STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAROLD BENNON CARTWRIGHT, III,

PETITIONER.

APPELLATE CASE NO. 2016-000005

BRIEF OF PETITIONER

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2.

Whether the Court of Appeals erred by finding no error in the trial court admitting photographs of petitioner's prison cell to corroborate the fact he attempted to commit suicide since this evidence was similarly not relevant, and unduly prejudicial if relevant?

3.

Whether the Court of Appeals erred by finding no error in the trial court qualifying Dr. Alicia Benedetto as an expert in "child sexual abuse dynamics" where she frankly acknowledged her job was to conduct interviews and not conduct research or studies and the judge thus abused his discretion by qualifying her as an expert to render opinion testimony under Rule 702, SCRE in this case?

4.

Whether the Court of Appeals erred by finding no error in the trial court qualifying Benedetto as an expert allowing her to bolster the testimony of the alleged victims, where the jury would draw the impermissible inference that the alleged victims were conducting themselves consistently with other victims of child sexual abuse?

STATEMENT OF THE CASE

Petitioner was indicted by the Aiken County Grand Jury for eight counts of criminal sexual conduct with a minor in the first degree, sixteen counts of a lewd act with a minor, two counts of criminal sexual conduct with a minor in the second degree, one count of criminal sexual conduct first degree, and one count of criminal sexual conduct in the third degree. R. p. 370 - 425.

His case came on for trial on April 15, 2013 before the Honorable Doyet A. Earley, III, and a jury. Michael Routzong and Dave Hayes represented petitioner. Kevin Molony was the assistant solicitor. R. p. 1

On April 18, 2013 the jury found petitioner guilty on each count presented to the jury. R. p. 356, l. 14 – 363, l. 22. Judge Early sentenced petitioner to concurrent sentences of thirty years imprisonment, twenty years imprisonment, and fifteen years imprisonment. However, the judge imposed a ten-year consecutive sentence for criminal sexual conduct in the third degree. Petitioner's sentence was therefore forty years imprisonment. R. p. 368, l. 4 – 369, l. 8.

The Court of Appeals affirmed in a summary opinion. State v. Harold Bennon Cartwright, III., 2015-UP-466 (filed September, 2015-UP-466 (filed September 30, 2015). App. 1-3. Petitioner sought rehearing. App. 4-9. Rehearing was denied on December 4, 2015. App. 10-11.

Petitioner sought certiorari, and the state filed a return. This Court granted certiorari in its order dated November 9, 2016. This brief of petitioner follows.

STATEMENT OF FACTS

An Introduction

Feelings of despair and hopelessness are among the many reasons people commit suicide. Respectfully, to simply assume a person is attempting suicide because they have been accused of committing a crime, and that are guilty of that crime, is as shallow as it is cruel and morally offensive.

All five members of this Court voted to grant certiorari on this identical issue in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011) on October 17, 2012. After briefs were submitted, Petitioner Orozco chose to dismiss his appeal, and this Court dismissed the appeal in its order dated September 5, 2013. This case now provides an excellent procedural vehicle to resolve this important legal and moral issue.

The qualification of Dr. Alicia Benedetto as an expert in "Child abuse dynamics," where she was a forensic interviewer, and not a researcher or academic, and her "general" opinion testimony which mirrored the facts of this case also makes this case an very good procedural vehicle for this Court to determine whether State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App. 1999), and State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) should now be overruled since they are inconsistent with the modern cases of State v. Kromah, 401 S.C. 340, 737, S.E.2d 490 (2013); State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), and Watson v. Ford Motor Co., 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010).

Trial facts

Prior to trial defense counsel moved to exclude evidence that petitioner attempted to commit suicide while in the Aiken County Detention Center awaiting trial. The assistant solicitor noted that at the prior trial, which apparently ended in a mistrial, that the state had introduced evidence of

petitioner's suicide attempt and photographs to corroborate it. R. p. 5, ll. 4-18. The solicitor argued this evidence was admissible to show "a guilty conscience." He analogized the suicide evidence to evidence of flight. R. p. 5, ll. 11-18.

Defense counsel noted that petitioner had turned himself in to law enforcement. This showed he was willing to "face these charges." Further, the state had to establish a nexus between the suicide attempt and the charges against him. In addition, even if this evidence was relevant its unduly prejudicial effect outweighed its probative value under Rule 403, SCRE. R. p. 5, l. 20 – 7, l. 23. Finally, this evidence diluted the presumption of innocence, and it could be construed as evidence of bad character. R. p. 6, l. 19 – 7, l. 23.

The judge ruled that, in all likelihood, he would admit this suicide evidence. However, he stated that he understood defense counsel's argument about establishing the nexus, and his additional Rule 403, SCRE argument. R. p. 7, l. 24 – 9, l. 3.

"Expert" testimony

Defense counsel also moved to exclude the testimony of witness Dr. Alicia Benedetto. The solicitor said this witness had testified before Judge Early previously. The judge responded: "I know that, ma'am, but I do so many of these I really and truly cannot remember her." The solicitor maintained: "She will be qualified as an expert in child sexual abuse dynamics and will testify as to the behavioral issues of children that have been abused." The solicitor added that Dr. Benedetto could testify that children who are sexually abused "act out," and she could testify "how factors in the home can affect children that have been sexually abused and things of that nature." R. p. 14, l. 16 – 15, l. 25.

