

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MARTIN RODRIGUEZ,

APPELLANT

APPELLATE CASE NO 2015-001902

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexual abuse case, whether the trial court erred in qualifying the State's child abuse assessment expert and allowing her to improperly bolster the complainant's credibility by testifying about only those characteristics that fit the testimony of the complainant?

STATEMENT OF THE CASE

In its June 2015, term, the Lexington County grand jury indicted appellant for second degree criminal sexual conduct with a minor and lewd act. R. _____. On August 24, 2015, appellant was tried before the Honorable R. Knox McMahon and a jury. R. 1. Susanne Mayes and Micah Caskey represented the State. R. 1. Robert T. Williams represented appellant. R. 1. The jury convicted appellant on both counts. R. 497, l. 22 – 498, l. 17. Judge McMahon sentenced appellant to consecutive terms of twenty years' imprisonment on the CSC charge and fifteen years on the lewd act charge. R. 506, l. 13 – 507, l. 7. This appeal follows.

ARGUMENT

In this sexual abuse case, the trial court erred in qualifying the State's child abuse assessment expert and allowing her to improperly bolster the complainant's credibility by testifying about only those characteristics that fit the testimony of the complainant.

The State offered Heather Smith ("Smith") as its expert in "Child Sexual Abuse Assessment and Treatment." R. 358, ll. 21 – 24. After extensive voir dire, appellant objected to her qualification. R. 362, ll. 24 – 23. The trial judge overruled appellant's objection and qualified Smith as offered by the solicitor. R. 363, l. 1 – 364, l. 6. The jury was dismissed after her testimony and Judge McMahon explained his reasoning for qualifying Smith. R. 382, l. 2 – 383, l. 2.

Interestingly, Judge McMahon cited the "recent case of State v. Anderson" as authority for his decision to qualify Smith. R. 382, ll. 16 – 23. State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). Anderson not only held that it was an error in qualifying a forensic interviewer as an expert in child abuse assessment, but the expert in Anderson was **also Smith**. Id. at 218, 776 S.E.2d at 79. The Court noted that the defendant objected to Smith's qualification because "there had been no previous determination that Smith possessed expertise in 'child abuse assessment.'" Id.

Here, Smith's testimony regarding her qualifications consisted mainly of the fact that she was a licensed counselor. R. 355, l. 25 – 358, l. 20. During appellant's voir dire, it was clear that most of her education dealt with generalized trauma. R. 359, l. 6 – 362, l. 23. She gave one presentation to the solicitors on forensic interviewing and court preparation. R. 360, l. 18 – 361, l. 2. She was not a psychologist, much less a psychiatrist. R. 355, l. 25 – 358, l. 20.

Just like in Anderson, the trial judge erred in qualifying Smith as an expert. Her credentials were insufficient to warrant qualification as an expert in anything other than the discredited field of forensic interviewing. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2015). Her testimony's sole purpose was to bolster the complainant's credibility. See State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015).

Nor can Smith's testimony be harmless error in this case. In Anderson, the Supreme Court found the error prejudiced the defendant because "Smith vouched for the minor when she testified only to those characteristics which she observed in the minor." Anderson at 79, 776 S.E.2d at 79. Smith did the same thing in this case. Appellant was Minor's stepfather. R. 114, ll. 12 – 14. Minor claimed appellant had sex with her when she was eleven years old. R. 120, l. 4 – 124, l. 10. Minor did not immediately report that appellant sexually assaulted her and still refused to allege that appellant assaulted her after she became pregnant. R. 124, l. 24. R. 144, l. 8 – 145, l. 15.

Minor claimed she refused to name appellant because he was the primary financial provider and because she believed her mother would take appellant's side. R. 124, ll. 11 – 24. She also explained her delay in reporting the abuse because she was afraid she and her siblings would be taken into foster care. R. 133, ll. 12 – 21. R. 145, ll. 2 – 7.

