child where the translator neither took . . . nor complied with the oath or obligation to translate accurately and verbatim."
 - h. Failed to "properly object and preserve the issue of the prosecution's leading questions to the minor child."
 - i. Failed to "properly object to the admissibility of evidence relating to Sybil Hill, her report, analysis, or statements."
2. Failure of the State to provide discovery:
 - a. "Failure to comply with rules of discovery and prior orders of the Court by failing to obtain and provide material and information which the State was obligated to disclose including information relating to facts surrounding the condition of the minor witness and subject of the Defendant's motion for examination."
 - b. "Failure to comply with the rules of discovery and prior orders of the Court by failing to obtain and provide material and information

which the State was obligated to disclose including information relating to Sybil Hill, her report, analysis or statements, including but not limited to any statements or information which Hill might have provided any agent of the State.”

III.

The Respondent asserts the Applicant’s allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant’s attorney rendered effective assistance well within the standard of “reasonableness within professional norms” for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at

2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The 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) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent notes the Applicant has raised issues regarding "the failure of the State to provide discovery." The Respondent submits these issues that are not cognizable in a PCR action. Rather, these allegations raise direct appeal issues that are 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). 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). The Respondent submits the proper avenue to raise these particular issues was through direct appeal. The Applicant could have raised these issues on appeal and the failure to do so has waived these allegations as grounds for relief.

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held solely on the issues of ineffective assistance of trial counsel that were raised in the application. The Respondent further requests all allegations regarding "the failure of the State to provide discovery" be denied as improper post-conviction relief issues.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

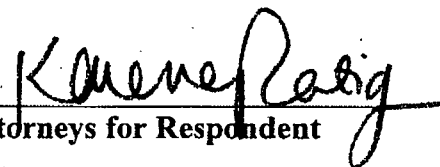
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

August 6, 2008

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) COURT OF COMMON PLEAS
3) 2008-CP-23-3131
4 Robert McCall) TRANSCRIPT OF RECORD
5 vs)
6 State of South Carolina)
7 _____)

8 May 25, 2010
9 Greenville, South Carolina

10 B E F O R E:

11 THE HONORABLE ROBIN STILWELL, Judge

12 A P P E A R A N C E S:

13 JEFFREY WILKES, Esquire
14 Attorney for the Applicant

15 KAREN RATIGAN, Esquire
16 Attorney for the State
17 Assistant Attorney General

18 Caroline Hiskell
19 Circuit Court Reporter

20 (Hearing taken by Teresa Johnson, transcribed by Caroline
21 Hiskell.)
22
23
24
25

I N D E X

WITNESSES	DR	CR	RED	REC
TIMOTHY SULLIVAN	4	25	31	---
DR. ALLISON FOSTER	36	57	65	---

E X H I B I T S

IDENTIFICATION	ID	IN EVD.
Applicant's		
1 Packet of information	15	15
2 Police report	21	21

Timothy Sullivan - Direct Examination

P R O C E E D I N G S

THE COURT: Ms. Ratigan, could you announce the case.

MS. RATIGAN: Your Honor, if it pleases the Court, this is case of Robert McCall versus the State of South Carolina, Docket Number is 2008-CP-23-3131. Mr. McCall was indicted for first degree sexual conduct with a minor and lewd act upon a child. He was represented on these charges by Mr. Sullivan.

On January 15, 2004, he was convicted of those offenses after a jury trial. Judge Pyle levied concurrent sentences of 20 years for CSC first with a minor, 15 years for lewd act.

Mr. McCall did file an appeal. It was perfected at the Court of Appeals which confirmed those convictions and sentences in October of 2007. The State is ready to proceed, Your Honor.

I would note for the record and for Your Honor's information that the victim is here today. She is the young lady wearing the pink top on the front row and several members of her family are here and they're just here to observe the proceedings today.

THE COURT: Thank you.

Mr. Wilkes, are you ready to proceed, sir?

MR. WILKES: We are, Your Honor. We would

Timothy Sullivan - Direct Examination

1 call Mr. Sullivan to the stand.

2 THE COURT: Yes, sir. If you would come
3 forward please.

4 THE CLERK: Mr. Sullivan, place your left
5 hand on the bible and raise your right hand.

6 TIMOTHY SULLIVAN, having been duly sworn,
7 testified as follows:

8 Thank you. You may be seated. State your
9 name for the record.

10 THE WITNESS: C. Timothy Sullivan.

11 DIRECT EXAMINATION

12 BY MR. WILKES:

13 Q. Mr. Sullivan, did you represent Mr. McCall in the
14 trial of his case?

15 A. I did.

16 Q. And in preparing for his trial, did you go
17 through the available Discovery given to you by the State?

18 A. I did.

19 Q. You made a motion at the time of trial relevant
20 to Emery Michael, do you recall?

21 A. I'm trying to remember. I actually made it prior
22 to that in front of Judge Miller so if it were granted, it
23 wouldn't delay the trial because it wouldn't be
24 dispositive. People were coming from Asheville and
25 Florida and people from out of town so I wanted to have

Timothy Sullivan - Direct Examination

1 the motion before the actually trial and they accommodated
2 me on that.

3 Q. And there was a hearing date before the trial?

4 A. In front of Judge Miller.

5 Q. And at the hearing, you moved for psychological
6 evaluation for the minor child based on Emery Michael?

7 A. I did.

8 Q. I'm going to skip ahead procedurally just to get
9 through the appellate purposes. From the denial of that
10 motion at that time and through trial, appeal was taken,
11 correct?

12 A. From Judge Miller?

13 Q. From the conviction?

14 A. Yeah. I think you filed the appeal after the
15 trial.

16 Q. Correct. And you're familiar with the Opinion in
17 the case?

18 A. I've read through it but I'm not that familiar
19 with it.

20 MR. WILKES: For the Court's reference, I'm
21 referring to an unpublished Opinion in 2007, UP453.

22 BY MR. WILKES:

23 Q. I'll just show you.

24 A. I've got a copy.

25 Q. You've got a copy?

Timothy Sullivan - Direct Examination

1 A. Uh-hum.

2 MR. WILKES: I'm not sure if the Court has
3 all of this in the record everything I'm going through,
4 even though it's probably in the record somewhere. I can
5 introduce each part to make it easier.

6 THE COURT: Let me just -- I'll do a quick
7 inventory of what I do have.

8 Mr. Wilkes, what I do have is a transcript of
9 the hearing in front of Judge Miller and the State does
10 not have that either.

11 BY MR. WILKES:

12 Q. It's my understanding that the State might not
13 have it, but I believe we have the record on appeal and we
14 can refer to it. If there's anything I ask you that you'd
15 like to refer to, I believe, that's included in the
16 record, the motion itself. I'll flip through it. You
17 recall making the motion.

18 A. I do.

19 Q. And you recall making the motion based on
20 information that was available to you at that time?

21 A. I did.

22 Q. Now, your recollection was or is consistent with
23 the Court's ruling that there was -- let me go back.
24 Ultimately the Court of Appeals ruled that the issue is
25 not preserved. Do you agree with that?

Timothy Sullivan - Direct Examination

1 A. That is correct.

2 Q. Now, as far as the issue under Emery Michael
3 being preserved for appellate review, would you agree,
4 simply, that that was in error not to make a timely
5 objection?

6 A. I alluded to it before the trial in front of
7 Judge Pyle.

8 Q. Right.

9 A. I didn't go into the specifics of the motion, but
10 I'd like to preserve that.

11 Q. Right.

12 A. And that's all I did. I did pick that up because
13 in Judge Miller's ruling he said that if they had any
14 information after that to furnish it to me and they did.

15 Q. And what did they give you?

16 A. A report from Bayhill when she was undergoing
17 some psychological evaluations.

18 Q. And did you present any of that to the Court?

19 A. That report did not say anything about any sexual
20 molestation or any opinion thereof or there about. It
21 went into more about her adjusting to school life and her
22 problems with that and her condition.

23 Q. So at the time that you made the motion, you
24 presented certain information that you were aware of?

25 A. At the time of the motion in front of Judge

Timothy Sullivan - Direct Examination

1 Miller, I was relying on a lot of things from the McCall
2 family about her behavior as far as some sexual things and
3 some fantasies and things of that nature.

4 Q. All that which is in the record?

5 A. I don't have that record. I assume it is.

6 Q. Let me show you a few things, if I can. You made
7 a motion, a written motion.

8 A. In front of Judge Miller and there's an
9 affidavit, I think, with it.

10 Q. And there was, thereafter, an Order denying the
11 evaluation?

12 A. Right.

13 Q. And you submitted with it the affidavit that's
14 attached?

15 A. Right.

16 Q. You agree with me that you did not submit the
17 medical records from Discovery. You submitted it on the
18 affidavit.

19 A. That's correct. I didn't have the Bayhill at the
20 time of this I don't think.

21 Q. But you did have some documentation that they
22 gave you from the doctors before regarding ---

23 A. It may have been something about Ms. Hill. I'm
24 not sure.

25 Q. Right, Sybil Hill.

Timothy Sullivan - Direct Examination

1 A. Yeah.

2 Q. And the doctor three days or four days before
3 Sybil Hill or after Sybil Hill?

4 A. There was a Huggins, I believe, from the ER.

5 Q. So at that time you did have those two documents
6 and some other related information that was not submitted
7 along with the affidavit?

8 A. As I recall, there were more to do with the
9 actual abuse more than her psychiatric condition.

10 Q. But there were historical medical stuff?

11 A. Uh-hum.

12 Q. The information that they also provided, that
13 included information from Dr. Henderson.

14 MR. WILKES: May I approach?

15 THE COURT: Sure.

16 BY MR. WILKES:

17 Q. I'm just going to go through this packet with
18 you. The information from Dr. Henderson who did the
19 interview with the child or at least the physical
20 examination ---

21 A. This is from the ER?

22 Q. Right.

23 A. Yeah.

24 Q. Did you have that at the time as well?

25 A. I don't recall when I received that, Mr. Wilkes.

Timothy Sullivan - Direct Examination

1 Q. But you would have received it in Discovery prior
2 to trial?

3 A. It could have been between Judge Miller and the
4 trial but I did have that prior to trial, yes..

5 Q. Now, in going through that, and I'm assuming you
6 read over that information?

7 A. I did.

8 Q. If you will look, and I'll just go through it
9 quickly with you to see if you recognize these documents,
10 the first page of that packet is your motion and the
11 second page is your affidavit.

12 A. Yes.

13 MR. WILKES: All of this, of course, is in
14 the record, Your Honor.

15 BY MR. WILKES:

16 Q. The next page there's the Order from Judge Miller
17 denying it?

18 A. Yes.

19 Q. And then there's a warrant and indictment and
20 then we get to the documents which the State provided you,
21 that is medical records of the child.

22 A. Right.

23 Q. Now, if you will look, and this is on that first
24 page of medical records, do you see where it says, "Monday
25 saw new MD concerned about molestation"?

Timothy Sullivan - Direct Examination

1 A. Is this one dated 6-7-96?

2 Q. Yes, sir.

3 A.. There's a lot of writing on it.

4 Q. It's not far down. It says at the top second
5 opinion.

6 A. Yeah, "Monday, saw new MD."

7 Q. "And concerned about molestation." So that was
8 the document you had at the time prior to trial.

9 A. Right.

10 Q. And the next page is a continuation of that. The
11 following page, which is typed and you turn over a couple
12 of pages where you see the typed page, in this medical
13 report on 6-3-96 also given to you by the State with
14 Discovery, correct?

15 A. Yeah.

16 Q. And in that one it indicated a no known history
17 of molestation...

18 A. I think a lot of the medicals -- yeah, urinary
19 tract infections.

20 Q. UTIs, correct. It indicates where it was
21 discussed possible causes of vaginitis including foreign
22 bodies, poor hygiene and molestation.

23 A. Correct.

24 Q. The document which you had at the time of trial
25 -- prior to trial through Discovery.

Timothy Sullivan - Direct Examination

1 A. Uh-hum.

2 Q Okay. Now, if you'll go to the next page, that
3 has got Dr. Henderson's name on it, Dr. Henderson, MD, the
4 physical exam, correct?

5 A. At the General Hospital.

6 Q. More stuff from Discovery, correct?

7 A. Right.

8 Q. All right. In that, if you'll look a couple
9 pages over where it says, "History of Present Illness,"
10 and there's a written narrative, and I think your copy is
11 redacted too and it's blacked out, it goes on to say the
12 child is in process of forensic examination with Linda
13 Hutton. Do you see that part?

14 A. I see the redacting about the -- is this from the
15 motel?

16 Q. Let me see if we're on the same page.

17 A. It says, "History of present illness," and it's
18 got some ---

19 Q. Yes, it's right here at the top where it mentions
20 that the child is in the process of forensic interview
21 with Linda Hutton.

22 A. Yes.

23 Q. That was a document that you had pre-trial from
24 Discovery, correct?

25 A. Correct.

Timothy Sullivan - Direct Examination

1 MR. RATIGAN: Your Honor, I believe that this
2 packet that Mr. Wilkes is going through is it part of the
3 record on appeal?

4 MR. WILKES: The majority of this, Your
5 Honor, is on the record. The only things -- there are
6 portions that are not and they're going to have to be
7 introduced at some point during this and I've already
8 redacted this.

9 MS. RATIGAN: That was my only question is
10 for some reason our office cannot find our record on
11 appeal so this not necessarily something the Judge has
12 right now?

13 MR. WILKES: Right.

14 THE COURT: That's what I was just asking.

15 MR. WILKES: There is going to be virtually
16 nothing that is not in the record, but anything the Court
17 doesn't have, I will try to get it up to the Court.

18 Your Honor, if I may, I think I've identified
19 the rest of this.

20 BY MR. WILKES:

21 Q. If you will look, other than Discovery, if you
22 will look at the back of that where we get to the
23 transcript portion in the back after those doctor's notes
24 -- well, there's one other thing to identify, the exhibit
25 from the trial, the Court's Exhibit where the jury had the

Timothy Sullivan - Direct Examination

1 question about the prosecutor leading the witness, do you
2 recall that?

3 A. I remember in the record and it got passed up. I
4 don't have that. I don't know where you are with that.

5 Q. It should be right there. That would be the
6 Court's Exhibit from the jury question. Do you remember
7 the juror that was concerned about all of the leading
8 testimony from the witness?

9 A. Yes.

10 Q. That was included in the record and we should
11 have a copy, but if we don't, we've got one there. And
12 the next page indicates the transcript from ---

13 A. Judge Miller.

14 Q. Yes, Judge Miller. That's our pre-trial
15 transcript which sets forth ---

16 A. This is the first time I've seen this.

17 MR. WILKES: We're not going to dispute that
18 that's the transcript.

19 Your Honor, I would just move to introduce
20 the packet and I'll just give the Court what I'm talking
21 about if I have a redacted copy.

22 MS. RATIGAN: We don't have an objection to
23 that, Your Honor. Mr. Wilkes has stated this was all on
24 the record on appeal so it should already be before the
25 Court.

Timothy Sullivan - Direct Examination

1 MR. WILKES: It should be accept for the
2 things he's identified as being the material he was given
3 in Discovery which was not admitted in his motion.

4 THE COURT: Okay.

5 MR. WILKES: And I have redacted these
6 carefully, but if the Court sees anything that I have not
7 redacted -- I'll make that Exhibit 1.

8 THE COURT: Without objection, that packet is
9 introduced as Applicant's Exhibit 1.

10 (Packet marked as Applicant's Exhibit No. 1
11 for identification and admitted into evidence.)

12 Go ahead, Mr. Wilkes.

13 MR. WILKES: Thank you, Your Honor.

14 BY MR. WILKES:

15 Q. If you'll flip over in the Discovery material
16 that you had, there was the IEPs for the child from
17 Greenville County Schools.

18 A. I think I got that after -- oh, reading?

19 Q. The school tests and that sort of thing. It was
20 delivered in Discovery, do you recall seeing that?

21 A. I got the stuff from Bayhill about the school,
22 but I don't -- I'm looking through here. Yes, school
23 records.

24 Q. Do you remember getting that through Discovery?

25 A. No, not --

Timothy Sullivan - Direct Examination

1 Q. Do you have any doubt that's what the State gave
2 you as Discovery?

3 A. If this is what they gave me, yeah, I received it
4 at some time.

5 Q. Which would simply show test scores for the
6 child?

7 A. Yes, in the last page about getting along and
8 things like that. Yes.

9 Q. Now, when you -- you were aware that there was
10 some unusual behaviors or what may have seemed unusual
11 which made you make the motion under Emery Michael?

12 A. That I thought I should make because of the age
13 of the victim and then just to protect the record. At
14 that time I was given information mainly by the McCalls
15 about the defendant and his family that Lauren was doing
16 in school and that she needed assistance in going from
17 classes. But mainly she seemed to be fine and upping her
18 grades but she had these problems with there was some
19 excessive masturbation, some fantasies about Bob and
20 things like that and I thought that may have needed to be
21 examined. So based on what I received from the McCalls is
22 the girl mainly was progressing well in school but she had
23 these other problems.

24 Q. Now, in making your motion, you did not submit
25 any of those prior doctor's notes, the IEP, or any of that

Timothy Sullivan - Direct Examination

1 other information that you had been given in Discovery,
2 correct?

3 A. That's correct. It showed she had been doing
4 well.

5 Q. Well, let me ask you this, did you any at time
6 have an expert witness in psychology, psychiatry, anybody
7 in that field review any documentation to make any
8 determination as to whether or not they could support the
9 position that a forensic examination might be appropriate?

10 A. I hired a psychologist for Bob and I don't recall
11 if they had access to this or not.

12 Q. So as far as you know you did not?

13 A. No.

14 Q. And you did not call any expert witness or any
15 witness at the motion hearing to support the motion?

16 A. No.

17 Q. Now, in looking at Dr. Henderson's report, do you
18 recall where it indicated that Dr. Henderson recorded that
19 Linda Hutton was in the process of a forensic assessment?

20 A. I think that would be the Bayhill. I did not
21 have that at that time.

22 Q. No, I'm not talking -- I'm talking about from the
23 ER, Dr. Henderson, from the initial Discovery response.
24 You looked at it?

25 A. I don't recall. I know there was somebody doing

Timothy Sullivan - Direct Examination

1 some evaluations and I was later given the Bayhill report
2 after this hearing.

3 Q. Did you follow up with Hutton to find out if she
4 did a forensic evaluation before the hearing before the
5 motion?

6 A. One of them I didn't know about. I didn't get
7 the report until afterwards. Part of his Order was to
8 furnish me anything they got between then and trial and I
9 recall that's when I got the Bayhill report. So until
10 then I did not -- I looked at it and they found like it
11 was more like a social thing. They found no evidence of
12 molestation.

13 Q. At the time of the hearing -- not the hearing but
14 the trial -- do you recall the testimony of Dr. Henderson?

15 A. I'd have to look at the record, but I'm sure --
16 she may have been the one who talked about you couldn't
17 tell if there had been tearing and that sort of thing and
18 it could have been healed and that type thing. If you'll
19 refer me to the transcript. I got the transcript here.

20 Q. I've got it too. If you look on Page 186, Line
21 23, I believe, you'll see where Dr. Henderson indicates
22 that she did not do a forensic evaluation or assessment,
23 would you agree with that one?

24 A. On Line --

25 Q. Transcript Number 186, the record on appeal would

Timothy Sullivan - Direct Examination

1 be 138, whichever one you're looking at.

2 A. I've got 186.

3 Q. And at Line 23, Dr. Henderson says what happens
4 was she was in the process of having a forensic interview
5 with Linda Hutton, do you see that.

6 A. Linda Hutton.

7 Q. So both in her history of the initial physical
8 exam and in her testimony, she believed that Linda Hutton
9 was doing a forensic assessment?

10 A. She was doing an assessment, yeah.

11 Q. And do you recall Linda Hutton's testimony at the
12 trial that she did not do a forensic assessment, do you
13 recall that?

14 A. She said she made no opinion about any sexual
15 molestation. She was more looking at it from social
16 interaction with classmates and that type thing,
17 adjustment.

18 Q. If you would look on 179 in specific the line
19 where she says her scope of work did not include a
20 forensic evaluation.

21 A. Of alleged sexual ---

22 Q. Right. Would you agree with me that somewhere
23 along the line they thought a forensic assessment was
24 being done and it was not done apparently?

25 A. There was no evidence in the record that she had

Timothy Sullivan - Direct Examination

1 been molested.

2 Q. No, just as far as the experts one thinking the
3 other one was doing something.

4 A. It wasn't.

5 Q. It was not. Now, assuming that they would have
6 testified to that the motion hearing, these were not
7 called at the motion hearing to support the motion?

8 A. One of them I did not have and one I did have. I
9 had the Henderson and not the Hutton, I think that's
10 correct.

11 Q. But by the time of trial you were aware of
12 Hutton?

13 A. I had everything then.

14 Q. And still at that time there was no indication of
15 a forensic interview by anybody in the case?

16 A. The only thing I had initially was Henderson, the
17 victim, and the mom.

18 Q. Now, you had the initial police report, I
19 believe, in Discovery also?

20 A. I did.

21 Q. And I don't know that that may be part of the
22 record so let me pull it out and let you look at it.

23 A. I've got my file here so I don't know where it is
24 in here.

25 Q. Well, I've got it and I've got it redacted so.

Timothy Sullivan - Direct Examination

1 A. Okay.

2 Q. Let me try to use a redacted version.

3 As far as you know the police report would
4 have been in your possession from Discovery, correct?

5 A. Correct.

6 Q. If you'll look at the second page and I'm going
7 to ask you to see if this is the report that you received.
8 Would that appear to be the police report that you had at
9 the time of the hearing in the trial?

10 A. Yes.

11 Q. And in there --

12 MR. WILKES: I would introduce this as No. 2.

13 MS. RATIGAN: I have no objection, Your
14 Honor.

15 THE COURT: Without objection, the same is
16 introduced as Applicant's No. 2.

17 (Police report marked as Applicant's Exhibit
18 No. 2 for identification and admitted into evidence.)

19 BY MR. WILKES:

20 Q. If you'll look at that page, do you see it begins
21 at the time the plaintiff stated that she took the victim
22 to the doctor back in '96?

23 A. Children's clinic, yes.

24 Q. Now, historically that sets forth some things,
25 but do you see essentially, and I'm paraphrasing because I

Timothy Sullivan - Direct Examination

1 think it speaks for itself, but do you see where it
2 indicates that the mother took the child to a doctor and
3 immediately after took her to another doctor?

4 A. She went to several.

5 Q. And you see it there where it indicates that the
6 officer related in the report where the doctor apparently
7 told the mother that they were talking too much or maybe
8 talking too much in front of the child?

9 A. I see that. The doctor said not to be talking
10 too much around the victim.

11 Q. Now, as far as presenting the motion to the Court
12 as to why it might be necessary to have the psychological
13 evaluation, you did not present the information as to the
14 prior doctor visits and the doctor saying you're talking
15 too much around the child or in front of the child, the
16 Court wasn't aware of that at the time of your motion?

17 A. No, my motion and the affidavit is all I
18 presented.

19 Q. Mr. Sullivan, an affidavit was sealed, was that
20 the affidavit that we have in the record? I'll show you.
21 It was the only one so that was the ---

22 A. It's attached to the motion.

23 Q. Very good, it's in the record. Now, were you
24 aware at the time the possibility that the mother had been
25 repeatedly going to different doctors?

Timothy Sullivan - Direct Examination

1 A. I think that was brought out in trial, yes.

2 Q. And were you aware that there was a possibility
3 that that repeated litany of going to doctors and telling
4 the story might have influenced her testimony?

5 A. I didn't think of it at the time. I didn't know
6 that she would be accompanying -- well, I knew she was
7 being examined, but I didn't know what was said at the
8 examination. I knew she had been seeing several doctors
9 prior to getting the results she wanted.

10 Q. To just summarize procedurally on the appeal
11 issue, that was raised in limine?

12 A. The request for evaluation?

13 Q. Right.

14 A. That was done in front of Judge Miller as I said
15 prior to the actual trial date. If we ordered it, it
16 wouldn't delay the trial because we had some people coming
17 from out of town so they accommodated me with that.

18 Q. Right. And the Court of Appeals held that it
19 wasn't sufficiently preserved at the time of trial.

20 A. In front of Judge Pyle.

21 MR. WILKES: Judge, I have a copy of the
22 Opinion.

23 THE COURT: You're talking about the Opinion
24 of Judge Miller from October 24th, 2008?

25 MR. WILKES: No, sir. I know the Court

Timothy Sullivan - Direct Examination

1 should have that in the record but I'm talking from the
2 Court of Appeals, the unpublished Opinion.

3 THE COURT: I have it. Thank you.

4 MR. WILKES: And that is part of the record.

5 Judge, just for the record, we agreed that we
6 could leave the record open if it's determined that the
7 Court doesn't have the record on appeal or needs that, we
8 can submit that. For some reason ---

9 THE COURT: Is it, in large part, included in
10 Applicant's Exhibit No. 1?

11 MR. WILKES: And I think you have the entire
12 transcript which would probably take care of it but just
13 in case it's necessary.

14 THE COURT: I don't have any problem with
15 that. I think I have the majority, if not all of the
16 record on appeal.. I have the transcript, Briefs from the
17 appellant and the respondent, and I also have the Opinion
18 together, obviously with the application, and the return
19 from the State and any documents attended to those.

20 MR. WILKES: Judge, I believe that's all I
21 have for Mr. Sullivan. The bulk of the material is in the
22 record and when I explain my position at the end to the
23 Court, I can explain what it is and where it is in the
24 record.

25 THE COURT: Good enough. Cross-examination.

Timothy Sullivan - Cross-Examination

CROSS-EXAMINATION

BY MS. RATIGAN:

Q. So clearly you filed the appropriate Discovery motions in this case.

A. Yes, I did with Ms. C, she had an open file policy. She gave me what she had.

Q. And did you review with Mr. McCall all of the documents from Discovery?

A. We met on many occasions so at their office and some at their homes in the evening.

Q. And is it true that there was no physical evidence in this case?

A. There was no independent testimony of any nature of physical abuse and molestation in the case.

Q. And did Mr. McCall gave a statement in this case, a confession?

A. Kind of a confession.

Q. Could you clarify what that means?

A. Well, I was told that he had been there about six hours and the officers denied it and I know how these things go that if he cooperated he could go home that night and they would work things out, and if he didn't, they would lock him up and take his kids away.

Bob explained to me he gave them something to help satisfy them enough so he could go home.

Timothy Sullivan - Cross-Examination

1 In his statement it said when she was five or
2 six he was changing her, she pulled her hands down to his
3 private area and his fingers inserted in her vagina. It
4 was an accident or something like that. He gave that
5 statement.

6 We went into a Jackson v. Denno Hearing of
7 the voluntariness and Judge Pyle admitted the statement..

8 Q. So his statement was that he had digitally
9 penetrated the victim?

10 A. Accidentally when she pulled his hand down, the
11 only occasion. And he gave that he says only to satisfy
12 them so they could let him go home and they wouldn't take
13 his kids and he wouldn't go to jail for 30 years, but he
14 did give the statement and it was ruled voluntarily.

15 Q. And in this case the allegations were that the
16 molestation began when the victim was about five, is that
17 accurate?

18 A. Five or six in that range, correct.

19 Q. And that it carried on through the period of
20 several years?

21 A. I think there was that occasion, there was one at
22 a birthday party I think at the girl's house and she
23 claims they were alone for a few minutes and something
24 happened then. And then there was another birthday party
25 some time later and a similar situation happened. There

Timothy Sullivan - Cross-Examination

1 were a lot of people there and they were alone for a few
2 minutes and something happened.

3 Q. It didn't all happen when she was five. It
4 happened at various stages?

5 A. Five, nine, eleven or something in that range and
6 the last one was somewhere in Columbia when she was 12 and
7 adjoining rooms and it happened with a bathing suit.

8 Q. And the victim was about 13 years old at trial;
9 is that correct?

10 A. At trial, Lauren was 13.

11 Q. And when the victim testified as trial, was her
12 testimony consistent? Were there any inconsistencies in
13 there that you recall?

14 A. Well, there was never a mention of any vaginal
15 touching. It's in the record and I'm not being to
16 graphic. She claimed that he touched her in the rectum or
17 something like that at the birthday party, the birthday
18 party, and the Columbia trip. I don't recall her
19 mentioning the five or six year old thing in the
20 testimony.

21 Q. I guess what I'm asking is were you able to catch
22 her in changing her story or something not being
23 consistent or was she more of a consistent witness?

24 A. I think there was somewhere in one of the
25 documents where I had to go into it because she was a very

Timothy Sullivan - Cross-Examination

1 sympathetic witness and I had to be very careful, but I
2 think somewhere, maybe Dr. Henderson, she at one time
3 retracted after the five or six year old ordeal happened
4 before the others had happened, but I didn't think that
5 after the testimony she went into I didn't think I could
6 any good with the jury with that kind of witness to try
7 and jump her.

8 Q. And there was nothing in the records you received
9 in Discovery that indicated there was any kind of sexual
10 abuse?

11 A. No, nothing. Like Mr. Wilkes alluded to, there
12 was no forensic evidence at all that there was any sexual
13 abuse. There was testimony about a urinary tract
14 infection and that could come from anything and not
15 necessarily a sexual situation.

16 Q. Well, the lack of records of sexual abuse, that
17 would have helped your case, right?

18 A. Yeah, I brought that out the report from Bayhill
19 she said she had not opinion about that and the doctor at
20 the hospital said it could happened because of infection
21 and she had no evidence of any penetration any, anal or
22 vaginal, no tearing or this type. And in the little
23 girl's testimony, she said she was never heard by any of
24 this penetration.

25 Q. And you brought this all out for the jury?

Timothy Sullivan - Cross-Examination

1 A. Yes.

2 Q. Now, the victim she was mainstream student at
3 school?

4 A. She needed help physically going from classes and
5 getting her books and things like that, but looking at her
6 scores, no, she was in the high percentile. And from what
7 the McCalls were telling me she was doing fairly well in
8 school, but she had a speech pathologist and she did need
9 help -- they talked about it, the grandfather, and I think
10 Valerie, Ms. McCall, they termed her language as lower
11 needs and they all understood her when she wanted
12 something she could communicate. But to strangers they
13 would have to listen carefully and get to know her.

14 Q. So her disabilities, as far as you knew, were
15 physical and not mental?

16 A. That's what I was -- from the reports I read.

17 Q. And you requested that she be evaluated based on
18 what Mr. McCall told you not based on any records you had
19 seen?

20 A. That was based on -- I had gone through some
21 stuff and basically it was the fantasies and the sexual
22 activity and there was a situation where there was some
23 playing with another cousin. I don't need to get into all
24 of that but it's in the record and the judge said that was
25 found to be kind of appropriate at that age. At the

Timothy Sullivan - Redirect Examination

1 hearing Brian and I presented some school records showing
2 she was put in pretty much mainstream so the Judge had
3 some -- I don't know if he actually introduced it, but
4 Brian had those records and furnished more to me later.

5 Q. But again, just to clarify, your request for that
6 evaluation wasn't based on any records you had, it was
7 based on what Mr. McCall and his family had told you?

8 A. Basically, yes.

9 Q. Now, you made that motion before Judge Miller, it
10 was denied. You alluded to it again before Judge Pyle.
11 Why didn't you basically remake the motion in front of
12 Judge Pyle? What was your thought on that?

13 A. I thought to get a circuit judge to overrule
14 another circuit judge, I had to show a change of
15 circumstances and I saw nothing in the records that would
16 be a change from the information I had in front of Judge
17 Miller to the information I had with Judge Pyle, so I
18 couldn't say things have changed and I've got new
19 information so I think you should reconsider it, so I
20 didn't do it.

21 Q. Now, based on the fact that he had given a
22 statement that was found to be voluntarily that he had
23 digitally penetrated the victim based on the victim's
24 testimony and the police reports, in your opinion having
25 her psychological evaluation would that have affected the

Timothy Sullivan - Redirect Examination

1 outcome of the case?

2 A. I can't speculate on that. I don't know what the
3 evaluation would have done, but I don't think it would
4 have changed the testimony or Mr. McCall's statement.

5 Q. And Mr. McCall testified at his trial?

6 A. He did. He had no record. The man had never
7 been in trouble in his life. He had five kids, three
8 girls and hadn't had any allegations. I think a couple of
9 relatives testified. I think a friend that's here today
10 testified.

11 Q. Did he come across as a credible witness on the
12 stand or do you think his testimony did not help the case?

13 A. I don't think he was the best witness I've ever
14 had, but he was scarred, but I think he had to explain the
15 statement. I think if he hadn't testified and they had
16 that statement, I don't think we had much choice. I let
17 it up to him and he had no record. He had to try and
18 explain his statement. I don't think he had any choice.

19 MS. RATIGAN: That's all I have, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. WILKES:

22 Q. Would you look on Page 84 of the transcript,
23 Mr. Sullivan.

24 A. The trial transcript?

25 Q. Yes, sir. It would be 47 if it's an record on

Timothy Sullivan - Redirect Examination

1 appeal.

2 A. I've got the transcript. What line?

3 Q. If you will look at Line 11, it's all in the
4 record and it's not required that you read it, but just to
5 make sure we're on the same page, would you agree with me
6 that the allegations changed completely at the time of
7 trial? Had there been any indication up until the time of
8 trial that that was the allegation that you're looking at
9 on Page 84?

10 A. No. The only thing I had as far as any physical
11 thing would be the statement of Ms. McCall. I did not
12 know specifics. I know she had complained about vaginal
13 infection and things like that, but I did not know the
14 specifics.

15 Q. We were aware of the allegation in the
16 indictment, correct?

17 A. CSC with a minor, yes.

18 Q. Aware of the details from the police report
19 indicating partial digital penetration vaginally, correct?

20 A. Based on his statement.

21 Q. But the testimony that you see on Page 84, that
22 is completely different than anything appearing in any
23 Discovery?

24 A. Correct. That was repeated again. Those were
25 the same three things she said at the birthday party,

Timothy Sullivan - Redirect Examination

1 birthday party, and Columbia.

2 Q. So that was a bit of a surprise, wasn't it?

3 A. Yes.

4 Q. And no indication of that prior to the trial?

5 A. No, I was thinking about the vaginal situation
6 and not about the anal situation.

7 Q. On the school grades you had indicated consistent
8 with the mother's testimony that the child was mainstream,
9 of course, and made fairly good grades in school, but the
10 IEP that you had with Woodcock test and the other testing,
11 the Johnson test, I believe it is, those testings of
12 standardized testing, did that not show the child testing
13 in grade 7 testing out on standardized testing at grade 4
14 3.7 and grade 4 again? It did show that, did it not?