Defense counsel argued this testimony was not admissible under Rule 702, SCRE because it would not assist the jury. Defense counsel also argued that *the only issue is whether the alleged*

victims were testifying truthfully, and that matters of credibility are "strictly within the purview of the jury." R. p. 16, l. 1 – 18, l. 13. (emphasis added).

The judge said that testimony dealing with "behavioral characteristics were admissible so as long as it did not invade the province of the jury regarding credibility." Defense counsel and the judge then discussed State v. Weaverling, 337 S.C. 460, 473, 523 S.E.2d 787, 794 (Ct.App. 1999), and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). R. p. 16, l. 1 – 18, l. 13. Defense counsel noted that the appellate courts in this state were going in the direction of excluding this type of evidence. R. p. 17, ll. 23-25. Defense counsel further noted that State v. Kromah was the Court's latest holding on the subject, and it supported the defense position that the "expert testimony" in this case should be excluded. The judge observed that the witness had not talked with the minor witnesses, and he offered that testimony about "general behavioral responses" was admissible. R. p. 16, l. 1 – 21, l. 16.

As will be seen infra, petitioner testified and denied the sexual abuse. He claimed the accusations stemmed from resentment of him for having the boyfriend of his fourteen-year-old daughter prosecuted for having sex with her. Petitioner had also contacted law enforcement about his concerns that her photographs were being posted on the internet along with her friends. In addition, he suspected a sexual relationship between his son Hoss and his stepdaughter, and he had found marijuana in his room. Concerning the evidence of petitioner's suicide attempt, which was allowed into evidence over defense objection, petitioner attempted to explain that he felt hopeless "at that time" because he was not able make bond, and because some members of his family had had turned on him.

As will also been seen infra, there was also evidence in this case of recantations, and minors "acting out." Witness Benedetto would then give her "expert testimony" that recantations were not

uncommon and they did not mean that the children were not sexually abused. Further, Benedetto opined minors "acting out" was also symptomatic of sexual abuse.

Daughter testifies

Daughter was the biological daughter of petitioner and Melinda Lively. She was twenty-eight-years-old at the time of the trial. R. p. 31, l. 9 – 32, l. 6. Hoss Cartwright and Jamie Cartwright were her natural siblings. Her stepsiblings were Stepdaughter 2 and Stepdaughter 1. R. p. 32, ll. 7–12.

Daughter claimed when she was four years old (i.e. 24 years previously) petitioner had her perform oral sex on him. Autry said she told her mother about this incident but her mother did not believe her. She also maintained petitioner threatened to kill her, her mother, and take his own life if she reported the incident. R. p. 32, l. 18 – 35, l. 4.

Daughter maintained the abuse continued from the time she was six-years-old until she was ten- years-old when her mother left petitioner and moved them to Georgia. R. p. 35, l. 18 – 39, l. 23. Daughter said after the oral sex petitioner would buy her things, and give her money. R. p. 39, ll. 2-5.

Daughter's future husband goes to jail for CSC

On cross-examination, Daughter acknowledged she never said anything about the alleged sexual abuse from 1995 until 2011. She admitted she married Kevin Autry and that Autry had served three years in prison for criminal sexual conduct for his conduct involving her. She acknowledged her husband had to register as a sex offender because of that conviction. She refused to admit that petitioner was the person who successfully pushed for law enforcement to prosecute Autry for his improper sexual relationship with her. She did acknowledge after her parents were divorced that petitioner still had visitation privileges with her. R. p. 47, l. 3 – 50, l.10.

The ex-wife

Petitioner's ex-wife, Melinda Lively, then testified that Daughter was her oldest daughter. Jamie Cartwright and Hoss Cartwright were her other children. R. p. 53, l. – 54, l. 6. Lively testified that Daughter claimed she was sexually abused when she was four or five years old. Lively now maintained that she did not contact law enforcement because petitioner threatened at gunpoint to kill them if they told anybody. R. p. 54, l. 7 – 55, l. 3.

Lively admitted in her complaint for divorce in 1997 that she did not allege sexual abuse had taken place, and she agreed that petitioner was entitled to visitation with the supposedly sexually abused children. She said she did not allege anything, and she did not fight visitation because she did not have "any evidence" against petitioner. R. p. 55, l. 9 – 57, l. 6. Lively admitted she remembered petitioner alleging that Lively allowed her oldest daughter, Daughter, who was only fourteen-years-old, to engage in sexual relationship with a twenty-three year-old man. R. p. 59, l. 8 – 60, l. 14.

Stepdaughter 1 testifies

Stepdaughter 1 was petitioner's stepdaughter. She was twenty-one years old at the time of trial. R. p. 63, l. 2 – 65, l. 10. Stepdaughter 1 said she was seven years younger than Daughter and three years older than Stepdaughter 2. R. p. 64, ll. 4-12.

Stepdaughter 1 maintained that when she was in the third grade petitioner made her perform oral sex. R. p. 65, l. 17 – 67, l. 1. Stepdaughter 1 said this happened "a few times a month," and that petitioner would buy her gifts afterwards. R. p. 67, ll. 1-23. Stepdaughter 1 acknowledged petitioner was arrested as a result of her allegations. However, Stepdaughter 1 recanted her allegations when she was about ten years old, and she told the solicitor the sexual abuse complained

of never actually happened. She said that petitioner moved back into the home shortly after she recanted. R. p. 68, l. 2 – 70, l. 24.

