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STATE OF SOUTH CAROLINA
In the Court of Appeals

ON CERTIORARI TO HORRY COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2017-000240

Timothy Young,

Respondent,

v.

State of South Carolina,

Petitioner.

BRIEF OF PETITIONER

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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Is the PCR court's finding that counsel was ineffective for failing to object to the qualification of two non-scientific experts when the State did not introduce any information about their reliability supported by any probative evidence or controlled by an error of law?

STATEMENT OF THE CASE

Timothy Young ("Young") is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Young was indicted at the March 2011 term of the Horry County Grand Jury for criminal sexual conduct with a minor, first degree (2011-GS-26-01088), and lewd act on a minor child (2011-GS-26-01089). Paul V. Cannarella, Esq. represented Young, and Candice Lively, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 4, 2011, Young proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Young guilty as indicted on April 7, 2011. Judge Culbertson sentenced Petitioner to imprisonment for concurrent terms of 25 years for the CSC and 10 years for the lewd act.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Laura L. Hiller, Esq., and Jonathan M. Hiller, Esq. who raised the following issue:

> Should Appellant's case be remanded to the trial court for further proceedings due to an error of law committed by the trial judge when he categorically denied Appellant access to all notes in a file maintained by a therapist, who testified for the State, on the basis that the notes contained in her file were non-discoverable material?

By unpublished opinion decided June 5, 2013, the South Carolina Court of Appeals affirmed Young's convictions. State v. Young, Op. No. 2013-UP-236 (S.C. Ct. App. filed June 5, 2013). Young moved to reconsider the opinion by motion filed June 20, 2013, which was denied by order filed August 22, 2013. Young petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated January 8, 2014. The Remittitur was issued on January 31, 2014.

Young filed his application for post-conviction relief on November 6, 2014 (2014-CP-26-07509). He alleged the following grounds for relief in his application, as amended by filing on May 2, 2016:

1. "Ineffective assistance of counsel for failure to make contemporaneous objection to Trial Court ruling Denis Scearce's notes were 'not discoverable' because they were 'notes'"
    a. "Ct. of Appeals declined to review issues raised due to lack of a contemporaneous objection"
2. "Ineffective assistance of counsel for failing to conduct a meaningful and thorough cross examination of the alleged victim"
    a. "Counsel failed to engage in a line of questioning with the alleged victim about an assertion she made to a social worker that the Defendant never sexually abused her"
3. "Ineffective assistance of counsel for failing to call a key witness who could have told the jury that the alleged victim said the Defendant never sexually abused her"
    a. "Counsel failed to call social worker who alleged victim informed that the Defendant never sexually abused her, even though she was under subpoena"
4. "Ineffective assistance of counsel for failing to object to Denise Scearce being qualified as an expert in child abuse assessment when there was no testimony offered as to her 'reliability' which resulted in improperly admitted testimony that bolstered the victim's testimony"
    a. "Counsel did not object to the qualification of Denise Scearce as an expert when there was not testimony, or other evidence, offered that her work had ever been published or peer reviewed in any way in violation of State v. Chavis (2015) and State v. White (2009)"
5. "Ineffective assistance of counsel for failing to object to Diane Nordeen being qualified as an expert in child development as it relates to forensic interviewing when there was no testimony offered as to her 'reliability' which resulted in improperly admitted testimony that bolstered the victim's testimony"
    a. "Counsel did not object to the qualification of Diane Nordeen as an expert when there was no testimony, or other evidence, offered that her work had ever been published or peer reviewed in any way in violation of State v. Chavis (2015) and State v. White (2009)"

The State made its return on April 1, 2016, and an evidentiary hearing into the matter was convened on May 12, 2016, before the Honorable Paul M. Burch. Young was present at the

hearing and represented by David B. Tarr, Esq. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented the State. By written order dated January 3, 2017, and filed January 6, 2017, Judge Burch granted the application for post-conviction relief.

This appeal follows.

STATEMENT OF THE FACTS

a. The abuse

CT lived primarily in the custody her biological father, Michael Chad Turbeville ("Chad"), and stepmother, Jennifer Turbeville ("Jennifer"), in North Carolina. (Appx. 100-04; Appx. 162-63). Every other weekend, CT would visit her biological mother, Nicole Skovinski ("Nicole"). (Appx. 104, ll. 1-11). The relationship between Chad and Nicole for maintaining the terms of custody was unstable—Nicole abused drugs, was inconsistent in showing up to exchange custody, and frequently appeared with new affections unfamiliar to Chad. (Appx. 104-05; Appx. 164, ll. 18-25). In that context, Nicole's marriage to Young was a great relief to Chad, who found Young to be "a very level headed, nice guy." (Appx. 105-06).