15 A. I'm not sure, Mr. Wilkes, it may have.

16 Q. But if it's in there it speaks for itself?

17 A. Yeah.

18 Q. So contrary to, and there may be plenty of
19 explanations for it, but that is contrary to all the
20 testimony from the mother that the child was in fact a
21 splendid mainstream student? Not that she wasn't but
22 cognitively there was some indication that she was
23 cognitively functioning below grade level significantly?

24 A. I received that from the mom, Mary, and from the
25 McCalls and the Bay Center Facility. I think from the

Timothy Sullivan - Redirect Examination

1 transcripts it mentioned the school work was credible.

2 Q. Right. And they are telling you that objectively
3 there was documentation to show functioning significantly
4 below grade level?

5 A. Yeah.

6 Q. The preservation issue as far as preserving that,
7 the issue as far as just preservation of that motion
8 request, not even getting into making additional factual
9 basis to renew it or increase it, but just to preserve
10 that issue if it was sufficient on its face, you would
11 agree that the objection or anything done in limine is not
12 going to be considered the contemporaneous objection
13 necessary to preserve it?

14 A. The only thing I did was reference it to Judge
15 Pyle. I did not reargue the motion and present any facts.

16 Q. Right. But the Court of Appeals ruled that the
17 reference was insufficient to preserve that, correct?

18 A. That's correct.

19 Q. You had said some facility and the young lady who
20 worked at that facility, the Bay Center Facility, that is
21 Linda Hutton.

22 A. I got the report right here, Linda G. Hutton.

23 Q. And she testified that there was no forensic
24 evaluation whatsoever?

25 A. On the first page, yeah.

Allison Foster - Direct Examination

1 Q. May I take a look at that?

2 A. Sure. Services rendered, the first paragraph.
3 She admitted during the trial so the only experts they had
4 -- there was no evidence -- she was more interested in the
5 girl's coping ability in school and in life general. This
6 was given to me, I think, after the Miller motion but
7 prior to trial.

8 Q. And in it, it indicates that the scope of work
9 does not include any forensic evaluation?

10 A. Yes.

11 Q. Her role was completely therapeutic?

12 A. Correct. They had no expert testimony on
13 physical molestation.

14 MR. WILKES: That's all I have for
15 Mr. Sullivan.

16 THE COURT: Any recross?

17 MS. RATIGAN: No, Your Honor.

18 MR. WILKES: We're going to start with
19 another witness. We just need a few minutes.

20 (Whereupon, there was a brief break.)

21 THE BAILIFF: Remain seated, the Court will
22 come to order.

23 MR. WILKES: We will call Dr. Foster to the
24 stand, please.

25 THE CLERK: Place your left hand on the bible

Allison Foster - Direct Examination

1 and raise your right hand.

2 ALLISON MARIE FOSTER, having been duly sworn,
3 testified as follows:

4 You may be seated.

5 State your full name for the record and spell
6 your first and last name.

7 THE WITNESS: My name is Allison Marie
8 Foster. My first name is spelled A-L-L-I-S-O-N, my last
9 name is spelled F-O-S-T-E-R.

10 THE CLERK: Thank you.

11 MR. WILKES: Judge, I do believe the State
12 will not oppose the Curriculum Vitae of Dr. Foster and I
13 will go through it very briefly since we are able to admit
14 it. If there is no objection, we'd like to admit it.

15 THE COURT: Any objection?

16 MS. RATIGAN: There's no objection.

17 THE COURT: Without objection, the same is
18 admitted as Applicant's No. 3.

19 (Curriculum Vitae marked as Applicant's No. 3
20 for identification and admitted into evidence.)

21 DIRECT EXAMINATION

22 BY MR. WILKES:

23 Q. Dr. Foster, where are you employed?

24 A. I'm employed at the Assessment and Research
25 Center commonly referred to as the ARC. I'm specifically

Allison Foster - Direct Examination

1 employed by the South Carolina Department of Mental
2 Health.

3 Q. And you have given me your Curriculum Vitae and I
4 have marked that and given it to the Court. Is that
5 pretty accurate on your current level of education,
6 background, training, and things such as that?

7 A. Yes, it is. It's reaching a few recent training
8 that I've conducted and received just in the last several
9 months but I can comment on those if requested.

10 Q. To make it very simple, may I just ask, you have
11 a degree?

12 A. I do. I have a Ph d., a Doctoral Degree from the
13 University of South Carolina.

14 Q. And you have in particular you have been
15 qualified as an expert of psychology and all related
16 matters I assume?

17 A. Not all related matters but ---

18 Q. Not that broad.

19 A. Not that broad, but I've spent my career since
20 September of 1995 as the program director of the ARC,
21 which is the Children's Advocacy Center. I specialize in
22 the forensic evaluation of suspected child abuse so I've
23 specialized over 100 times easily in the last 15 years in
24 US Court's Marshal, General Sessions, Family Court,
25 Federal Court of Appeals and all of my service, education,

Allison Foster - Direct Examination

1 training and the training I've offered others, all in some
2 manner relate to matters of child abuse evaluation and
3 treatment or forensic evaluations of children in related
4 litigation in child custody matters.

5 Q. You teach ---

6 A. I do.

7 Q. --- forensic interviewing also?

8 A. Yes, I do. And I also teach in the South
9 Carolina School of Medicine. I'm assisted professor in
10 the School of Medicine in the Department of
11 Neuropsychology and Behavioral Science. Four times a year
12 at the ARC we provide a five day forensic interview
13 training course that's now called Child First. It used to
14 be called Finding Words. It's a nationally accredited
15 course and then I also am a guest lecturer and trainer for
16 two other national organizations.

17 MR. WILKES: We would offer Dr. Foster as an
18 expert in psychology and forensic interview techniques.

19 MS. RATIGAN: We have no objections, Your
20 Honor.

21 THE COURT: All right.

22 BY MR. WILKES:

23 Q. The critical question is in all those times you've
24 testified, how many times have you testified for the
25 defense in this case.

Allison Foster - Direct Examination

1 A. Once in a juvenile matter that I can recall. I
2 can't recall being called by the defense in any other
3 litigation. I have been retained by the defense, but the
4 lion's share of my testimony and my provision of service
5 goes to the prosecution.

6 Q. You would be the State's go to person in this
7 type of case?

8 A. Yes.

9 Q. But may I presume even so you would be neutral
10 and bias in your assessment in either side?

11 A. I would be neutral and unbiased. I believe you
12 said biased.

13 Q. That's Freudian.

14 A. I have a trained ear. And my rule is, of course,
15 to provide objective evaluations as to suspected abuse
16 and, obviously, if I get called to testify it's because
17 the process has went far enough for there to be charges,
18 for their to be prosecution.

19 Q. In this case, you are being called as an expert
20 by us.

21 A. Yes.

22 Q. And the family has compensated you appropriately
23 for that?

24 A. Yes.

25 Q. And any compensation hinging on your testimony

Allison Foster - Direct Examination

1 today?

2 A. No.

3 Q. So your testimony today you believe will be as
4 objective as can be?

5 A. Yes.

6 Q. Now, I have been over some documents and in the
7 interest of time I will try to go over them very quickly.
8 There is much in the record but to highlight the issues we
9 discussed the issue of the Emery Michael Motion.

10 A. Yes.

11 Q. And you're familiar with Emery Michael?

12 A. I am.

13 Q. And you're familiar with the forensic interview
14 process and when it's appropriate?

15 A. Definitely.

16 Q. Now, in this case and you have heard some of the
17 things I have asked Mr. Sullivan here in Court and
18 probably seen some of the documents that we've introduced,
19 of those things, Mr. Sullivan had made a motion for
20 forensic evaluation of the trial, you knew that?

21 A. Yes.

22 Q. Can you explain what the forensic evaluation is
23 first of all?

24 A. Yes.

25 A forensic evaluation is an expert process of

APPENDIX 86

Allison Foster - Direct Examination

1 inquiry. In this case we're talking about a child victim
2 forensic evaluation and not a defendant evaluation, which
3 would also be considered a forensic evaluation, but my
4 area is the evidence based protocol driven method of
5 inquiry to collection information from a suspected child
6 abuse victim and then to provide that information back to
7 a multi-disciplinary investigative team to be a central
8 component of an overall investigation.

9 Q. Now, when we first spoke and I had made an
10 outline to try and assist me in asking questions, I had
11 made it out based on the American Academy of Adolescent
12 Psychiatry Abstract. Is that the kind of document, and
13 I'm sure there's many and there's more current, but that's
14 the type of document that you might rely on in your
15 determination of when an exam might be appropriate?

16 A. Yes.

17 Q. And I'm going to do my best to walk through this,
18 but bare with me, please. Can you just explain a little
19 bit about the forensic interview, the evaluation, the
20 technique and what the goal is?

21 A. Yes. There are a few nationally recognized
22 schools that teach interview protocols, modern research
23 based evidenced based interview protocols that are
24 accepted in the field in the United States. The
25 particular one I subscribe to and train four times a year

Allison Foster - Direct Examination

1 and the one that's been endorsed in South Carolina cases
2 is the Corner House Interview Process which is commonly
3 referred to as RATAC so it's a five-stage forensic
4 interview process and I can describe that. And what I
5 will say is that there are sort of differences of art and
6 technique across the nationally accepted protocols but
7 they all share much more in common than they do in
8 difference and they're all based on the research in child
9 development, memory, and suggestibility, and sexual abuse
10 dynamics, process of disclosure. So we have a wealth of
11 information at this point in time that drives sound
12 interviewing practice. And so a forensic interview is a
13 protocol driven process. Its goal is not to get a
14 disclosure from a child, its goal is to set circumstances
15 through which facts can be elicited from a child and
16 alternative hypothesis can be explored and it is to
17 essentially provide a means for a child to communicate
18 whatever it is he or she wants to say without suggesting
19 leading, misleading, or directing the child's statements.

20 And it also it is a process that doesn't
21 happen in a vacuum. It happens at the referral of law
22 enforcement or child protective services or a court and it
23 is critical that it be preserved in as much of its
24 totality as possible.

25 Q. Can you explain a little bit about the

Allison Foster - Direct Examination

1 preserving, the need for preserving, and how you go about
2 preserving and what the customary practice is to preserve
3 as far as documentation?

4 A. Yes. The state of the art of video recording of
5 forensic interviews and certainly the Children's Advocacy
6 Center of South Carolina at this point, informally, we all
7 video record all of our forensic interviews. Fifteen
8 years ago that may have been economically unfeasible so
9 there were arguably some arguments against video recording
10 because of the lack of admissibility of an out-of-court
11 statement in litigation. Those laws have been reformed
12 and changed over time and certainly video is cheap and
13 accessible now. So the South Carolina Network of
14 Children's Advocacy Center has a position on that and
15 states that video recording insures the most complete
16 documentation, and that's consistent with the national
17 guidelines on documentation.

18 In the absence of video recording, audio
19 recording would be the second best. In the absence of
20 video or audio recording, having somebody who can
21 literally transcript question and answer, question and
22 answer, but obviously you lose a lot when you get reduced
23 to that level.

24 Q. And let me ask you this, and I'll jump ahead just
25 a little bit, you talked about alternative hypothesis

Allison Foster - Direct Examination

1 being explored, there's a lot that goes into forensic
2 interviewing that is documented, correct?

3 A. Yes, correct.

4 Q. Is the intent to simply document the specific
5 questions and answers or the entire process?

6 A. The entire process.

7 Q. Now, we have talked a little bit about the
8 interview in this case where there had been questions and
9 answers recorded, when you looked at that, that did not
10 include the entire process, though, did it?

11 A. There's really no way for me to know what is
12 omitted and what is included. It looks as if the
13 responding officer had a template that she designed
14 because she had indicated like "NA" next to certain
15 questions, which would suggest they weren't asked, but
16 honestly without some kind of verbatim transcript, there's
17 really no way for me to know what has been included and
18 what has been excluded.

19 Q. And we have not been able to provide that?

20 A. Correct.

21 Q. Now, the purpose of the forensic interview is the
22 achieve some unbiased information?

23 A. That's correct.

24 Q. As best as possible?

25 A. Yes.

Allison Foster - Direct Examination

1 Q. In the process, in receiving the complaint an
2 officer receives a complaint and were to make an initial
3 interview, question a child, what would the process be
4 after that as far as professional evaluation, forensic
5 determinations that sort of thing, what would be the next
6 step?

7 A. Typically, especially in an urban community like
8 this one or like mine in Columbia -- we have a multi-
9 disciplinary child abuse response team that includes the
10 partner agencies. Typically from the point of a complain
11 law enforcement and some sort of an initial response from
12 responding officer, which may or may not also include a
13 connection or cross referral to child protective services,
14 DSS, the next stage is referral to the specialists who are
15 usually housed in the Children's Advocacy Center,.

16 It might, depending on the timing of the
17 disclosure and the need for an acute medical exam, the
18 child could be referred to an acute medical examination in
19 the emergency department, but otherwise he or she would be
20 referred for the chronic sexual abuse protocol exam by a
21 medical expert and referred for a forensic interview by a
22 properly trained and vetted forensic interviewer who will
23 conduct the video recorded interview and then disseminate
24 those results to the team.

25 Q. And in this case from what you've seen and heard

Allison Foster - Direct Examination

1 today, that process would have been with the child being
2 examined by Dr. Henderson who is an MD?

3 A. Yes.

4 Q. Pediatrician for physical signs of abuse?

5 A. Yes.

6 Q. Dr. Henderson could have also conducted a
7 forensic type interview at that time?

8 A. I don't believe so. Dr. Henderson is my friend
9 and colleague and she is an esteemed pediatrician. To my
10 knowledge, she is not trained in a five-day forensic
11 interview training course and would not represent herself
12 as a forensic interviewer.

13 Q. Would that explain why her documentation
14 indicated that she was not doing one and she believed it
15 was being done by Linda Hutton?

16 MS. RATIGAN: I'm going to object to
17 speculation, Your Honor.

18 MR. WILKES: I'm just referring to what is in
19 the record.

20 THE COURT: I understand. I'll overrule it.

21 BY MR. WILKES:

22 Q. In other words, that process then if she does not
23 do it would have been her reference to Linda Hutton and
24 her records would be the normal process?

25 A. Correct. It would be atypical for a pediatrician

Allison Foster - Direct Examination

1 to do both the exam and the forensic interview. That's
2 highly atypical. It would be typical for the physician to
3 conduct the medical exam and for a forensic interviewer to
4 conduct a forensic interview.

5 Q. And you have reviewed Dr. Henderson's record?

6 A. Yes.

7 Q. Which is in evidence which states that Linda
8 Hutton is doing a forensic evaluation?

9 A. Correct.

10 Q. Now, normally the process would be the child
11 would have then been evaluated by that professional?

12 A. Yes.

13 Q. You had seen, I believe, the testimony where
14 Linda Hutton clearly stated she did not do a forensic
15 interview?

16 A. Correct.

17 Q. Just from that documentation would there appear
18 that there was a miscommunication or something was
19 dropped?

20 A. Yes.

21 Q. Now, tell me and I'm going to do my best with the
22 details but from the technical side, the forensic
23 interview how might that be important? In other words,
24 from this case -- and you had gone through of the
25 documentation which is in evidence and you've heard

Allison Foster - Direct Examination

1 Mr. Sullivan testify -- based on those things, and correct
2 me if I'm wrong and I'll summarize, based on those things
3 there is some indication there is a below grade level
4 functioning?

5 A. Excuse me. Yes.

6 Q. The physical impairment?

7 A. Yes.

8 Q. The speech impairment, difficulties with speech,
9 those things that you have heard and I believe they're in
10 evidence, would those things come into play in a forensic
11 interview?

12 A. Yes.

13 Q. How so? Would those be the basis to think that a
14 forensic evaluation might be necessary?

15 A. Definitely. Whenever we have children referred
16 who have any range of special needs, it's incumbent upon
17 us to evaluate what impact, if any, those special needs
18 have. If we're interviewing a child who has a hearing
19 disability, a speech disability, whose native language is
20 not English, we have to look at okay what is going to be
21 the role of the interpreter, is that interpretation going
22 to be forensically defensible, will there be any
23 interference or sort of undue suggestion as a result of
24 bringing in this third party, and how do we manage that?

25 There are many decisions that have to be made

Allison Foster - Direct Examination

1 so we want to match the question level to the cognitive
2 development level of the child. We need to make sure we
3 use communication aides and a setting and a methodology
4 that support and match the skill level of the child who
5 we're interviewing. So it is a detailed assessment. It's
6 typically at the Children's Advocacy Center, these kinds
7 of decisions are made by somebody with a Master's Degree,
8 who's a licensed mental health professional who has
9 specialized training.

10 Q. Ms. Hutton could have done that?

11 A. Linda Hutton, to the best of my knowledge, is a
12 qualified expert in this area and is part of the
13 Greenville Multi-disciplinary team and is the person that
14 they were at that time they were referring for forensic
15 interviews. I have not reviewed Ms. Hutton's CV and am
16 not entirely up to speed on her education training and
17 experience as a forensic evaluator.

18 Q. I think we can assume that she could have done
19 it, I think that would be fair to assume. If
20 Dr. Henderson assumed that she would be doing it, it would
21 be fair to assume?

22 A. Correct. And if she's been vetted by the team
23 and has a licenses and has a Master's or better, I do
24 believe this to be the case.

25 Q. Now, tell me the issue of competency would be

Allison Foster - Direct Examination

1 something that is addressed by the forensic evaluation?

2 A. Yes.

3 Q. The issues of any in addition to, I guess, and
4 maybe you can explain the differences, the cognitive
5 issues as well as any potential psychological issues,
6 those would all be evaluated and explored in that forensic
7 evaluation?

8 A. Correct.

9 Q. And being familiar with Emery Michael, that would
10 be the purpose of Emery Michael, correct, is to insure
11 that can happen if appropriate?

12 A. That is correct and I'm familiar with that case
13 and the psychologist at the center of that case and she is
14 the forensic evaluator focused on the fact that there was
15 a mental status concern and so that's what a forensic
16 evaluator is supposed to do and that is take those things
17 into consideration and ensure that a statement that is
18 collected for forensic purposes has met a standard of
19 competence.

20 Q. I'm going to do my best on this one as well and
21 you can collaborate, capacity, and when I say capacity I
22 understand it to be perceiving facts accurately, capacity
23 to recollect, recall, distinguishing truth from falsehood,
24 fantasy from reality, comprehensive duty to tell the
25 truth, communicate based on personal knowledge, those are

Allison Foster - Direct Examination

1 the things that go into the question of capacity?

2 A. Yes.

3 Q. Now, important in this case and I think in record
4 and you have heard some testimony that the investigators
5 have actually documented where there had been mention that
6 a doctor told the mother that she maybe talking about the
7 allegations from way back in front of the child too much.

8 A. Yes.

9 Q. From Dr. Henderson's records, Dr. Henderson
10 indicate -- did Dr. Henderson's records indicate that the
11 mother related the story and then had the daughter confirm
12 it to the doctor?

13 A. Yes.

14 Q. And I believe Mr. Sullivan indicated there had
15 been some other testimony about continuing allegations and
16 ongoing allegations historically, would all of that be
17 important in determining whether or not a forensic
18 evaluation might be necessary?

19 A. Yes, and it would also be important to the
20 forensic evaluator to review that history and to consider
21 its impact on what it is that the child says in the
22 interview.

23 Q. And that's one of the important purposes of that
24 evaluation?

25 A. Correct.

Allison Foster - Direct Examination

1 Q. And you'd have to explain confabulation for me.
2 What is confabulation?

3 A. Confabulation is a fancy sounding word for
4 amalgamation for taking sort of a combination of fact and
5 fiction and having it become integrated in ones mind and
6 memory over time. So we all, to some degree or another,
7 are suggestible and the farther we get in time from a
8 circumstance or when we hear repeated versions of events
9 perhaps we didn't personally experience but we derive
10 information from other sources, we could end up with sort
11 of an amalgamation of information that forms some belief
12 or memory. It could also be based on wishes, motivations,
13 dreams.

14 Q. For instance, if in fact there is information
15 that a young child or a child functioning cognitively,
16 perhaps, on a young level, hears repeatedly a story by an
17 authority figure, would that have a tendency to create or
18 influence memory?

19 A. Yes, it can and it's at the heart of the issues
20 that are researched regarding memory and suggestibility
21 and very much at the heart of protocol reform that we've
22 gone through in the last 15 years in terms of our forensic
23 interview protocols.

24 Q. Those facts known at that time at the time of
25 Mr. Sullivan's motions, that much being known, would that

Allison Foster - Direct Examination

1 have been a significant factor for an expert, such as
2 yourself, to consider the question of the necessity of a
3 forensic evaluation?

4 A. Yes. The necessity for forensic evaluation and
5 whatever conclusions would be drawn therein would, in
6 part, be based on that history and review of those
7 records.

8 Q. Now, obviously you're aware of the child in this
9 case has some communication difficulties which may be, I
10 don't know if it's termed orthopedic but mechanically
11 perhaps. Is there a concern with communication as far as
12 trying to understand cognitive function when there's
13 limited communication?

14 A. Yes.

15 Q. Obviously that was known at the time of the
16 motion, would that have been a significant factor just in
17 determination of whether evaluation was necessary?

18 A. Yes.

19 Q. The testimony at trial and I had referred to it,
20 I believe without reading it out loud, would it be a
21 concerting factor -- and this is of course facts that come
22 out after the trial -- but would a change completely in
23 testimony from a story that had been consistent for a long
24 time and then at trial be significantly different would
25 that be concerting as far as a need for forensic

Allison Foster - Direct Examination

1 evaluation?

2 A. Yes.

3 Q. Of course he didn't have that until trial because
4 it didn't come out until trial, but certainly it tends to
5 support the proposition after the fact?

6 A. Correct. It's very concerting and opens up, for
7 me as a professional, a lot of concern about what happened
8 that wasn't documented in therapy, what was happening in
9 the family, what was happening in the environment in terms
10 of influences on the child's account of at that point
11 quite historical events.

12 Q. Now, getting back just for a second to
13 confabulation, the parent has an obsession or belief of
14 abuse, is that likely or is it at least possible to
15 influence the child if made aware of it?

16 A. Yes.

17 Q. And in this case if the story was recounted
18 repeatedly to doctors by the mother, could that be a
19 significant factor in trying to determine if an evaluation
20 should have been ordered?

21 A. Yes.

22 Q. In the record and I can't say you may have read
23 it, but I told you the mother had made a statement during
24 trial about earlier complaints, that she had taken it to
25 professional pediatricians and made the quote and

Allison Foster -- Direct Examination

1 "actually didn't get to the right ones," would that be
2 concerning if a parent continued to take a child
3 repeatedly to doctor after doctor?

4 A. Yes, that particular language and the pattern of
5 behavior suggests what we would call a confirmatory bias
6 and we also talk in terms of what we call doctor shopping.
7 But the idea is if a parent who and it could be for very
8 well intentioned reasons, a parent has a feared complaints
9 and goes to doctor "A" and it doesn't confirm their
10 suspicion and they go to doctor "B" and doctor "C" until
11 they hear what it is they want to hear. That's what we
12 call a confirmatory bias and it suggests that there is
13 really only one correct or acceptable answer and that any
14 other explanation is being rejected. And that, of course,
15 that becomes forensically important because it will
16 influence -- may influence the child unduly.

17 Q. And very quickly I believe you heard testimony
18 about, and this has been years prior, but the child being
19 taken to a doctor where there was no record showing
20 molestation and can you explain in a record -- what is
21 common in a professional's response when there's a UTI?
22 Is molestation one of the possible causes that's explained
23 to parents, is that normal?

24 A. That's a good question. Urinary tract infections
25 are completely non-specific. They are what we call a

Allison Foster - Cross-Examination

1 non-specific finding, but there would be a spectrum of
2 possible explanations from bubble baths to sexual
3 molestation.

4 Q. It has to be mentioned in the doctor's report,
5 but for him to say these are possible causes, there's
6 nothing out of the ordinary about that even if he says
7 possible molestation?

8 A. That's correct. There would be a range for
9 screening of the UTI.

10 Q. Now, if the parent and it were to be known that
11 the parent three days later or four days later how ever
12 many days later takes the child to another doctor and says
13 they are now suspicious of molestation, would that be
14 cause for concern in the area of confabulation?

15 A. It would be.

16 Q. Now, to be clear, my questions are trying to
17 drive at the ability or the factors that are relevant to a
18 determination whether the motion was necessary. There's
19 no way for me to ask you what the results would be,
20 correct?

21 A. Correct.

22 Q. But at that time from the things that you have
23 heard today and the things that you have seen that we put
24 into evidence, would there have been enough basis for an
25 expert to opine that a forensic evaluation was appropriate

Allison Foster - Cross-Examination

1 and necessary?

2 A. I believe that to be the case, yes.

3 Q. Now, would you have if you had seen this?

4 A. Yes. If I had known that only a responding
5 officer had conducted this interview with a speech
6 language assistant facilitating the child at a non video
7 recorded situation with the concerns about cognitive
8 delays and speech impairment and sort of the swirl of
9 doctors visits and sort of this perseverance on the
10 concern, it would have definitely elevated my concern that
11 a more expert thorough evaluation be conducted.

12 Q. And that would be the forensic evaluation?

13 A. Yes.

14 Q. Which as you understand would have been the
15 question of Mr. Sullivan's motion?

16 A. Yes.

17 MR. WILKES: I have nothing further. Thank
18 you, Dr Foster.

19 CROSS-EXAMINATION

20 BY MS. RATIGAN:

21 Q. Just a few quick questions. Did you generate a
22 report in this case?

23 A. I did not.

24 Q. And what documents did you review in order to
25 come up with your conclusions?

Allison Foster - Cross-Examination

1 A. I'm going to do this by reconstructive memory so
2 I may miss one but I know I reviewed the charging -- the
3 incident report and the charging by Lorraine Henderson and
4 her summary of the interview. I reviewed medical records
5 including Nancy Henderson's medical exam, some of the
6 testimony around the issue of the question of the
7 competency issue, either some of the testimony and
8 possibly some of the reports of Linda Hutton, but I would
9 probably have to have my memory refreshed as to whether I
10 saw the report or just testimony; information from the
11 victim's school and I can't remember what else.

12 Q. So would it be fair to say that you looked at
13 some of the times presented for the motion hearing?

14 A. I believe so, yes, and I will add the note from
15 the jury is something I reviewed. I had heard that from
16 testimony but that was something also I reviewed in
17 advance.

18 Q. So you reviewed some items that were not
19 available at the motion hearing because they happened
20 subsequent?

21 A. I believe so, and correct me if I'm wrong because
22 I am not a lawyer, I'm a psychologist, but I believe the
23 testimony is that the motion was first brought forward
24 pretrial and then some of the things I reviewed became
25 evidence at the trial and perhaps not available in a

Allison Foster - Cross-Examination

1 pretrial setting.

2 Q. So basically your opinion is had an expert had
3 reviewed those documents that were available pretrial, it
4 would have been enough to opinion that there needed to be
5 an evaluation?

6 A. Yes, that's right, strictly on the basis of
7 modern protocol and having a child referred into a CAC for
8 a sexual abuse allegation and then having that child have
9 special needs, the threshold to me was clearly met that a
10 forensic evaluation and not simply a non-video recorded
11 interview by a front line law enforcement officer. I
12 don't think that the proper evaluation stand was met and
13 that would exclude some of the things that I reviewed but
14 our team would not have considered that to be an
15 acceptable standard.

16 Q. Back in 2003-2004, would it have been incompetent
17 not to have it video taped?

18 A. No.

19 Q. How long has that been going on in this state?

20 A. The Children's Center in Charleston has the
21 longest history, Spartanburg has the second largest
22 history. Both of their video recording predates -- I mean
23 it goes back to the early to mid-90's. My center went to
24 video recording in the year 2000, and it goes from there.
25 Policy has certainly moved in that direction. National

Allison Foster - Cross-Examination

1 guidelines have moved in that direction since the early
2 2000's.

3 Q. So based on the lack of a video taped interview,
4 the police report, Dr. Henderson's reports and the IEPs,
5 looking at all that in toto, if you had been consultant,
6 you would have said you need an evaluation. That's
7 basically what you're saying?

8 A. Yes.

9 Q. One of the reasons you said that there should
10 have been an evaluation is that the victim had special
11 needs?

12 A. Yes. It just elevates the basis for concern in
13 terms of making sure there's a developmental match between
14 the interviewer and the child and an appropriate forensic
15 match in terms of the facilitated communication.

16 Q. Was there anything specifically in
17 Dr. Henderson's reports that triggered in your mind their
18 being a red flag or a problem?

19 A. Without it in front of me I would be reluctant to
20 say. I'd have to have it in front of me.

21 Q. What about the IEPs?

22 A. The below average academic functioning, the fact
23 there is an IEP and the fact that there was scores that
24 suggested that while she was a seventh grader, she was
25 functioning more at the third and forth grade level in

Allison Foster - Cross-Examination

1 certain domains.

2 Q. And the incident report, supplemental report, the
3 red flags in there are what you've already alluded about
4 the mother's statements to doctors?

5 A. Mother statements to doctors in the presence of
6 the child and the multiple physician visits all on the
7 basis of what physicians call the feared complaint of
8 sexual abuse due to UTIs.

9 Q. And just for my clarification, is a forensic
10 interview the same thing as a psychological evaluation?

11 A. I'm glad you asked because a forensic evaluation
12 versus a psychological evaluation or do you mean a
13 forensic interview versus a psychological evaluation? Ask
14 me your question one more time.

15 Q. Well, let me back it up. Are you saying that
16 your believe is that there should have been a forensic
17 evaluation or there should have been a forensic interview?

18 A. A forensic evaluation and a forensic interview
19 really would be synonymous. Either one would have been
20 informed by review of the records and video recorded
21 interview itself, consideration of the other collateral
22 data, the medical exam, like Nancy Henderson's medical
23 exam, and typically in our State and certainly in my
24 Center, all of that comes together and a report is
25 generated and recommendations are made and then that staff

Allison Foster - Cross-Examination

1 at the multi-disciplinary team.

2 The forensic interview arguably is just the
3 interview itself. A psychological evaluation may or may
4 not have been warranted but a licensed Master's level or
5 Doctorate level evaluator who could have met this child
6 would have been able to appraise the need for further
7 evaluation such as neuro psychological testing or a
8 psychiatric consult or whatever that evaluator might have
9 deemed appropriate, but at least that way a mental health
10 professional who specializes in this area would have been
11 able to make that determination about what else is needed
12 if anything.

13 Q. So we're talking about a forensic evaluation.
14 Are you here today to give an opinion about whether or not
15 these records would have been a red flag for a
16 psychological evaluation?

17 A. Well, just a generic psychological is not
18 typically conducted in suspected victims because it's non
19 specific, so what I'm saying is that a forensic evaluator
20 would have been able to review these matters and then
21 determine what additional testing or evaluation of the
22 child's competency was recommended.

23 Q. Now, you've given some testimony about the fact
24 that it was troubling to you that the victim had perhaps
25 changed her story at the trial.

Allison Foster - Cross-Examination

1 A. Right.

2 Q. But isn't that common in children who are sexual
3 abuse victims to change or recant?

4 A. Recantation is certainly considered to be an
5 element of what we call a process of disclosure and it's
6 believed to occur in as many as about 20 percent of true
7 sexual abuse cases that there will be a period in the
8 process of disclosure where there's recantation and then a
9 victim will rehabilitate and then come back around to that
10 account in a majority of those true cases.

11 Now, recantation is certainly different from
12 just a brand new statement that has no relationship to
13 what is said at the outset so I wouldn't call that a
14 recantation.

15 Q. Well, let me ask it this way, is it possible for
16 minor victims of sexual abuse to add on to their story as
17 it goes along, maybe not recant it, but to add on detail
18 or embroider it, is that common?

19 A. Yes. I kind of take issue with the term
20 embroider it because it almost sounds like they would be
21 embellishing ---

22 Q. Adding details would be embroidering it, that's
23 what I'm not asking. I'm not asking for falsehoods, I'm
24 asking for additional details.

25 A. Yes. And the answer is, yes.

Allison Foster - Cross-Examination

1 Q. And you testified that you're family with the
2 Michael H factors?

3 A. Yes.

4 Q. Now, when you say you're familiar with what the
5 courts are looking for under Michael H. or is that just
6 something that you have in front of you when you're doing
7 the evaluation?

8 A. I don't have it in front of me when I'm doing an
9 evaluation. I have read the opinion numerous times and
10 know the psychologists and have had the opportunity to
11 discuss that case. So I've just come to understand what
12 the court's concerns were in terms of the larger question
13 of indiscreet of liability and the sort of things that in my
14 field we pay attention to about the admissibility of
15 out-of-court statements and how we should do our job to
16 conform to the rules of the court.

17 Q. And one of those factors isn't it having to do
18 with the remoteness in time between the requested
19 evaluation and the time that the abuse would have
20 happened?

21 A. Yes.

22 Q. And in this case, didn't the first incident of
23 abuse occur approximately eight years before the trial?

24 A. Approximately six since she was approximately 13
25 at the time of the trial.

Allison Foster - Redirect Examination

1 Q. Seven.

2 A. That would be seven years.

3 Q. In your opinion that is not too remote of a time
4 period?

5 A. No. Nobody can be a mind reader so my
6 understanding is we have to take the case at the time of
7 disclosure and then look at the factors surrounding that
8 moment in time when there is a complaint made because we
9 know that discloser is going to be a component of most
10 child abuse allegations -- delayed disclosure is going to
11 be a component of most child abuse scenarios.

12 MS. RATIGAN: That's all I have, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. WILKES:

15 Q. On the issue of capacity, the goal of the Court's
16 decision of entering Michael, is it align with what we are
17 attempting to do?

18 A. Yes.

19 Q. That's what we're dealing with here?

20 A. Yes.

21 Q. Now, the remoteness of time, is that not a reason
22 to do the evaluation? If it is more remote in time,
23 wouldn't that be a good basis to do it?

24 A. In my opinion, yes. We are usually called into
25 court to talk about issues of delayed and disclosure and

Allison Foster - Redirect Examination

1 the fact that there are issues around memory,
2 suggestibility, recall, all of which relate to delays
3 between time of event and time of reporting. It just
4 elevates the who standard of care question because we do
5 have a responsibility to be diligent in terms of
6 critically appraising, objectively appraising, carefully
7 evaluating the reliability of historical statements.

8 Q. So the remoteness of time, in this case, it would
9 be warranted -- the evaluation would be warranted based on
10 facts of when it was reported and circumstances?

