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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Tracking No: 2011119348

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THE STATE,

Respondent,

vs.

TIMOTHY E. YOUNG,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
Bar No. 100145

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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**I.**

**Any issue regarding the sufficiency of the trial judge's review of the therapist's file for exculpatory material is not preserved for review. Furthermore, Appellant conceded that the trial judge reviewed the therapist's file for exculpatory material. Moreover, Appellant failed to show a Brady violation.**

## STATEMENT OF THE CASE

On March 31, 2011 a Horry County Grand Jury indicted Appellant for first-degree criminal sexual conduct with a minor and a lewd act on a minor. Paul V. Cannerella, Esquire represented Appellant in the circuit court proceedings, and Assistant Solicitor Candice Lively represented the State.

In May 2010, Appellant made a pre-trial motion, where Appellant sought access to all counseling and results or reports concerning the treatment of the victim, which were in possession of the victim's therapist, Denise Scearce. (R. p. 6.)

With consent from the State and Appellant, the Honorable Benjamin H. Culbertson conducted an *in camera* review of the therapist's file for exculpatory material. On March 17, 2011, Judge Culbertson held a pre-trial hearing where Appellant asked Judge Culbertson to review the therapist's file for exculpatory material. Judge Culbertson reviewed the file for exculpatory material and gave Appellant everything from the therapist's file except a Medicaid identification card and the therapist's notes. (R. p. 13.) On March 22, 2011, the trial judge issued a written order sealing the records that Appellant was denied access. Order to Seal Exhibit.)

On April 4, 2011, Appellant proceeded to trial. On April 7, 2011, the jury found Appellant guilty of both charges. (R. p. 207.) Thereafter, Judge Culbertson sentenced Appellant to a total of twenty-five years of imprisonment. (R. p. 208.)

On June 16, 2011, during a post-trial hearing, the trial judge denied Appellant's motion for a new trial. (R. p. 209.) On June 19, 2011, the trial judge issued a written order denying Appellant's motion for a new trial. On June 17, 2011, Appellant filed his Notice of Appeal. This appeal follows.

## STATEMENT OF FACTS

**The Sexual Assault**

Appellant performed oral sex and digital penetration on the seven-year-old victim ("Victim"). (R. p. 119.)

Victim lived with her biological father ("Father") and stepmother ("Stepmother") in North Carolina. (R. p. 16.) However, Victim would visit her biological mother ("Mother"), who was married to Appellant, in Myrtle Beach every other weekend. (R. p. 18.)

In the summer of 2008, Father became concerned with Victim's behavior. Victim would constantly complain of stomachaches while she was at school. (R. p. 23.) In addition, Victim would lay in a fetal position while screaming and hollering. Victim would also use the bathroom in her pants. These problems would usually occur right after Victim returned from visiting Mother and Appellant. (R. p. 154.) On August 18, 2008, Father sent Victim to Denise Scearce for therapy. (R. p. 25.)

On October 31, 2008, Victim visited Mother and Appellant in Myrtle Beach. On November 4, 2008, Victim disclosed to Stepmother that Mother sexually assaulted Victim. (R. p. 39; R. p. 78.) On November 6, 2008, Father and Stepmother took Victim to Scearce for therapy. (R. p. 79.) Victim did not go back to Mother's house in Myrtle Beach after the disclosure.

On January 14, 2009, Victim made a second disclosure of sexual abuse to Stepmother. (R. p. 88.) However, this time, the disclosure was against Appellant. On November 6, 2008, Father and Stepmother took Victim back to Scearce for additional therapy. (R. p. 156.) Scearce wrote a report to the Department of Social Services in Columbus County regarding Victim's disclosure of the sexual assault committed by Appellant. (R. p. 165.) At trial, Scearce testified

that there was no indication that Victim had been exposed to sexual conduct through pornography or on the internet. (R. p. 168.)

**The Pre-Trial Hearing**

In May 2010, Appellant made a pre-trial motion for access to all counseling results and reports in possession of Scearce concerning the treatment of Victim. Appellant and the prosecutor entered into a consent order in January 2011, noting the prosecution's objection to Appellant's request because the records were not in the custody, possession or control of the State and did not fall within Rule 5, SCRCrimP, but agreeing that a copy of the records would be delivered to the trial court under seal and that the trial court would conduct a review of the records for possible exculpatory material and notify the parties if potentially exculpatory material was found. Both parties also agreed that a later hearing would be held regarding the relevancy/admissibility of any potentially exculpatory material identified. In addition, the State submitted a Motion *in limine* dated March 8, 2011, to exclude the therapist's records at trial and to deny Appellant access to the records pursuant to State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