Stepdaughter 1 claimed after petitioner returned to the household that he would "hump" her leg about "three to seven times a week." He continued to buy her gifts, and take her shopping. Stepdaughter 1 alleged that petitioner threatened to kill the entire family, and then himself if she told. R. p. 70, l. 12 – 73, l. 13. Stepdaughter 1 testified the oral sex ceased from the time she was nine years old until she was fifteen. At fifteen, Stepdaughter 1 claimed she agreed to have sexual intercourse with petitioner under duress. R. p. 73, l. 11 – 80, l. 19.

On cross-examination Stepdaughter 1 admitted she became involved in drugs with Timothy Bowman. She acknowledged that she also became very rebellious. R. p. 93, l. 1. – 94, l. 13.

Recantation

Michelle Prince was a DSS employee who investigated Stepdaughter 1's allegations. Prince acknowledged she was aware Stepdaughter 1 had recanted. R. p. 96, l. 25 – 100, l. 12.

Stepdaughter 2, the internet, and Hoss

Stepdaughter 2 was petitioner's other stepdaughter. Stepdaughter 2 was eighteen-years-old at the time of petitioner's trial. She testified she had a good relationship with petitioner when she was younger but she maintained that changed when she was about thirteen-years-old. She said petitioner then began "humping" her on the leg, and that she despised him. R. p. 101, l. 4 – 103, l. 8. Stepdaughter 2 said petitioner would buy her items after the sexual abuse. She also said petitioner would become angry and threaten to kill the entire family. R. p. 104, l. 15 – 105, l. 16.

Stepdaughter 2 said she later was homeschooled in a shed by petitioner, and at some point, they began having sexual intercourse. Stepdaughter 2 said she began taking birth control pills, and she maintained that was petitioner's idea. R. p. 107, l. 10 – 109, l. 14.

Stepdaughter 2 admitted that petitioner became very upset because there were photographs of her on the internet. Stepdaughter 2 said she did not have any reason to be embarrassed about the photographs because petitioner was mistaken in thinking they were photographs of her. R. p. 129, l. 5 – 131, l. 6. Petitioner would later strongly dispute the assertion of mistaken identification. Stepdaughter 2 also denied a romantic relationship with petitioner's son, Hoss, as petitioner suspected. R. p. 131, ll. 3-12.

Buffy Brown

The testimony of Buffy Brown was read to the jury since a medical condition after the first trial prevented her from testifying live. R. p. 139, l. 21 – 141, l. 15. Buffy married petitioner in December of 1999 and their divorce was just finalized prior to her testimony in 2013. Buffy testified that Stepdaughter 1 had alleged petitioner sexually abused her. Buffy admitted that Stepdaughter 1 recanted her allegations, and Buffy now maintained that she "probably did put some pressure on Stepdaughter 1 [to recant] because he [petitioner] had convinced me he had done nothing wrong." R. p. 142, l. 4 – 143, l. 25.

More on recantations

Petitioner moved back in after Stepdaughter 1's recantation. R. p. 144, ll. 1-12. Buffy said that petitioner's stepdaughters, Stepdaughter 1 and Stepdaughter 2, always referred to him as "Daddy." She did not believe they were being molested. She also acknowledged that Stepdaughter 1 had "some problems" such as sneaking out of the house. However, she was not positive that Stepdaughter 1 also had begun drinking at a young age. R. p. 151, l. 22 – 155, l. 1.

Stepdaughter 2 denied she tried to protect petitioner, and she said she simply did not believe anything of a sexual nature had been going on with the minors. R. p. 155, ll. 2-18. Stepdaughter 2 maintained now that she may have been "naïve." R. p. 155, ll. 19-22.

Hoss Cartwright

Eighteen-year-old Hoss Cartwright testified that petitioner made vulgar comments to his stepsister, Stepdaughter 2, while they were growing up together. R. p. 169, ll. 2-19. Hoss also said he found petitioner's inspections of Stepdaughter 2's clothes before school "odd." R. p. 169, ll. 8-17.

Hoss denied petitioner caught him smoking marijuana. Hoss essentially admitted he was smoking marijuana but he maintained that petitioner never caught him. R. p. 175, ll. 7-20. Hoss confirmed that petitioner thought he, Hoss, was having sex with his stepsister. R. p. 175, ll. 16-20.

Benedetto testimony

As seen, petitioner objected to the testimony of Dr. Alicia Benedetto prior to trial. R. p. 203, ll. 5-17. Benedetto testified she worked with the Assessment and Resource Center (ARC). Benedetto said, "most of what the ARC does is forensic interviews when there are allegations of abuse." R. p. 204, ll. 17-20.

Benedetto had a Ph.D. from St. Johns University in Psychology. R. p. 205, ll. 4-7. She had conducted a five-day training on Finding Words for prosecution officials. R. p. 206, ll. 1-21. Benedetto maintained her experience was not based "in books" but on the fact, "*I interview children every day.* That's basically what, what I do. So, at the ARC, *I conduct forensic interviews on a daily basis. I've done that for the past 12 years.*" R. p. 207, l. 20 – 208, l. 6. (emphasis added). Benedetto said she had been qualified before as an expert in "child sex abuse dynamics." R. p. 208, ll. 15 – 209, l. 3.