11 A. In my view it would be, yes.

12 Q. If the evidence were to show that there had been
13 repeated discussions with different doctors, Dr. Henderson
14 and Ms. Hutton, would there have been any substantial
15 harm, obvious at least, in having a forensic interview?

16 A. No.

17 Q. One more at this point would certainly not cause
18 foreseeable harm to say Ms. McCall could have a forensic
19 interview done?

20 A. Correct. I do not have any sense that it would
21 have caused harm. This is a child who was meeting with a
22 mental health professional for therapy, was having
23 standardized testing at the school, was accustomed to
24 medical care and visits, and there was really nothing that
25 has to be intimidating or frightening or traumatizing. In

Allison Foster - Redirect Examination

1 fact, to the contrary instead of a police officer
2 interviewing the child, it is thought that it is better to
3 have a trained licensed child professional evaluate a
4 child and then make those determination. So I would
5 submit that there is little to no reason to believe that
6 this would have been a traumagentic event for a child.

7 Q. And just as a last point, Emery Michael addressed
8 in specific a psychological issue effecting and is that as
9 effecting the capacity and reliability, is that the reason
10 it was important?

11 A. Yes.

12 Q. Would the same thing occur with cognitive issues
13 as far as reliability and competency of the testimony,
14 would that be the same?

15 A. Yes.

16 MR. WILKES: Nothing further.

17 THE COURT: Dr. Foster, I'm going to ask you
18 just two questions. The opinion that you offered today is
19 essentially that a forensic evaluation of this witness was
20 necessary under the circumstances.

21 THE WITNESS: Yes.

22 THE COURT: Are you offering any opinion as
23 to what the results of any forensic evaluation may have
24 been?

25 THE WITNESS: No.

Allison Foster - Redirect Examination

1 THE COURT: Okay. Thank you. You may step
2 down.

3 THE WITNESS: Thank you.

4 (Witness leaves the witness stand.)

5 MR. WILKES: Your Honor, that would be our
6 case.

7 THE COURT: Anything from the State?

8 MS. RATIGAN: Your Honor, we would rest on
9 the evidence before the Court.

10 THE COURT: And I know I want to hear some
11 arguments but I want to ask you one thing as a shop
12 keeping matter because I just received a note from my
13 secretary from the jail about a defendant who has been
14 transported from SCDC and I need to ask you if he relates
15 to your docket tomorrow in any way, shape, or form.

16 MS. RATIGAN: Okay.

17 THE COURT: They characterize it as urgent.

18 MR. WILKES: To them it is.

19 THE COURT: To them it is. You can come on
20 up.

21 (Whereupon, there was a discussion off the
22 record.)

23 THE COURT: Okay, Mr. Wilkes.

24 MR. WILKES: If we may, in light of the other
25 duties and obligations and the time involved, I think it's

Allison Foster - Redirect Examination

1 very simply clear where we've gone with it. The record
2 does speak and I think is what I have done is try to hit
3 the nail on the head. There is stuff on the record and if
4 I could submit a short memorandum, I could point out those
5 facts are in the record.

6 THE COURT: I'd be happy to receive that.

7 MR. WILKES: Instead of standing up here and
8 trying to articulate it.

9 THE COURT: That's what I wanted to get from
10 you essentially. I hear from the testimony that the main
11 complaint that the applicant would make is the failure to
12 not only request the psychological evaluation, but to
13 follow-up and appropriately preserve it based on
14 additional discovery that was received and testimony that
15 was elicited at the time of trial. But in the application
16 you have additional grounds a well.

17 MR. WILKES: And they are all interrelated.
18 I would say this, you will see those others on the State's
19 discovery issues, failure to provide discovery, was the
20 prepare for the event that something would come up
21 unexpectantly at the last minute, so that was
22 prophylactic. The rest of them should be pretty on point,
23 but they should all be pretty on point with this.

24 And what I would also like to do, and this
25 will save time, if we could submit a short memorandum and

Allison Foster - Redirect Examination

1 I will point to the record that I have alluded to and have
2 been testified to rather than have the Court search for
3 it.

4 THE COURT: I understand. I am entirely
5 comfortable with that manner of proceeding.

6 MS. RATIGAN: The only thing I would ask,
7 Judge, if I could get Mr. Wilkes memorandum and have a
8 couple of days just so I know where he's going with it.

9 THE COURT: How many days do you need?

10 MR. WILKES: Whatever you tell me it will,
11 happen.

12 THE COURT: I don't want to put unreasonable
13 deadlines on you. If you can, I would like it within 10
14 days and ---

15 MR. WILKES: It will be done.

16 THE COURT: And Ms. Ratigan, you will have
17 five days to respond. And just let me say this too, this
18 obviously is an important proceeding for everyone in the
19 courtroom and I don't want you to get the impression from
20 any off cuff comments that I may have made to suggest that
21 I'm trying to rush it. I truly am not. We can stay there
22 until 7:00, 8:00, 9:00 or 10:00 if you want to.

23 MR. WILKES: Can simply say that rather than
24 sit here and have you try to write down all of the
25 references it would be common and comfortable to do the

Allison Foster - Redirect Examination

1 memorandum.

2 THE COURT: Well, good enough. I'll receive
3 your memorandum and your answer and I'll take it under
4 advisement.

5 MS. RATIGAN: Thank you, Judge.

6 MR. WILKES: Thank you, Your Honor.

7 ---END OF TRANSCRIPT RECORD---

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Robert Duncan McCall, Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Unpublished Opinion No. 2007-UP-453
Submitted October 1, 2007 – Filed October 10, 2007

AFFIRMED

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Attorney John W. McIntosh, Assistant Deputy Attorney
General Salley W. Elliott, Assistant Attorney General
David A. Spencer, of Columbia; Robert M. Ariail, of
Greenville; for Respondent.

PER CURIAM: Robert Duncan McCall appeals his convictions for the offenses of criminal sexual conduct with a minor in the first degree and committing a lewd act upon a minor. At issue in this appeal is whether the trial judge erred in denying McCall's motion for an independent psychological examination of the victim. We affirm.^[1]

FACTS

A grand jury in Greenville County indicted McCall for the offenses of criminal sexual conduct with a minor in the first degree and committing a lewd act on a minor. The victim was McCall's niece by marriage.

On October 24, 2003, the trial court, Judge Edward W. Miller presiding, held a hearing on McCall's motion to have the victim undergo an independent psychological or psychiatric evaluation. In support of the motion, counsel for McCall noted the following: (1) the victim was a special needs student; (2) the victim went through two rounds of group therapy at a sexual trauma center and was told she could not do a third round; (3) the victim's mother once stated the victim wanted to recant her accusations against McCall; (4) the defense was willing to pay for the evaluation and had identified three psychiatrists who could perform it; (5)

the charges against McCall were based in part on incidents allegedly occurring as long as six years before the victim came forward; (7) the indictments were based primarily on statements by the victim and her mother; and (8) there were possible "fantasy issues" between the victim and McCall. Counsel further submitted an affidavit with hearsay evidence that the victim engaged in masturbation and once allowed a cousin to shave off her pubic hair.

In response, the solicitor objected to the motion, noting the victim's handicaps were orthopedic rather than emotional and she was a mainstream student who had achieved good grades and did not have behavior problems. The solicitor further asserted the therapy the victim received was necessitated by the alleged sexual abuse on which the indictments were based and problems associated with her physical disabilities rather than on any emotional or psychological abnormalities. Similarly, the solicitor averred the excessive masturbation could be "associated with a history of sexual abuse." Finally, the solicitor dismissed the shaving incident as a "childhood antic" that was not indicative of any sexually deviant behavior on the victim's part.

By written order dated October 24, 2003, Judge Miller denied McCall's motion for an independent evaluation of the victim. In the same order, however, he ordered the State "to turn over any and all records of psychological evaluation of the Victim as soon as possible" and granted McCall "leave to revisit this issue if review of these documents shows a compelling need for psychological evaluation of the Victim."

Following a trial by jury before Judge C. Victor Pyle on January 12-15, 2004, McCall was convicted of both offenses and received concurrent sentences of twenty years on the charge of first-degree criminal sexual conduct with a minor and fifteen years on the charge of lewd act on a minor. This appeal followed.

LAW/ANALYSIS

Relying on In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004), both at trial and on appeal, McCall asserts his motion to have the victim undergo an independent evaluation should have been granted. In addition to the arguments he raised during the pre-trial hearing, he also argues on appeal that, during the trial, the victim's allegations changed dramatically from what she related during the investigation. Finally, McCall notes that, contrary to Judge Miller's instructions, no treatment records for the victim had been made available to him. We hold McCall failed to preserve his arguments for appellate review.

A trial judge has the discretion "to order a psychological examination in cases in which the child is the complaining victim" upon a showing of "compelling need." In re Michael H., 360 S.C. at 551-52, 602 S.E.2d at 735. The trial judge, however, must have the opportunity to determine whether such an examination is warranted in a particular case. Id. at 546, 602 S.E.2d at 732.

Like McCall, the defendant in Michael H. unsuccessfully moved before the final hearing took place to have the complaining witness submit to a psychological evaluation. Id. at 544, 602 S.E.2d at 731. Unlike McCall, however, the defendant in Michael H. moved again to have the complainant submit to a psychological evaluation after a clinical psychologist treating the complainant testified at trial and defense counsel discovered he had not received notes concerning reports by the complainant that "he [the complainant] had been hearing voices in his head for some time." Id. at 544-45, 602 S.E.2d at 731.

In contrast, during the jury trial in the present case, defense counsel made only a passing reference to his prior motion to have the victim evaluated, stating at the beginning of the hearing, "And just for the record I would like to note that I still objected to that ruling just to protect myself." At no time did defense counsel expressly argue that the inconsistencies between the victim's trial testimony and her statements during the investigation warranted an order for her to submit to a psychological evaluation, and we see no way to construe counsel's statements to encompass such an assertion. Similarly, the record does not show any attempt by the defense to compel the State to release the victim's treatment records. See State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005), cert. granted (Oct. 19, 2006) ("A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve the issue for review."). Because the trial judge never had the opportunity to consider, much less rule on, whether the information elicited during the trial would constitute a compelling reason to order a psychological

evaluation of the victim or whether McCall was unjustifiably deprived of access to the victim's treatment records, we cannot address these issues on appeal.

AFFIRMED.

ANDERSON and THOMAS, JJ., and GOOLSBY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

JAN - 5 2006

**ATTORNEY GENERALS
OFFICE**

APPEAL FROM GREENVILLE COUNTY
COURT OF GENERAL SESSIONS

C. Victor Pyle, Circuit Court Judge

Case No. 03-GS-23-01234; 03-GS-23-07589

The State, ... Respondent,

v.

Robert Duncan McCall, II, ... Appellant.

Brief of Appellant

J. Falkner Wilkes

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Table of Contents

Table of Contents	1
Table of Authorities	2
Statement of Issues on Appeal	3
Statement of the Case	3

Argument

I. The Trial Court Erred in Failing Grant Defendant's Motion to Order an Independent Psychological Evaluation of Child Victim.	4
Conclusion	11

Table of Authorities

Cases

In Re Michael H., 602 S.E.2d 729 (2002, *refiled* 2004) 9

Statement of Issues on Appeal

1. Did the trial court apply the proper analysis in denying Defendant's motion for an independent psychological examination?
2. Do the facts of the case establish a compelling reason to warrant an independent psychological examination of child?
3. Does the failure of the trial court to grant the motion constitute an abuse of discretion requiring reversal of the Appellant's conviction?

Statement of the Case

Robert Duncan McCall, II, was indicted by grand jury in Greenville County for the offense of criminal sexual conduct with a minor in the first degree and committing a lewd act upon a minor. There was a pre-trial motion hearing held on the record October 23, 2003. A trial by jury was had January 12-15 of 2004, the Honorable C. Victor Pyle, Jr., presiding. Appellant was represented at trial by Timothy Sullivan of Greenville, South Carolina. The State was represented at trial by Bryna S. Seay, Assistant Solicitor. The Appellant was found guilty and sentenced to a period of twenty years on the CSC and fifteen years concurrent on the Lewd Act on a Minor charge. The Appellant was remanded to the custody of the Carolina Department of Corrections where he is presently confined. J. Falkner Wilkes represent Appellant on the brief of this case.

Argument

I. The Court Erred in Denying Defendant's Motion to Require a Child Victim to Have an Independent Psychiatric Examination.

In the present case the alleged victim (L.G.) was thirteen at the time of trial and testified to events alleged to have occurred as early as age 5. The record establishes that L.G. suffers from severe emotional, cognitive, and coping mechanism issues. (R. 128-129). Evidence further established that L.G. is severely disabled. (R. 128-129; 196).

Appellant moved *in limine* to have the prosecutrix (L.G.) submit to an independent psychological evaluation. (R. T 2-23; 247 [in possession of clerk]). Subsequent to a hearing the trial court denied the Appellant's motion finding that there was no compelling need warranting an intrusion of L.G.'s privacy. (R. 1-23; 248) The Appellant again raised his objection to the ruling again at trial. (R. 31-32).

At the time of trial L.G. suffered from a sleep disorder and was taking antidepressants. (R. 17). There was also an indication through close family members that L.G. suffered from deep psychological problems, which including having sexual fantasies and excessive masturbation. (R. 251-253; R. 115). In one instance L.G. caused or allowed a five year old cousin to shave off her pubic hair. (R. 251-253). Apparently, L.G. had at some point either denied or recanted the occurrence of the earlier allegations. (R. 6).

At the time that L.G. made the allegations that are the subject of this case there was sufficient medical basis for the accessing physician to order a psychological evaluation. Dr. Henderson indicated that L.G. was in the process of having Laura Hutton perform a forensic assessment on L.G. at the time that Henderson had scheduled L.G. for a physical examination. (R.1138-139).

The same story of digital penetration was related to Dr. Henderson upon the physical examination. Dr. Henderson's examination resulted in absolutely no physical findings of abuse.¹ Nevertheless, Dr. Henderson detailed the alleged abuse which was related by the mother with L.G. in the room. (R. 138-140). The essential facts to the allegation were that the Appellant put his finger in L.G.'s genital area. Dr. Henderson indicated only a complaint by L.G. of digital vaginal contact. (R. 138-140). The allegation of digital vaginal contact remained consistent prior to the trial.

At trial L.G.'s allegations changed dramatically. Despite repeating numerous times the allegations of digital vaginal contact, L.G. changed her story using the same phrase, over and over again apparently for different events: "He put his penis in my butt." (R. 61, l. 7; 59, l. 25; 53, l. 19; 47, l. 10). L.G. testified that "He put his penis in my butt" at "her house and his house and some other house." (Amanda's house.) (R. 46). Dr. Henderson was clear that L.G. never related anything of the sort to her during the medical examination. (R. 138-139).

In her testimony at trial the nature and frequency of contact with Appellant also changed dramatically from her earlier version of the events. In trial testimony the number of contacts increased and the alleged events now happened at moments when there were crowds of people were gathered. When questioned at trial on specific details L.G. was unable to give any definitive answers. Contrary to the earlier story, L.G. testified that it happened more than once at his house. (R. 47). But when later asked if these things

¹The mother of L.G. made a public statement that she had to take her daughter to four or five doctors in order to find someone who would even begin to believe her. (T. 263).

happened at her house she said: "I don't know." (R. 51, l. 23-25). She then testified that during her birthday party he "put his penis in my butt." When questioned if she was sitting or standing or any details of what allegedly happened. (R. 53, l. 20-25). When asked about specifics of an alleged incident at a cousin's house, L.G. testified "I am standing up and he go to me, he put his penis in my butt." (R. 59, l. 23-25). The same testimony was repeated for the Columbia allegation. "He put his penis in my butt." When asked if he did anything else she said no. When asked again if he touched her anywhere else on her body she said "on my butt." (R. 64). L.G. repeated the same line over and over but couldn't testify to any other facts about the occurrences. L.G. simply abandoned the original version of her story.

The testimony of L.G. further showed a lack of understanding and inconsistencies which can't be simply be attributed to her speech impairments. Testimony elicited by the prosecutor on redirect clearly establish the need to have the child submit to a psych exam:

Q. Lauren, you say that what your uncle didn't hurt you, do you mean it didn't hurt you physically, it didn't hurt your body?

A. No.

Q. How did it make you feel inside?

A. Good. Good.

The interpreter: You're saying, Good?

A. Yeah

The interpreter: Good.

Q. Made you feel good inside when he did these things?

A. Yes.

Q. Why was that?

A. I don't know.

Q. Lauren, did you understand what I was asking you?

A. No.

Q. I asked when you Uncle did these things to you, how did it make you feel?

Q. What were you feelings about it?

A. Bad.

Q. Why did you say good just a minute ago? Did you understand me?

A. No.

Q. So it made you feel bad.

A. Yes.

(R. 70, l. 20-71, l. 25).

The ease with which L.G.'s testimony could be manipulated further shows the need for the requested independent evaluation. The testimony of L.G. was apparently so easily manipulated that it drew an objection in the middle of the trial from a jury member. The juror, even recognizing the need for accommodating L.G.'s limitations, was concerned that the jury was not necessarily getting accurate and truthful testimony. (R. 72-73, R. 250).

The record clearly establishes a compelling reason to order an independent psychological evaluation of the prosecutrix in this case. L.G. was five or six at the time of the first allegation. Even at age thirteen at the time of trial there was a potential that a child of her age could confuse touching and penetration. (R. 139). The record shows the existence of serious psychological problems with sexual implications. L.G. had been subjected to as many as six, possibly more, physical examinations concerning the allegations. Plus, at the time of the motion L.G. had been in psychological counseling for over a year and a half. (R. 17). Under the circumstances there could be little risk of the child being traumatized by a simple forensic psychological examination.

In this case, where the Appellant and prosecutrix are the only two witnesses to the events, fundamental fairness dictates Appellant be entitled to request psychological evaluation of the complainant's psychological status. In Re Michael H., 602 S.E.2d 729 (2002, *refiled* 2004). The court has recognized that cases involving child victims present special concerns that weigh in favor of allowing judicial discretion to order psychological evaluations.

In the present case there is clearly the need for such an examination. In addition to the fact that the present case involves allegations made by a child, the allegations go back to the time the child was five. There are facts in record showing that the child has serious psychological problems and suffers from sexual fantasies. There is evidence that the child could confuse touching from penetration. The child's behavior also included excessive masturbation and having a five year old relative shave off her pubic hair. Applying the analysis outlined in In Re Michael H., *supra*, there is clearly a compelling reason for the examination.

The court has set forth factors to consider which are intended to assist in weighing the defendant's need for the examination against the victim's right to privacy. (1) The nature of the examination. In this case the examination sought was psychological. Psychological examination would, by its nature, be non-invasive. The child had apparently already been examined and was currently under psychological treatment for at least a year and a half so that an additional evaluation would not be unduly intrusive. (2) The victim's age. L.G. was five at the time of the first alleged event. She was under twelve at the time the charges were filed and as evidenced by her school testing, she

functioned at two to three grade levels behind her actual grade level. (3) The resulting physical and/or emotional effects of the examination on the victim. The child apparently has undergone regular medical treatments for her muscular disorder unrelated to the case. Related to the mother's obsession with the possibility of abuse the child has been subjected to numerous physical examinations as well as other psychological evaluations or treatment. There is little likelihood that an addition psychological evaluation would cause any emotional injury to the child. (4) The probative value of the examination. Physical examinations have revealed no positive indication of abuse. Plus, the child's testimony changed dramatically over the version of the facts given to medical examiners and law enforcement without any explanation whatsoever in the record. Evidence as to the competency of the witness would have tremendous probative value in this case. (5) The remoteness in time of the examination to the alleged criminal act. In the present case the examination would have been fairly remote in regards to the allegation of when the child was five years old, but much closer in time to allegations of later abuse. Plus, due to the existing psychological issues suffered by the child up to the time of the trial, the examination would remain timely in regards to the defense of the case. (6) The evidence already available for the defendant's use. Clearly, although the child had been under psychological treatment for at least a year and a half prior to trial by Hutton, who the state intended to call as an expert witness, no records had been made available to the defendant. As late as the date of the motion hearing in the case the state claimed not to know if any treatment records existed for L.G.'s one and a half years of treatment. And according to Hutton, she was engaged only in therapy and therefore could not render an

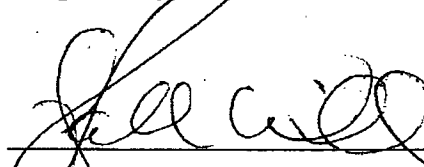
opinion from a forensic aspect. (R.129-131). As a result any disclosure from Hutton would not serve to provide the type of forensic evaluation which could be used in the defense of this case.

Under the analysis set forth by the Supreme Court the Appellant clearly established the grounds for obtaining an independent psychological examination of the child in this case. Based on the facts of this case, and the applying the reasoning of In Re Michael H., *supra*, and related cases, it was an abuse of discretion for the trial court to deny the Appellant's motion for such an evaluation.

Conclusion

Based on the foregoing the conviction and sentence of the Appellant should be reversed.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'J. Falkner Wilkes', is written over a horizontal line.

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January 3, 2006.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF GENERAL SESSIONS

C. Victor Pyle, Circuit Court Judge

Case No. 03-GS-23-01234; 03-GS-23-07589

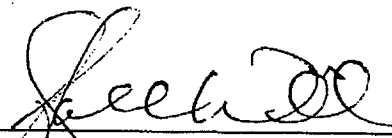
The State, ... Respondent,

v.

Robert Duncan McCall, II, ... Appellant.

Certificate

I certify that the Brief of Appellant is the same as the initial brief with the exception of corrections of typographical errors and notations to the record.


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
C. Victor Pyle, Circuit Court Judge

THE STATE

Respondent

ROBERT DUNCAN MCCALL, II

Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUE ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	
The trial court did not abuse its discretion in denying the motion to have the victim evaluated, where the issue was not raised at trial, where appellant presented no basis to believe the victim might be incompetent, where the only evidence of sexual fantasies mentioned by appellant seems to be his own, and where the examination was sought only for purposes of interrogating the victim; further, <u>In re Michael H.</u> was wrongly decided and should be overruled.	10
CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<u>First Savings Bank v. McLean</u> , 314 S.C. 361, 444 S.E.2d 513 (1994)	12
<u>In re Michael H.</u> , 360 S.C. 540, 602 S.E.2d 729 (2004)	10, 13, 19, 20, 21, 22
<u>Newsome v. State</u> , 782 P.2d 689 (Alaska Ct. App. 1989)	13, 20
<u>Pennsylvania v. Ritchie</u> , 480 U.S. 39 (1987)	23
<u>People v. Beauchamp</u> , 483 N.Y.S.2d 946 (Sup. Ct. 1985)	14, 16
<u>People v. King</u> , 581 P.2d 739 (Colo. Ct. App. 1978)	19, 20
<u>Roche v. South Carolina Alcoholic Beverage Control Comm'n</u> , 263 S.C. 451, 211 S.E.2d 243 (1975)	11
<u>Sellers v. State</u> , 362 S.C. 182, 607 S.E.2d 82 (2005)	15
<u>South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group</u> , 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001)	11
<u>State v. Bailey</u> , 298 S.C. 1, 377 S.E.2d 581 (1989)	11, 12
<u>State v. Barrett</u> , 299 S.C. 485, 386 S.E.2d 242 (1989)	17
<u>State v. Davis</u> , 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003)	11
<u>State v. Delaney</u> , 417 S.E.2d 903 (W.Va. 1992)	23
<u>State v. Mitchell</u> , 330 S.C. 189, 498 S.E.2d 642 (1998)	23
<u>State v. Williams</u> , 321 S.C. 455, 469 S.E.2d 49 (1996)	23
<u>Weatherford v. Bursey</u> , 429 U.S. 545 (1977)	23

STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not abuse its discretion in denying the motion to have the victim evaluated, where the issue was not raised at trial, where appellant presented no basis to believe the victim might be incompetent, where the only evidence of sexual fantasies mentioned by appellant seems to be his own, and where the examination was sought only for purposes of interrogating the victim; further, In re Michael H. was wrongly decided and should be overruled.

STATEMENT OF THE CASE

For purposes of this brief, respondent agrees that appellant's statement of the case is substantially correct.

STATEMENT OF FACTS

McCall sexually assaulted his **physically** disabled niece in a variety of manners from the time she was five or six years old. He admitted one instance to law enforcement. He disclosed to them and the niece's grandparents that he thought she had a crush on him and flashed her breasts – when she was five or six years old.

Lauren, thirteen years old at the time of trial, is physically disabled with severe muscle weakness and joint contractures. She needs much physical assistance. She needs help in the bathroom and needs help dressing. She can't zip up her pants. To eat with a spoon, she needs to support one hand with the other. She needs orthopedic assistance at school and has an aide at school. Born paralyzed from the neck down, she can walk on crutches in therapy if she is spotted, and can move herself around some between furniture. R. pp. 89-92.

She also has oral motor difficulty that effects her speech. Despite this physical impairment to her speech, she has shown dramatic improvement from when she was five years old, but it was still necessary to have a speech pathologist act as an interpreter on occasion during Lauren's testimony. R. pp. 35-38; pp. 91-92.

She is **cognitively normal**. She is in a regular curriculum and has been on the A/B honor roll throughout middle school. R. p. 91, lines 1-7.

McCall and his wife used to babysit Lauren when she was about five or six years old. R. p. 93, lines 7-18. While changing Lauren, McCall would put his penis in her butt. R. p. 47, lines 10-13. He also touched Lauren with his hand, both on her butt and in her front. R. pp. 47-48. He admitted to law enforcement that he digitally penetrated her one time. R. p. 160. He told Lauren he would kill her and that she would go to hell if she ever told anyone.

R. p. 49, lines 7-14.

Lauren began to have frequent and recurring urinary tract infections and bladder infections that just would not clear up. Lauren's mother took her to Dr. Hill, who was not her primary care physician, and as a result of a conversation with him, she asked Lauren whether anyone had inappropriately touched Lauren. Lauren disclosed that someone had. Lauren was six at the time and Lauren said it happened at McCall's house. Lauren's parents decided to not allow Lauren to have any contact with McCall. Ultimately, Lauren's mother did not pursue prosecution because she was advised at that time there was not enough proof. She regretted her decision. R. pp. 94-99.

At Lauren's seventh birthday party, McCall walked into her room and penetrated her from behind while she was standing up. Everyone else was outside. R. pp. 53-54. She testified she did not tell her mother because she was scared. R. p. 55, lines 17-20.

Another incident occurred at her cousin Amanda's house during Amanda's birthday pool party. While everyone else was outside, he put his penis in her butt. R. p. 59. The last time McCall assaulted Lauren was on a trip to Columbia for a soccer match McCall's daughter participated in. Although initially reluctant to allow Lauren to go with the McCall family, McCall's wife and daughter encouraged Lauren's mother to allow it, assuring her they would not leave her alone with McCall (they knew Lauren's mother had concerns about McCall but did not know that it "involved Lauren or sexual abuse"). Shannon was supposed to be taking care of her. Shannon left early though. After swimming in the hotel pool, Lauren ended up alone in a hotel room with McCall while McCall's wife and daughter Mary Beth went to Wal-Mart. While assisting her change clothes, he put his penis in her butt. R.

pp. 62-64; pp. 100-01.

After that trip, Lauren disclosed the assaults to Amanda, who Lauren described as her best friend. It was Amanda who convinced Lauren tell her mother. R. pp. 65-66.

Amanda testified that Lauren told her that McCall had done something to her in Columbia and at Amanda's birthday party and Amanda encouraged her to tell her mother. Amanda also testified that at Amanda's birthday party, Amanda's mother directed Amanda to go into the house and bring Lauren back outside because Lauren was inside and upset. R. pp. 73-79.

Amanda's mother, Andrea Pridmore, corroborated that she found Lauren inside and crying at Amanda's party. McCall was there. Lauren would not tell Andrea what was wrong. R. pp. 84-85.

An investigation ensued and law enforcement questioned McCall. He told Deputy Lorraine Henderson the following:

... he remembered when she was five or six years old that she had a crush on him. And that she had made gestures to him that made him feel uncomfortable. I asked about the gestures, you know, what kind of gestures would a five or six year old could make [sic]. He was telling me, you know, how she was handicapped and stuff and how she was laying in the floor. And kind of half in and half out of his daughter's room and that she was changing clothes and that she had grabbed under her breast and kind of waived it at him.

R. p. 156, lines 1-15. Henderson told McCall that she didn't think Lauren had any breasts when she was five or six years old. So McCall proceeded to demonstrate how Lauren supposedly cuffed her breast and waived it at him. McCall claimed that when he felt she had a crush on him, he stayed away at that point. R. p. 156, lines 16-24.

McCall came back two days later and told Deputy Tony Hudgins that he felt like Lauren had a crush on him when she was about five or six years old. R. p. 189, lines 19-24. Initially denying anything happened, McCall then related that he was helping her get either dressed or undressed and, according to McCall, Lauren pulled his hand between her legs to her vaginal area and that McCall inserted a finger in her vagina at that point. Hudgins notified Deputy Lorraine Henderson to come take a statement. R. p. 190, lines 1-19; p. 246..

McCall sometime afterwards went over to his father-in-law and Lauren's grandfather's house. The grandfather, Nick Demos, had provided for McCall's jail bond, using his house as collateral. McCall told Demos the following:

... he knew that somebody was molesting her. And the reason that he knew is that she had a pronounced crush on him. And she had learned these techniques of excitement from somebody. But he didn't know why she chose him.

R. p. 198, lines 2-5. McCall described to Demos an incident where Lauren was naked and he thought she was coming on to him: "That she was coming on to him by cuffing her breasts and trying to entice him with her breasts." R. p. 198, lines 11-13. Undoubtedly amazed, Demos called his wife downstairs and McCall repeated the same thing for her. R. p. 197, lines 18-25.

McCall's wife, Valerie McCall, testified for the defense, giving the prosecution the opportunity to have her admit that she left Lauren alone with McCall. She admitted it. She admitted that she left them alone for twenty minutes at the hotel room in Columbia, thus helping the prosecution prove opportunity. R. p. 212, lines 17-22.

McCall also called Shannon, his adult daughter, to the stand, apparently to buttress the "she came on to me" defense. She testified that Lauren, who needed help with

everything, needed privacy. She testified that Lauren dealt with it by being “jovial” about it. While helping her in the rest room: “She would offer you her [butt] cheek and, you know, giggle about it.” Suppl. R. p. 4, lines 13-24.

McCall admitted telling law enforcement that he digitally penetrated Lauren, but blamed law enforcement for this. He admitted he lied to law enforcement, but assured the jury he was telling the truth to them. R. pp. 226-27. About the comments attributed to him that he felt Lauren had a crush on him and cuffed her breasts to entice him, he told the jury that it was “an exaggeration”. But he confirmed that she was five or six when she did this. R. p. 229, lines 1-10. The rest of the testimony on this point is best explained by direct quote, as follows:

Q: Cuffed her hand under her breast?

A: Well, you know, it's her chest and I used the term breast, I don't really – you know, I don't really see a difference in the term. You know, chickens have breasts. Breast plate of knights armour is a breast, you know, but it's a general term as far as I'm concerned.

R. p. 229, lines 11-19.

Pre-trial motion.

Two months before trial, McCall moved to allow him to hire a psychiatrist to mentally evaluate Lauren. McCall proffered the following:

... I think there are some fantasies here. I'm not sure how deep they are and how far they go. Also, I have some information that she went through two rounds of group therapy at a sexual trauma center and was told she could not do a third round. I have no information about those sessions, whether there were reports made. ...

Motion (M.) R. p. 5, line 25 - p. 6, lines 7. He also claimed that "it was stated by the mom, I think, that Lauren at one time wanted to recant her statement. And I don't know whether it was because it was not true and it was hurting the family or just because it was causing a lot of friction in the family and she didn't want it to be a problem to the family." M. R. p. 6, line 24 - p. 7, line 5.

McCall attempted to articulate the purpose of the examination as follows:

The other – the probative value of the examination and the issue before the Court – I really don't know. I'm not sure. That's why I want to have it. It may be – it may not help us at all or it may be very insightful. That I can't answer on that point.

M. R. p. 7, line 22 - p. 8, line 1.

The Court gave McCall another chance to clarify what benefit would be derived from examining the child, leading to the following colloquy:

Counsel: The results could be – I don't know what the – the results may come back that it didn't happen. I don't know. That it didn't happen. I don't know what she would say by herself.

Court: A contradictory statement.

Counsel: Yeah. That I don't know. That's why I'm making the motion. It may come back fine and everything is just like it says. He agrees and everything else, and maybe that would change my mind as far as –

Court: Well, see, now, you're just talking about doing an independent interrogation.

M. R. p. 9, lines 11-23. Counsel could only reply that there were some unspecified "fantasy issues". He did not specify who was having the fantasy.

That's the basis of McCall's motion.

The prosecution properly noted that McCall's counsel "is confusing – or equating her physical disabilities with mental disability, which is simply incorrect. She does not have mental disabilities. She is a mainstream student. She makes all A's and B's." M. R. p. 13, lines 18-22. Lauren also received the Governor's reading award, outstanding citizenship awards, and academic awards. M. R. p. 13, line 25 - p. 14, line 2. The prosecution advised the trial court that there was no question as to Lauren's competency. M. R. p. 15, lines 16-17.

The prosecution advised that Lauren's therapist advised the prosecution that Lauren has not been referred for psychological testing while seeing her, that she has shown no signs of thought disorder, nor psychosis, and has not found any indication Lauren is not competent. M. R. pp. 16-17.

ARGUMENT

I.

The trial court did not abuse its discretion in denying the motion to have the victim evaluated, where the issue was not raised at trial, where appellant presented no basis to believe the victim might be incompetent, where the only evidence of sexual fantasies mentioned by appellant seems to be his own, and where the examination was sought only for purposes of interrogating the victim; further, In re Michael H. was wrongly decided and should be overruled.

McCall alleges trial court error in denying his motion to force the victim to have a mental evaluation. Because McCall failed to show a compelling need for the evaluation and the trial court did not abuse its discretion in denying the pre-trial motion, there was no error. Further, the issue should not be addressed because it is not preserved for review.

McCall relies on In re Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004) to argue that his motion to have the victim evaluated should have been granted. In that case, the complainant was a five year-old child at the time of the incident, Defendant Michael was twelve or thirteen at the time of the incident. After obtaining therapy records at trial, Michael's attorney discovered reports that the complainant had been hearing voices in his head for some time. The voices told him to say mean things to his friends and to rape Michael like Michael raped him. Id., at 544, 602 S.E.2d at 731.