During a pretrial hearing held on March 17, 2011, Appellant acknowledged that he received some discovery from the State that pertained to the therapist's records. Judge Culbertson, attempting to clarify Appellant's position as to the review of the records in light of Appellant's disclosure that he received material from the therapist's file, stated, "All right, so, am I still going through it and then I make a decision or are you withdrawing your request to get anything out of it?" (R. p. 9.) Appellant clarified that he still wanted the trial court to proceed with its review for exculpatory material. Thereafter, the trial judge stated that he did not know whether the parties were ready to discuss the matter at that time, but he had reviewed the material, he identified a few documents he thought might be subject to disclosure, and he would

hear the positions of the parties at that time as to the documents identified. (R. pp. 9-10.) The trial judge indicated that he excluded the vast majority of what the therapist provided him because those documents were notes that he concluded were not subject to disclosure. (R. p. 10.) The transcript from the hearing indicates that the material identified by the trial court as items possibly subject to disclosure had either already been provided to Appellant or was provided to Appellant at that time. (R. pp. 10-12.) The trial judge stated that the only material not provided were the therapist's notes and a Medicaid identification card. (R. p. 12.) The State suggested the trial court place the therapist's notes and Medicaid identification card under seal because the court reviewed the material *in camera*. (R. pp. 12-13.)

Appellant never objected at the pre-trial hearing or at trial on the ground that the trial judge failed to conduct a thorough and adequate examination of the records or on any other ground respecting the manner of review.

After the pre-trial hearing, the trial judge issued a written order finding the material marked as Court's Exhibit #1 as not discoverable. The order stated that the material should be sealed and not opened except by order of the court or at the direction of the appellate court. (R. p. 3.)

## ARGUMENT

### I.

**Any issue regarding the sufficiency of the trial judge's review of the therapist's file for exculpatory material is not preserved for review. Furthermore, Appellant conceded that the trial judge reviewed the therapist's file for exculpatory material. Moreover, Appellant failed to show a Brady violation.**

On appeal, Appellant asks this Court to remand this case back to the trial judge with instructions for him to unseal Court's Exhibit #1 and re-review the entire file for exculpatory material. Appellant contends the trial judge failed to conduct an adequate examination of the records and improperly denied him access to the notes because the trial judge only considered Rule 5, SCRCrimP. However, as Appellant requested, the trial judge reviewed the therapist's file for exculpatory material, and Appellant never objected to the sufficiency of the trial judge's review. Furthermore, Appellant concedes in his brief that the trial judge examined the therapist's file for exculpatory material. Thus, Appellant's contention that the trial judge only conducted a Rule 5 review is without merit. Moreover, Appellant failed to prove that the State committed a Brady violation. Therefore, this Court should affirm the trial judge's ruling.

#### A. Appellant never objected to the sufficiency of the trial judge's review of the therapist's file.

The consent order, pre-trial hearing transcript, and the trial transcript reflect that Appellant consented to and acquiesced in all procedures and rulings regarding the review of the therapist's file. Appellant asked the trial judge to conduct an *in camera* review of the therapist's file in order to determine if the file contained any exculpatory material. The trial judge did exactly what Appellant requested. (See R. pp. 9-13; App. B. p. 1; App. B. p. 8.) After the trial judge completed the *in camera* review, the trial judge asked Appellant's trial counsel if there

were any other issues regarding Appellant's motion for discovery. (R. p. 13.) Appellant's trial counsel replied: "About Counselor Scearce, no, Your Honor."

Appellant never objected to the trial court's oral ruling or written order regarding the review of the therapist's file. The first time Appellant took exception to the trial judge's review of the file was when Appellant made a motion to this Court to unseal Court's Exhibit #1, which was served approximately seven months after the trial.

Accordingly, the issue Appellant now complains of on appeal is not preserved for appellate review. See State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (stating an issue conceded at trial cannot be raised on appeal); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) (a contemporaneous objection is required to preserve issues for appeal); see also State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) (stating issues not raised to and ruled upon by the trial court will not be considered on appeal); Creech v. S.C. Wildlife and Marine Resources Dep't., 328 S.C. 24, 49 S.E.2d 571 (1977) (a defendant cannot argue on appeal an issue in support of a motion when the issue was not presented to the trial court); see also State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal).

Moreover, it appears Appellant is attempting to engage in a fishing expedition that is contrary to the position he took at trial. Furthermore, Appellant is attempting to revoke his earlier consent by asking this Court to do what he could have requested of the trial court but did not. See State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (stating the government has no affirmative duty to undertake a fishing expedition to find impeaching evidence).