On cross-examination defense counsel inquired about exactly what "child abuse dynamics" involved. Benedetto said it "refers to how children experience abuse, and that's oftentimes what, what I'm qualified in." R. p. 209, ll. 3-17. When asked how many studies she had been involved in

regarding child abuse dynamic, Benedetto answered that she *conducted interviews and not studies.* She was not a researcher on the subject. R. p. 210, ll. 16-22.

Defense counsel Hayes then objected to Benedetto being qualified as an expert witness, and allowing her to give expert testimony. He noted that she testified and admitted her background was doing forensic interviews, and she was not involved in studies and research. The state had not shown that her testimony was objectively reliable. R. p. 211, ll. 1-12.

The judge denied the motion to exclude her testimony, and he ruled that Benedetto was qualified to give her opinion testimony regarding "child abuse dynamics." R. p. 211, l. 13 – 212, l. 12. The judge said he would later give an instruction on expert opinion testimony to the jury. R. p. 212, ll. 7-13.

What the jurors are told

Benedetto maintained she did not know anything about the facts of this prosecution. She said that "Child Sexual Abuse Accommodation Syndrome" involved a pattern of behavior "that a child may engage in that would otherwise seem to not make sense to us." R. p. 213, ll. 7-21. Benedetto said because a child responded differently than an adult to sexual abuse did not mean that the child was not telling the truth. R. p. 214, ll. 4-7.

Benedetto told the jurors that victims of child sexual abuse were told not to tell about the abuse. She said it was not unusual for an abuser to buy gifts for the abused children. R. p. 214, l. 10 – 215, l. 14. In addition, she said the children often thought they may be harmed if they did not keep the abuse a secret. R. p. 217, l. 5 – 220, l. 4.

Benedetto was then specifically asked about recantations. Benedetto answered that a child recanting or taking back their allegation of abuse did not mean that the abuse did not happen. She claimed, "we're open to the possibility that it's a true recantation, but we also know that *many times*

a child recants because of what happens after they tell, and so we want to be sure not to miss those cases." R. p. 223, l. 21 – 224, l. 11. (emphasis added). Benedetto maintained that sometimes children recanted because they feared having to change schools or other consequences based on their allegations. R. p. 224, ll. 12-22.

Benedetto also told the jurors that sexual abuse can cause minors to begin drinking or using drugs which have a negative influence on their health. R. p. 225, ll. 9-13. Benedetto added that minors "acting out" was also not unusual when they were being sexually abused. R. p. 225, l. 14 – 226, l. 17. Benedetto also maintained that if a child does **not** get upset or act out or show emotion that did not mean that they were not sexually abused. R. p. 226, ll. 18-21.

Suicide Attempt - proffer

The state proffered the testimony of Aiken County Detention Guard James Hettich. Hettichs testified on April 13, 2011 he observed petitioner hanging in his jail cell with a sheet tied from his bunk. R. p. 249, l. 5 – 251, l. 2. Hettich said that the sheet was tied tight, and that petitioner was unresponsive while hanging from the neck. "His touch was cold and clammy. He was unresponsive. He wasn't speaking. He was breathing however." R. p. 251, ll. 1-21.

Defense counsel told the judge that he did not have any additional arguments about why this suicide evidence should be excluded. The judge then cited the Court of Appeals opinion in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011) as support for the suicide evidence being admitted.[1] The judge ruled the evidence was admissible. R. p. 253, l. 5 – 254, l. 1.

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[1] As seen above, certiorari was granted by this Court on October 17, 2012. This Court can take judicial notice of the fact that petitioner Orozco voluntarily dismissed his appeal after certiorari was granted by this Court, all five Justices, on the issue of whether this Court erred by holding evidence of his suicide attempt was admissible.

Jury in to hear suicide evidence

Hettich then testified that while working as a correctional officer at the Aiken County Detention Center on April 13, 2011 he was notified that petitioner was trying to harm himself. Hettich saw petitioner hanging from the top bunk by a sheet. He along with another deputy were able to untie the knot from the bed sheet. They laid petitioner on the floor. Two photographs, State's Exhibits 12 and 13, of petitioner's jail cell where the suicide attempt occurred were then introduced to corroborate the objectionable testimony. R. p. 257, l. 3 – 260, l. 15. Those photographs were before the Court of Appeals, and are now before this Court to review.

Petitioner testifies

Petitioner took the stand in his own defense, and denied he had molested his children or stepchildren. Petitioner noted that Stepdaughter 1 had recanted her allegations, and that he later discovered photographs of Stepdaughter 2 on the internet. Petitioner said despite her denial regarding the photographs he recognized all of the girls involved in the internet photographs. He testified that he notified Channel 12 News, and the North Augusta Police Department about the internet photographs. R. p. 280, l. 17 – 284, l. 12.

Petitioner confirmed that he found marijuana in Hoss's bedroom. He testified that Hoss and Stepdaughter 2 both became angry with him. R. p. 285, l. 1 – 289, l. 3.