The Supreme Court noted that important information was uncovered during cross-examination of the treating therapist and Michael's attorney moved to have the victim evaluated at the end of the State's case. Id.

In the instant case, McCall did not move to evaluate the victim at the end of the State's case. Following the pre-trial motion, the Honorable Judge Miller issued an order

denying the motion for evaluation, but ordered the prosecution to provide any mental health records to McCall and that McCall could revisit the motion should review of the documents show a compelling need for the evaluation. R. p. 253 (order).

At trial, before the Honorable Judge Pyle, McCall asserted the following:

... just for the record, I guess we'll start. We had a hearing in front of Judge Miller on Friday, I guess about November, the end of October. This case was called to trial and wasn't reached so the Friday before that about having a[n] independent, psychological evaluation on the victim and Judge Miller denied that motion. And just for the record I would like to note that I still objected to that ruling just to protect myself.

R. p. 31, line p. 21 - p. 32, line 4.

Judge Pyle's only response was: "All right". R. p. 32, line 5. McCall never discussed the contents of the treatment records and whether or not they helped support his motion. He did not seek to put them in evidence.

The issue is not preserved because it was not raised and ruled upon by Judge Pyle. The purpose of an appeal is to determine whether the trial court acted properly and when a moving party's contentions are not presented or passed upon by the trial court, they should not be considered on appeal. See Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975). An issue is not preserved if the trial court does not rule on it. South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003). Further, McCall failed to offer any argument or relay in facts in support of his motion to Judge Pyle, who was not the judge at the previous hearing. See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (stating "standard motions"

are being made at the conclusion of the trial is insufficient to preserve the issue of sufficiency of the evidence); First Savings Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating when an “[a]ppellant fails to provide arguments or supporting authority for his assertion,” the issue is deemed abandoned on appeal).

In the instant case, Judge Miller clearly made only a preliminary ruling, but was allowing McCall the opportunity to raise the motion again once he had the opportunity to develop facts through discovery granted in the motion or by McCall’s own investigation. McCall did not offer any facts or arguments to support his motion, and ultimately did no more than inform Judge Pyle that a previous motion had been made and denied. Thus, McCall failed to sufficiently present argument for Judge Pyle to rule. Judge Pyle was denied the opportunity to properly rule. Further, Judge Pyle did not rule by saying “all right”. Accordingly this issue is not preserved for review.

Further, even if this Court was to review this issue, it should limit its scope to the facts and arguments presented during the initial pre-trial hearing. So even if the victim’s trial testimony raises concerns about the victim’s competency as McCall suggests (it does not), it should not be considered because McCall failed to re-raise the issue at any point following her testimony, even by way of post-trial motion. Thus the trial court was denied the opportunity to comment on her in-trial demeanor to decide if there was any question of her competency.

McCall’s pretrial motion before Judge Miller was supported by no more than conjecture and broad, unsupported assertions. McCall referred to some unspecified

“fantasies” but does not disclose any facts or explanation for the basis of his belief.¹ His reference to the victim not going for a third round of group therapy also fails to raise any belief that she is incompetent. There are any number of explanations for why she might not have undergone the third round of group therapy, and the least likely seems to be as a consequence of mental incompetency. McCall clearly failed to show a compelling need. In fact, the truth revealed itself that McCall just wanted to interrogate the victim with his paid expert in hopes of a recantation. See Newsome v. State, 782 P.2d 689 (Alaska Ct. App. 1989) (finding no error in denying Newsome’s motion to have victim undergo mental evaluation where Newsome “never established with any specificity what he believed a psychiatric examination would accomplish” and noting that a “psychiatrist is not a human polygraph”).

The Supreme Court held that a trial judge has the discretion to order the complainant be examined where the defendant can show a compelling need. Michael H. at 548-49, 602 S.E.2d at 733. Specifically, the Court noted: “We adopt these guidelines, recognizing the serious and significant competing interests presented in this case and similar cases involving child victims. In such cases, a trial judge is, and must be, vested with broad discretion in the conduct of trial.” Id.

In Michael H., the minor’s attorney moved for a mental evaluation of the complainant out of concerns of the questionable mental health of the complainant. Id. In the instant case,

¹ McCall makes reference to a fantasy between the victim and McCall. M. R. pp. 9-10. The only fantasy found in the record is McCall’s, based on the record at trial where McCall believed the victim was flashing her “breasts” at him when she was six years old.

McCall argued for a mental evaluation for purposes of a fishing expedition and in hopes of a recantation of her allegations – or as Judge Miller noted, to perform an interrogation. See People v. Beauchamp, 483 N.Y.S.2d 946 (N.Y. App. Div. 1985) (finding “children are not discoverable items”).²

Further, the prosecution noted at the hearing that therapist Linda Hutton determined the victim showed no signs of thought disorder or psychosis, and even though the victim was taking an antidepressant, it “would not be viewed as unusual given these circumstances.” M. R. p. 17, lines 9-14. McCall failed to establish that the victim’s taking of antidepressant medicine evidences that she is incompetent in any fashion. The antidepressant appears to be treatment for the trauma that McCall inflicted.

The remaining assertions McCall makes are based on a misreckoning of the trial record or they are entirely unsupported by the record. McCall references the victim suffered a sleep disorder at the time of trial, citing page 17 of the motion transcript. However, there is no reference on that page to a sleep disorder, and further, the record does not suggest any likelihood that a sleep disorder would render the victim incompetent.

McCall asserts in his brief that there is “an indication through close family members

² The Beauchamp court found an examination “would not only be inappropriate . . . but would border on gratuitous cruelty” and further noted the following:

It must be understood and conceded that a court directed examination by defendant’s psychiatrists would be aimed at proving his allegations. The infants would be questioned for the purpose of determining whether they were persuaded to testify falsely about their sexual abuse at the outset. They would not be interrogated with therapy in mind. It will be another ego diminishing episode – a recurring trauma – setting the stage for traumatic repercussions.

Id. at 948-49.

that L.G. suffered from deep psychological problems, which including [sic] having sexual fantasies and excessive masturbation. (R.115)." Br. of App. p. 4. There is nothing in the record indicating that family members believed the victim suffered "deep psychological problems" or had "sexual fantasies".³

The masturbation, which could not possibly be more irrelevant to whether a witness is competent, was readily explained by the mother: "According to the doctors she does that as a release for stress. She's got – well as you can imagine, a very stressful life. She has, you know, surgeries and just her daily life is very hard." R. p. 115, lines 22-25.

The victim cannot run around and play with other children. She is very limited in physical activity and the means that she can relieve stress. Therefore, it is not surprising that this would become a means of relieving stress. McCall fails to indicate how this shows she is incompetent to be a witness. It had no probative value at trial and has no probative value now on appeal; it was nothing more than a harassing and unwarranted intrusion on the victim's privacy that should never have been admitted at trial.

McCall's reference during pre-trial to the victim possibly recanting allegations was no more than conjecture formulated out of third hand information. This has no relevance to the issue of competency, but only feebly credibility. McCall failed to develop this assertion at trial, if there was ever any merit to it.

Cynically, McCall is attempting to bootstrap treatment for the victim's resulting trauma from his abuse inflicted on her to support his case, when he notes: "Dr. Henderson

³ Further, a witness's mental illness alone is not enough to rebut the presumption that a witness is competent. Sellers v. State, 362 S.C. 182, 607 S.E.2d 82, 86 (2005).

indicated that L.G. was in the process of having Laura Hutton perform a forensic assessment on L.G. at the time that Henderson had scheduled L.G. for a physical examination. (138-39)". Br. of App. p. 4. He also cites a portion of therapist Linda Hutton's testimony that she dealt with: "Emotional issues, cognitive sorts of issues, coping mechanisms." R. p. 129, lines 2-3. What McCall neglects to mention is the reason for the therapy was to deal with the trauma McCall inflicted by sexually abusing the victim – coping emotionally with having been sexually abused.

It is clear from the record that Hutton was treating her for trauma related to the sexual abuse. It would be appalling if defendants were able to use the existence of treatment for resulting trauma they inflicted as a basis for forcing a child victim to be mentally evaluated.⁴ It would be poor policy to tax victims for seeking treatment to cope with the trauma caused by sexual abuse inflicted upon the victims. McCall's argument on this point is without merit.

He also alleges that the victim changed her story at trial and never alleged beforehand that McCall put his penis in her butt. He further asserts that: "It was apparent that the prosecutor was equally unaware of the complete change in L.G.'s testimony prior to trial. (T. 307-09)." Nothing in the record indicates that the prosecution was unaware of the allegation of anal penetration. Further, while the victim did not disclose anal penetration to

⁴ Consider the Beauchamp court's observations, quoted as follows:

The emotional trauma resulting from child sexual abuse is more serious than the physical trauma – including the venereal and genital infection that often results from such victimization. The latter usually heal or can be cured medically. The former may and usually does result in prolonged or permanent damage. [internal citation omitted]. These potential dangers create a guarded future prognosis. Therapy must be applied with the highest degree of sensitivity.

Beauchamp, supra.

the examining doctor, there is nothing in the record to suggest that she did not disclose this to others when she disclosed abuse.⁵ Typically, the particulars of a complaint of sexual abuse are not permissible under the outcry exception to the hearsay rule.⁶ Further, that issue is one of credibility and has no relevance to the issue of mental competency.

McCall also refers to the following testimony to support his position:

Q: Lauren, you say that what your uncle didn't hurt you, do you mean it didn't hurt you physically, it didn't hurt your body?

A: No.

Q: How did it make you feel **inside**?

A: Good. Good.

Q: I'm sorry, I can't understand what you're saying?

A: Good.

Interpreter: You're saying, Good?

A: Yeah.

Interpreter: Good.

Q: Made you feel good **inside** when he did these things?

⁵ McCall quotes the victim's testimony six times that she stated he put his penis in her butt to give the illusion she testified like some robotic parrot. It's a splendid literary device, but sophistically ignores the full context of her testimony, which displayed competence despite the **physical** impairment to her speech that must have made the task tiresome. Br. of App. pp. 5-6. McCall's admission of sexual misconduct bolsters her credibility.

⁶ State v. Barrett, 299 S.C. 485, 486, 386 S.E.2d 242, 243 (1989) (hearsay testimony that victim complained of sexual assault is admissible, but not the particulars of the assault).

A: Yes.

Q: Why was that?

A: I don't know.

Q: Lauren, did you understand what I was asking you?

A: No.

Q: I asked when your Uncle did these things to you, how did it make you feel?

Defense Counsel: I think she answered that, Your Honor.

Court: Go ahead.

By Ms. Seay:

Q: What were your feelings about it?

A: Bad.

Q: Why did you say good just a minute ago? Did you understand me?

A: No.

Q: So it made you feel bad?

A: Yes.

Q: Did you feel afraid?

A: Yes.

R. p. 70, line 22 - p. 72, line 2.

This testimony is more the product of imprecise questioning rather than any inconsistent or manipulated testimony as McCall wants this Court to believe. Asked how the acts felt inside (to the victim, meaning how they felt, physically, inside her body), the

victim replied good, because the acts were physically stimulating. She answered the question properly, the problem is the prosecutor did not ask what the prosecutor meant. The prosecutor eventually got on the victim's wavelength and asked about her feelings (more precisely, her emotions). Emotionally, those acts made her feel bad – they embarrassed her. R. p. 172, lines 7-8.

This understanding of her testimony is born out by Dr. Nancy Henderson's testimony that the lack of pain for the child during a sexual assault is not uncommon. "A lot of times what occurs is somewhat pleasurable." R. pp. 142-43. So the victim was not manipulated. The child answered imprecise questions logically, and the prosecutor cleared up her own confusion to ask the question she intended. The physical contact was physically stimulating, but emotionally traumatic.

Where there was no real basis in McCall's motion, he really was seeking nothing more than a fishing expedition, he wholly failed to show a compelling need for the examination. Therefore, Judge Miller did not abuse his discretion, and the pre-trial motion was properly denied. Michael H., supra.

On the other hand, where the issue was never raised to Judge Pyle, clearly he could not abuse his discretion. Judge Pyle was never informed of the basis of the original motion. Nothing in the record before Judge Pyle indicates why the victim did not undergo a third round of therapy, what fantasies she was supposedly having, or what mental health and therapy records that McCall received from the State indicate about the victim's competency. See People v. King, 581 P.2d 739 (Colo. Ct. App. 1978).

In King, the Colorado court observed that it was not error to deny the defendant's

motion for a mental evaluation of the victim where the only evidence was the defendant's affidavit that the victim was "'mentally immature' had a 'vivid imagination,' and is 'subject to flights of fancy,' and that he had 'observed that the complainant has fantasies concerning sexual contact and relationships.'" The court found the statements conclusory and devoid of specific factual recitation. Id. at 741.

Further, there is no evidence in the record that the victim suffered from any sort of thought disorder or psychosis. The trial court did not abuse its discretion in denying the competency exam.

McCall refers to the Delaney factors⁷ adopted by Michael H. to support his position. First, that test need not be applied in the instant case because McCall has failed to show any evidence that would elicit concerns about Lauren's competency. However, the following factors were adopted in Michael H. to be considered by the trial court:

(1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination of the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.

Michael H., at 547, 602 S.E.2d at 732-33.

The record fairly discloses that the nature of the examination is that Lauren would be interrogated by one of three doctors that McCall has chosen for the purposes of seeking

⁷ State v. Delaney, 417 S.E.2d 903 (W.Va. 1992). Some states allowing the possibility of a court-ordered examination of the victim also factor the degree of corroborating evidence. See, e.g. Newsome, at 690. McCall's confession to one instance certainly provides profound corroboration to the veracity of her testimony.

a recantation of testimony or at a minimum, to act as a “human polygraph.” The victim is of a reasonably advanced age, but still a child. The emotional effects are potentially severe – especially since the examination contemplated is for interrogation – the victim has suffered emotional trauma from McCall’s assaults, has seen her family torn by the process of bringing McCall to justice, and now suffered from the indignity of having very private information shared with a jury (i.e., the irrelevant masturbation testimony). McCall stated he did not know the probative value of an examination. He did not know what evidence would likely be produced from an examination.

Finally, McCall did not provide any information for the record that he could not have used records or other evidence at trial in lieu of a mental examination. The order following the pre-trial motion indicates that the prosecution was to supply McCall with mental health records. McCall did not complain at trial that these records were not provided or did not answer the questions he raised during the pre-trial motion. He failed to show at trial that those records would be inadequate to cross-examine Lauren. It is his burden to provide a sufficient record, and he did not provide a sufficient record to examine this factor. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996).

Additionally, Michael H. was wrongly decided and respondent will move to argue against precedent if this matter is brought for oral argument.

The reasons that Michael H. was wrongly decided are articulated well by Chief Justice Toal’s dissenting opinion. Justice Toal took issue with the majority’s belief that the majority’s holding would not dissuade child victims from reporting. Id. at 557, 602 S.E.2d

at 738. It should be noted that often the parents of the victim have a large part in determining whether the State will be able to prosecute. Parents would undoubtedly decline to allow their children to be subjected to interrogation by a defendant's psychiatric experts, as was contemplated in this case.

Further, this case illustrates just how defendants will seek to use Michael H.'s holding as an opportunity to seek a fishing expedition, by relying on nothing more than conjecture, unsubstantiated assertions, and pure rhetoric as a means to give their own experts access to vulnerable, traumatized victims. Michael H. has inadvertently given license for the sexual assailants to reach the victim through their attorneys and experts to perpetuate the intimidation that is part and parcel of preventing them from being brought to justice. Adult victims of sexual assaults, not to mention other victims of violent crimes, are not treated so harshly, and neither should child victims.

Michael H. is also wrongly decided because it improperly conferred the right of a defendant to impose a mental examination of a child victim on the basis of Due Process and the Confrontation Clause. Such a discovery right is not warranted under any prior interpretation of these constitutional provisions by the United States Supreme Court.

Reliance on federal constitutional principles is patent in the Michael H. opinion. In Michael H., the South Carolina Supreme Court determined that guidelines for evaluating the existence of compelling need "safeguard child complainants from unnecessary intrusions into their privacy, while also protecting a defendant's right to confront his accuser." Id. at 548, 602 S.E.2d at 733 (emphasis added). Further, the Court found an absolute bar on ordering the victim to be mentally evaluated "ignores the necessary balance which must be

sought between a complainant's privacy rights and the defendant's right to a fair trial." Id. at 549, 602 S.E.2d at 733. (emphasis added). The Court later concludes: "fundamental fairness dictates a defendant be entitled to request a psychological evaluation of a child witness where there is compelling reason to question the complainant's psychological status." Id. at 549, 602 S.E.2d at 734 (emphasis added).

There is no constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545, 559 (1977). The right to confront witnesses is not the right to gain evidence in discovery. Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987). Accordingly, the South Carolina Supreme Court misapplied these principles of the federal constitution in Michael H. Michael H. should be overruled.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Assistant Attorney General

ROBERT M. ARIAIL
Solicitor, 13th Judicial Circuit

BY: 

DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
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ATTORNEYS FOR RESPONDENT

January 4, 2007

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenville County
C. Victor Pyle, Circuit Court Judge

THE STATE,

Respondent,

vs.

ROBERT DUNCAN MCCALL, II,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Assistant Attorney General

ROBERT M. ARIAIL
Solicitor, 13th Judicial Circuit

By: 

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Post Office Box 11549
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ATTORNEYS FOR RESPONDENT

January 4, 2007

APPENDIX 160

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenville County
C. Victor Pyle, Circuit Court Judge

THE STATE,

Respondent,

vs.

ROBERT DUNCAN MCCALL, II,

Appellant.

PROOF OF SERVICE

I, Karen Farrell, certify that I have served the within Final Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

J. Falkner Wilkes
Craven & Wilkes
201 Whitsett Street
Greenville, S. C. 29604

I further certify that all parties required by Rule to be served have been served.

This 4th day of January, 2007.


KAREN FARRELL
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

PCR

Q. 1

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE) IN THE COURT OF GENERAL SESSIONS
Case No. 03 1234

State of South Carolina)

vs.)

MOTION

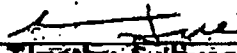
Robert D McCall II)

Defendant)

PLEASE TAKE NOTICE that the undersigned, as attorney for the Defendant, will move before the Court on Wednesday, September 2003, or as soon thereafter as can be heard, for an Order requiring the victim to submit to an individual psychological evaluation.

This Motion is not intended for the purpose of delay but is made in the interest of justice and based upon the enclosed affidavit which is in a sealed envelope which is to be opened only by the Court and the Solicitor.

Executed at Greenville, South Carolina, this 5th day of September, 2003.


C. Timothy Sullivan
Attorney for Defendant
105 Willenhall Lane
Greenville, S. C. 29611
(864) 246-8591

FILED CLERK OF COURT
PAUL H. WICKESMAN
GREENVILLE, S.C.
2003 SEP - 5 PM 3:19

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

State of South Carolina,

v.

Robert D. McCall, II,

Defendant.

) IN THE COURT OF GENERAL SESSIONS
) Case No. 03-1234

AFFIDAVIT

I, C. TIMOTHY SULLIVAN, Attorney for Defendant, being duly sworn, states as follows:

"That during the investigation of this case, it has come to my attention that the victim has deep psychological problems and sexual fantasies, for example, people have gone into the victim's home and she would be in the other room and they could hear her moaning and making noises and the parents said 'that's just Lauren masturbating'. In another instance, the family found out that a couple of years ago, while playing with a cousin, she allowed the cousin to shave her public hair off. It upset the parents.

The above acts indicated to the affiant to be psychological and sexual fantasies that may influence her case.

That from a reliable family member.

SWORN to before me this 5 day)

of September, 2003.)

Elizabeth B. Johnson (LS))
Notary Public for South Carolina)

My Commission expires 03-03-09)

C. Timothy Sullivan
C. Timothy Sullivan
Attorney for Defendant

FILED
CLERK OF COURT
PAUL B. WOODWARD
GREENVILLE, SC
2003 SEP 5 PM 3:19

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF GREENVILLE)

STATE OF SOUTH CAROLINA,)

Indictment No: 2003-GS-23-123

VS.)

ORDER

ROBERT D. MCCALL II,)

DEFENDANT.)

This matter is before me upon the Defendant Robert McCall's Motion to Compel the Victim to undergo an independent psychological evaluation by the Defendant's expert.

The State is ordered to turn over any and all records of psychological evaluation of the Victim as soon as possible. Defendant is granted leave to revisit this issue if review of these documents shows a compelling need for psychological evaluation of the Victim.

The Defendant's Motion for an independent evaluation of the Victim is denied.

IT IS SO ORDERED.

EDWARD W. MILLER
Edward W. Miller
Presiding Judge, Fifteenth Circuit

Greenville, South Carolina

Dated: 10/24/03

A Certified Copy
Paul B. W. [Signature]
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 10/24/03

FOSTER LETTER 3 of 48

253

ARREST WARRANT

G-654397

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
GREENVILLE

THE STATE

against 02-90568

ROBERT DUNCAN MCCALL II

Address: GREENVILLE, S.C. 29615

Phone: SSN:

Sex: M Race: W Height: 5'7 Weight: 190

DL State: SC DL#: DOB: Agency: ORIS: 230000

Prosecuting Agency: G'VILLE SHERIFF'S OFFICE

Prosecuting Officer: L. HENDERSON 630/*166

Offense: CRIMINAL SEXUAL CONDUCT 1ST

DEGREE WITH A MINOR Offense Code:

Code/Ordinance Sec. 16-3-650

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant ROBERT DUNCAN MCCALL II
on 6/26/02

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
GREENVILLE

AFFIDAVIT 02-90568

Form No. 100-1
S.C. Attorney General
July 28, 1990
SCCA 518Personally appeared before me the affiant INV. LORRAINE HENDERSON who
being duly sworn, deposes and says that defendant ROBERT DUNCAN MCCALL II
did within this county and state on 2-21-96 THRU 2-21-97 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of)
in the following particulars:

DESCRIPTION OF OFFENSE: CRIMINAL SEXUAL CONDUCT FIRST DEGREE WITH A MINOR

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts: AFFIANT HAS A STATEMENT FROM
THE VICTIM, WHO IS A 12-YEAR OLD FEMALE IMPLICATING THE DEFENDANT IN THE ABOVE
SAID OFFENSE. THE VICTIM STATES WHILE SHE WAS IN THE CARE AND CUSTODY OF THE
DEFENDANT HE DID INSERT HIS FINGER INTO HER VAGINA ON MORE THAN ONE OCCASION.
AFFIANT ALSO HAS IN POSSESSION A STATEMENT FROM THE DEFENDANT ADMITTING THAT HE
INSERTED HIS FINGER INTO THE VICTIM'S VAGINA ON ONE OCCASION.
INVESTIGATION REVEALED THIS INCIDENT DID OCCUR WITHIN THE BOUNDARIES OF GREENVILLE
COUNTY. SEE CASE #02-90568.

M.L.G.

Sworn to and subscribed before me
on 2-21-97

Signature of Issuing Judge (L.S.)

Signature of Affiant

Affiant's Address 4 MOGEE STREET
GREENVILLE, S.C. 29601

Affiant's Telephone 467-5136

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
GREENVILLE

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
XX BETWEEN 2-21-96 - 2-21-97 defendant ROBERT DUNCAN MCCALL II

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☐ Municipality of) as set forth below:

DESCRIPTION OF OFFENSE: CRIMINAL SEXUAL CONDUCT FIRST DEGREE WITH A MINOR

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
defendant at the time of its execution or as soon thereafter as is practicable.Signature of Issuing Judge (L.S.) Judge's Address 4 MOGEE STREET
GREENVILLE, S.C. 29601

Judge's Telephone 467-5312

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

Judge Code: 544

ORIGINAL

APPENDIX 105

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

At a Court of General Sessions, convened on FEBRUARY 25, 2003 the

Grand Jurors of Greenville County present upon their oath:

That ROBERT DUNCAN MCCALL, II did in Greenville County, between the 21st day of February, 1996 and the 21st day of February, 1997, commit a sexual battery on M.L.G., who was less than eleven years of age. This is in violation of §16-3-655(1) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Bryna S. Seay
SOLICITOR

PATIENT NAME

PAGE

1

DATE	PROBLEMS/FINDINGS	PLANS
6/7/96	2nd opinion. - Feb - UTI - May → dysuria but no UTI - vulvovaginitis treated w/ A+D, over-the-counter soap, etc. - Monday saw new MD - concerned about molestation - stay w/ Mom & GM has gone to school for orthopedic problems - has variety of therapy - gone to cousin's home - no sexual penetration - pin exams - not enthusiastic w/ D/C last → vaginal D/C + and was red - no bubble bath play in sand - generally loose clothing - assistance at toilet - sometimes delays voiding → discomfort - new enuresis (had been dry for several years) - behavior - no other changes, seem tired seem happier - Mom new home all the time + facilitating (R) - no Δ in sleep other than enuresis - diet good - no weight loss - seemed to get angry when Mom asked about possibility of abuse - still has dysuria	5/p UTI's most had a fever. on Triclor now. (4)
	PE: CA: UAD. HEENT: Neck: ⊙ Chest: lung - clear heart - S1+S2 ⊙ abd: ⊙ AS, soft, NT, ⊙ HSM/masses abd: ⊙ HSM/masses GU:  - annular hymen symmetrical Small opening → - edge of hymen a bit thick but symmetrical 1.2 cm but not exactly	

FOSTER LETTER 6 of 46

Jun. 3. 2002 9:20AM

No. 2155 P. 3/3

PATIENT NAME

PAGE

DATE	PROBLEMS / FINDINGS	PLANS
	Do: vulvar/vaginitis Plan: 1) asymptomatic 2) hyaline 3) if worse → bottom for yeast 4) Flu: usual pediatric doses chosen 5) Safety measures	See as

FOSTER LETTER 7 of 46

APPENDIX 168

248

WGT

HEAD

T-974

AHV 5/16. Seen because of continued complaints of frequency, burning on urination. Family is planning on going out of town the next day.

O: Alert, active, WF. Afebrile. Heart/lungs

normal. Abdomen soft, nontender. Vaginal exam unremarkable. UA clear. Urine culture plated.

a: N/S urethritis, no evidence of UTI.

P: Fluids, no particular treatment needed at this point. Using cream in vaginal area, call tomorrow for urine culture report. s/sbr

6/3/96

S: Pain with urination on and off since January. At one time she was cultured and had a UTI, at other times the cultures have been negative, but symptoms have continued. Mom has tried sitz baths and wiping her vaginal and urethral area well, but not calmed the symptoms. No known history of molestation but child is developmentally delayed especially speech wise. She goes to school and gets therapy there. No fever. No vomiting. child does not complain of any backache or stomachache.

O: Alert, cooperative, pretty much nonverbal child. She will respond to some questions slowly, with one word answers. Unable to describe her symptoms to me. When asked whether anyone had touched her in her vaginal or genital area, she nodded yes, but unable to elaborate any further in that subject. Abdomen soft, nontender. No HSM or mass. No distension of bladder. No flank pain. Chest, CV clear. HEENT normal, with supple neck. GU exam shows reddened labia minora and labia majora. Urethra slightly reddened. Hymen opening looks rounded, and slightly large, measured at 5 x 7 mm in diameter. Don't see any acute tears. There is milky fluid in vaginal vault. Perianal area normal.

A: Vaginal area. Vulvovaginitis.

P: I did not culture urine since it appeared grossly contaminated with epi's. There were a few bacteria present but I doubt this is urinary infection. I did culture vaginal discharge. This will be sent to ODC at GHS. Amoxil 10 days, 250 t.i.d. Return in 2 weeks. I

discussed the possible causes of vaginitis with parents including foreign body, poor hygiene and molestation. There were appropriate in their questions.

sh/sbr

CHILDREN FROM BIRTH THROUGH AGE 17

Sent Name: [REDACTED]

Date: 8-1-02

Stamp Plate
Name of Patient

Date of Visit:	8/1/02	Time:	10am
Source of Intake Information:	[REDACTED]		
Relation:	☐ Child Protective Services ☐ Medical Provider ☐ Law Enforcement ☐ Other: ☒ Guardian		
Is patient in Emergency Protective Custody?	☒ No ☐ Yes Date:		
Site:	GCAC/GHS		
Provider Name (Print):	NANCY HENDERSON M.D.		

2002-139

EXAM TYPE PERFORMED: ☐ SEXUAL ABUSE ☐ PHYSICAL ABUSE ☐ BOTH

DEMOGRAPHIC INFORMATION				
Photocopy of Agency Demographic Information May Be Submitted				
Patient Name:	[REDACTED]	Sex:	☒ Female ☐ Male	
DOB:	[REDACTED]	Age:	12	
SS#:	[REDACTED]			
Race:	☒ White ☐ Black ☐ American Indian ☐ Oriental ☐ BI-Racial ☐ Other		Migrant:	☒ No ☐ Yes
Mailing Address:	[REDACTED] Greenville, SC			
Street Address:	[REDACTED]			
City:	[REDACTED]			
County of Residence:	Greenville			
Current School:	District:	Grade:		
Legal Custodian/Relation:	[REDACTED] - Mother			
Contact Name:	Lorraine Henderson	Contact Phone:	467-5136	
Accompanying Guardian/Relation:				
Payment Source:	Crime Victims	Policy #:		
INVOLVED AGENCIES				
Law Enforcement:	Greenville	☐ Police Department ☒ Sheriff Department		
Officer:	Lorraine Henderson	Phone:	467-5136	
Address:	4 McDev St Greenville	Report Date:	SC 2/6/03	
DSS:	Social Worker's Name:			
Phone:	Ext:			
Address:				
Other Agency(ies):				

FOSTER LETTER 9 of 46

CANARY - LAW ENFORCEMENT

PINK - VICTIM COMPENSATION

APPENDIX 170

INCIDENT INFORMATION

Stamp Pl:
Name of P:

Patient Name:

Date:

8-1-02

Previous Exam for Maltreatment: ☐ No ☐ Unknown ☐ Yes	
Date:	
Location:	
Physician:	Phone:
Results:	
Initial Indicator of Risk: ☐ Victim Behavior ☐ Victim Verbal	

2002-139

Physical Indicators: ☐ Witness ☐ Unknown ☐ Other:

Brief History of Allegations and/or Reason for Referral:

Molested in Greenville + Columbia
visiting 22 F cousin and she left w/ her mother + state
(uncle) (thrusts) and hunched her w/ his clothes on. From
ages 3-6 had vaginal infection, took to doctor and
doctor was suspicious, asked if anyone had touched
her, but wouldn't tell who

IF KNOWN, Identity of alleged offender:

Robert McCall III

Age:

Sex: ☐ Female ☒ Male

Race: C

Relationship to Child:

Uncle

Date/Place of first alleged maltreatment:

Date/Place of last alleged maltreatment:

Date of last contact:

Access to this child: ☐ No ☐ Yes

Access to other children: ☐ No ☐ Yes

See Below:

IF KNOWN, Identity of additional offender:

Age:

Sex: ☐ Female ☐ Male

Race:

Relationship to Child:

Date/Place of first alleged maltreatment:

Date/Place of last alleged maltreatment:

Date of last contact:

Access to this child: ☐ No ☐ Yes

Access to other children: ☐ No ☐ Yes

of Therapist Involved:

Agency:

Phone:

Therapist's Signature:

Date:

FOSTER LETTER 10 of 48

ITE - HOSPITAL

CANARY - LAW ENFORCEMENT

PINK - VICTIM COMPENSTI

APPENDIX 171

PATIENT INFORMATION

Stamp Pla
Name of Pa

Patient Name:

Date:

Location:

Relationship:

Accompanying Adult(s)/Relationship(s):

Patient's Communication Skill Level: ☐ WNL ☒ Delayed ☐ Unknown

Personal Physician's Name: Dr. Shoppard, Catherine, MD

Location:

Phone:

North Wad Middle School TE

Current Medications:

Antibiotics Taken Since Possible Exposure:

Reason Rx:

Allergies: ☐ N/A ☒ No ☐ Yes - Drug(s):

☐ Atopic Dermatitis ☐ Other:

Developmental Level: ☐ Appropriate ☒ Delayed ☐ Advanced ☐ Unable to Assess

Prenatal History: Maternal Violence/Trauma ☐ No ☐ Yes -

Complication: ☐ No ☐ Yes -

Substance Use: ☐ No ☐ Yes -

ETOH:

Perinatal History: Complications: ☐ No ☐ Yes -

Length of Hospital Stay:

Birth Weight:

Permanent Past Medical History

Surgeries -

☐ Invasive Diag. Proc. -

☐ Medical Treatment -

☐ Hospitalizations -

☐ Ingestion -

☐ Head Injuries ☐ No ☐ Yes

☐ Physical Injuries ☐ N/A ☐ No ☐ Yes -

☐ Burns -

☐ Ano-genital Injuries or Infection -

☐ Other -

Menarche: ☐ No ☒ Yes

Age: 11

Date of LMP: 3/20/02

Normal: ☐ N/A ☐ No ☒ Yes

Pregnancy History:

STD History:

Use of Contraceptives: ☒ N/A ☐ Oral ☐ Injectable Contraceptive ☐ Condoms ☐ Other -

Comments:

Permanent Family History

☐ Bleeding & Bruising Disorders -

☐ Bone Disease -

☐ Drug Use -

☐ ETOH Use -

Domestic Violence (Severity/Frequency) -

Reported to Law Enforcement ☐ Yes ☐ No

☐ Mental Health Problems -

Examiner's Signature

Date

FOSTER LETTER 11 of 46

WHITE - HOSPITAL

CANARY - LAW ENFORCEMENT
Page 3 of 12

PINK - VICTIM COMPENST

APPENDIX 172

PHYSICIAN'S HISTORY OF PRESENT ILLNESS
FOR BOTH PHYSICAL ABUSE AND CHRONIC SEXUAL ABUSE CASES

Stamp Pt:
Name of P:

Patient Name:

Date:

Patient interviewed
in the Presence of:

Brief Summary of Assault(s)- Include date, time, location, if possible.
Some children may be able to associate the time of assault with weekends, a holiday, or a special television show. Describe in the child's own words details of the abuse.

Reason History Not Obtained:

[redacted] was not interviewed today so to being in process of Forensic Assessment with Linda Hutton. Mom did review the situation with [redacted] in room [redacted] agreed to help by letting us know if any changes needed to be made. Mom stated that ~ was also [redacted] no dispute was taken to Doc and diagnosed ~ vaginal infection and hand on exam the phys. Dr. Hall had concerns of possible sexual abuse. [redacted] was questioned and eventually disclosed sexual abuse (described penetration to the area by Uncle Bob). She later retracted statement and Mom was advised that since everything was mom's decision not to answer later he not having contact with Bob until the past May when his daughter Shannon was being visited. Shannon left house with Bob for short time maybe 20 mins. It is at this time the [redacted] has told that Bob again put his body against hers and put his finger in her genital area. After mom stated this info [redacted] agreed that this is the correct information.