Because the issue Appellant now complains of on appeal has not been preserved, there is no reason for this Court to take the extraordinary measure of remanding the case to the trial court with instructions to unseal Court's Exhibit #1 in order to determine whether or not the therapist's file contains exculpatory material.

**B. Appellant conceded that the trial judge reviewed the file for exculpatory material.**

Appellant argues this Court should remand this case in order for the trial court to review the therapist's file for exculpatory material as required under Pennsylvania v. Ritchie, 480 U.S 39 (1987). However, Appellant conceded in his brief that the trial judge has already examined the therapist's file for exculpatory material. (Appellant's Br. 1; Appellant's Br. 8.)

In support of Appellant's request to remand this case back to the trial court in order for the trial judge to review the therapist's file for exculpatory material, Appellant cites to Ritchie, 480 U.S 39. In Ritchie, the Supreme Court held "Ritchie [was] entitled to have the . . . file reviewed by the trial court to determine whether it contain[ed] information that probably would have changed the outcome of his trial." As Appellant correctly noted in his brief, the trial judge in Ritchie **never** reviewed the file in question. Instead, the trial judge in Ritchie merely accepted the assertion that there was no medical report in the file.

Furthermore, in State v. Bryant, our Supreme Court noted that the trial court should not have ruled that the contested material was not exculpatory and therefore not subject to disclosure. 307 S.C. 458, 461-462, 415 S.E.2d 806, 808-809 (1992). The trial court did not review the contested material but instead merely relied on a State's witness' representation that material was not exculpatory.

In stark contrast to the facts in Ritchie and Bryant, the facts in this case clearly show that the trial judge reviewed the therapist's file for exculpatory material. Appellant's request to the trial judge to review the therapist's file for exculpatory material was clear. The trial judge understood what Appellant was looking for and nothing in the record suggests that the trial judge did not review the file for exculpatory material. Moreover, Appellant admits in his brief that the

trial judge reviewed the therapist's file for exculpatory material. See Thomas v. Dootson, 377 S.C. 293, 296, 659 S.E.2d 253, 254 (Ct. App. 2008) (holding a party is bound by a concession in his or her brief).

Thus, there is no need for this Court to remand this case back to the trial court in order for the trial court to review the therapist's file for exculpatory material. The trial court has **already** conducted such an examination.

**C. Appellant failed to show a Brady[1] violation.**

In Brady, the Supreme Court held the following: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. Furthermore, "an individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching." State v. Moses, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (Ct. App. 2010).

First, Appellant failed to prove that the therapist's file contained evidence that was favorable to Appellant. In Appellant's brief, Appellant admits he does not know what is in the file and therefore "presume[s]" the therapist's file contains favorable evidence. (App. Br. 7.)

Second, the State did not have possession of the therapist's file. (See R. pp. 4-5.) Furthermore, the State delivered the records to the trial judge under seal for his review. Thus, there is no legitimate basis for believing the State knew that the therapist's file contained exculpatory material.

[1] Brady v. Maryland, 373 U.S. 83, 87 (1963).

Third, Appellant admits that the State did not suppress any material from the therapist's file. In fact, Appellant admits that the trial judge was the one that suppressed the material.

Fourth, Appellant, failed to prove that the therapist's file contained evidence that was material to Appellant's guilt or innocence or was impeaching. United States v. Bagley, 473 U.S. 667, 682 (1985) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); see also Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d, 70, 73 (2006) ("The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.' " (quoting Kyles v. Whitley, 514 U.S 419, 434 (1995)). Once again, Appellant presumes the file contained a "wealth" of favorable and material evidence. However, such a presumption is completely speculative and without basis.

Thus, Appellant failed to prove all four elements of a Brady violation.

In summary, the trial judge has already conducted a review of the therapist's file for exculpatory material as required by Ritchie. Appellant never objected to the sufficiency of the trial judge's review. Furthermore, Appellant failed to prove a violation under Brady. Thus, there is no need for this Court to remand this case to the trial court in order for the trial court to conduct a Ritchie review for the second time.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General

BY: Julie Kate Keeney
Julie Kate Keeney
Bar # 100145

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 8, 2012

STATE OF SOUTH CAROLINA
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Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Tracking No: 2011119348

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General

BY: Julie Kate Keeney
Julie Kate Keeney
Bar # 100145

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 8, 2012

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**PROOF OF SERVICE**

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I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura L. Hiller, Esquire
Jonathon M. Hiller, Esquire
HILLER & HILLER, PA
1053 London St., Ste. B
Myrtle Beach, SC 29577

I further certify that all parties required by Rule to be served have been served.
This 8th day of November, 2012.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727