As for the suicide attempt, petitioner attempted to explain that he turned himself in after being accused of these crimes. Petitioner thought he understood why the false allegations were lodged against him. However, petitioner could not make bond, and he stood accused of "heinous" crimes. Petitioner offered that his biological daughter now hated him, and "at that time I did not feel like I wanted to live anymore." R. p. 289, l. 17 – 291, l. 17.

Court of Appeals

In a summary opinion the Court of Appeals cited State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011) as authority for holding the admission of the suicide attempt evidence was proper. App. 2. The Court also cited this Court's opinions in State v. Chavis, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015); State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), and State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993), in support of its holding that Bennetto was properly qualified as an expert witness, and that her testimony was proper. App. 2-3.

Rehearing

Petitioner, on rehearing asked the Court to reconsider its opinion in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011) regarding the suicide attempt evidence. App. 4-6. Petitioner also wrote, regarding Dr. Benedetto "that State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), which *is cited by this Court in the opinion*, does not support the admission of this testimony about recantations not meaning sexual abuse did not occur, about abusers buying gifts for the abused, and about the abused being threatened about disclosure of the abuse. All of this supposed `expertise' certainly struck the jury as the **same evidence** [of] what occurred in this very case." App. 7-8.

Petitioner also urged that the Court of Appeals should recognize that Weaverling[2] and Schumpert are no longer good law in light of the Kromah modern line of cases. He wrote that "Petitioner reiterates that this `child sexual abuse dynamics' evidence served the same evil that State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2011), held can no longer exist. Again, State v. Weaverling and Kromah can no longer be reconciled and Weaverling should respectfully be overruled as it is the pre-gatekeeping case that is being used to justify impermissible bolstering such as occurred in this case. This Court cited State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859,

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2 State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App. 1999).

861 (1993) in its opinion, and Schumpert likewise should be overruled because it cannot be reconciled in an intellectually honest way with State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), and Kromah. The jury in this case heard that the actions of the state's complaining alleged child sexual abuse witnesses were on all fours with the actions and characteristics of other victims of child sexual abuse. The witness should not have been qualified as an expert and her testimony was extremely prejudicial." App. 7-8. Rehearing was denied.

ARGUMENT

1.

The Court of Appeals erred by finding no error in the trial court admitting evidence petitioner attempted to commit suicide while incarcerated on the charges in this case since this evidence was irrelevant, and even if relevant its probative value was substantially outweighed by its unduly prejudicial effect under Rule 403, SCRE (Arguments 1& 2).

As seen, defense counsel objected to the state introducing evidence of petitioner's suicide attempt. Defense counsel noted that petitioner had turned himself in which showed he was willing to "face these charges." Counsel also argued that the state had to establish a nexus between the suicide attempt and the charges against him. Further, even if this evidence was relevant its unduly prejudicial effect outweighed its probative value under Rule 403, SCRE. R. p. 5, l. 20 – 7, l. 23. The suicide evidence also diluted the presumption of innocence, and it could also be construed as evidence of bad character. R. p. 6, l. 19 – 7, l. 23.

In State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct.App. 2011) the Court of Appeals noted that whether evidence of attempted suicide is probative of the accused's consciousness of guilt was an issue of first impression in South Carolina." The Court wrote that flight evidence was relevant when there was a nexus between the flight and the offense charged." R. p. 7. The Court reasoned evidence of the suicide attempt was relevant and admissible because the totality of the evidence created an inference that Orozco's actions in attempting suicide were motivated as a result of his belief that sexual misconduct allegations had been made against him.

There was no South Carolina authority supporting admission of evidence of a suicide attempt as evidence of consciousness of guilt as the Court of Appeals recognized in Orozco. The Court of Appeals declined petitioner's request that it reconsider its holding in Orozco. Further, the analogy

to flight and guilty knowledge is deeply troubling for problems well beyond the defendant being aware of charges against him or that he is being sought by the police for purposes of arrest. However, petitioner will deal first with the nexus which should involve much more than the defendant merely understanding charges have been lodged against him. Cf. State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); See, also, State v. Brown, 528 A.2d 1098 (R.I.1987); Commonwealth v. Jones, 457 Pa. 563, 576, 319 A.2d 142, 150 (1974) (circumstances justify inference that accused's actions were motivated as result of his belief that officers were aware of his wrongdoing and *were seeking him* for that purpose), cited in State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

In State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (S.C. 2006), this Court held that proof that the accused was aware of the charges and sought to avoid them was critical. The Pagan Court held that without proof that the accused was aware of the charges against him at the time of his flight, the evidence of flight was irrelevant and its admission was erroneous.

Beyond the nexus of attempted suicide to the awareness of an accusation or an arrest warrant or that police are looking for a person, this evidence is troubling not only at as a legal matter but as a moral matter. As defense counsel argued, petitioner turned himself in to face the charges in this case. This indicated a belief in the criminal justice system, and a belief he would be exonerated. However, suicide is often a matter of despair rather than desperation. Meaning, it is *many times much more complicated than understanding the sad case of a suspect surrounded by armed police killing himself rather than being captured.* This case provides such an example. Petitioner thought that life was no longer worth living at "that time." He could not make bond, and members of his family had "turned on him." When a person's family, or part of his family, will not even support

him, the fact that thoughts that "life is no longer not living" creep into his head should not be surprising.