Were any photographs taken during the incident? ☒ No ☐ Yes ☐ Unknown Comments:

Did anyone see the assault? (i.e., brother, sister, friend) ☒ No ☐ Yes ☐ Unknown Comments:

Was there any coercion used? ☐ Knife ☐ Gun ☒ Choke ☐ Fists ☐ Binding
☐ Physical Size ☐ Verbal Threats ☒ Parent or Adult Authority ☐ Bribe
☐ Drugs/Alcohol ☐ Unknown ☐ Other: Comments:

Narrative of Concerns and Observations

of Support Person: ☐ Cooperative ☐ Uncooperative ☐ Supportive ☒ Unsupportive ☐ Hostile ☐ Flirt ☐ Ambivalent

FOSTER LETTER 12 of 46

WHITE - HOSPITAL

CANARY - LAW ENFORCEMENT

PINK - VICTIM COMPENST

APPENDIX 173

SEXUAL ABUSE/ASSAULT INFORMATION
FOR CHRONIC SEXUAL ABUSE CASES ONLY
 Optional Supplement to Interview

Stamp P
 Name of F

Patient Name: _____ Date: _____

Patient Interviewed in the Presence Of:		United in person 8 min 7 in person of having in person of		Described by Patient	N Y U	Comments
Sexual Contact						
Penis		X				
Finger			X			
Foreign object (Describe)		X				
Anal Contact						
Penis		X				
Finger		X				
Foreign object (Describe)		X				
Oral Copulation of Genitals						
of Victim by Assailant		X				
of Assailant by Victim		X				
Oral Copulation of Anus						
of Victim by Assailant		X				
of Assailant by Victim		X				
Masturbation						
of Victim by Assailant		X				
of Assailant by Victim		X				
Did ejaculation occur? If yes, write child's description.						
Describe location(s) on the body:						
Where did ejaculate go?						
Describe assailant's genitals:						
Condom used		X				
Foam, jelly, or lubricant used (circle).		X				
Fondling, licking, kissing or biting (circle)		X				
Describe the location on the body:						
Assailant's Signature _____ Date _____						

FOSTER LETTER 13 of 46

REVIEW OF SYMPTOMS

Stamp P1a
Name of Pa

Patient Name:

Date:

Patient Interviewed
in the Presence of:

		Described by Patient			Described by Historian			Prior Tx			Comments
		N	Y	U	N	Y	U	N	Y	U	
Urogenital	Pelvic pain				✓						
	Genital discomfort or pain				✓						
	Dysuria				✓						
	Urinary tract infections					✓					
	Enuresis				✓						
	Hematuria				✓						
	Genital itching				✓						
	Genital discharge (Describe color/odor/amount)				✓						
	Genital bleeding				✓						
Rectal	Rectal pain				✓						
	Rectal bleeding				✓						
	Rectal itching				✓						
	Constipation				✓						
	Incontinent of stool				✓						
General Symptoms	Frequent headaches				✓						
	Frequent stomachaches				✓						
	Vomiting				✓						
	Eating disorder				✓						
	Weight change				✓						
Behavioral Symptoms and Observations	Sexual Behaviors				✓						difficult to know if sexual or other behavior what has happened
	Sleep Disorders				✓						
	School Problems				✓						
Prior Testing Date:		bats ago - man to being ever reports to cop						Prior Treatment Date:			
[] Kt [] Pregnancy [] Chlamydia [] HIV								[] Pregnancy - Specify:			
[] GC [] RPR [] Other:								[] STD - Specify:			
Signature:								Date:			

FOSTER LETTER 14 of 46

WHITE - HOSPITAL

CANARY - LAW ENFORCEMENT

PINK - VICTIM COMPENST

APPENDIX 175

PHYSICAL EXAMINATION RECORD

Stamp Plate
Name of Patient

Patient Name: _____ Date: _____

Name(s) of Person(s) Present:

MM

Behaviors Observed During Exam: Describe:

Awake

Physical Exam: Height: _____ % Weight: _____ % H.C.: _____ %

	WNL	ABN	NA	Explain
General Appearance	✓			<i>chronic deformity of hands & feet. unable to walk</i>
CN II-XII	✓			
Motor Strength/Tone		✓		
Reflexes/TMs	✓			
Visual Fundi	✓			
Nose	✓			
Mouth/Oropharynx	✓			
Teeth: Upper	✓			
Teeth: Lower	✓			
Frenulums: Lips	✓			
Neck	✓			
Breasts/Chest	✓			
Back	✓			
Lungs	✓			
Heart	✓			
Abdomen	✓			
Hair/Scalp	✓			
Skeletal		✓		<i>chronic deformity lower legs & some contracture</i>
Other				

Comments:

Examiner's Signature

Date: _____
FOOTER LETTER 15 OF 46

PHYSICAL EXAMINATION RECORD

Date:

Stamp Plate
Name of Plate

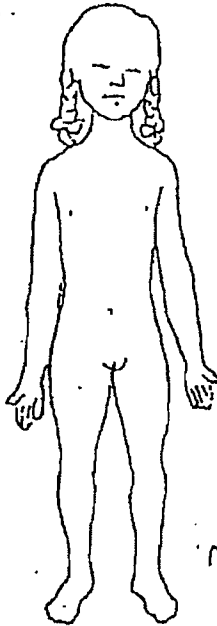
Skin Findings:
(Describe color, configuration, measurements, and any remarks on the child as to the etiology for each lesion.)

Photos Taken: ☒ No ☐ Yes Number Taken: _____
Forensic Dentistry Consult: ☒ No ☐ Yes Who: _____
Lesions Consistent with Ble Marks: ☒ No ☐ Yes

Male/Female Exam	WNL	ABN	Describe
Teenage Stage (Maturity Level)			
Breast 1 2 3 (4) 5	✓		
Genitals 1 2 3 4 (5)	✓		
Inguinal Adenopathy	✓		
Medial Aspect of Thighs	✓		
Perineum	✓		
Male Genital Exam			
Penis			
Circumcised	☐ No	☐ Yes	
Urethral Meatus			
Scrotum			
Testes (Anal/rectal exam on next page)			
Urethral Discharge	☐ No	☐ Yes	
Consistent w/Condyloma	☐ No	☐ Yes	Treated (Method):
Urethral Acid Diagnostic	☐ No	☐ Yes	
Physician Signature			

BODY DIAGRAMS

Stamp Plate
Name of Patient



multiple
of of hand

multiple
surgical scars
on legs

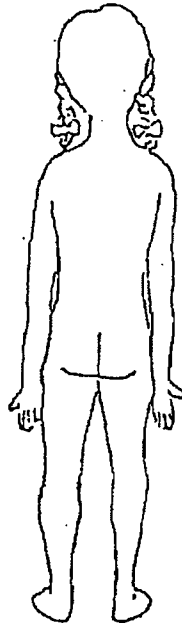
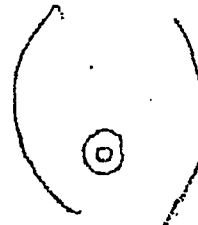
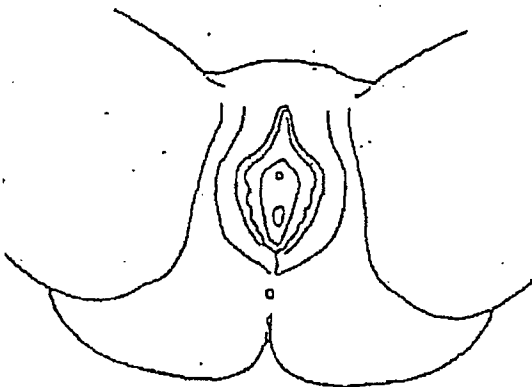


DIAGRAM OF HYMEN



BODY DIAGRAMS

Stamp Plate
Name of Police

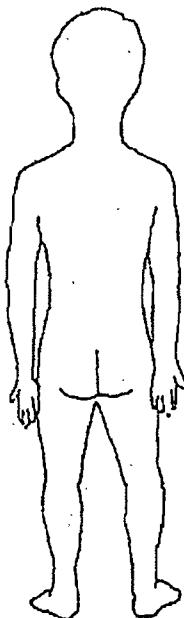
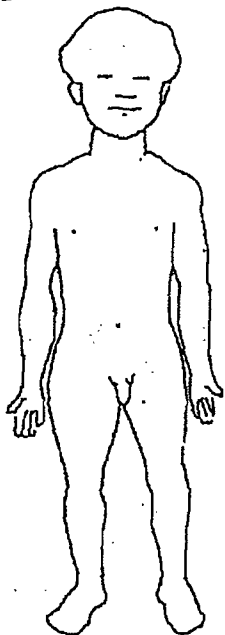
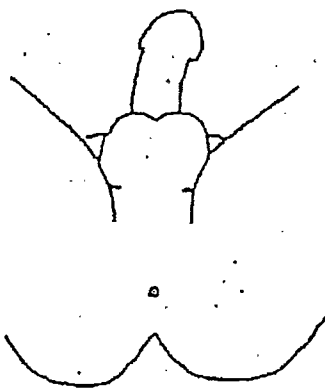


DIAGRAM OF SIGNIFICANT FINDINGS



6

PHYSICAL EXAMINATION RECORD

Patient Name: _____

Date: _____

Stamp Pl:
Name of P. _____

GENITAL EXAM

Female	WNL	ABN	Describe
Labia Majora	☒		
Labia Minora	☒		
Clitoris	☒		
Periurethral Tissue/ Urethral Meatus	☒		
Perihymenal Tissue	☒		
Hymenal Introitus	☒		
Hymen: ☐ Crescentic ☒ Annular ☐ Redundant			
Other:			
Clefts (Location)			
Transection			
Concavity			
Narrowing			
Other:			
Vagina	☒		
Vaginal Discharge	☒		<i>white, curd-like</i>
Fossa Navicularis	☒		
Posterior Commissure or Posterior Fourchette	☒		
Condyloma			Treated (Method):
Acetic Acid Diagnostic			
Describe:			
Exam Position Used: ☒ Supine ☐ Prone or Knees/Chest ☐ Supporter's Lap			

Female Male Anal Exam

	WNL	ABN	Describe
Perineum	☒		
Buttocks	☒		
Perianal Skin	☒		
Tone	☒		
Anal Verge/Folds Rugae	☒		
Condyloma			
Anal Tags			
Anal Fissures			
Reflex Dilatation		☐ No ☐ Yes	
Stool In Rectum		☐ No ☐ Yes	
Method of Exam for Anal Tone: ☐ Observation ☐ Digital Exam			
Exam Position Used: ☒ Supine ☐ Lateral Recumbent ☐ Prone or Knees/Chest ☐ Supporter's Lap			
Describe:			
Anoscopic Exam: ☒ No ☐ Yes			
Proctoscopic Exam: ☒ No ☐ Yes			
Genital Exam Using: ☒ Direct Vision ☐ Endoscope			
Photos Taken: ☐ No ☒ Yes - Number Taken:			

Comments:

Effect of Support Person: ☒ Cooperative ☐ Uncooperative ☒ Supportive ☐ Unsupportive ☐ Hostile ☐ Flat ☐ Ambivalent

Examiner's Signature: _____

Date: _____

FOSTER LETTER 19 of 46

WHITE - HOSPITAL

CANARY - LAW ENFORCEMENT
Page 11 of 12

PINK - VICTIM COMPENS

APPENDIX 180

B/SUMMARY

Stamp Plal
Name of Pal

nt Name:

Date:

laboratory Specimens (Check specimens collected.) Date:

Type	Blood	Urine	Throat	Vaginal	Urethral	Rectal	Other
GC Culture				X			
Chlamydia Culture				X			
Wet Prep				X			
Herpes Cult							
C&S							
Other							

UCG/BHCG		Treatment: ☒ No ☐ Yes - Rx:
U/A		☐ Pregnancy Prophylaxis (Specify):
RPR		☐ STD (Specify):
HIV		☐ Bleeding Studies ☐ PT ☐ PTT ☐ von Willebrande
CBC		☐ Other (Specify):
Hep B		X-Rays:

Recommendation for Follow-Up: ☐ Medical - ☒ Mental Health - *Linda Huth* ☐ Other Agency -

ARY: A normal exam does not rule in or out maltreatment. Please note the exact wording of the headings below. Recognize that finding
ostic of sexual abuse/contact are exceedingly rare when the contact has occurred greater than 72 hours from this physical exam.
☐ SIGNIFICANCE OF PHYSICAL FINDINGS UNKNOWN

Patients Exam:	AND GENITAL	PHYSICAL TRAUMA	OTHER
Normal Exam			
Nonspecific			
Suspicious			
Consistent			
Diagnostic			

Are there any discrepancies in history: ☐ No ☐ Unknown ☐ Yes Explain:

Discussion: *Approximate - there may have been a sex violation of sexual abuse to Linda by
Vince who lived with her in the previous of years, a known environment which
may be difficult to the child disclosure but appears to be going well
Exam today and find
Vince's behavior would be consistent with the disclosure but as yet a part
of the overall eval. will still be pending complete*

Signature of Examiner: *[Signature]* Print Name of Examiner: *[Name]* Date: *[Date]*
Signature of Preceptor: *[Signature]* Date: *[Date]*

Exam ☐ Photos ☐ Olig/Phone ☐ Protocol ☐ Video Reviewed By: *[Signature]*

Copies of Report Sent to: ☐ DOVA Date: *[Date]* ☐ LE Date: *[Date]* ☐ OSS Date: *[Date]* ☐ Other Date: *[Date]*

FOSTER LETTER 20 of 46

Parent
PARENT COPY

THE SCHOOL DISTRICT OF GREENVILLE COUNTY
INDIVIDUALIZED EDUCATION PROGRAM

School Year: 2003-04

IDENTIFYING INFORMATION

☐	Interim
☐	Initial
☒	Annual Review
☐	Special Review

Name [REDACTED] Social Security [REDACTED] Sex F Grade 7 DOB [REDACTED] m d y

Contact(s) [REDACTED]

Relationship Parent/Guardian Home Phone [REDACTED] Day Phone [REDACTED]

Contact(s) [REDACTED]

Relationship [REDACTED] Home Phone [REDACTED] Day Phone [REDACTED]

Teacher [REDACTED] Medicaid # [REDACTED] School Northwest Middle Date of IEP Meeting 05/15/2003 m d y

IEP Initiation Date 08/25/2003 IEP Ending Date 06/03/2004 Excluding Summer Months [REDACTED] Anticipated Annual Review 05/15/2004 m d y

Primary Disability: Orthopedically Impaired *Regular class with support service*

Other Disabling Conditions Speech language impaired
Other Health Impaired

PRESENT LEVELS OF EDUCATIONAL PERFORMANCE

Area(s) of Assessment	Method of Assessment*	Date	Findings
Academic	Woodcock Johnson III Achievement Battery	03/17/2003	The Woodcock Johnson III Achievement Battery is an individually administered achievement test. The scores are reported as Grade Equivalents (GE) and Standard Scores (SS) with 100 as an average (mean). Reading Recognition - GE - 4.0 SS - 85 Reading Comprehension - GE - 3.7 SS - 87 Written Expression - GE - 4.0 SS - 83 These scores indicate that <u>[REDACTED]</u> is performing below grade level in reading recognition, reading comprehension, and written expression. <u>[REDACTED]</u>'s written expression skills have improved over the course of this school year. Based on her report card grades and her performance in her academic classes, <u>[REDACTED]</u> is working at a higher grade level than these achievement scores indicate. Lauren's teachers feel that her difficulties with attention and distractibility affect her performance on tests. For this reason, there is some inconsistency in her test scores.
Academic	Report Card Grades	03/26/2003	Lauren earned the following grades for the 3rd nine weeks period: Language Arts - B *Literature - A Mathematics - A *Science - A *Social Studies - A *participates in the general curriculum Lauren received passing grades in all of her academic classes. FOSTER LETTER 21 of 48

THE SCHOOL DISTRICT OF GREENVILLE COUNTY
INDIVIDUALIZED EDUCATION PROGRAM

School Year: 2003-04

IDENTIFYING INFORMATION

☐	Interim
☐	Initial
☒	Annual Review
☐	Special Review

Written Communication	OT/Teacher Observation	4/8/03	Lauren will demonstrate improved communication skills on a keyboard and by refining her cursive handwriting skills.

*Indicate name of test, observation/checklist, or other method of assessment.

Strengths:

Lauren is very polite and kind. She gets along well with her peers. Lauren does well with basic math calculations.

Describe how the student's disability affects involvement and progress in the general curriculum.

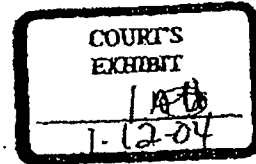
Lauren's disability affects her mobility and management of materials throughout the school and in her classrooms. She needs assistance in the lunchroom and restroom, as well as with carrying her books and materials to and from each classroom.

Lauren moves around with the assistance of a walker and will require extra time when moving from one place to another.

Lauren also has weaknesses in the area of fine motor skills, which will make writing more difficult for her. She may require extended time and/or the use of a keyboard for writing assignments. Lauren also experiences difficulty with attention and distractibility. She often has to be redirected or refocused back to the assignment(s) she is working on in class. She may

require extra time to complete assignments and/or an environment with no distractions in order to accommodate her difficulty with attention.

For Preschool Only: Describe how the disability affects the child's participation in appropriate activities.



Judge Pyle,

I have read about cases of alleged child molestation in which the investigators asked so many leading questions that the child actually said things that were not true, especially as small children.

In this testimony, I understand the child's need for help in understanding her speech. However, it seemed that the questions led the witness.

I just wanted to make that point, to be sure that investigator influence is not excessive, so we hear the witnesses true testimony.

Thank you. Charlie Weisel

~~Professor~~ Charlie Weisel

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF GENERAL SESSIONS
2003-GS-23-1234

STATE OF SOUTH CAROLINA,
PLAINTIFF,)

vs.)

ROBERT DUNCAN MCCALL, II,
DEFENDANT.)

TRANSCRIPT OF RECORD

COPY

October 24, 2003
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, JUDGE.

A P P E A R A N C E S:

BRYNA S. SEAY, ESQ.
Assistant Solicitor
Attorney for the Plaintiff

C. TIMOTHY SULLIVAN, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Official Court Reporter

001

FOSTER LETTER 24 of 46

APPENDIX 185

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

1 MR. SULLIVAN: Judge, this would be the case of the
2 State v. Robert D. McCall, II. Here is the indictment
3 number, 03-1234.

4 It is a motion by -- on behalf of the Defendant to
5 have the victim have a psychological or psychiatric
6 evaluation independent of what's been done. I have a copy
7 of the motion here.

8 THE COURT: Yes, please.

9 MR. SULLIVAN: The attachment doesn't need to be
10 published. The Solicitor has a copy. And the victim's
11 family, they know about it. They know the contents. And
12 I'm not here to try and embarrass anybody in this
13 proceeding. But everybody in the courtroom is aware of
14 that, what's in the contents of that.

15 THE COURT: All right.

16 MR. SULLIVAN: I would preface this to my client and
17 his wife, whom I've met with on many occasions about this
18 case, are aware of this motion. They're aware of the
19 nature of it. I've talked to them over a period of weeks
20 about it. I talked to Mr. McCall yesterday afternoon
21 about it. And I did not feel his presence would be
22 required. I talked, again, to Mrs. McCall this morning
23 and told her that it was scheduled for today and I would
24 let them know the results.

25 They would not offer any testimony or anything to

003

1 contribute to the motion. And there are a lot of
2 feelings, as you can imagine. This is a victim and an
3 uncle, the niece and the uncle is involved. The families,
4 there would be a lot of friction. And I thought unless he
5 could contribute something to the matter to keep them
6 separate.

7 THE COURT: Okay. That's fine.

8 MR. SULLIVAN: Judge, I'm sure you're aware -- I
9 think you had one of these, I understand, a couple of
10 weeks ago. And I've never done one. So I'm going to
11 follow the outline -- I'll pass this up -- and try and
12 make this brief. You're aware of the matter of --

13 THE COURT: Delaney.

14 MR. SULLIVAN: Yeah, the Delaney.

15 And it looks like the criteria set forth there -- one
16 would be the nature of the examination of question,
17 intrusive inherent examination. I'm not asking for any
18 kind of physical exam. It's just strictly a psychological
19 and psychiatric exam of the victim. I don't think that
20 would be intrusive. It would be a lot less intrusive or
21 traumatized than what we'll have to go through in Court in
22 a couple of weeks, I think. The victim's age, she's 13
23 now. She was 12 at the last incidence when this happened.

24 The resulting physical and emotional effects of the
25 examination. I don't see where that would be traumatized.

004

1 It would be she and a psychiatrist in a private room
2 without any people. He would be a stranger to her. And I
3 understand from the Solicitor and from records that I have
4 that it's possible that she would require a speech
5 therapist to be present to help the examiner understand
6 some of her responses.

7 I would ask that if you do grant this that the
8 examination start with the pathologist there -- or
9 therapist available, but not there unless he feels that
10 she needs it. I'd like an independent exam.

11 The only exam I've got is one by Dr. Henderson, which
12 the Solicitor has furnished to me. And at that one, the
13 mother did all the talking. The girl, from what I can
14 examine here, was there, but she did not really talk that
15 much.

16 MS. SEAY: That -- I'm sorry.

17 MR. SULLIVAN: At her school review, this was on --
18 furnished, again, by the Solicitor on May 15 of this year.
19 They -- she's a special needs student. And, again, I'm
20 not trying to embarrass anybody. But at that meeting,
21 there's a -- present to get the total view of this child
22 is a physical therapist and a speech pathologist. And I
23 don't know if we're going to need somebody in the
24 courtroom when she testifies or not. I assume so.

25 You have some information there. I think there are

005

1 some fantasies here. I'm not sure how deep they are and
2 how far they go. Also, I have some information that she
3 went through two rounds of group therapy at a sexual
4 trauma center and was told she could not do a third round.
5 I have no information about those sessions, whether there
6 were reports made. The Solicitor is not aware of those
7 reports.

8 THE COURT: Of what?

9 MR. SULLIVAN: The Solicitor does not -- was not
10 aware of these sessions. I've not --

11 THE COURT: What's your basis for thinking that
12 happened?

13 MR. SULLIVAN: The parents were at a conference and
14 they spoke to the people about sexual abuse things and
15 stated that REDACTED ED had been through two rounds of group
16 therapy. Someone was there that knew the situation and
17 told us about it. And they stated where she had been
18 through two rounds of group therapy at the sexual trauma
19 center and was told she could not do another round. I
20 don't know what that means, whether that wouldn't help her
21 or was bothering her or what. I have no reports of that.
22 And the Solicitor is not aware of that.

23 Also, in that same situation, it was stated by the
24 mom, I think, that REDACTED at one time wanted to recant her
25 statement. And I don't know whether it was because it was

006

1 not true and it was hurting the family or just because it
2 was causing a lot of friction in the family and she didn't
3 want it to be a problem to the family. There are a lot of
4 issues here, Judge. And this is a serious case. He's
5 charged --

6 THE COURT: What are the charges?

7 MR. SULLIVAN: CSC first with a minor, and then a
8 direct presentment to include a lewd act also in the same
9 case. So it's a serious case.

10 The girl does have some speech limitations, maybe
11 some psychological and some physical. And I think it
12 would be -- I'm not trying to just delay the matter at
13 all.

14 THE COURT: I know you're not.

15 MR. SULLIVAN: I think it would be in the best
16 interest of the whole situation to have her examined.
17 I've got names of -- and we would pay for it. The Defense
18 would pay for it. I've got names of three psychiatrists,
19 which I'll be happy to go over with the Solicitor, a Peter
20 Owens, a Wade Harris, and a Tony Goodbar. And they're
21 supposed to be very competent psychiatrists in this field.

22 The other -- the probative value of the examination
23 and the issue before the Court -- I really don't know.
24 I'm not sure. That's why I want to have it. It may be --
25 it may not help us at all or it may be very insightful.

007

1 That I can't answer on that point.

2 The remoteness of the examination. One of the
3 emphasis in this case as far as remote allegedly happened
4 when she was six, but was not discovered until she was 12.
5 So that was a six-year lap there. We're talking now from
6 the last time it happened until this time maybe a year.
7 But the remoteness, I would think, is a problem.

8 And then the evidence available. Well, you know,
9 pretty much what I have is, basically, statements by the
10 mother and the child. She needs help communicating. So
11 that's what I have. And I have an illusion to a sexual
12 trauma center group therapy, which I don't -- two group --
13 two sessions --

14 THE COURT: Have you filed a motion to discover that?

15 MR. SULLIVAN: I filed a motion, not on that
16 particular instance. I discovered that here recently. I
17 was made aware of this. But the Solicitor is not aware of
18 it.

19 THE COURT: All right.

20 MR. SULLIVAN: So she has nothing to gain --

21 MS. SEAY: I need to clarify that.

22 THE COURT: Okay.

23 MR. SULLIVAN: Basically, that's it, Your Honor.

24 And as stated, the Defendant is very much aware of
25 what's going on. And I thought it best for him not to be

008

FOSTER LETTER 31 of 46

1 here.

2 THE COURT: And what is the compelling need that you
3 have for this?

4 MR. SULLIVAN: I'm not sure who we're hearing from,
5 Your Honor, on this case. I'm not sure how much of this
6 is the girl and how much is outside influence. I'd like
7 to have an exam without the family there where she and
8 somebody could talk about it.

9 THE COURT: What benefit is going to be derived from
10 the examination?

11 MR. SULLIVAN: The results could be -- I don't know
12 what the -- the results may come back that it didn't
13 happen. I don't know. That it didn't happen. I don't
14 know what she would say by herself.

15 THE COURT: A contradictory statement.

16 MR. SULLIVAN: Yeah. That I don't know. That's why
17 I'm making the motion. It may come back fine and
18 everything is just like it says. He agrees and everything
19 else, and maybe that would change my mind as far as --

20 THE COURT: Well, see, now, you're just talking about
21 doing an independent interrogation.

22 MR. SULLIVAN: Well, it's an exam by a psychiatrist
23 really.

24 THE COURT: Well, but what --

25 MR. SULLIVAN: I think there are some fantasy issues

1 here. And there was some -- at one time, I think there
2 was an affinity between this young lady and the uncle. He
3 looked after her a good bit. And I don't know what
4 happened on that. But I'm not sure. Some of this may
5 have carried over. I don't know. That's why I'm asking
6 for someone more skilled in this field than I am,
7 obviously.

8 And, again, I'm not trying to do anything to
9 embarrass or make it hard on the victim by any means or
10 delay the matter. I think in fairness to my client in
11 view of her limitations, I think I had to do this, so.

12 THE COURT: All right.

13 Mr. SULLIVAN: That's all I have, Your Honor.

14 THE COURT: Okay. Ms. Seay.

15 MS. SEAY: Thank you, Your Honor.

16 I appreciate the Court's patience because I do have
17 some things that I'd like to share with you about the
18 history of this case and also the victim's particular
19 situation, and why we oppose this motion.

20 Your Honor, the victim is now 13 years old. Her name
21 is REDACTED She is present in Court today,
22 along with her parents, a grandparent, an aunt, an uncle,
23 and a cousin, and speech pathologist from the Greenville
24 County school district, who deals with her regularly.

25 Your Honor, initially, when this victim was six years

010

1 old, she disclosed to her mother a sexual incident
2 involving her uncle, who is the Defendant in this case.
3 The aunt and uncle are the godparents of this child. And
4 they had been caring for her while the mother worked when
5 she was a younger age. And when this victim was six, she
6 initially disclosed to her mother. There were various
7 discussions within the family, as well as going to a
8 pediatrician to determine what to do about this particular
9 situation.

10 As it has been related to me, the family decided,
11 based on the advice of a particular pediatrician that they
12 saw, that it would be best and less disruptive to the
13 family if it were not reported to any law enforcement
14 authority, but if they just ceased having any contact
15 between the uncle and the child. And that's what they
16 chose to do.

17 As time progressed, there was no contact. However,
18 in May of 2002, the victim went on a trip to Columbia with
19 some other family members that included some members of
20 the Defendant's family. There was some one-on-one contact
21 that occurred that the parents -- unbeknownst to the
22 victim's parents happened. The victim disclosed that the
23 uncle committed a sexual act on her at that time. Then
24 the victim's family decided that they must do something in
25 terms of reporting this. So it was reported at that time.

011

1 The incident, as I said, happened in Columbia, but
2 Investigator Loraine Henderson in sorting through this
3 discussed with the victim the previous incidents when she
4 was younger and made a charge based on that.

5 THE COURT: Based on?

6 MS. SEAY: Based on the incidents that happened when
7 the victim was approximately six years old.

8 THE COURT: Did she file also charges for the recent
9 activity?

10 MS. SEAY: I think the matter was referred to
11 Columbia authorities. I don't think that they pursued an
12 investigation or made a charge as a result of that.

13 THE COURT: All right.

14 MS. SEAY: The Defendant was interviewed in this case
15 by Investigator Henderson. He gave a statement admitting
16 committing the offenses that the child alleged he
17 committed when she was six years old. And, Your Honor --

18 THE COURT: Is that what he's on trial for?

19 MS. SEAY: Yes, sir.

20 THE COURT: Okay.

21 MS. SEAY: And, Your Honor, we strongly object to any
22 kind of a psychological evaluations for a number of
23 reasons. First of all, let me give you a little bit of
24 history about this victim.

25 As I said, she's 13 years old now. She's a

012

1 seventh-grade student at Northwest Middle School in
2 Travelers Rest. She was born several weeks prematurely
3 and had no muscle movement from the neck down. Her
4 parents have told me that there was some indication that
5 it was possibly a spinal cord injury or something that had
6 happened during the pregnancy that caused this problem.
7 She had severe physical problems as a result of this.

8 When she was 13-months-old, she had an open hip
9 reduction to correct a hip dislocation and she had to be
10 in a full body spica cast. When she was two years old,
11 she had surgery on both of her feet. When she was in
12 first grade, she had a hamstring lengthening to assist her
13 with muscle lengthening. When she was in fourth grade,
14 she had bilateral tibial osteotomies and casts as a result
15 of that. She must sleep in certain equipment and braces
16 as a result of her physical disabilities. She's received
17 occupational therapy throughout her life.

18 Your Honor, her -- Mr. Sullivan is confusing -- or
19 equating her physical disabilities with a mental
20 disability, which is simply incorrect. She does not have
21 mental disabilities. She is a mainstream student. She
22 makes all A's and B's. And I have for the Court a copy of
23 her report cards for fifth and sixth grades, which I'd
24 like to hand up, along with some certificates where she
25 has achieved honor roll, the Governor's reading award,

013

1 outstanding citizenship awards, academic achievement
2 awards. And these have all been provided to Mr. Sullivan.

3 THE COURT: I'll take you at your word.

4 MS. SEAY: Okay.

5 THE COURT: I mean, I believe everything you tell me.

6 MS. SEAY: As I said, Mr. Sullivan has those.

7 Your Honor, her primary --

8 THE COURT: I should say with respect to the
9 record -- I mean, with respect to her school record.

10 MS. SEAY: Her primary diagnosis, if you will, Your
11 Honor, is that she's orthopedically handicapped. And she
12 has a speech language impairment as a result of this
13 muscular problem. And I'm just going to refer to it as a
14 problem. As a result of the muscular problem she has, it
15 prohibits her from speaking normally.

16 I have spoken to her on several occasions and she
17 speaks generally in one- or two-word increments and has
18 difficulty, but it is not impossible to understand her
19 once you've spoken with her a little bit. The school,
20 because she has this particular physical disability, is
21 required to do an individualized education program for her
22 each year. And that was what Mr. Sullivan was referring
23 to where the speech pathologist and the teachers and
24 different specialists meet to plan an educational program
25 for her each year. I have a copy of the one that pertains

014

1 to this particular school year, 2003 and 2004. I've made
2 a copy for Your Honor if you'd like to look at it.

3 THE COURT: And what's that going to tell me?

4 MS. SEAY: This tells what her disabilities are and
5 that they are physical. She requires a physical aid to
6 assist her in school by carrying -- helping her carry her
7 books from class to class, writing notes for her because
8 she has disabilities with her hand muscles, helping her
9 with her locker, going to the restroom, and that kind of
10 thing. But she is a mainstream student who has achieved
11 good grades. She's not a behavior problem.

12 And in regard to the particular allegations
13 concerning fantasies and all that --

14 THE COURT: Is there any question as to her
15 competency?

16 MS. SEAY: No, sir. There is no question as to her
17 competency. She is, of course, presumed competent.

18 THE COURT: Okay. And what about these counseling
19 sessions he's referred to?

20 MS. SEAY: Yes. I would like to address that.

21 The -- first of all, let me clear up what he was
22 saying about that I had given him something from
23 Ms. Henderson. That was a medical exam, a copy of a
24 medical exam where she saw a pediatrician for a chronic
25 sexual assault protocol, basically. That did not refer to

015

1 any kind of psychological testing or anything like that.

2 THE COURT: Why did she -- why was that necessary?

3 MS. SEAY: It's a standard procedure that's done with
4 any report of a child, just so that they can test for
5 sexually transmitted diseases and different things like
6 that.

7 THE COURT: Okay.

8 MS. SEAY: The incidents that Mr. Sullivan has
9 referred to, I want to tell you that this child has been
10 seeing Linda Hutton, who is a local therapist. You may be
11 familiar with her. She's at the Bay Laurel Center for
12 Psychiatry and Psychotherapy. She's a licensed social
13 worker. She's been in practice for 30 years and has been
14 qualified as an expert witness in the area of sexual --
15 treatment of sexual abuse in children a number of times in
16 both criminal court and Family Court.

17 She's been seeing REDACTED for about a year and a half
18 for treatment issues related to the sexual abuse and also
19 some self-esteem issues that I [REDACTED] has had as a result of
20 her physical disabilities.

21 THE COURT: Have you provided those records to
22 Mr. Sullivan?

23 MS. SEAY: I spoke with Ms. Hutton and she has faxed
24 me a letter today indicating that masturbation, in her
25 experience, is not viewed as a pathological problem in

010

1 children. That excessive masturbation can be associated
2 with a history of sexual abuse.

3 As to the pubic hair incident that is referenced in
4 the affidavit that he gave you, she felt that that was
5 more a childhood antic or something of that nature. That
6 happened when the victim and her cousin were five and
7 seven-years-old. Childhood antics, I don't think it's
8 indicative of any sexual behavior.