Smith's expert testimony mirrored Minor's. She only gave three reasons why children do not immediately report abuse, all of which matched Minor's testimony. R. 364, l. 25 – 367, l. 12. First, she claimed children do not tell when the perpetrator is "someone who is in a parent role." R. 365, ll. 19 – 25. Second, she claimed children do not tell when they think a "non-offending caregiver" would not believe them. R. 366, ll. 1 – 6. Finally, she claimed that birth placement

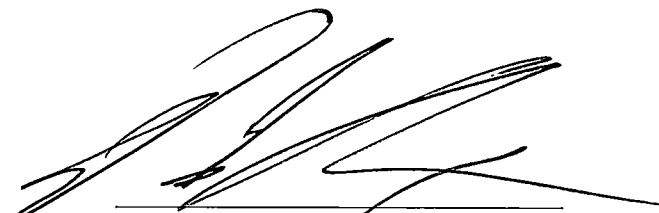
and the need to protect siblings would be a reason not to tell. R. 367, ll. 7 – 12. All of these factors specifically matched Minor's testimony.

The State will likely argue that Smith's testimony is harmless error because of DNA evidence showing that appellant was the father of Minor's child. R. 415, ll. 9 – 25. However, appellant called into question the accuracy of the DNA expert's test on cross-examination. The DNA expert only used 15 loci to draw her conclusion regarding paternity. R. 419, ll. 7 – 9. On cross, the expert was forced to admit that tests exist that examine 20 and 24 loci. R. 420, ll. 3 – 19. The expert admitted that these tests would give more information than the test she used. R. 421, ll. 1 – 6.

The DNA expert also admitted that brothers would have similar DNA. R. 422, ll. 2 – 10. Appellant's brother, Roy, lived for a time at the house with Minor, but no evidence of DNA testing regarding Roy was ever introduced. R. 192, l. 6 – 193, l. 4. R. 471, ll. 7 – 22. Because the State's DNA evidence was incomplete and their investigation was not thorough, Smith's testimony cannot be harmless and this case must be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and grant him a new trial.

A handwritten signature in black ink, appearing to be 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of September, 2016.

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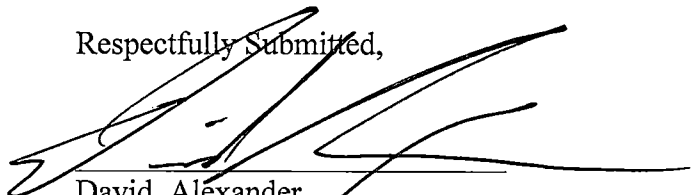
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Martin Alejandro Rodriguez states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Honorable R. Knox McMahon, which was held on August 26, 2015 (trial hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Therefore, counsel asks the Court to relieve him as counsel for Martin Alejandro Rodriguez.

Respectfully Submitted,



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 19th day of September, 2016.

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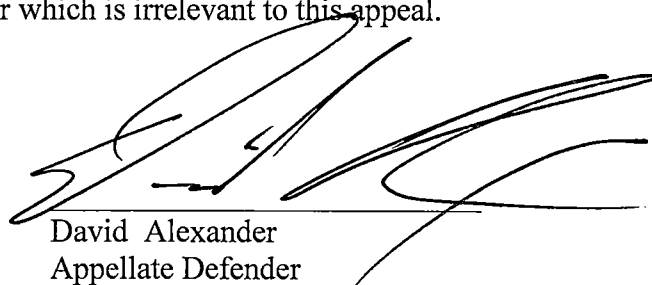
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 19, 2016



David Alexander
Appellate Defender

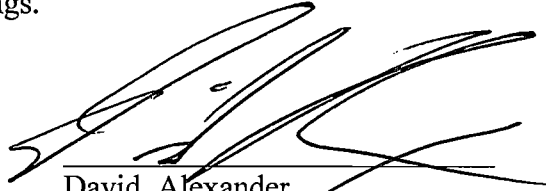
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 19, 2016.

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

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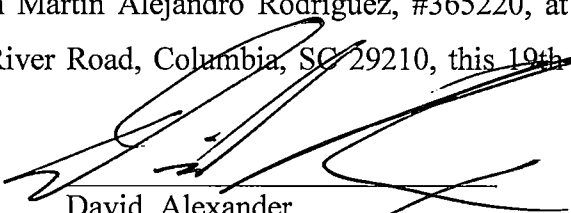
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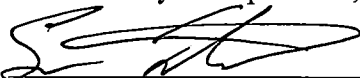
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Martin Alejandro Rodriguez, #365220, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 19th day of September, 2016.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of September, 2016.



(L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.