Suicide, as in this case, is often attributable to the feeling that the sheer number of obstacles in one's life have become too much to overcome. Here, petitioner mourned the fact that his own daughter had turned on him. To use a suicide attempt in a court of law in this state as evidence of guilt of a criminal offense to achieve a conviction should *most respectfully*, be distasteful (at a minimum), and not allowed.

In Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989) the court held it was error to admit evidence of an alleged suicide attempt as evidence of the accused's consciousness of guilt. The court cited various reasons for its holding. These reasons included that the inmate accused of various sex offenses may have feigned attempted suicide to invite mitigation on the sentence he was serving when the alleged sexual offense occurred. The court also noted that the suicide note itself was never even offered into evidence nor was it contents explained to the jury. The court refused the answer the question whether evidence of a suicide attempt *was ever admissible.*

In State v. Mann, 132 N.J. 410, 625 A.2d 1102 (1993), the court found it was reversible error to admit evidence of an attempted suicide without first conducting a full pretrial hearing on the issue. The defendant argued he had a preexisting propensity to commit suicide because of other factors in his life, and the court cautioned that such ambiguities weigh strongly in favor of extreme caution before such evidence can be admitted. A defendant's psychological, social or financial situation may play a role in the suicide attempt. In short, an accusation of criminal wrongdoing can be the last straw in an otherwise troubled life.

The court in Mann also reasoned that if evidence of a suicide attempt *was ever properly admitted that jury instructions were necessary* that if the jury could credit *any alternative*

explanation for the suicide attempt it could not infer consciousness of guilt. In South Carolina, of course, the analogy to flight in this context is equally troubling *since instructions of evidence of flight are improper.* See, State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980).

The court in State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897), opined that a jury should never be able to treat a suicide attempt as evidence of guilt. The court reasoned that the one who flees seeks to escape punishment where one who attempts suicide *seeks to avoid the disgrace* that attaches to being charged with a crime. The court stated that this motive "of delicacy" would be more powerful in an innocent, rather than a guilty person. While it may have been a cultural truth the court also wrote the incidence of suicide was higher *among innocent than guilty persons.*[3]

The court in State v. Onorato, 171 Vt. 577, 762 A.2d 858 (2000) held that the probative value of an attempted suicide and suicide note was substantially outweighed by unfair prejudice and a confusion of the issues. The court noted that the reasons for an attempted suicide are "*numerous and complex, and may be even less indicative of guilt than flight evidence.*" The Court went on to say that evidence of attempted suicide is "highly equivocal and circumstantial" such that its admissibility "may introduce remote, secondary concerns that might confuse the jury."

In People v. Foster, 56 Ill.App.3d 22, 371 N.E.2d 961, 13 Ill.Dec. 869 (1977), the court held that evidence of the defendant's suicide attempts were not admissible because there was not a sufficient nexus between the actions taken and the crime charged. The court found that not only was there too much time between the suicide attempt and the offense *but also* the defendant's psychological problems and interactions with police could be credited for his behavior.

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[3] There was also a North Dakota statute that mandated an accomplice's testimony must be corroborated to maintain a conviction.

Petitioner here correctly recognized that child sex cases have become "heinous crimes." This Court has repeatedly recognized the extreme prejudice inherent in an accusation in child sex or abuse cases, and explained that our criminal justice system must be cautious of adding undue prejudice to an already explosive allegation and situation through the use of evidence that raises a spurious tendency to seek a conviction based on an improper basis. See State v. Kromah, 491 S.C. 340, 737 S.E.2d 490 (2013); State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012)[4]; State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

This suicide attempt evidence also diluted the presumption of innocence to which petitioner was entitled by allowing the jury to speculate, as the prosecution encouraged, that petitioner's suicide attempt in jail pre-trial was evidence of his guilt. The solicitor ridiculed petitioner's forced explanation to this evidence that despair led him to attempt to end his life, and not consciousness of guilt of these accusations. R. p. 189.

The evidence of petitioner's suicide attempt, and the photographs to corroborate it, as seem below in more detail, were erroneously admitted, and the opinion of the Court of Appeals should be reversed.

Moreover, as defense counsel argued, even if this evidence was properly admitted as relevant under Rule 401, SCRE, it should have been excluded under Rule 403, SCRE because its probative value was substantially outweighed by its unduly prejudicial effect and its tendency to *confuse the jury* and invite a verdict on an improper basis. See Rule 403, SCRE.

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4 The Attorney General dismissed the certiorari petition to this Court in McKerley.

Issue Two: The suicide attempt photographs

The same argument against admission of this evidence applies to the two photographs corroborating the fact petitioner attempted to commit suicide. Those photographs were on file with the Court of Appeals, and should now be before this Court. This Court, like the Court of Appeals, would not be engaging a "gruesome photographs analysis" in this case. Rather, the photographs simply drew further attention to the fact that petitioner attempted suicide.

As stated, the solicitor mocked petitioner's testimony about his despondent feelings at the time he attempted to kill himself in his closing argument to the jury encouraging it to convict petitioner. R. p. 189. Defense counsel had correctly argued the suicide evidence diluted the presumption of innocence that is fundamental in a criminal case.