9 Ms. Hutton says, "I have not referred [redacted] for
10 psychological testing during our work together, as such
11 was not indicated. She has shown no signs of thought
12 disorder, nor psychosis. She is presently taking an
13 antidepressant, which would not be viewed as unusual given
14 these circumstances."

15 So she has not found any indication that this child
16 is not competent. I think that it would certainly be
17 unduly invasive of this child's privacy. It --

18 THE COURT: Have you turned over the records?

19 MS. SEAY: I don't have any records related to that.
20 I'll be glad to give him a copy of this letter that she
21 faxed me this morning.

22 THE COURT: Is she going to be a witness?

23 MS. SEAY: Possibly, yes, sir.

24 But I don't have any records from her. I don't know
25 if there are any, to be honest.

017

1 THE COURT: Well, if she's been seeing her for a year
2 and a half, there's going to be a bunch of records.

3 MS. SEAY: I don't know. But I'll be glad to consult
4 with her and find out, and if there are provide them.

5 THE COURT: Yes. When is this case set for trial?

6 MS. SEAY: It is set for November 4th, a week from
7 Tuesday.

8 MR. SULLIVAN: A week from Tuesday, Your Honor.
9 That's why I wanted to have this --

10 THE COURT: You need to get those records to him.
11 And that issue may -- I mean, that may --

12 Right now, I'm not inclined to grant your motion,
13 Mr. Sullivan, but I'm going to -- and I'm not going to.
14 But I'm not going to allow him --

15 You need to disclose those records as soon as
16 possible. Whether or not they're admissible at trial is a
17 whole separate question.

18 MS. SEAY: Right.

19 THE COURT: But that -- I mean, if she is doing --
20 if she has received counseling, there may be something in
21 there that might require that this issue be revisited. I
22 don't know.

23 So let's just handle it that way. And you all get
24 those just as quickly as you can so that he's not -- so
25 there will be no -- the Defendant can't claim that he

018

1 didn't have time to review when it comes time for trial.
2 And then if we need to revisit that issue, I'll be in
3 Greenwood, but you all will be able to get in touch with
4 me down there. Next week, I'll be in Greenwood, and I
5 think I'm holding trials that week.

6 MS. SEAY: Yes, sir.

7 MR. SULLIVAN: You're the trial judge in this case,
8 Your Honor.

9 THE COURT: Okay. So I'm not going to grant the
10 motion at this time. But you all -- I mean, examine the
11 records, get them to him, let him look at them.

12 They are to be confidential. You're not to disclose
13 them to anybody, and do it like that.

14 MS. SEAY: Yes, sir.

15 Thank you.

16 THE COURT: All right.

17 MR. SULLIVAN: Judge, let me clear one thing up just
18 for my clarification. I was -- thought from my review of
19 the record that the incident that happened when she was
20 six that they, initially, took her to a doctor because she
21 had an infection, a vaginal infection. And in the
22 discussion of the possible causes, one of them was
23 possibly touching by somebody.

24 THE COURT: Okay.

25 MR. SULLIVAN: But, at that time, the uncle was not

019

1 identified, that she said, well, somebody did it, but she
2 wouldn't say who. He wasn't identified until the 12
3 year -- when she was 12 with the Columbia thing.

4 THE COURT: It sounds like an issue at trial to me.

5 MR. SULLIVAN: That's my understanding of how this
6 developed.

7 THE COURT: Well, I don't know anything about the
8 case.

9 MR. SULLIVAN: I just wanted to make sure. That's my
10 understanding from their point of view.

11 THE COURT: Well, you'll just have to talk to them
12 about it.

13 MR. SULLIVAN: Okay.

14 THE COURT: I don't want to know about the facts
15 until we -- any more than I need to until we get there.

16 MR. SULLIVAN: Thank you, Your Honor.

17 MS. SEAY: Thank you.

18 THE COURT: And are you going to be able to get the
19 records?

20 MS. SEAY: Your Honor, I should be able to get in
21 touch with -- I know Ms. Hutton is not in her office
22 today, but I should be able to get in touch with her on
23 Monday. And I'll just go ahead and fax her something
24 also. But, as I said, I don't know of anything that
25 exists. I did speak with her by phone yesterday in regard

020

1 to these issues and she said, I'll send you, you know, a
2 letter regarding those.

3 THE COURT: Okay. Well, make sure you provide that
4 to him. If she's got an issue, I mean, some --

5 MS. SEAY: Like privacy or something.

6 THE COURT: Yes. Maybe if we can get the family to
7 execute a release --

8 MS. SEAY: Right.

9 THE COURT: And these are to be kept confidential.
10 They're not to be disseminated to anybody and not to your
11 client.

12 MR. SULLIVAN: It would be for my benefit.

13 THE COURT: You review them and find out if there's
14 an issue that needs -- that is going to require this to be
15 revisited.

16 MR. SULLIVAN: I'll let Mrs. Seay know right away,
17 and then we'll call you and let you know if --

18 THE COURT: Okay. So if the family would cooperate,
19 it would save a lot of -- probably save a lot of trouble.

20 MS. SEAY: Yes, sir. We'll take care of that.

21 Thank you.

22 THE COURT: Thank you very much.

23 (Pause.)

24 THE COURT: Mr. Sullivan.

25 MR. SULLIVAN: Judge, my understanding is that you're

021

1 ruling against me on the motion for having her examined
2 independently.

3 THE COURT: Without prejudice to prevent you -- I
4 mean, from coming back after an examination, if you've got
5 any other factual issue --

6 MR. SULLIVAN: Of Ms. Hutton's records.

7 At this point, I would note my objection pursuant to
8 your ruling in this matter.

9 THE COURT: Okay.

10 MR. SULLIVAN: I thought I presented sufficient
11 evidence to -- that's the basis and I thought I presented
12 sufficient grounds for an examination.

13 THE COURT: Okay. And I found that there wasn't a
14 compelling need at this time that would require the
15 invasion of the victim's privacy.

16 MR. SULLIVAN: Thank you, Your Honor.

17 THE COURT: Thank you.

18 *****END OF TRANSCRIPT OF RECORD*****
19
20
21
22
23
24
25

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PCR EV 2

OF		GREENVILLE COUNTY SHERIFF'S OFFICE				CASE NUMBER		NCIC ENTRY	
AGENCY I.D.		OFFENSE	CLASS	DAY	INCIDENT REPORT		0 2 0 0 0 0 9 0 5 6 8		
SC0230000		11C							
EVENT	INCIDENT TYPE				OFFENSE COMPLETED	FORCED ENTRY	PREVIO TYPE	SWITCH ENTERED	
	CRIMINAL SEXUAL CONDUCT 1ST DEGREE WITH A MINOR				YES ☒ NO ☐	YES ☐ NO ☒	20 Residence/Home		
	INCIDENT LOCATION (STREET ADDRESS, APARTMENT AND NUMBER, STREET NAME AND NUMBER)				GREENVILLE, S.C.				
	INCIDENT DATE				TIME	TO	DATE	TIME	
VICTIM	02-21-96				0800	02-28-97	2400	40 Personal Weapons	
	MARY				Member	JSOU	W F 47	N/A	
	7 FAIRVIEW AVE.				GREENVILLE	S.C.	29601	02	
	MCCALL, ROBERT DUNCAN				7857	(Cryphon) Work	GREENVILLE	SC 29615	
SUBJECT	ARRESTEE ARMED				YES ☐ NO ☐ WEAPON TYPE:	ARRESTED ON CURRENT OFFENSE			
	JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED				☐ REFERRED TO OTHER AUTHORITY				
	CHARGES				WARRANTY				
	VEHICLE				VEHICLE				
VEHICLE	VEHICLE				VEHICLE				
	VEHICLE				VEHICLE				
	VEHICLE				VEHICLE				
	VEHICLE				VEHICLE				
NARRATIVE	ON 6/10/02 THIS R/O SPOKE WITH THE COMP. SHE WANTED TO GIVE R/O INFORMATION ABOUT AN ALLEGED ABUSE THAT OCCURRED POSSIBLY DURING THE TIME FRAME LISTED ABOVE. THE COMP. STATED THAT THE VICTIM HAD TOLD THAT THE SUSPECT PUT HIS FINGER INTO HER VAGINA. THE COMP. STATED THAT THE VICTIM WAS SEEN BY DOCTORS BACK THEN BUT THE VICTIM WAS NOT TELLING THAT ANYONE HAD TOUCHED HER. THE COMP. STATED NOW WITH THE VICTIM IS THAT THE SUSPECT TOUCHED HER IN HER PRIVATES BACK THEN AND NOW ALSO. THIS R/O TOLD HER THAT R/O WOULD TALK WITH THE VICTIM TO SEE IF R/O COULD GET ANYTHING FROM THE VICTIM. SHE STATED THAT THE VICTIM IS OLDER NOW AND SHE IS TALKING MORE ABOUT THE INCIDENT. THE COMP. STATED DURING THE TIME FRAME LISTED ABOVE HER SISTER VALERIE WAS KEEPING THE VICTIM IN HER HOME WHILE THE COMP. AND HER HUSBAND WORKED. SHE KEPT THE VICTIM FROM THE TIME SHE WAS 2YOA UNTIL 6YOA AND THIS CAME UP AND SHE DID NOT KEEP HER ANYMORE.								
	JURISDICTION OF PARTY								
	JURISDICTION OF RECOVERY								
	TOTAL VALUE								
PROPERTY	REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM/DECEASED COOPERATION 4. ☐ EXTRACTION DENIED 5. ☐ AVAILABLE, NO ARREST								
	REPORTING OFFICER: HENDERSON, LORRAINE * 166								
	DATE: 6-10-02								
	APPROVED OFFICER: BROWN, SGT. M.J.								

Henderson

1-29-02

APPENDIX 207

AGENCY I.D.
SC0230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

0,2,0 0 0,0,9,0,5,6,8

IND. RPT.

☒ ORIGINAL REPORT ☐ STATUS CHANGE ☐ ADDITIONAL VICTIM ☐ ADDITIONAL STOLEN PROPERTY
☐ SUPPLEMENTAL REPORT ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

INCIDENT TYPE: CRIMINAL SEXUAL CONDUCT 1ST W/MINOR

PATROL DISTRICT: 03A

PAGE 2 OF 8 PAGES

ID. OVERFLOW	☐ COMPLAINT	NAME (LAST, FIRST, MIDDLE)		VICTIM RELATIONSHIP TO SUSPECT		RESIDENT		RACE		ETH.	
	☐ VICTIM	G M I		Member							
	☐ SUSPECT			CITY		STATE		ZIP CODE		PATROL DISTRICT	
	☐ RUNAWAY			GREENVILLE		SC				03A	
	☐ WANTED									EVENING PHONE	
	☐ WARRANT										
	☐ ARREST										
	☐ MISSING										
	☐ JAIL										
	☐										
HEIGHT		WEIGHT		HAIR		EYES		FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.			
☐ VICTIM NO		VIOLENCE INJURY: ☐ YES ☐ NO		COMPLAINT OF NON-VIOLENCE INJURY: ☐ NO ☐ YES		VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK		DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK		☐ TWO-MAN VEHICLE ☐ DETECTIVE/SPL. ASST. ☐ ALONE ☐ ONE-MAN VEHICLE ☐ OTHER ☐ ARRESTED	
☐ SUBJECT NO		USING ALCOHOL: ☐ NO ☐ YES ☐ UNK		USING DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK		☐ ARRESTED ON CURRENT OFFENSE ☐ CLEARED BY ARREST ON PRIOR OFFENSE					
ARRESTEE ARMED ☐ YES ☐ NO		WEAPON TYPE: ☐ FULL-AUTO ☐ OTHER		☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY							
JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY											

THE COMP. STATED THAT SHE TOOK THE VICTIM TO THE DOCTOR BACK IN 96 AND THAT WAS DR. SWANSON AT THE CHILDREN'S CLINIC. SHE STATED THE VICTIM HAD AN INFECTION THAT WOULD NOT GO AWAY. THEY THOUGHT IT WAS POSSIBLE THAT IT WAS UTI. SHE STATED THAT THE DOCTOR SAID SOMETHING ABOUT A POSSIBILITY OF CHILD MOLESTATION. SHE STATED THAT THE VICTIM HAD AN VAGINAL INFECTION AND A ENLARGED HYMEN. THE DOCTOR ASKED THE VICTIM ABOUT ANYONE TOUCHING HER THEN AND SHE STATED YES SOMEONE HAD BUT WOULD NOT TELL HER WHO. THE MOTHER STATED THAT SHE TRIED TO TALK WITH THE VICTIM ABOUT IT AND SHE DENIED IT TO HER. THE MOTHER STATED THEY TOOK THE VICTIM TO A SECOND DOCTOR IN SHANNON. IT WAS A FRIEND OF HER BROTHER-IN-LAW. SHE STATED THAT THE VICTIM WAS CONSISTANT WITH STORY BUT THE DOCTOR SAID THEY MIGHT BE TALKING TO MUCH AROUND THE VICTIM. SHE STATED FOR THE VICTIM NOT TO HAVE ANY CONTACT WITH THE SUSPECT AND THEY SHOULD NOT CONFRONT THE SUSPECT BECAUSE THEY DID NOT KNOW THAT IT WAS HIM. THIS WAS DR. JIMMY SENG. SHE STATED THAT SHE HAD KEPT THE VICTIM AWAY FROM THE SUSPECT UP UNTIL SHANNON, WHICH IS HIS DAUGHTER LEFT THE VICTIM IN COLUMBIA WITH HER AUNT AND OTHER COUSINS. THE MOTHER STATED THAT THE VICTIM WAS ONLY BEING KEPT BY HER FAMILY BACK THEN. SHE STATED THAT HER SISTER HAS FIVE KIDS AND SHE HAD BEEN WITH THE SUSPECT FOR 23 YEARS.

THE COMP. STATED THE OTHER THINGS THAT MAKE HER THINK IT COULD POSSIBLY BE THE SUSPECT IS IN MAY OF 96, THE SUSPECT'S DAUGHTER SHANNON WAS GOING TO THE PROM AND SHE WAS ALL DRESSED UP AND THE FAMILY MADE A BIG UP TO DO ABOUT IT. SHE STATED THAT HE KEPT THE DAUGHTER IN THE ROOM AND WOULD NOT LET HER COME OUT AND HE WAS JUST ACTING VERY STRANGE. SHE STATED THAT SHE TOLD HER SISTER THAT SHE NEEDED TO LOOK INTO THAT AND HER SISTER ASKED HER WAS SHE SAYING THAT THE SUSPECT WAS MOLESTING HER CHILD. SHE STATED NOTHING ELSE WAS SAID ABOUT THAT.

THE MOTHER ALSO STATES BACK IN JUNE OF 83, HER BABY SISTER WENT TO SPEND THE SUMMER IN NEW ORLEANS WITH THE SUSPECT AND HIS FAMILY. THE SUSPECT WAS CAUGHT SPYING ON THE 17 YEAR OLD SISTER IN THE BED ROOM AND THE BATH ROOM. SHE STATED THAT THE SUSPECT WAS CONFRONTED ABOUT THIS SITUATION AND HE DREW HIS FIST BACK AT THE CHILD. SHE STATED THAT HER PARENTS WENT AND GOT HER SISTER AND BROUGHT HER BACK HOME. THE MOTHER STATED OTHER THAN THESE INCIDENTS OCCURING, SHE KNEW NOTHING OF THE SUSPECT TOUCHING THE VICTIM UNTIL THE VICTIM SAID SOMETHING ABOUT IT.

THE VICTIM SUFFERS FROM MAJOR DISABILITIES, MUSCLE WEAKNESS AND A COMMUNICATION PROBLEM. SHE STATED THE VICTIM KNOWS RIGHT FROM WRONG AND CAN COMMUNICATE SOME BUT WILL NOT A LOT. SHE STATED THAT SHE HAD A COUSIN A THAT SHE WAS VERY CLOSE TO AND TALK WITH A LOT AND SHE COULD POSSIBLY HELP WITH THE VICTIM COMMUNICATION IF NEED BE.

PROPERTY	TYPE									TOTAL VALUE	
	STOLEN										
	DAMAGED										
	BURNED										
	RECOVERED										
ADMIN	SEIZED										
	SUBJECT IDENTIFIED	☐ YES ☐ NO		SUBJECT LOCATED		☐ YES ☐ NO		☐ ACTIVE ☐ ADMN. CLOSED ☐ UNFOUNDED		☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER	☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER
	SEARCH FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH, 2. ☐ NO PROSECUTION, 3. ☐ VICTIM/CLINIC COOPERATION, 4. ☐ EXTRADITION DENIED, 5. ☐ JUVENILE-NO ARREST										
	REPORTING OFFICER(S)	DATE		UNIT NO.	APPROVING OFFICER		DATE		UNIT NO.		
	HENDERSON, LORRAINE *166	06-10-02		630	BROWN, SGT. M.J.		06-10-02		601		
	☐ YES ☐ NO (OFFICER)										

AGENCY I.D.
SCO230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

CASE NUMBER

02000090568

NCIC

INC. ENT

☐ ORIGINAL REPORT ☐ STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY
☐ SUPPLEMENTAL REPORT ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

INCIDENT TYPE: CRIMINAL SEXUAL CONDUCT 1ST

PATROL DISTRICT 2

PAGE 3 OF 8 PAGES

I.D. OVERFLOW	☐ COMPLAINT	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT			RESIDENT	RACE	SEX	AGE	D.O.B.	ETH	
	☐ VICTIM #	C 1	#1	#2	#3							
	☐ SUBJECT #	ADDRESS	CITY	STATE	ZIP CODE	PATROL DISTRICT	PHONE	EVENING PHONE				
	☐ RUNAWAY	GREENVILLE SC										
	☐ WANTED	WEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	☐ WARRANT											
	☐ ARREST											
	☐ MISSING											
	☐ JAIL											
	☐											
☐ VICTIM NO. VISIBLE INJURY: ☐ YES ☐ NO ☐ COMPLAINT BY NON-VISIBLE INJURY: ☐ NO ☐ YES ☐ VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK ☐ DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK ☐ TWO-MAN VEHICLE ☐ DETECTIVE/COMPLAINANT ☐ ALONE ☐ ONE-MAN VEHICLE ☐ OTHER ☐ ARRESTED ☐ ARRESTED ON CURRENT OFFENSE ☐ CLEARED BY ARREST ON PRIOR OFFENSE ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE: ☐ FULL-AUTO ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY												

ON 6/10/02 THIS R/O MET WITH RICK AND MARY GOLLWITZER, THEY WANTED TO REPORT AND ALLEGED ASSAULT. THE COMP. STATED THAT SHE ALLOWED HER NEICE TO PICK HER DAUGHTER UP FROM SCHOOL ON FRIDAY 5/24/02. SHE BROUGHT THE VICTIM HOME AND SHANNON WHO IS THE NEICE STAYED ALL NIGHT AT THE COMP'S HOUSE. THEY WERE TO GO TO COLUMBIA ON SATURDAY FOR SHANNON'S SISTER M. 15 SOCCER GAME. SHE STATED THEY STAYED IN COLUMBIA ALL NIGHT ON SATURDAY THE 25TH OF MAY. SHE STATED AT NOON SHANNON LEFT TO COME HOME BECAUSE SHE HAD A WEDDING TO ATTEND. SHE STATED THAT THE VICTIM WAS LEFT WITH M. B. AND HER SOCCER FRIEND TO WATCH. THE VICTIM SPENT THE NIGHT IN COLUMBIA WITH THE FAMILY. THEY GOT BACK ON SUNDAY 5/26/02. THE MOTHER STATED THAT SHE GOT BACK IN TOWN LATER ON THAT EVENING. SHE STATED THEY HAD WENT TO CHARLESTON. THE COMP. STATED THAT HER SISTER WHICH IS VALERIE MCCALL TOLD HER THAT SHE NEEDED TO TELL HER BEFORE SHE FOUND OUT THAT THE VICTIM WAS IN THE ROOM WITH THE SUSPECT. SHE CAME BACK FROM WALMART AND FOUND THE SUSPECT IN THE ROOM WITH THE VICTIM. SHE STATED THAT HER SISTER BECAME UPSET AND THEY GOT INTO AN ARGUMENT. THE SUSPECT WAS NOT TO BE ALONG WITH THE VICTIM DUE TO THE VICTIM ACCUSING THE SUSPECT OF TOUCHING HER BEFORE WHEN SHE WAS SIX YEARS OLD. THE MOTHER STATED THAT SHE TRIED TO TALK TO HER DAUGHTER ABOUT THIS AND HER DAUGHTER FIRST DENIED THAT ANYTHING OCCURRED. THE MOTHER STATED THAT THEY GOT HER COUSIN AMANDA TO TALK WITH HER BECAUSE SHE IS CLOSE TO HER.

ON 5/29/02 AMANDA TOLD THEM THAT THE VICTIM HAD SAID THAT THE SUSPECT PUT HIS FINGER IN HER. PRIMARY PART THE MOTHER STATED THAT THIS WAS THE SECOND TIME THAT THE ALLEGATION HAS COME UP AND THEY WANTED TO DO SOMETHING ABOUT IT. SHE STATED THAT THE VICTIM WAS LEFT WITH THE SUSPECT AT THE POOL AT THE COMFORT INN SUITES ON SATURN PARKWAY IN COLUMBIA. SHE STATED THAT THE DAUGHTER MARY BETH AND VALERIE RAN UP TO WALMART THAT WAS VERY NEAR THE MOTEL TO GET A BATHING SUIT. SHE STATED THAT THE VICTIM WAS AT THE POOL BUT THE SUSPECT TOOK HER BACK TO THE ROOM. THIS R/O TOLD THE MOTHER THAT THIS WAS NOT R/O JURISDICTION AND THIS R/O WOULD GIVE IT TO THE APPROPRIATE AUTHORITIES. SHE STATED THAT WAS FINE. THE MOTHER ALSO STATED TO THIS R/O THAT THE ALLEGATION CAME UP IN 96 AND THEY TOOK THE VICTIM OUT OF TOWN AND HAD HER CHECKED AND THAT WAS WHY THE VICTIM WAS NOT SUPPOSE TO BE AROUND THE SUSPECT ALONE. THE MOTHER STATED THAT SHE IS ONLY GOING BY WHAT THE VICTIM SAID. THIS R/O TOLD THE MOTHER THAT R/O NEEDED TO TALK WITH THE VICTIM. SHE TOLD THIS R/O THAT THE VICTIM HAD A SPEECH PROBLEM AND IT WOULD BE DIFFICULT TO UNDERSTAND HER. THIS R/O TOLD HER TO LET R/O TRY BUT ALSO THE VICTIM HAD A SPEECH THERAPIST WITH HER FROM THE GREENVILLE HOSPITAL SYSTEM TO HELP WHEN R/O NEEDED HELP. SHE STATED THAT THE VICTIM SAID THAT SHE WOULD TRY AND TALK WITH R/O. R/O WAS INFORMED THAT THE VICTIM ALSO HAD AN APPOINTMENT WITH THERAPIST LINDA HUTTON ON THE 17TH OF JUNE AND A PHYSICAL WITH DR. HENDERSON ON JULY 17TH AT 10:30 @ CHILDREN'S CENTER.

PROPERTY	TYPE									TOTAL VALUE
	STOLEN									
	DAMAGED									
	REMOVED									
	RECOVERED									
ADMIN	SUBJECT IDENTIFIED		SUBJECT LOCATED		ACTIVE ☐ ADMM. CLOSED ☐		ARRESTED UNDER 18 ☐		EX-CLEAR UNDER 18 ☐	
	☐ YES ☐ NO		☐ YES ☐ NO		☐ UNFOUNDED		☐ ARRESTED 18 AND OVER		☐ EX-CLEAR 18 AND OVER	
	REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM DECLINED COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE NO ARREST									
	REPORTING OFFICER(S)		DATE		UNIT NO.		APPROVING OFFICER		DATE	
	HENDERSON, LORRAINE * 166		06-10-02		630		BROWN, SGT. M.J.		06-10-02	

AGENCY I.D.
SCO230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

CASE NUMBER

0,2,0,0,0,0,9,0,5,6,8

NCIC

IND. EXT.

☐ ORIGINAL REPORT

☐ STATUS CHANGE

☐ ADDITIONAL VICTIM

☐ ADDITIONAL STOLEN PROPERTY

INCIDENT TYPE: CSC 1ST W/MINOR

☒ SUPPLEMENTAL REPORT

☐

☐ ADDITIONAL OFFENDERS

☐ ADDITIONAL RECOVERED PROPERTY

PATROL DISTRICT

PAGE 4

OF 8 PAGES

☐ COMPLAINT

NAME (LAST, FIRST, MIDDLE)

☐ VICTIM

G. J. I.

VICTIM RELATIONSHIP TO SUBJECT

Member

RESIDENT RACE SEX AGE D.O.B. ETH

☐ SUBJECT

ADDRESS

CITY

STATE

ZIP CODE

PATROL DISTRICT

DAYPHONE

EVENING PHONE

☐ RUNAWAY

GREENVILLE

☐ WANTED

☐ WARRANT

☐ ARREST

☐ MISSING

☐ JAIL

☐

HEIGHT WEIGHT HAIR EYES

FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL REGULARITIES, ETC.

☐ VICTIM NO VISIBLE INJURY: ☐ YES ☐ NO

COMPLAINT OF NON-VISIBLE INJURY: ☐ NO ☐ YES

VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK

☐ TWO-MAN VEHICLE ☐ DETECTIVE/PL. ASST. ☐ ALONE

☐ SUBJECT NO USING ALCOHOL: ☐ NO ☐ YES ☐ UNK

USING DRUGS: ☐ NO ☐ YES

TYPE: ☐ UNK

☐ ONE-MAN VEHICLE ☐ OTHER ☐ ADMITTED

ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE:

☐ HANDGUN ☐ LONG

☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

THIS R/O TALKED WITH THE VICTIM AND THE FOLLOWING QUESTIONS WERE ASKED AND THE VICTIM RESPONDED.

R/O: WHAT IS YOUR NAME? VIC: L
R/O: HOW OLD ARE YOU? VIC:
R/O: WHEN IS YOUR BIRTHDAY? VIC:
R/O: DO YOU GO TO SCHOOL? VIC: YEA
R/O: WHAT SCHOOL DO YOU GO TO? VIC: GATEWAY
R/O: WHAT GRADE ARE YOU IN? VIC: 5TH
R/O: WHO IS YOUR TEACHER? VIC: MRS. T. A. FINE
R/O: WHERE DO YOU LIVE? VIC:
R/O: WHO DO YOU LIVE WITH? VIC: MY MOM AND MY DAD.
R/O: WHAT IS YOUR MOTHER'S NAME? VIC: MARY
R/O: WHAT IS YOUR DAD'S NAME? VIC: KIRK
R/O: DO YOU HAVE BROTHERS AND SISTERS? VIC: NO
R/O: WHAT ARE THEIR NAMES? VIC: N/A
R/O: HOW OLD ARE THEY? VIC: N/A
R/O: DO THEY GO TO SCHOOL? VIC: N/A
R/O: DO YOU HAVE A TELEPHONE? VIC: YEA
R/O: DO YOU KNOW YOUR PHONE NUMBER? VIC: 242-
R/O: WHY ARE YOU HERE TODAY? VIC: YEA
R/O: ABOUT WHAT? VIC: N/A
R/O: WHAT IS TELLING THE TRUTH? VIC: NOT A LIE
R/O: WHAT IS TELLING A LIE? VIC: NOT THE TRUTH
R/O: IS IT GOOD TO TELL THE TRUTH? VIC: YEA
R/O: IS IT GOOD TO TELL A LIE? VIC: NO
R/O: WHAT WOULD HAPPEN IF YOU TELL A LIE? VIC: N/A
R/O: WHAT WOULD HAPPEN IF YOU TELL THE TRUTH? VIC: N/A

fw Redacted phone number

R/O: CAN YOU NAME YOUR BODY PARTS? USING THE FIGURE DRAWING THE VICTIM WAS ASKED TO TELL THIS R/O THE BODY PARTS. SHE NAMED HAIR, EYES, NOSE, LIPS, NECK, SHOULDERS, ARMS, TOMMY, FINGERS, KNEES, LEGS, AND TOES. THE VICTIM DID NOT KNOW WHAT THE NAVAL WAS AND THE VICTIM DID NOT WANT TO TELL R/O THE PRIVATE PARTS BUT SHE WROTE THEM DOWN. SHE WROTE BUTT, TUN PART FOR THE VAGINA, AND BOOSIES FOR THE BREAST. THE VICTIM BEGIN TO CRY A LITTLE AND THIS R/O TOLD HER THAT WAS FINE EVERYBODY HAD A NAME FOR THEM. R/O TOLD HER IT TOOK HER LONG ENOUGH TO WRITE THOSE PARTS OUT. SHE JUST SMILED.

PROPERTY	TYPE								TOTAL VALUE
	STOLEN								
	DAMAGED								
	BURNED								
	RECOVERED								
ADMIN	SUBJECT IDENTIFIED	☐ YES ☐ NO	SUBJECT LOCATED	☐ YES ☐ NO	☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED	☐ ARRESTED UNDER 11 ☐ ARRESTED 1 BAND OVER	☐ EX-CLEAR UNDER 11 ☐ EX-CLEAR 18 AND OVER		
	REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM DECLINES COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE-NO ARREST								
	REPORTING OFFICER(S)	DATE		UNIT NO.	APPROVING OFFICER	DATE		UNIT NO.	
	HENDERSON, LORRAINE - 166	06-10-02		630	BROWN, SGT. M.J.	06-10-02		601	

AGENCY I.D.
SCQ230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

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☒ ORIGINAL REPORT	☐ STATUS CHANGE	☐ ADDITIONAL VICTIMS	☐ ADDITIONAL STOLEN PROPERTY	INCIDENT TYPE: CRIMINAL SEXUAL CONDUCT 1ST W/MINOR
☐ SUPPLEMENTAL REPORT	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL RECOVERED PROPERTY	PATROL DISTRICT: 03A	PAGE 5 OF 8 PAGES

ID. OVERFLOW	☐ COMPLAINT	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT			RESIDENT	RACE	SEX	AGE	D.O.B.	LYN
	☐ VICTIM #	G	M	Member	#1	#2	#3				
	☐ SUBJECT #	ADDRESS									
	☐ RUNAWAY	CITY									
	☐ WANTED	STATE									
	☐ WARRANT	ZIP CODE									
	☐ ARREST	PATROL DISTRICT									
	☐ MISSING	DAYPHONE									
	☐ JAIL	EVENING PHONE									
	☐	HEIGHT									
WEIGHT											
HAIR											
EYES											
FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.											
COMPLAINT BY VICTIM NO. VISIBLE INJURY: ☐ YES ☐ NO											
EXPLAIN: ☐ NO ☐ YES											
VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK											
DRUGS: ☐ NO ☐ YES ☐ UNK											
TWO-MAN VEHICLE: ☐ DETECTIVE/SPL. ASST. ☐ ALONE											
ONE-MAN VEHICLE: ☐ OTHER ☐ ASSISTED											
SUBJECT NO. USING ALCOHOL: ☐ NO ☐ YES ☐ UNK											
USING DRUGS: ☐ NO ☐ YES ☐ UNK											
ARRESTED ON CURRENT OFFENSE											
Cleared by arrest on prior offense											
ARRESTEE ARMED: ☐ YES ☐ NO WEAPON TYPE: ☐ SEMI-AUTO ☐ FULL-AUTO											
ON VIEW ARREST: ☐ SUMMONED ☐ CUSTODY											
JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY											

R/O: HAS ANYBODY EVER TOUCHED YOU TUN PART?
R/O: HOW OLD WERE YOU WHEN THIS HAPPENED?
R/O: WHO DID IT?
R/O: WHO IS YOUR UNCLE?
R/O: DO YOU LIKE BOB?
R/O: WHERE DOES BOB LIVE?
R/O: WHO DOES BOB LIVE WITH?

R/O: WHO WAS WITH YOU WHEN THIS HAPPENED TO YOU?
R/O: WHERE WAS BOBBY?
R/O: WHICH ONE OF THE BOYS ARE OLDER?
R/O: WHERE WAS SHANNON AND MARY BETH?
R/O: WHERE DID THIS HAPPEN AT?
R/O: WHY WERE YOU AT BOB'S?
R/O: DID YOU GO TO SCHOOL THEN?
R/O: WHAT GRADE WERE YOU IN WHEN THIS FIRST HAPPEN?
R/O: WHO WAS YOUR TEACHER?
R/O: WHY WERE YOU THERE?
R/O: DID YOU LIVE THERE?
R/O: WHY WERE YOU THERE?
R/O: WHERE WERE JAMIE AND MICHAEL?
R/O: WHERE WERE YOU?
R/O: WHAT WERE YOU DOING IN THERE?
R/O: WHERE WAS VALERIE?
R/O: WHERE WAS BOB?
R/O: WHY WAS HE IN THERE?
R/O: WHERE WERE YOU IN THE ROOM?
R/O: WHAT DID YOU HAVE ON?
R/O: DID ANYBODY TAKE YOUR CLOTHES OFF?
R/O: WHAT WERE YOU DOING ON THE BED?
R/O: WHAT WAS BOB DOING?
R/O: WAS HE STANDING, SITTING OR LAYING DOWN?
R/O: WAS HE TALKING TO YOU?