The suicide evidence was offered to have the jury conclude the defendant found taking his life was a better option than the punishment for his crime. Jurors are not supposed to be concerned with punishment and this was exactly what this evidence encouraged them to think about. Such speculation about punishment versus suicide is unbecoming, respectfully, of our criminal justice system. See Pettie v. State, 316 Md. 509, 560 A.2d 577 (1989); State v. Coudotte, 7 N.D. 109, 72 N.W. 913 (1897). Even if the photographs, as is the case with the suicide evidence itself, were relevant, they should have been excluded given their unduly prejudicial effect under Rule 403, SCRE.

As seen above, petitioner's defense was that some in his own family had turned against him, and wanted him put away for spite. The sheer number of allegations against petitioner made a fair trial difficult enough without this spurious evidence of guilt in the nature of his suicide attempt. Petitioner asked the Court of Appeals to reconsider its opinion in Orozco, and noted that all Five of

the Justices of this Court had granted certiorari following it. This Court respectfully should now reverse the opinion of the Court of Appeals.

2.

The Court of Appeals erred by finding no error in the trial court allowing Dr. Alicia Benedetto to be qualified as an expert in "child sexual abuse dynamics" where she frankly acknowledged her job was to conduct interviews and not conduct research or studies and the judge thus abused his discretion by qualifying her as an expert to render opinion testimony under Rule 702, SCRE in this case. Moreover, the Court of Appeals erred by finding that once qualified as an expert witness, and therefore allowed her to give opinion testimony, that her testimony did not constitute highly prejudicial bolstering testimony since her child abuse testimony at times mirrored the facts of this case. (Issues 3-4).

Issue 3: Dr. Alicia Benedetto should not have been qualified as an expert in "child sexual abuse dynamics" which allowed her to give her opinion testimony.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2013) this Court noted that there was no objection to the qualifications of the witness *in that case*. However, the Court noted it had previously observed that the witness might not even need to be qualified as an expert. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

This Court held that it could "envision no circumstance where their qualification as an expert at trial would be appropriate" in the *"forensic interviewer" type context*. Although this Court was speaking of forensic interviewers, the testimony of Benedetto here on "child sexual abuse dynamics" was offered for the same purpose, which was to imply to the jury that someone who worked in this "specialty" of abused children could offer expertise which allegedly would assist the jury in deciding whether the minors were being truthful. The testimony would allegedly assist the jury within the confines of Rules 702 and 703, SCRE.

Defense counsel correctly argued that Benedetto would simply have the jury conclude that the alleged minor victims in this case acted consistently or shared behavioral characteristics with other victims of sex abuse. As seen, she testified that recantations did not mean sexual abuse did not occur, and there were recantations in this case. She testified about abusers buying gifts for the abused, and there were evidentiary claims of that in this case. She testified about the abused being threatened about disclosure of the abuse, and there were evidentiary claims of that in this case. She testified about the abused turning to drugs or drinking, and there was evidence of that in this case. She testified about the abused starting to "act out," and there was evidence of that in this case. All of this "general abuse testimony" certainly had to strike the jury as the same evidence as what occurred in this very case.

As seen, Benedetto was unapologetic that she was *a forensic interviewer* and not a research professional. She did forensic interviews every day. She should not have been qualified as an expert in this case. See, State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009).

In State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015) this Court held that it was error to qualify witness Smith as an expert in "child abuse assessment." This Court cited Schumpert and Weaverling in support of its holding, and this case now presents the ideal vehicle to reconsider whether Schumpert and Weaverling are still good law or whether they should be formally overruled. Petitioner will explain further below why these pre-gatekeeping cases cannot survive Kromah and the modern jurisprudence, and they will only continue to foster great confusion among the bench and bar unless they are overruled.

Although she did not examine any of the alleged victims, she was not qualified to be a "child sex abuse dynamics" *or* a "child abuse assessment" expert. Whichever title Benedetto is given it implied *a strong research component*. Otherwise, it was just a forensic interviewer -- who did not

even interview the child -- masquerading as an independent researcher and writer in either the area of "child sex abuse dynamics" or "child abuse assessment."

Petitioner is also aware that this Court in Anderson stated "child abuse assessment" testimony should not come from the same witness that examined the alleged victim because it runs an even greater danger of bolstering the child's testimony. Here, though, Benedetto, as stated, was a forensic interviewer, and not a researcher or writer on this subject. This Court, most respectfully, should now clarify that Anderson does not stand for the proposition that a former forensic interviewer can simply be renamed a "child sexual abuse dynamics" or "child abuse assessment expert," and give the same testimony that a witness qualified in that area could tender to the jury. That is exactly what happened in this case. As undersigned counsel has argued in other similar cases before this Court, and the Court of Appeals, certain solicitors have made no secret that an "end run" can be made around this Court's instruction to the bench and bar in Kromah by simply renaming the forensic interviewer something else.

However, petitioner's broader point remains, as explained further below, that it is time to reconsider the continued viability of Schumpert and Weaverling, and if those cases are not overruled, to decide whether the state may use a forensic interviewer such as Benedetto to serve the same purpose of providing by simply renaming her a "child abuse assessment expert" or "child sexual abuse dynamics" expert.

Issue 4: The opinion testimony itself and the outdated 1990's cases

As stated above, she testified recantations did not mean that sexual abuse did not occur, that abusers often bought gifts for the abused, and that the abused are often threatened about disclosure of the abuse, and they start to "act out." R. p. 225, l. 14 – 226, l. 17. The same is true of Benedetto's testimony that sexual abuse can cause minors to begin drinking or using drugs which

have a negative influence on their health. R. p. 225, ll. 9-13. All of this mirroring the same claims in this case which has the dangerous tendency to invite a verdict on a spurious basis.