VIC: YEA.
VIC: 6
VIC: MY UNCLE.
VIC: BOB
VIC: NO
VIC: IN GREENVILLE.
VIC: HIS WIFE VALERIE, HIS KIDS, MICHAEL, MARY
BETH, JAMIE, BOBBY AND SHANNON.
VIC: JAMIE AND MICHAEL (SHE IS SAYING GABEY)
VIC: AT THE POOL.
VIC: I DON'T KNOW.
VIC: SHOPPING.
VIC: AT BOB'S
VIC: I DON'T KNOW.
VIC: YEA.
VIC: I DON'T KNOW.
VIC: DON'T KNOW.
VIC: STAYING THERE.
VIC: NO
VIC: MY MOM AT WORK AND MY DAD AT WORK.
VIC: IN THE LIVING ROOM.
VIC: IN THE BOYS ROOM..
VIC: DON'T KNOW.
VIC: AT THE STORE.
VIC: WITH ME.
VIC: DON'T KNOW.
VIC: ON THE BED.
VIC: CLOTHES.
VIC: NO.
VIC: LAYING DOWN
VIC: LOOKING AT ME.
VIC: STANDING.
VIC: NO

PROPERTY	TYPE							TOTAL VALUE
	STOLEN							
	DAMAGED							
	BURNED							
	RECOVERED							
ADM.	SEIZED							
	SUBJECT IDENTIFIED		SUBJECT LOCATED		☐ ACTIVE ☐ ADMIN. CLOSED		☐ ARRESTED UNDER 18	
	☐ YES ☐ NO		☐ YES ☐ NO		☐ UNFOUNDED		☐ ARRESTED 18 AND OVER	
	REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION, 3. ☐ VICTIM DECLINES COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE NO ARREST							
	REPORTING OFFICER(S)		DATE	UNIT NO.	APPROVING OFFICER		DATE	UNIT NO.
	HENDERSON, LORRAINE *166		06-10-02	630	BROWN, SGT. M.J.		06-10-02	601

AGENCY I.D.
SC0230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

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☒ ORIGINAL REPORT ☐ STATUS CHANGE ☐ ADDITIONAL VICTIM ☐ ADDITIONAL STOLEN PROPERTY
☐ SUPPLEMENTAL REPORT ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

INCIDENT TYPE: CRIMINAL SEXUAL CONDUCT 1ST W/MINOR
PATROL DISTRICT: 03A PAGE 6 OF 8 PAGES

I.D. OVERFLOW

☐ COMPLAINANT ☐ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ MISSING ☐ JAIL

NAME (LAST, FIRST, MIDDLE): G. M. L. ADDRESS: GREENVILLE CITY: STATE: ZIP CODE: PATROL DISTRICT: TELEPHONE: EVENING PHONE:

HEIGHT: WEIGHT: HAIR: EYES: FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

COMPLAINANT OF NON-VISIBLE INJURIES: ☐ NO ☐ YES ☐ UNK
VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK
VICTIM USING DRUGS: ☐ NO ☐ YES ☐ UNK
SUBJECT USING ALCOHOL: ☐ NO ☐ YES ☐ UNK
SUBJECT USING DRUGS: ☐ NO ☐ YES ☐ UNK

ARRESTEE ARMED: ☐ YES ☐ NO WEAPON TYPE: ☐ HANDGUN ☐ FULL-AUTO ☐ OTHER

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

ARRESTED ON CURRENT OFFENSE: ☐ YES ☐ NO
CLEARED BY ARREST ON PRIOR OFFENSE: ☐ YES ☐ NO
ON VIEW ARREST: ☐ SUMMONED ☐ CUSTODY

R/O: WHAT BOB DID WAS THAT RIGHT OR WRONG? VIC: WRONG.
R/O: HOW DID YOU KNOW IT WAS WRONG? VIC: MY MOM
R/O: WHAT DID HE USE TO TOUCH YOU WITH? VIC: HIS HANDS
R/O: BOTH HANDS OR ONE HAND? VIC: ONE
R/O: WHERE DID HE TOUCH YOU? (VICTIM TURNING RED) VIC: HERE (VICTIM POINTED TO THE VAGINAL AREA).
R/O: WAS IT ON TOP OF YOUR CLOTHES OR UNDERNEATH YOUR CLOTHES? VIC: TOP
R/O: WHAT DID HE SAY WHEN HE DONE THAT? VIC: NOTHING.
R/O: DID YOU SAY ANYTHING? VIC: NO,
R/O: HOW DID THAT MAKE YOU FEEL? VIC: NOT HAPPY.
R/O: DID YOU EVER TELL ANYBODY? VIC: NO
R/O: WHY? VIC: DON'T KNOW.
HIS INTERVIEW WAS CONDUCTED WITH JANNIE SALLY FROM GREENVILLE HOSPITAL SYSTEM KINETICS (PED. THERAPY) SPEECH. SHE HAD TO LEAVE THE INTERVIEW, AFTER TALKING TO THE VICTIM ABOUT ANOTHER INCIDENT, THIS R/O LET THE VICTIM GO OUT IN THE LOBBY FOR A WHILE. R/O TALKED WITH THE PARENTS FOR A WHILE AND GOT INFORMATION FROM THEM. THIS R/O THEN SPOKE WITH THE VICTIM AGAIN.

R/O: DID ANYTHING ELSE HAPPEN WHEN BOB TOUCHED YOU ON TOP OF YOUR CLOTHES?
VIC: YEA
R/O: WHAT? (THE VICTIM WAS TURNING RED AGAIN AND JUST LOOKING AT THE FLOOR) R/O TOLD HER THAT R/O NEEDED THE TRUTH.
R/O: NOW DID ANYTHING ELSE HAPPEN?
VIC: TOUCHED MY TUN.
R/O: HOW DID HE TOUCHED YOUR TUN PART?
VIC: WITH HIS FINGER.
R/O: WHAT DID HE DO WITH HIS FINGER?
VIC: SAME THING.
R/O: DID HE DO THIS ON THE OUTSIDE OF YOUR CLOTHES OR INSIDE YOUR CLOTHES?
VIC: OUTSIDE AND INSIDE.
R/O: WHAT DID HE DO WITH HIS FINGER?
VIC: IN TUN PART.
R/O: ARE YOU TELLING THE TRUTH ABOUT THIS?
VIC: YEA

PROPERTY	TYPE							TOTAL VALUE
	STOLEN	DAMAGED	BURNED	RECOVERED	SEIZED	OTHER	UNKN	

ADMIN

SUBJECT IDENTIFIED: ☐ YES ☐ NO
SUBJECT LOCATED: ☐ YES ☐ NO
☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED
☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER
☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL RELEASE: 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION. 3. ☐ VICTIM/DEFENSE COOPERATION. 4. ☐ EXTRADITION DENIED. 5. ☐ JUVENILE NO ARREST

REPORTING OFFICER(S): HENDERSON, LORRAINE #166 DATE: 06-10-02 UNIT NO.: 630 APPROVING OFFICER: BROWN, SGT. M.J. DATE: 06-10-02 UNIT NO.: 601

☐ YES ☐ NO

AGENCY I.D.
SC0230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

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☒ ORIGINAL REPORT ☐ STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

INCIDENT TYPE: **CRIMINAL SEXUAL CONDUCT 1ST W/MINOR**

PATROL DISTRICT: **03A** PAGE **7** OF **8** PAGES

I.D. OVERFLOW

☐ COMPLAINANT ☐ VICTIM ☐ SUBJECT ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ MISDEMEANOR ☐ JAIL

NAME (LAST, FIRST, MIDDLE): **GREENVILLE** CITY: **GREENVILLE** STATE: **SC** ZIP CODE: **29601** PATROL DISTRICT: **03A**

RELATIONSHIP TO SUBJECT: **Member**

RESIDENT: ☐ RACE: ☐ SEX: ☐ AGE: ☐ D.O.B.: ☐ ETHNICITY: ☐

HEIGHT: ☐ WEIGHT: ☐ HAIR: ☐ EYES: ☐ FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.: ☐

VICTIM NO. ☐ VISIBLE WOUNDS: ☐ YES ☐ NO ☐ COMPLAINT OF NON-VISIBLE WOUNDS: ☐ YES ☐ NO ☐ VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK ☐ TWO-MAN VEHICLE ☐ DETECTIVE/PL. ARMY. ☐ ALONE ☐ ONE-MAN VEHICLE ☐ OTHER ☐ ASSISTED

SUBJECT NO. ☐ USING ALCOHOL: ☐ NO ☐ YES ☐ UNK ☐ USING DRUGS: ☐ NO ☐ YES ☐ TYPE: ☐ UNK ☐ ARRESTED ON CURRENT OFFENSE ☐ CLEARED BY ARREST ON PRIOR OFFENSE

ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE: ☐ SEMI-AUTO ☐ FULL-AUTO ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

R/O: WHEN WAS THE LAST TIME THAT ROB EVER TOUCHED YOU?
VIC: DON'T KNOW.
R/O: HOW OLD WERE YOU?
VIC: 12
R/O: WHERE WERE YOU WHEN HE TOUCHED YOU?
VIC: IN COLUMBIA.
R/O: WHAY WERE YOU IN COLUMBIA?
VIC: WATCH M B PLAY SOOCER.
R/O: DID HE TOUCH YOU?
VIC: YEA.
R/O: WHERE DID HE TOUCH YOU?
VIC: MY TUN PART AND BUTT.
R/O: WHAT DID YOU HAVE ON?
VIC: NOTHING
R/O: WHY WERE YOU THERE WITH NOTHING ON?
VIC: I PULLED MY SWIMMING SUIT OFF.
R/O: WHY DID YOU PULL OFF YOUR SWIMMING SUIT?
VIC: IT WAS WET.
R/O: WHERE WAS BOB?
VIC: HELPING ME.
R/O: HELPING YOU DO WHAT?
VIC: PUT MY CLOTHES ON.
R/O: WHAT WAS HE HELPING YOU PUT ON?
VIC: MY SHIRT.
R/O: DID YOU PUT UNDERWEAR ON TOO?
VIC: NO
R/O: WHERE WERE YOU IN THE HOUSE?
VIC: IN THE ROOM.
R/O: WHAT ROOM?
VIC: MY ROOM.
R/O: DID THIS HAPPEN BEFORE HE HELPED YOU WITH YOUR SHIRT OR AFTER HE HELPED YOU PUT THE SHIRT ON?
VIC: AFTER HE PUT MY SHIRT ON.
R/O: WHAT WERE YOU DOING WHEN THIS HAPPEN?

PROPERTY	TYPE	STOLEN	DAMAGED	BURNED	RECOVERED	FINES	TOTAL VALUE

SUBJECT IDENTIFIED: ☐ YES ☐ NO SUBJECT LOCATED: ☐ YES ☐ NO

☐ ACTIVE ☐ ADMIN. CLOSED ☐ ARRESTED UNDER 18 ☐ EX-CLEAR UNDER 18

☐ UNFOUNDED ☐ ARRESTED 18 AND OVER ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM/COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE-NO ARREST

REPORTING OFFICER(S): **HENDERSON, LORRAINE *166** DATE: **06-10-02** UNIT NO.: **630** APPROVING OFFICER: **BROWN, SGT. M.J.** DATE: **06-10-02** UNIT NO.: **601**

EX-CLEAR: ☐ YES ☐ NO (OFFICER)

AGENCY I.D.
SC0230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

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☒ ORIGINAL REPORT ☐ STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

INCIDENT TYPE: CRIMINAL SEXUAL CONDUCT 1ST W/MINOR

PATROL DISTRICT: 03A PAGE 8 OF 8 PAGES

ID OVERFLOW

☐ COMPLAINANT ☐ VICTIM ☐ SUBJECT ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ MISDEMEANOR ☐ JAIL

NAME (LAST, FIRST, MIDDLE): G L M L Member

RESIDENT: ☐ RACE: ☐ SEX: ☐ AGE: ☐ D.O.B.: ☐ LTM: ☐

CITY: GREENVILLE STATE: SC ZIP CODE: 29605 PATROL DISTRICT: 03A

HEIGHT: ☐ WEIGHT: ☐ HAIR: ☐ EYES: ☐ FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.: ☐

VICTIM NO. ☐ VISIBLE INJURY: ☐ YES ☐ NO ☐ COMPLAINT OF NON-VISIBLE INJURY: ☐ NO ☐ YES ☐ VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK ☐ TWO-MAN VEHICLE: ☐ DETECTIVE/SPL. ADULT. ☐ ALONE ☐ ONE-MAN VEHICLE: ☐ OTHER ☐ ASSISTED

EXPLAIN: ☐ SUBJECT NO. ☐ USING ALCOHOL: ☐ NO ☐ YES ☐ UNK ☐ USING DRUGS: ☐ NO ☐ YES ☐ TYPE: ☐ UNK ☐ ARRESTED ON CURRENT OFFENSE ☐ CLEARED BY ARREST ON PRIOR OFFENSE

ARRESTEE ARMED: ☐ YES ☐ NO WEAPON TYPE: ☐ SEMI-AUTO ☐ FULL-AUTO ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

VIC: SITTING ON THE BED.
R/O: WHAT DID HE DO?
VIC: UNDER MY SHIRT.
R/O: WHAT DID HE DO UNDER YOUR SHIRT?
VIC: WITH HIS HAND.
R/O: WHAT DID HE DO WITH HIS HAND?
VIC: IN THERE, (THE VICTIM POINTED TO HER VAGINAL AREA)
R/O: WHAT DID HE SAY TO YOU?
VIC: NOTHING.
R/O: WHAT DID YOU SAY TO HIM?
VIC: NOTHING.
R/O: DID YOU TELL ANYBODY?
VIC: NO
R/O: WHERE WAS VALERIE, AND M...
VIC: THEY WENT TO WALMART TO BUY M... B... A SWIMMING SUIT.
R/O: WHERE WAS SHANNON?
VIC: AT HOME
R/O: WHERE WERE THE BOYS WHEN THIS HAPPEN?
VIC: IN THE OTHER ROOM.
R/O: WHO WAS THERE?
VIC: J... AND M...
R/O: HOW DID SOMEONE FIND OUT THAT HE WAS IN THE ROOM WITH YOU?
VIC: BOBBY TOLD VALERIE AND VALERIE TOLD MY MOTHER.
R/O: WHY DID YOU NOT GO TO THE WALMART STORE WITH VALERIE AND M... B...
VIC: DON'T KNOW, I WAS IN THE POOL.
R/O: WHY DID YOU GET OUT OF THE POOL?
VIC: TOO MANY PEOPLE IN THE POOL.
R/O: WHO TOLD YOU TO GET OUT?
VIC: BOB.
R/O: WHERE DID YOU GO WHEN YOU GOT OUT OF THE POOL?
VIC: TO THE MOTEL.
R/O: I NEED YOU TO SHOW THIS R/O WHAT BOB DID TO YOU WHEN YOU WERE ON THE BED. THIS R/O USED THE ANATOMICAL DOLL. THE VICTIM STUCK HER FINGER IN THE DOLL'S VAGINA

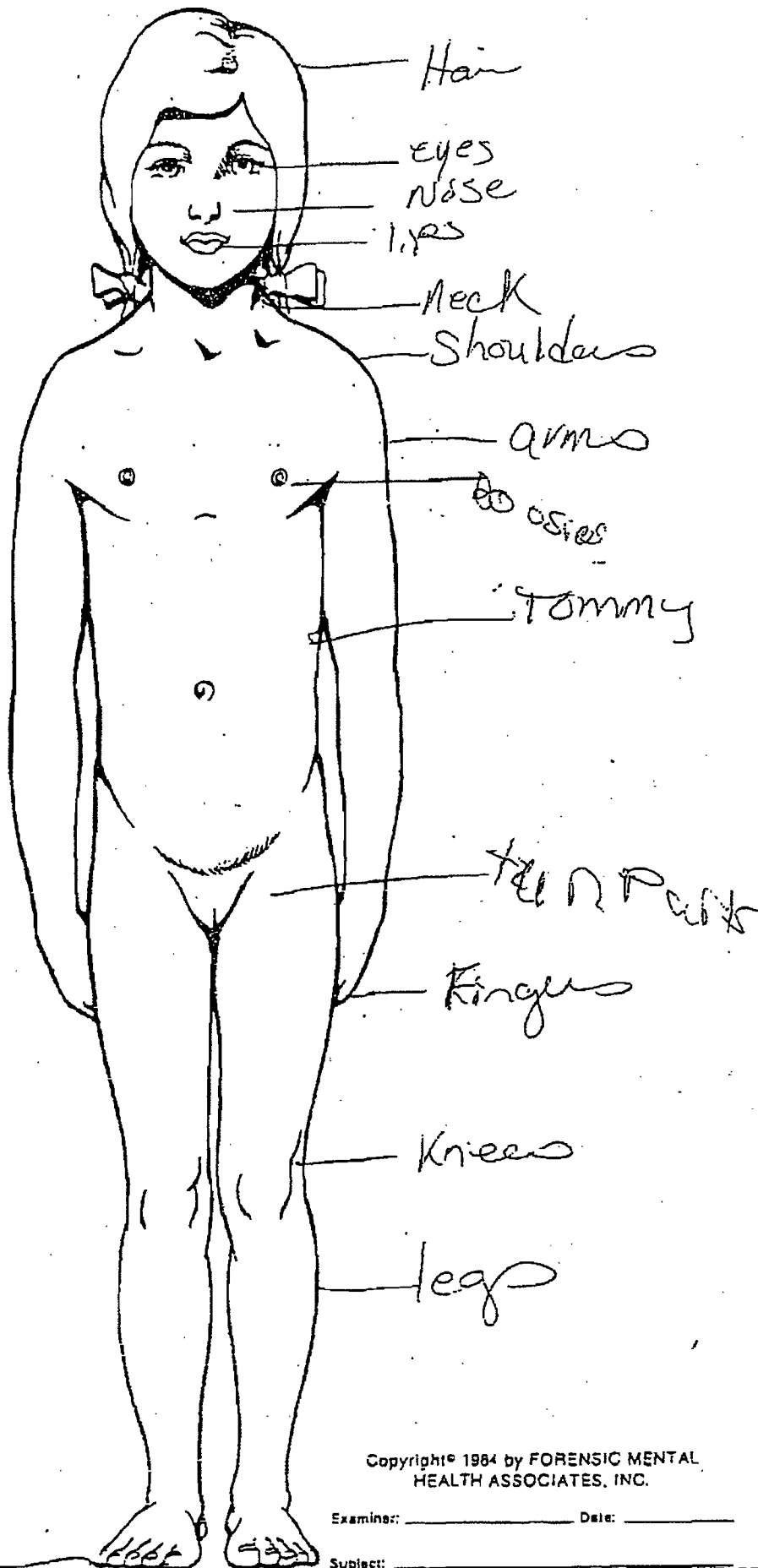
PROPERTY	TYPE	STOLEN	DAMAGED	BURNED	RECOVERED	SEIZED	TOTAL VALUE

SUBJECT IDENTIFIED: ☐ YES ☐ NO SUBJECT LOCATED: ☐ YES ☐ NO ☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED ☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM/DEALER COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE-NO ARREST

REPORTING OFFICER: HENDERSON, LORRAINE *166 DATE: 06-10-02 UNIT NO.: 630 APPROVING OFFICER: BROWN, SGT. M.J. DATE: 06-10-02 UNIT NO.: 601

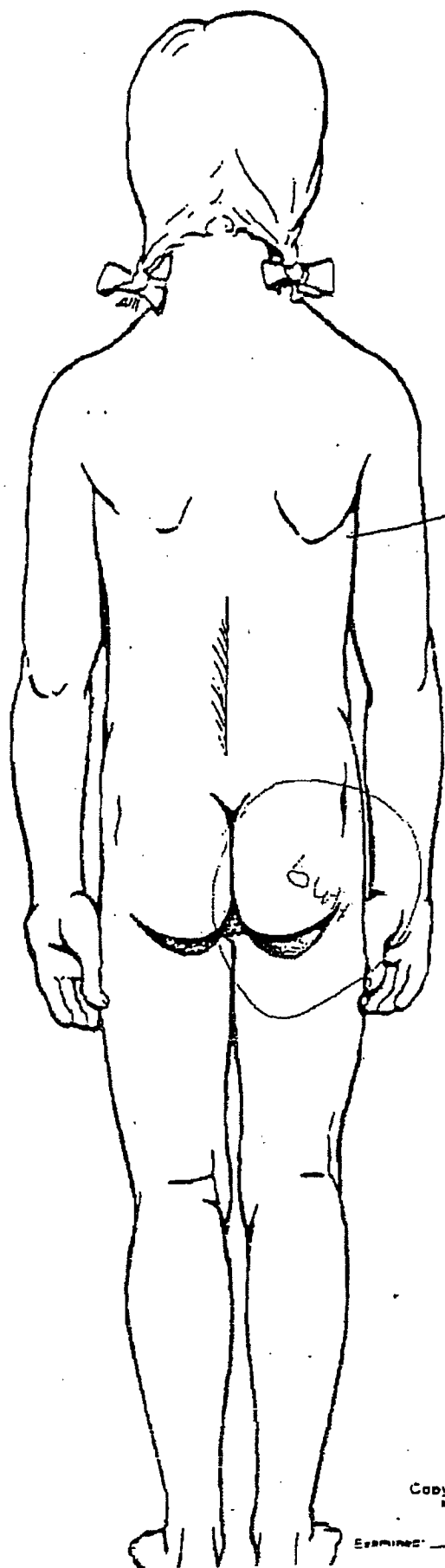
RECEIVED BY: ☐ YES ☐ NO (OFFICER)



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Examiner: _____ Date: _____

Subject: _____



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MENTAL HEALTH ASSOCIATES

Examiner: _____ Date: _____

CURRICULUM VITAE

ALLISON MARIE FOSTER, PH.D.

Assessment & Resource Center (ARC)

PO Box 119

Columbia, South Carolina 29202

phone: (803) 898-1477

facsimile: (803) 898-1471

e-mail: afd68@scdmh.org

EDUCATION

University of South Carolina, Columbia, SC
Ph.D., Clinical-Community Psychology, May, 1996

Emory University, Atlanta, GA
BA, Psychology and English Literature, May, 1988

LICENSURE

South Carolina License #684 in clinical psychology, awarded September 19, 1997.

CURRENT EMPLOYMENT

Program Director, Assessment & Resource Center (ARC), Columbia, SC September, 1995 - present.

Provide clinical and administrative leadership to the ARC, an Accredited Children's Advocacy Center (CAC). Conduct forensic evaluations of children suspected of being maltreated; develop programs of treatment and research; teach multidisciplinary professionals nationally and statewide; supervise trainees in clinical psychology, child psychiatry, family practice, social work, and nurse practice. Provide expert testimony in legal proceedings. Supervise clinic personnel.

DMH Assistant Professor, University of South Carolina School of Medicine, Department of Neuropsychiatry and Behavioral Science, Columbia, August, 1999 - present.

Teach and supervise medical students in matters of child abuse evaluation and treatment; conduct clinical research.

Clinical Psychologist, part-time private practice, Columbia, SC, September, 1997 - present. Conduct child and family-oriented psychological evaluations, psychotherapy, professional consultation, and training to multi-disciplinary professionals serving children.

OTHER EMPLOYMENT

Clinical Psychologist, University Specialty Clinics, Columbia, SC, August, 1999 – August, 2008.

Conduct child and family-oriented psychological evaluations, professional consultations, and treatment.

Instructor, Child Psychopathology (Psyc 510), University of South Carolina Department of Psychology, Columbia, Fall Semester, 1998.

Child and Family Therapy Practicum Supervisor, University of South Carolina Department of Psychology, Columbia, Fall Semester, 1997.

Instructor, Survey of Personality (Psyc 440), University of South Carolina Department of Continuing Education, Columbia, Fall, 1993; Spring, 1992; Spring, 1991.

Instructor, The Psychology of Women (Psyc 310), University of South Carolina Department of Continuing Education, Columbia, Summer, 1994; Fall, 1992; Fall, 1991.

CLINICAL RESEARCH, MANUSCRIPTS IN PROGRESS AND PUBLICATIONS

DeFelice*, AF, Musick, JE, Sobo, R., Tomaso, AR, & Morrison, CK (September, 2006). *A Prosecutor's Guide to Psychological Evaluations and Competency Challenges in Juvenile Court. Special Topics Series*, American Prosecutors Research Institute.

Foster, AM, Burke, LK, Olszewski, RJ, Smith, HM, Williams, N & Allen, C. (manuscript in preparation).

DeFelice, AF (July, 1998). Symptoms and contextual factors of children referred for sexual abuse evaluations: Preliminary findings. American Professional Society on the Abuse of Children (APSAC), Chicago, IL.

DeFelice, AF (1996). Contributing factors to the development of adolescent sex offending. Unpublished doctoral dissertation, University of South Carolina, Columbia.

Scherer, DG, Melloh, T, Buyck, D, Anderson, C, & Foster, AM (1996). Relation between children's perceptions of maternal mental illness and children's psychological adjustment. Journal of Clinical Child Psychology, 25(2), 156-169.

Foster, AM (August, 1995). Rape awareness/avoidance training: Prevention for a high-risk community. American Psychological Association, New York, NY.

Shea, SJ, McKee, GR, Foster, AM, & Bostdorff, C (August, 1995). Characteristics of women who kill their children. American Psychological Association, New York, NY.

Foster, AM (March, 1994). Family risk factors in the development of adolescent sex offenders. Contribution to Symposium on Juvenile Delinquency, Southeastern Psychological Association,

**DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

New Orleans, LA.

Foster, AM, and Bundy, MB (August, 1992). Citizen response to toxic contamination in an affluent neighborhood: An exploratory study. American Psychological Association, Washington, DC

Heilbrun, AB, Foster, AM, and Golden, J (1989). The death sentence in Georgia: Criminal justice or racial injustice? Criminal Justice and Behavior, 16(2), 19-154.

EDITORIAL ACTIVITIES

Doctoral Dissertation Committee for Chamarlyn L. Fairley: Semi-structured versus Non-structured Interview Protocols in the Assessment of Child Abuse: Does it really matter?

Chapter reviewer for Follingstad, D. and McCormick, M. (2002). Law and Mental Health Professionals: South Carolina. Washington, DC: APA.

NATIONAL PRESENTATIONS

Foster, AM (May 5, 2009).). Dynamics of victimization; Linguistic issues in the forensic interviewing of children. Faculty for *Equal Justice: Investigation and Prosecution of Child Abuse*. National District Attorneys Association National Center for the Prosecution of Child Abuse, May 4-8, 2009 Denver, CO.

Foster, AM (March 25, 2009). To Tell You The Truth: Effects of Competency Assessment and Oath-Taking in the Forensic Interview Process. Presentation for the 25th National Symposium on Child Abuse, March 23-26, 2009, Huntsville, AL.

Foster, AM (February 26, 2009). Linguistics & Child Development. Faculty for *childPROOF: Advanced Trial Advocacy for Child Abuse Prosecutors*, National Center for the Prosecution of Child Abuse, National Advocacy Center, Columbia, SC

Mitchell, R, & Foster, AM (September 15, 2008). Preparing the Prosecution Expert Witness for Direct and Cross Examination. Presentation for the National Summit on Child Abuse, National Advocacy Center, Columbia, SC.

Foster, AM (September 15, 2008). To Tell You The Truth: Competency Assessment & Oath-Taking in the Forensic Interview Process. Presentation for the National Summit on Child Abuse, National Advocacy Center, Columbia, SC

DeFelice, AF (March, 2007; February, 2006; March, 2004; March, 2003; January, 2002; March, 2001; July, 2000). Linguistics & Child Development. Faculty for *childPROOF: Advanced Trial Advocacy for Child Abuse Prosecutors*, National Center for the Prosecution of Child Abuse, National Advocacy Center, Columbia, SC.

DeFelice, AF (March 20 - 24, 2006). Adolescent Development and the Compliant Victim. Faculty for

**DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

Unsafe Havens I: Prosecuting Online Crimes Against Children. National Center for the Prosecution of Child Abuse, Phoenix, AZ.

DeFelice, AF (January 24, 2006). There Is No Side of Caution: What to do when coaching is a concern and when to name it child abuse. Presentation for the *San Diego International Conference on Child and Family Maltreatment*.

DeFelice, AF (November 14 – 18, 2005). Faculty for National *Finding Words*, American Prosecutors Research Institute's National Child Protection Training Center, Winona, MN.

DeFelice, AF (October 24, 2005). Memory & Suggestibility; Interviewing Children where there are Suspicions of Coaching. Faculty for *Advanced Forensic Interviewing of Children*. National Children's Advocacy Center, Huntsville, AL.

DeFelice, AF (October 26, 2005). Rapport Building Interviews. Faculty for *Unsafe Havens II: Investigation and Prosecution of On-line Crimes Against Children*. National Center for the Prosecution of Child Abuse, National Advocacy Center, Columbia, SC.

DeFelice, AF (October, 2005). Child Development 101. *Academy Online*, National Children's Advocacy Center, Huntsville, AL.

DeFelice, AF (August 30- 31, 2005). Memory & Suggestibility; It Does Happen: What to do when coaching is a concern; Adolescent Development; Child Interview Practicum. Faculty for *Forensic Interviewing of Children*, United States Navy Training at the National Children's Advocacy Center, Huntsville, AL.

DeFelice, AF (June 2, 2008; August 31, 2004; October 6, 2003; August 12, 2002). Dynamics of victimization; Linguistic issues in the forensic interviewing of children. Faculty for *Equal Justice: Investigation and Prosecution of Child Abuse*. American Prosecutors Research Institute's National Center for the Prosecution of Child Abuse, Memphis, TN; New Orleans, LA; Baltimore, MD; Indianapolis, IN.

DeFelice, AF (July 26-30, 2004; August 18-22, 2003; June 25 - 29, 2001; January 8 - 12, 2001). Faculty, National Children's Advocacy Center *Academy: Forensic Interviewing of Children*. Huntsville, AL, Collinsville, IL.

DeFelice, AF (December 5, 2005; November 1, 2004; May 6, 2004; September 29, 2003). Child development: What kids know and when they know it. Faculty for *The Adolescent Brain*, American Prosecutors Research Institute, Columbus, OH and Columbia, SC.

DeFelice, AF (March 17-18, 2004). The Coached Child; Child Development for Forensic Interviewers. Presentations for the *National Children's Advocacy Center's 20th National Symposium*, Huntsville, AL.

DeFelice, AF (March 12-14, 2003). Addressing memory and suggestibility issues in child forensic

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interviews; Child sexual abuse allegations arising in the context of divorce / custody disputes. Presentations at the *National Children's Advocacy Center Nineteenth National Symposium on Child Abuse*, Huntsville, AL.

Steele, LC and DeFelice, AF (March 12, 2003). Interviewing pre-school children. Presentation at the *National Children's Advocacy Center Nineteenth National Symposium on Child Abuse*, Huntsville, AL.

DeFelice, AF (January 27-31, 2003). Faculty for *Finding Words: Interviewing Children and Preparing Them for Court*. American Prosecutors Research Institute's National Center for the Prosecution of Child Abuse, Forsyth, GA.

DeFelice, AF (January 7-8, 2003). Two-Day Forensic Interview Training. Faculty for *American Prosecutors Research Institute's National Center for the Prosecution of Child Abuse*, Towson, MD.

DeFelice, AF (May 7-10, 2002). Faculty for the National Children's Advocacy Center (NCAC) Advanced Investigative Interview Training, Huntsville, AL.

REGIONAL OR STATEWIDE PRESENTATIONS

Mitchell, R, & Foster, AM (May 13, 2009). Preparing the Prosecution Expert Witness for Direct and Cross Examination. Presentation for the Utah Children's Justice Symposium, May 12 – 14, 2009 Midway, UT.

Foster, AM (May 13, 2009). Competency Assessment & Oath-Taking in the Forensic Interview Process. Presentation for the Utah Children's Justice Symposium, May 12 – 14, 2009 Midway, UT.

DeFelice, AF (April 4, 2007). Developmental Abilities of Children. Faculty for *Child Sex Abuse Investigator Course*, sponsored by the USC Children's Law Center for the SC Criminal Justice Academy, Columbia.

DeFelice, AF (February 9, 2007). Children's Advocacy Centers: What They Are and How They Help. Invited address for the *South Carolina Department of Social Services Statewide Continuing Legal Education Meeting*, Columbia.

DeFelice, AF (February 2, 2007). Forensic Assessment of Suspected Child Maltreatment. One-day workshop conducted for *South Carolina Department of Social Services*, in conjunction with the USC Center for Child and Family Studies, Columbia.

**DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

DeFelice, AF (January, 2007; October, July, April and January, 2006; October, August, and March, 2005; October, August and March, 2004; October, August, and March, 2003; October and August 2002; October and August, 2001). Faculty for *Finding Words South Carolina: Interviewing children and preparing them for court*. Co-sponsored by the Assessment and Resource Center and the USC Children's Law Center. Accredited by Corner House of Minneapolis, MN and the National Center for the Prosecution of Child Abuse, Alexandria, VA.

DeFelice, AF (November 28, 2006). The Impact of Violence on Young Children; Should I Report This? Issues of suspected abuse. Workshops for *the Early Years 2006* statewide conference November 28 – 29, Boise, ID.

DeFelice, AF (September 28, 2006). There is No Side of Caution: What to do when coaching is a concern in the investigation of child abuse cases; Understanding Children's Memory & Suggestibility: Implications for child abuse investigations; Child Development for Multidisciplinary Teams. Workshops presented for *Child Protection: Our Responsibility* statewide conference, September 28 – 29, Cedar Rapids, IA.

DeFelice, AF (August 30, 2006). The Process of Disclosure; Psychological Abuse of Children: Coaching as Pediatric Condition Falsification. Workshops for the *2006 Child Maltreatment Summit, Children Need Everyday Heroes*, August 29 – 31, Kearney, NE.

DeFelice, AF (August 22, 2006). Emotional and Psychological Impact of Delays on Children. Invited address for the *South Carolina Judicial Department Family Court Mini-Summit*, Columbia Metropolitan Convention Center.

DeFelice, AF (June 7, 2006). There is No Side of Caution: What to do when coaching is a concern in the investigation of child abuse cases; Child Development for Multidisciplinary Teams. Workshops for the *13th Annual Training Conference on Crime Victim Assistance*, June 7 & 8, Boise, ID.

DeFelice, AF (December 8, 2005). What the Guardian Ad Litem needs to know about child abuse cases. Presentation for the *7th Annual Advanced Guardian Ad Litem Seminar*, Richmond, Virginia.

DeFelice, AF (October 13, 2005). Effects of Abuse & Neglect on Child Development. Presentation for *the Children's Law Conference*, University of South Carolina, Columbia.

DeFelice, AF (March 23-25, 2005; March 23-25, 2004). Child development. Presentation for *Building Successful Teams: Investigation and Prosecution of Serious Injury and Fatal Child Abuse*, Atlanta, GA; Macon, GA.

DeFelice, AF (June 7-9, 2004). Children and Adolescents as Crime Victims. Presentation for the *Idaho Council on Domestic Violence and Victim Assistance 11th Annual Training Conference on Crime Victim Assistance*, Boise.

DeFelice, AF (May 25-26, 2004; April 28-29, 2004). Faculty, *Forensic Interview Training*, Pennsylvania

**DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

District Attorneys Institute, Dubois and Scranton.

DeFelice, AF (May 15, 2003). Adolescent Development. Presentation for the *5th Annual Children's Law Conference*, University of South Carolina School of Law, Columbia.

DeFelice, AF (April 24, 2003). Working with abused children and adolescents. Workshop for the *South Carolina Association of Children's Home and Family Services and the Governor's Office Continuum of Care Program Oversight*, Columbia.

DeFelice, AF (April 15, 2003). Treatment issues affecting abused children. Presentation for the *Abuse Intervention Consortium's First Annual Conference*, Delaware.