This Court is aware that solicitors are seeking to avoid allegations of bolstering by no longer putting up forensic interviewers as experts. However, the same bolstering occurred here under the guise of "child sexual abuse dynamics expert" testimony. State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

This "child sexual abuse dynamics" evidence served the same evil that State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499, n.5, (2013), held can no longer exist. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), and Kromah can no longer be reconciled and Weaverling should respectfully be overruled as it is a pre-gatekeeping case that is being used to justify impermissible bolstering such as occurred in this case. In Weaverling, the Court of Appeals found it was proper for a social worker, who had never interviewed the alleged victim, to testify that it was not uncommon for past victims of sexual abuse to become sex offenders themselves.

In State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) the Court of Appeals relied on this Court's opinion in State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) that "[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence *to prove a sexual offense occurred* where the probative value of such evidence outweighs its prejudicial effect." (emphasis added). Schumpert was decided in 1993, and the Rules of Evidence did not take effect until **September 3, 1995.** See Rule 1103, SCRE.

State v. Henry, 329 S.C. 266, 277, 495 S.E.2d 463, 468 (Ct.App. 1997) is another outdated pre-gatekeeping case in the small mold. In Henry, the Court of Appeals found no error in allowing a person, Badger, who had a degree in sociology and a master's degree in social work to testify the

alleged victim suffered from post-traumatic stress disorder (PTSD) as a result of being sexually abused:

> "When meeting with child victims of sexual abuse, Badger provides individual therapy and treatment. She prepares assessments ***to determine whether the child has been sexually abused.*** Badger conducts workshops on how to interview child sexual abuse victims, *how to determine whether they were abused*, and how to treat sexual abuse. In March of 1991, Badger met with Victim three times for a total of approximately three hours. At each meeting, Badger spent five to ten minutes alone with Victim's mother in order to obtain some background information. The purpose of the meetings was to treat Victim for sexual abuse. Victim described the sexual abuse. *Badger opined Victim suffered from PTSD. Badger based her diagnosis and opinion as to PTSD on the history received from Victim, Badger's personal observations of Victim, Victim's demeanor, and symptoms exhibited by Victim. Badger did not talk to anyone other than Victim and her mother when forming her opinion.* Psychotherapists "believe that they would be biased by other information and therefore they do not collect collateral information before they do their interview and make their diagnosis."

(emphasis added).

In modern times, as explained in Watson v. Ford Motor Co., 389 S.C. 434, 446- 47, 699 S.E.2d 169, 175 (2010): "Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony *is necessary to assist the jury* in resolving factual questions, the *expert is qualified* in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence"). It is against this backdrop that we analyze whether the trial court erred in admitting the challenged expert evidence."

Petitioner respectfully does not think the reasoning of Shumpert, Weaverling, and Henry can survive the holdings of Kromah; and the gatekeeping function and reliability modern cases of State v. White, and Watson v. Ford Motor Co.. This Court, for that reason, should respectfully overrule them to prevent the pervasive confusion that now exists with attempting to harmonize them.

Two days prior to the filing of this brief of petitioner, this Court, in State v. Berry, Op. No. 27690, Shearouse's Adv. Sh. No. 46, at pp. 47-50 (filed December 7, 2016), vacated the ruling of the Court of Appeals in State v. Berry, 413 S.C. 118, 775 S.E.2d 51 (Ct.App. 2015) in which that Court held, citing Weaverling and Schumpert, held that the testimony of an expert psychologist and social worker regarding behaviors observed in victim and symptoms of post-traumatic stress disorder (PTSD) was admissible, and did not constitute improper bolstering under Kromah.[5]

The jury in this case heard that the actions of the state's complaining alleged child sexual abuse witnesses were on all fours with the actions and characteristics of other victims of child sexual abuse in other **documented** cases. That implies the expert is a researcher, and not just a renamed forensic interviewer.

It is no longer enough, as this Court has stated, to avoid the Court's gatekeeper function, by merely stating the familiar mantra that any objection to reliability merely "goes to the weight, and not the admissibility of the evidence." The witness here should not have been qualified as an expert and her testimony was explosively prejudicial bolstering given the unusual way in which this unqualified witness was used. Petitioner respectfully submits that the Court of Appeals opinion should be reversed in this case, and the holdings of Weaverling, Schumpert, and Henry should be overruled.

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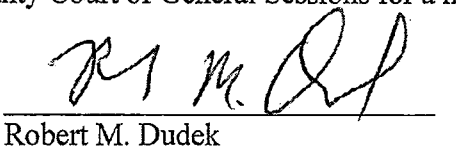
[5] While this Court vacated on procedural grounds the opinion certainly has drawn notice.

CONCLUSION

By reason of the foregoing arguments, the opinion of the Court of Appeals should be reversed, and this case remanded to the Aiken County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of December, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAROLD BENNON CARTWRIGHT, III,

PETITIONER.

APPELLANT CASE NO. 2016-000005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Harold Bennon Cartwright,III, #355084, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of December, 2016.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of December, 2016.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.