DeFelice, AF. (October 1, 2001). Developmentally appropriate interviewing of child victims. *2001 SC Solicitors' Association Conference*, Myrtle Beach.

DeFelice, AF, Olszewski, RJ, and Burke, LK. (September, 2001). Special issues in the forensic interviewing of child victims. *Prevent Child Abuse South Carolina 26th Annual Conference*, Columbia.

DeFelice, AF (August 27, 2001). Developmental considerations: Investigating crimes against children. Sponsored by *The Children's Advocacy Center*, Austin, TX.

DeFelice, AF (July 13, 2001). Interviewing the child witness. Handling Juvenile Sex Offender Cases. Co-Sponsored by the *Children's Law Office of the USC School of Law, Juvenile Justice Resource Center and the SC Center for Sex Offender Management*, Columbia.

DeFelice, AF (May 18, 2001). Memory and suggestibility in children: A one-day workshop. Sponsored by the *Cherokee Child Advocacy Council, Inc.* Woodstock, GA.

DeFelice, AF (April 20, 2001). Developmentally appropriate interviewing of children. *Caring Courts for Children: SC Guardian Ad Litem Conference*, Columbia.

DeFelice, AF (March 13, 2001). Developmental considerations for forensic interviewers. *Finding Words South Carolina*. Sponsored by the American Prosecutors Research Institute, Corner House, Children's Law Office, and Assessment and Resource Center, Columbia.

DeFelice, AF (February 19, 2001). Identifying and responding to child abuse: A workshop for professionals serving children. Sponsored by the *Mental Health Association*, Lancaster.

DeFelice, AF (October 19, 2000; May 18, 2000; April 20, 2000; April 22, 1999; January 21-22, 1999; March, 1998; April, 1997; December, 1996). Evaluation and treatment of child sexual abuse. Workshop for child and adolescent community mental health workers. *Community Education Program of South Carolina Department of Mental Health*, Columbia.

DeFelice, AF (August 8, 2000) Developmental considerations for forensic interviewers. *Multi*

**DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

disciplinary Response to Child Abuse Conference. Sponsored by the Pee Dee Coalition Against Domestic and Sexual Assault, Florence.

DeFelice, AF (May 16, 2000). Forensic interviewing of child victims / witnesses. Presentation for the *Southeast Regional Conference on Child Fatalities*, Hilton Head, SC.

Cordisco, L, Gilbert, C, DeFelice, AF, Ralston, L (April 26 - 28, 2000). Child Forensic Interview Training Clinic. Co-sponsored by the *National Children's Advocacy Center and South Carolina Network of Children's Advocacy Centers*, Charleston, SC.

DeFelice, AF (October, 1999). Forensic interviewing of children suspected of sexual abuse. *Criminal Justice Academy Child Abuse Investigators Training*, Columbia.

DeFelice, AF & Caldwell, L (September 24, 1999). Forensic interviewing of child victims / witnesses: Using developmentally appropriate techniques. *Prevent Child Abuse South Carolina 24th Annual Conference*, Columbia.

DeFelice, AF & Sanders, C (May 20, 1999). Assessment of child abuse allegations in divorce litigation. *First Annual Children's Law Office Conference*, Columbia.

DeFelice, AF (October 30, 1998). Dialogue with the victims: Treatment issues in child sexual abuse cases. *South Carolina Child Protection Advisory Committee Conference*, Columbia.

DeFelice, AF (June 26, 1998). Counseling students who are abused. *Summer Institute for South Carolina teachers and guidance counselors*, Columbia.

DeFelice, AF (May 26-27, 1998). Issues of sexual abuse and how these evolve over time. South Carolina Department of Mental Health, *12th Annual Children, Adolescents, and Their Families (CAF) Conference*, Columbia.

DeFelice, AF & Payson, M (April 23, 1998). Sexual abuse: How to recognize signs and symptoms. *Lucia Murchison Public Health Social Work Conference*, Myrtle Beach.

DeFelice, AF (April 17, 1998). Child witnesses of violent crime. *South Carolina Victim Assistance Network Annual Conference*, Columbia.

DeFelice, AF (January, 1998). The process of disclosure in child sexual abuse cases. Presentation to *South Carolina Victim Assistance Network*, Columbia.

Holmes, GR, & DeFelice, AF (February, 1997). Working through the stress of change. *South Carolina Child Protection Advisory Committee Conference*, Columbia.

HONORS AND AWARDS

South Carolina Professional Society on the Abuse of Children 2001 Research Award

**DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

Outstanding Trainer for 1999, awarded by the Richland County Volunteer Guardian ad Litem Program

PROFESSIONAL AFFILIATIONS

American Psychological Association (APA)

APA Division 37, Section on Maltreatment

American Professional Society on the Abuse of Children (APSAC)

Half A Nation Steering Committee, National Center for the Prosecution of Child Abuse

South Carolina Professional Society on the Abuse of Children (SCPSAC), 2004 Board President

South Carolina Psychological Association (SCPA)

South Carolina Network of Children's Advocacy Centers. Member

Richland County Multidisciplinary Investigative Team, Member

**DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

GRANTS AWARDED

The Duke Endowment, Child Care Division, Calendar Years 2007-2010
National Children's Alliance, Annual Program Support Grants, Calendar Years 2000 – 2009
SC Department of Public Safety, State Victims Assistance Program, FY 2002-2003
The Duke Endowment, Health Care Division, child abuse professional education and service enhancement, Calendar Years 2000-2003

PRE-DOCTORAL CLINICAL TRAINING

Clinical Psychology Intern, William S. Hall Psychiatric Institute, Columbia, SC
September 12, 1994 - September 8, 1995.

Conducted evaluations and psychotherapy across inpatient, outpatient, forensic and community mental health settings serving child, adolescent, and adult populations.

Student Psychotherapist, University of South Carolina Psychological Services Center, Columbia, SC
September, 1989 - August, 1994.

Conducted evaluations and therapy with full age-range of outpatient clients, under the supervision of clinical psychology faculty.

Psychology Intern, South Carolina Department of Juvenile Justice, Division of Institutional Psychology
Columbia, SC, September 1992 - August, 1994

Provided individual and group psychotherapy, crisis intervention, and sex offender risk assessments.
Served as consultant to social workers and parole board.

Psychology Intern, South Carolina Department of Youth Services (now SC Department of Juvenile Justice), Division of Community Psychology, Columbia, SC, September 1991 - August, 1992

Conducted psychological evaluations of juvenile offenders for Richland County Family Court.

CONTINUING PROFESSIONAL EDUCATION

Recent Developments Impacting Child Abuse Practice: Crawford, Davis, and Moore; Psychological Evidence of Child Abuse and Sexual Abuse; A History of Child Protections. Workshops by Professor John E.B. Myers. Fourth Annual *Joining Hands to Protect Children* Conference, SC Network of Children's Advocacy Centers, Columbia. April 26, 2007.

Parent-Child Interaction Therapy, A Five Day "Train the Trainer" Course by Cheryl B. McNeil, Ph.D. Columbia, SC, May 19-23, 2003.

Advanced Child Sexual Abuse Forensic Interview Training. CornerHouse, Minneapolis, MN, February 10 – 14, 2003.

***DeFelice** was the legal name of Allison M. Foster from February, 1996 to December, 2008

- Attachment theory and its application to child sexual abuse, Ann Elliott, Ph.D. South Carolina Professional Colloquium on Child Abuse, Charleston, February 22, 2002.
- Matching treatment approaches to the presenting problems, Mark Chaffin, Ph.D. South Carolina Professional Colloquium on Child Abuse, Charleston, February 22, 2002.
- The substandard interview: Can we prosecute? Gina Richardson, Ph.D., Jim Peters, J.D. South Carolina Professional Colloquium on Child Abuse, Charleston, February 21, 2002.
- Talking to abused children: Understanding and being understood, Gina Richardson, Ph.D. South Carolina Professional Colloquium on Child Abuse, Charleston, February 21, 2002.
- Guidelines for the mental health treatment of abused and traumatized children, Benjamin E. Saunders, Ph.D. South Carolina Psychological Association, Columbia, February 8, 2002.
- Family focused intervention in child maltreatment, Elizabeth Ralston, Ph.D., LISW, LMFT, 26th Annual Conference of Prevent Child Abuse South Carolina, Columbia, September 28, 2001.
- The art and science of forensic interviewing of young children who may have been sexually abused, Kathleen Coulborn Faller, Ph.D., ACSW, Advanced Training Institute for Prevent Child Abuse South Carolina, Columbia, September 26, 2001.
- Stress, trauma and brain development: Implications for child protection, Sandra K. Hewitt, Ph.D., Seventh Annual Colloquium on Child Abuse, Charleston, SC, February 15-16, 2001.
- Patterns of attachment and implications for custody, Sandra K. Hewitt, Ph.D., Seventh Annual Colloquium on Child Abuse, Charleston, SC, February 15-16, 2001.
- Recently issued guidelines for the mental health treatment of abused and traumatized children, Benjamin E. Saunders, Ph.D. Seventh Annual Colloquium on Child Abuse, Charleston, SC, February 15-16, 2001.
- Parent-child interaction therapy for relationship enhancement, Cheryl B. McNeil, Ph.D., Seventh Annual Colloquium on Child Abuse, Charleston, SC, February 15-16, 2001.
- Finding Words. Co-sponsored by the American Prosecutors Research Institute (APRI) and Corner House. Boise, ID, August 28 - September 1, 2000.
- Confronting child abuse in rural communities, Victor Vieth, J.D., Second Annual Children's Law Conference, Columbia, SC, May 11, 2000.
- Preparing children for court, Julie Lipovsky, Ph.D., Second Annual Children's Law Conference, Columbia, SC, May 11, 2000.

**DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

- Memory and suggestibility of the child witness, Tom Lyon, J.D., Ph.D., Second Annual Children's Law Conference, Columbia, SC, May 11, 2000.
- Competency examinations of child witnesses, Tom Lyon, J.D., Ph.D., Second Annual Children's Law Conference, Columbia, SC, May 12, 2000.
- African Americans and child maltreatment, Veronica Abney, Ph.D., LCSW, DCSW, Fifteenth National Symposium on Child Sexual Abuse, Huntsville, AL, March 10, 1999.
- How to present clinical opinions in forensic settings, Mark Chaffin, Ph.D., Fifteenth National Symposium on Child Sexual Abuse, Huntsville, AL, March 10, 1999.
- Improving outcomes for children: Cognitive interviews, Susan Samuels, MSW & Detective James Starks, Fifteenth National Symposium on Child Sexual Abuse, Huntsville, AL, March 11, 1999.
- What you need to know before interviewing 3- and 4-year-olds, Sandra K. Hewitt, Ph.D., Fifteenth National Symposium on Child Sexual Abuse, Huntsville, AL, March 11, 1999.
- How to respond to defense challenges to the investigative interview, Brian Holmgren, JD & Victor Veith, JD, Fifteenth National Symposium on Child Sexual Abuse, Huntsville, AL, March 11, 1999.
- Effective child abuse investigation techniques for multi disciplinary teams, Detective Mike Johnson, Fifth Annual South Carolina Professional Colloquium on Child Abuse, Charleston, February 18, 1999.
- Interviewing young victims in child abuse cases, Detective Richard L. Cage, Fifth Annual South Carolina Professional Colloquium on Child Abuse, Charleston, February 19, 1999.
- Team development workshop, Children's Law Office, University of South Carolina School of Law, Columbia, October 29 & 30, 1998.
- Child forensic interview training clinic, Kathleen C. Faller, Ph.D., ACSW, DCSW, Kee MacFarlane, MSW, Melissa McDermott Steinmetz, ACSW, Daniel Jarboe, MA, LPC, Kenneth Lanning, Christine Pawelski, EdD, Anne Graffam Walker, Ph.D., Donna Pence, MA, John Stirling, MD, Hon. Harry M. Elias, J.D., American Professional Society on the Abuse of Children, Huntsville, AL, March 15-21, 1998.
- Treatment of child victims, Lucy Berliner, MSW, Fourth Annual South Carolina Professional Colloquium on Child Abuse, Charleston, SC, February 21, 1998.
- Aggressive behavior in childhood and early adolescence: A risk and resiliency perspective, Mark Fraser, Ph.D. Fourth Annual South Carolina Professional Colloquium on Child Abuse, Charleston, SC, February 20, 1998.
- Juvenile sexual offending: Clinical evaluation and treatment, John Hunter, Ph.D. Fourth Annual South Carolina Professional Colloquium on Child Abuse, Charleston, SC, February 20, 1998.
- *DeFelice* was the legal name of Allison M. Foster from February, 1996 to December, 2008

Engaging non-offending parents in sexual abuse cases, Ann Elliott, Ph.D. & Mark Chaffin, Ph.D. Fourth Annual South Carolina Professional Colloquium on Child Abuse, Charleston, SC, February 20, 1998.

A day with John Briere, Ph.D. South Carolina Professional Society on Child Abuse, Columbia, SC, November 21, 1997.

Diagnostic and therapeutic phases in the treatment of childhood dissociative disorders, Frances S. Waters, MSW, ACSW, LMFT. Advanced Training Institute, Council on Child Abuse and Neglect, Columbia, SC, September 27, 1997.

Play therapy considerations when working with traumatized children, Sandra Frick-Helms, RN, Ph.D., RPT-S. Council on Child Abuse and Neglect, Columbia, SC, September 26, 1997.

Developmental aspects of violence: Implications for child protection, Ronald E. Zuskin, MSW, LCSW-C, 22nd Annual Conference, Council on Child Abuse and Neglect, Columbia, SC, September 25, 1997.

Investigating/evaluating sexual abuse in divorce & custody cases: Research & practice guidelines, Mark Chaffin, Ph.D. Council on Child Abuse and Neglect, Columbia, SC, September 25, 1997.

The magic of play therapy, Mark Barnes, Ph.D. Canadian Play Therapy Institute, Atlanta, GA, April 14 & 15, 1997.

Child sexual abuse: Assessment & treatment, F. Honey Sheff, Ph.D. Psychoeducational Resources, Inc. Charlotte, NC, December 9, 1997.

Expert witnesses in child abuse cases, Brian Holmgren, Esq., Mark Ellis, Esq. Children's Law Project, Columbia, SC, May 10, 1996.

Play therapy seminar, Sandra Frick-Helms, RN, Ph.D., RPT-S, William S. Hall Psychiatric Institute, Columbia, SC, December, 1995 - February, 1996.

Advanced training on child sexual maltreatment, Peggy Hamrick, LMSW, Kim Rosborough, LMSW, National Center on Missing and Exploited Children Comprehensive Action Program (M/CAP), Columbia, SC, December 4-5, 1995.

Comprehensive intervention in child sexual abuse, Ethel Amacher, MSW, LCSE, PIP, Lexington County Children's Center, Lexington, SC, September, 1995.

Contemporary applications of directive therapy with adolescents and young adults, Jay Haley, Charlotte, NC, February 25, 1994.

Working with victims and offenders of sexual abuse, A. Nicholas Groth, Ph.D., Eliana Gill, Ph.D.,

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Forensic Mental Health Associates and Family and Children's Service of Greater Greensboro, Greensboro, NC, December, 1993.

Grief work with children and adolescents, Sue Heiney, RN, MN, SC, South Carolina Department of Juvenile Justice, Columbia, SC, November, 1993.

Treatment of adult and adolescent survivors of sexual abuse: A two-day advanced training for clinicians, Joanna Colrain, M.Ed., LPC, Columbia, SC, October 22-23, 1993.

The forensic interviewing of children, Nancy Copeland-Aldridge, LCSW, ACSW, Council on Child Abuse and Neglect, Columbia, SC, September, 1993.

The sex offender, David Szymanowski, 8th Annual Treatment Conference on Sexual Abuse, Hilton Head Island, SC, March 3, 1993.

The sex offender, Stanton Samenow, Ph.D., Midlands Technical College, Columbia, SC, January 30, 1991.

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THE FOLLOWING TRANSCRIPT IS FROM THE RECORD ON APPEAL FROM
THE DIRECT APPEAL AND HAS ROA NUMBERS ALSO IN THE RIGHT BOTTOM CORNER
OF THE PAGES.

Index

Pre-trial motion for evaluation of minor	1
Transcript from trail	
Original court reporter's index of transcript	28
Motion to suppress	29
Jo Guest	
Direct	35
Matters - interpreter sworn	39
LG	
Direct	40
AP	
Direct	74
Cross	86
Mary Gollwitzer	
Direct	89
Cross	107
Linda Hutton	
Direct	120
Cross	130
Nancy Henderson	
Direct	132

Cross	140
Redirect	142
Lorraine Henderson	
Direct	143
Cross	170
Antonio Bailey	
Direct	176
Cross	180
Tony Hudgins	
Direct	181
Cross	193
Nick Demos	
Direct	194
Cross	199
Motions	249
Joanna Davis	
Direct	263
Shannon McCall	
Direct	203
Valerie McCall	
Direct	203
Cross	212

Robert McCall

Direct	213
Cross	222
Motions	234
State's Exhibit 3	245
Written Motion for Psychiatric Evaluation of Minor	246
Sealed affidavit (original in possession of Clerk of Court of Appeals)	247
Order	248
Certificate	249

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF GENERAL SESSIONS
2003-GS-23-1234

STATE OF SOUTH CAROLINA,
PLAINTIFF,

vs.

TRANSCRIPT OF RECORD

ROBERT DUNCAN MCCALL, II,
DEFENDANT.

COPY

October 24, 2003
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, JUDGE.

A P P E A R A N C E S:

BRYNA S. SEAY, ESQ.
Assistant Solicitor
Attorney for the Plaintiff

C. TIMOTHY SULLIVAN, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Official Court Reporter

001

FOSTER LETTER 24 of 46

APPENDIX 234

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

002

FOSTER LETTER 25 of 46

1 MR. SULLIVAN: Judge, this would be the case of the
2 State v. Robert D. McCall, II. Here is the indictment
3 number, 03-1234.

4 It is a motion by -- on behalf of the Defendant to
5 have the victim have a psychological or psychiatric
6 evaluation independent of what's been done. I have a copy
7 of the motion here.

8 THE COURT: Yes, please.

9 MR. SULLIVAN: The attachment doesn't need to be
10 published. The Solicitor has a copy. And the victim's
11 family, they know about it. They know the contents. And
12 I'm not here to try and embarrass anybody in this
13 proceeding. But everybody in the courtroom is aware of
14 that, what's in the contents of that.

15 THE COURT: All right.

16 MR. SULLIVAN: I would preface this to my client and
17 his wife, whom I've met with on many occasions about this
18 case, are aware of this motion. They're aware of the
19 nature of it. I've talked to them over a period of weeks
20 about it. I talked to Mr. McCall yesterday afternoon
21 about it. And I did not feel his presence would be
22 required. I talked, again, to Mrs. McCall this morning
23 and told her that it was scheduled for today and I would
24 let them know the results.

25 They would not offer any testimony or anything to

003

1 contribute to the motion. And there are a lot of
2 feelings, as you can imagine. This is a victim and an
3 uncle, the niece and the uncle is involved. The families,
4 there would be a lot of friction. And I thought unless he
5 could contribute something to the matter to keep them
6 separate.

7 THE COURT: Okay. That's fine.

8 MR. SULLIVAN: Judge, I'm sure you're aware -- I
9 think you had one of these, I understand, a couple of
10 weeks ago. And I've never done one. So I'm going to
11 follow the outline -- I'll pass this up -- and try and
12 make this brief. You're aware of the matter of --

13 THE COURT: Delaney.

14 MR. SULLIVAN: Yeah, the Delaney.

15 And it looks like the criteria set forth there -- one
16 would be the nature of the examination of question,
17 intrusive inherent examination. I'm not asking for any
18 kind of physical exam. It's just strictly a psychological
19 and psychiatric exam of the victim. I don't think that
20 would be intrusive. It would be a lot less intrusive or
21 traumatized than what we'll have to go through in Court in
22 a couple of weeks, I think. The victim's age, she's 13
23 now. She was 12 at the last incidence when this happened.

24 The resulting physical and emotional effects of the
25 examination. I don't see where that would be traumatized.

004

1 It would be she and a psychiatrist in a private room
2 without any people. He would be a stranger to her. And I
3 understand from the Solicitor and from records that I have
4 that it's possible that she would require a speech
5 therapist to be present to help the examiner understand
6 some of her responses.

7 I would ask that if you do grant this that the
8 examination start with the pathologist there -- or
9 therapist available, but not there unless he feels that
10 she needs it. I'd like an independent exam.

11 The only exam I've got is one by Dr. Henderson, which
12 the Solicitor has furnished to me. And at that one, the
13 mother did all the talking. The girl, from what I can
14 examine here, was there, but she did not really talk that
15 much.

16 MS. SEAY: That -- I'm sorry.

17 MR. SULLIVAN: At her school review, this was on --
18 furnished, again, by the Solicitor on May 15 of this year.
19 They -- she's a special needs student. And, again, I'm
20 not trying to embarrass anybody. But at that meeting,
21 there's a -- present to get the total view of this child
22 is a physical therapist and a speech pathologist. And I
23 don't know if we're going to need somebody in the
24 courtroom when she testifies or not. I assume so.

25 You have some information there. I think there are

005

1 some fantasies here. I'm not sure how deep they are and
2 how far they go. Also, I have some information that she
3 went through two rounds of group therapy at a sexual
4 trauma center and was told she could not do a third round.
5 I have no information about those sessions, whether there
6 were reports made. The Solicitor is not aware of those
7 reports.

8 THE COURT: Of what?

9 MR. SULLIVAN: The Solicitor does not -- was not
10 aware of these sessions. I've not --

11 THE COURT: What's your basis for thinking that
12 happened?

13 MR. SULLIVAN: The parents were at a conference and
14 they spoke to the people about sexual abuse things and
15 stated that REDACTED had been through two rounds of group
16 therapy. Someone was there that knew the situation and
17 told us about it. And they stated where she had been
18 through two rounds of group therapy at the sexual trauma
19 center and was told she could not do another round. I
20 don't know what that means, whether that wouldn't help her
21 or was bothering her or what. I have no reports of that.
22 And the Solicitor is not aware of that.

23 Also, in that same situation, it was stated by the
24 mom, I think, that REDACTED at one time wanted to recant her
25 statement. And I don't know whether it was because it was

006

1 not true and it was hurting the family or just because it
2 was causing a lot of friction in the family and she didn't
3 want it to be a problem to the family. There are a lot of
4 issues here, Judge. And this is a serious case. He's
5 charged ---

6 THE COURT: What are the charges?

7 MR...SULLIVAN: CSC first with a minor, and then a
8 direct presentment to include a lewd act also in the same
9 case. So it's a serious case.

10 The girl does have some speech limitations, maybe
11 some psychological and some physical. And I think it
12 would be -- I'm not trying to just delay the matter at
13 all.

14 THE COURT: I know you're not.

15 MR. SULLIVAN: I think it would be in the best
16 interest of the whole situation to have her examined.
17 I've got names of -- and we would pay for it. The Defense
18 would pay for it. I've got names of three psychiatrists,
19 which I'll be happy to go over with the Solicitor, a Peter
20 Owens, a Wade Harris, and a Tony Goodbar. And they're
21 supposed to be very competent psychiatrists in this field.

22 The other -- the probative value of the examination
23 and the issue before the Court -- I really don't know.
24 I'm not sure. That's why I want to have it. It may be --
25 it may not help us at all or it may be very insightful.

007

1 That I can't answer on that point.

2 The remoteness of the examination. One of the
3 emphasis in this case as far as remote allegedly happened
4 when she was six, but was not discovered until she was 12.
5 So that was a six-year lap there. We're talking now from
6 the last time it happened until this time maybe a year.
7 But the remoteness, I would think, is a problem.

8 And then the evidence available. Well, you know,
9 pretty much what I have is, basically, statements by the
10 mother and the child. She needs help communicating. So
11 that's what I have. And I have an illusion to a sexual
12 trauma center group therapy, which I don't -- two group --
13 two sessions --

14 THE COURT: Have you filed a motion to discover that?

15 MR. SULLIVAN: I filed a motion, not on that
16 particular instance. I discovered that here recently. I
17 was made aware of this. But the Solicitor is not aware of
18 it.

19 THE COURT: All right.

20 MR. SULLIVAN: So she has nothing to gain --

21 MS. SEAY: I need to clarify that.

22 THE COURT: Okay.

23 MR. SULLIVAN: Basically, that's it, Your Honor.

24 And as stated, the Defendant is very much aware of
25 what's going on. And I thought it best for him not to be

008

1 here.

2 THE COURT: And what is the compelling need that you
3 have for this?

4 MR. SULLIVAN: I'm not sure who we're hearing from,
5 Your Honor, on this case. I'm not sure how much of this
6 is the girl and how much is outside influence. I'd like
7 to have an exam without the family there where she and
8 somebody could talk about it.

9 THE COURT: What benefit is going to be derived from
10 the examination?

11 MR. SULLIVAN: The results could be -- I don't know
12 what the -- the results may come back that it didn't
13 happen. I don't know. That it didn't happen. I don't
14 know what she would say by herself.

15 THE COURT: A contradictory statement.

16 MR. SULLIVAN: Yeah. That I don't know. That's why
17 I'm making the motion. It may come back fine and
18 everything is just like it says. He agrees and everything
19 else, and maybe that would change my mind as far as --

20 THE COURT: Well, see, now, you're just talking about
21 doing an independent interrogation.

22 MR. SULLIVAN: Well, it's an exam by a psychiatrist
23 really.

24 THE COURT: Well, but what --

25 MR. SULLIVAN: I think there are some fantasy issues

1 here. And there was some -- at one time, I think there
2 was an affinity between this young lady and the uncle. He
3 looked after her a good bit. And I don't know what
4 happened on that. But I'm not sure. Some of this may
5 have carried over. I don't know. That's why I'm asking
6 for someone more skilled in this field than I am,
7 obviously.

8 And, again, I'm not trying to do anything to
9 embarrass or make it hard on the victim by any means or
10 delay the matter. I think in fairness to my client in
11 view of her limitations, I think I had to do this, so.

12 THE COURT: All right.

13 Mr. SULLIVAN: That's all I have, Your Honor.

14 THE COURT: Okay. Ms. Seay.

15 MS. SEAY: Thank you, Your Honor.

16 I appreciate the Court's patience because I do have
17 some things that I'd like to share with you about the
18 history of this case and also the victim's particular
19 situation, and why we oppose this motion.

20 Your Honor, the victim is now 13 years old. Her name
21 is REDACTED She is present in Court today,
22 along with her parents, a grandparent, an aunt, an uncle,
23 and a cousin, and speech pathologist from the Greenville
24 County school district, who deals with her regularly.

25 Your Honor, initially, when this victim was six years

010

1 old, she disclosed to her mother a sexual incident
2 involving her uncle, who is the Defendant in this case.
3 The aunt and uncle are the godparents of this child. And
4 they had been caring for her while the mother worked when
5 she was a younger age. And when this victim was six, she
6 initially disclosed to her mother. There were various
7 discussions within the family, as well as going to a
8 pediatrician to determine what to do about this particular
9 situation.

10 As it has been related to me, the family decided,
11 based on the advice of a particular pediatrician that they
12 saw, that it would be best and less disruptive to the
13 family if it were not reported to any law enforcement
14 authority, but if they just ceased having any contact
15 between the uncle and the child. And that's what they
16 chose to do.

17 As time progressed, there was no contact. However,
18 in May of 2002, the victim went on a trip to Columbia with
19 some other family members that included some members of
20 the Defendant's family. There was some one-on-one contact
21 that occurred that the parents -- unbeknownst to the
22 victim's parents happened. The victim disclosed that the
23 uncle committed a sexual act on her at that time. Then
24 the victim's family decided that they must do something in
25 terms of reporting this. So it was reported at that time.

011

1 The incident, as I said, happened in Columbia, but
2 Investigator Loraine Henderson in sorting through this
3 discussed with the victim the previous incidents when she
4 was younger and made a charge based on that.

5 THE COURT: Based on?

6 MS. SEAY: Based on the incidents that happened when
7 the victim was approximately six years old.

8 THE COURT: Did she file also charges for the recent
9 activity?

10 MS. SEAY: I think the matter was referred to
11 Columbia authorities. I don't think that they pursued an
12 investigation or made a charge as a result of that.

13 THE COURT: All right.

14 MS. SEAY: The Defendant was interviewed in this case
15 by Investigator Henderson. He gave a statement admitting
16 committing the offenses that the child alleged he
17 committed when she was six years old. And, Your Honor --

18 THE COURT: Is that what he's on trial for?

19 MS. SEAY: Yes, sir.

20 THE COURT: Okay.

21 MS. SEAY: And, Your Honor, we strongly object to any
22 kind of a psychological evaluations for a number of
23 reasons. First of all, let me give you a little bit of
24 history about this victim.

25 As I said, she's 13 years old now. She's a

012

1 seventh-grade student at Northwest Middle School in
2 Travelers Rest. She was born several weeks prematurely
3 and had no muscle movement from the neck down. Her
4 parents have told me that there was some indication that
5 it was possibly a spinal cord injury or something that had
6 happened during the pregnancy that caused this problem.
7 She had severe physical problems as a result of this.

8 When she was 13-months-old, she had an open hip
9 reduction to correct a hip dislocation and she had to be
10 in a full body spica cast. When she was two years old,
11 she had surgery on both of her feet. When she was in
12 first grade, she had a hamstring lengthening to assist her
13 with muscle lengthening. When she was in fourth grade,
14 she had bilateral tibial osteotomies and casts as a result
15 of that. She must sleep in certain equipment and braces
16 as a result of her physical disabilities. She's received
17 occupational therapy throughout her life.

18 Your Honor, her -- Mr. Sullivan is confusing -- or
19 equating her physical disabilities with a mental
20 disability, which is simply incorrect. She does not have
21 mental disabilities. She is a mainstream student. She
22 makes all A's and B's. And I have for the Court a copy of
23 her report cards for fifth and sixth grades, which I'd
24 like to hand up, along with some certificates where she
25 has achieved honor roll, the Governor's reading award,

013

1 outstanding citizenship awards, academic achievement
2 awards. And these have all been provided to Mr. Sullivan.

3 THE COURT: I'll take you at your word.

4 MS. SEAY: Okay.

5 THE COURT: I mean, I believe everything you tell me.

6 MS. SEAY: As I said, Mr. Sullivan has those.

7 Your Honor, her primary --

8 THE COURT: I should say with respect to the
9 record -- I mean, with respect to her school record.

10 MS. SEAY: Her primary diagnosis, if you will, Your
11 Honor, is that she's orthopedically handicapped. And she
12 has a speech language impairment as a result of this
13 muscular problem. And I'm just going to refer to it as a
14 problem. As a result of the muscular problem she has, it
15 prohibits her from speaking normally.

16 I have spoken to her on several occasions and she
17 speaks generally in one- or two-word increments and has
18 difficulty, but it is not impossible to understand her
19 once you've spoken with her a little bit. The school,
20 because she has this particular physical disability, is
21 required to do an individualized education program for her
22 each year. And that was what Mr. Sullivan was referring
23 to where the speech pathologist and the teachers and
24 different specialists meet to plan an educational program
25 for her each year. I have a copy of the one that pertains

014

1 to this particular school year, 2003 and 2004. I've made
2 a copy for Your Honor if you'd like to look at it.

3 THE COURT: And what's that going to tell me?

4 MS. SEAY: This tells what her disabilities are and
5 that they are physical. She requires a physical aid to
6 assist her in school by carrying -- helping her carry her
7 books from class to class, writing notes for her because
8 she has disabilities with her hand muscles, helping her
9 with her locker, going to the restroom, and that kind of
10 thing. But she is a mainstream student who has achieved
11 good grades. She's not a behavior problem.

12 And in regard to the particular allegations
13 concerning fantasies and all that --

14 THE COURT: Is there any question as to her
15 competency?

16 MS. SEAY: No, sir. There is no question as to her
17 competency. She is, of course, presumed competent.

18 THE COURT: Okay. And what about these counseling
19 sessions he's referred to?

20 MS. SEAY: Yes. I would like to address that.

21 The -- first of all, let me clear up what he was
22 saying about that I had given him something from
23 Ms. Henderson. That was a medical exam, a copy of a
24 medical exam where she saw a pediatrician for a chronic
25 sexual assault protocol, basically. That did not refer to

015

1 any kind of psychological testing or anything like that.

2 THE COURT: Why did she -- why was that necessary?

3 MS. SEAY: It's a standard procedure that's done with
4 any report of a child, just so that they can test for
5 sexually transmitted diseases and different things like
6 that.

7 THE COURT: Okay.

8 MS. SEAY: The incidents that Mr. Sullivan has
9 referred to, I want to tell you that this child has been
10 seeing Linda Hutton, who is a local therapist. You may be
11 familiar with her. She's at the Bay Laurel Center for
12 Psychiatry and Psychotherapy. She's a licensed social
13 worker. She's been in practice for 30 years and has been
14 qualified as an expert witness in the area of sexual --
15 treatment of sexual abuse in children a number of times in
16 both criminal court and Family Court.

17 She's been seeing REDACTED for about a year and a half
18 for treatment issues related to the sexual abuse and also
19 some self-esteem issues that I REDACTED has had as a result of
20 her physical disabilities.

21 THE COURT: Have you provided those records to
22 Mr. Sullivan?

23 MS. SEAY: I spoke with Ms. Hutton and she has faxed
24 me a letter today indicating that masturbation, in her
25 experience, is not viewed as a pathological problem in

016

1 children. That excessive masturbation can be associated
2 with a history of sexual abuse.

3 As to the pubic hair incident that is referenced in
4 the affidavit that he gave you, she felt that that was
5 more a childhood antic or something of that nature. That
6 happened when the victim and her cousin were five and
7 seven-years-old. Childhood antics, I don't think it's
8 indicative of any sexual behavior.

9 Ms. Hutton says, "I have not referred [] for
10 psychological testing during our work together, as such
11 was not indicated. She has shown no signs of thought
12 disorder, nor psychosis. She is presently taking an
13 antidepressant, which would not be viewed as unusual given
14 these circumstances."

15 So she has not found any indication that this child
16 is not competent. I think that it would certainly be
17 unduly invasive of this child's privacy. It --

18 THE COURT: Have you turned over the records?

19 MS. SEAY: I don't have any records related to that.
20 I'll be glad to give him a copy of this letter that she
21 faxed me this morning.

22 THE COURT: Is she going to be a witness?

23 MS. SEAY: Possibly, yes, sir.

24 But I don't have any records from her. I don't know
25 if there are any, to be honest.

017