In the summer of 2008, Chad and Jennifer became concerned with CT's behavior. CT would regularly complain of stomachaches while she was at school. (Appx. 109, ll. 15-18; Appx. 168-70). CT would soil herself, curl into a fetal position, and scream.[1] (Appx. 109, ll. 19-20; Appx. 166-68). When Chad would drop CT off at school, she would get out of the car, then run back and demand Chad not leave. (Appx. 109, ll. 20-23). CT would wake suddenly in the night and complain of nightmares about Young lurking in the night. (Appx. 109-10; Appx. 213, ll. 6-11). The school counselor made note that CT changed from a bubbly, giggly kindergartener to an anxious, fearful, clinging child who accumulated an unusual number of absences in the 2008-2009 school year. (Appx. 371-74). Chad and Jennifer determined that the problems were usually occurring after CT returned from visitation with Nicole and Young. (Appx. 110, ll. 5-12; Appx. 166-67). On August 18, 2008, Chad took CT to child therapist Denise Scearce for treatment. (Appx. 110-11; Appx. 135, ll. 11-20; Appx. 168, ll. 4-12).

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[1] Not necessarily all at once.

On October 31, 2008, CT visited Nicole and Young in Myrtle Beach. On November 4, 2008, after returning to Chad and Jennifer, CT disclosed that Nicole touched her: "my mama does nasty things to me." (Appx. 112-14; Appx. 170-71; Appx. 173, ll. 17-19; Appx. 190, ll. 7-16). CT explained Nicole would take baths with her and thereafter apply Neosporin on her privates. (Appx. 193, ll. 12-22; Appx. 206-07). Chad and Jennifer took CT to Scearce for additional therapy and contacted the Department of Social Services. (Appx. 171, ll. 2-16). CT did not go back to Nicole's house in Myrtle Beach after the disclosure, pursuant to the advice of social services and Chad's attorney. (Appx. 140-41; Appx. 171, ll. 20-25; Appx. 173, ll. 20-22). Nonetheless, Nicole managed to stay in contact with the children by leaving cards for them with the principal of their school, despite investigation by the Department of Social Services and assurances by the school district's attorney that she would not be permitted on school grounds. (Appx. 142-43; Appx. 173-74). CT's behavioral issues thereafter continued: complaints of headaches and stomachaches, screaming, fear, erratic sleep schedules, and refusals to sleep in her own bedroom. (Appx. 174-75). Jennifer asked Scearce to write a letter to the school addressing the incident, and Scearce did so. (Appx. 175, ll. 11-20).

On January 14, 2009, CT made a second disclosure to Jennifer, this time regarding sexual abuse by Young. (Appx. 115-17; Appx. 180-81; Appx. 190, ll. 17-23; Appx. 210-12). CT told her "[t]hat [Young] licked a little above my front privacy part and that he – sometimes put his finger in my front privacy part." (Appx. 212, ll. 8-18). Jennifer wept. (Appx. 212, ll. 19-23).

Young had touched and licked CT multiple times, and instructed CT to not tell Nicole, so CT told Jennifer. (Appx. 214-15). CT explained: "I'd have my shirt on and he'd pull down my pants and I tried to pull them back up but then he would try to pull them back down." (Appx. 215-16). Young would spread CT's legs, and she would struggle to keep them close together.

(Appx. 217, ll. 3-17). Young was stronger than the seven-year-old. (Appx. 216, ll. 2-8). Sometimes Young only touched the outside, sometimes Young penetrated CT with his finger, which hurt. (Appx. 217, ll. 18-25). CT only felt comfortable disclosing one incident at a time. (Appx. 218-19). CT was relieved by disclosing the abuse, and the nightmares eventually ceased haunting her. (Appx. 212-13; Appx. 220, ll. 12-16).

Chad and Jennifer contacted DSS and Scearce again after the second disclosure. (Appx. 117-18; Appx. 182, ll. 9-18). Chad additionally reported the disclosures to the Myrtle Beach Police Department. (Appx. 118-119; Appx. 302-03). Officer Joe Graham, of the Myrtle Beach Police Department, referred CT to the Children's Recovery Center for a forensic interview. (Appx. 301, ll. 13-21; Appx. 305, ll. 2-18). CT was interviewed on February 17, 2018. (Appx. 350, ll. 7-10). Several days after the forensic interview, upon reviewing the report from the Children's Recovery Center, Officer Graham proceeded in bringing charges against Young. (Appx. 306, ll. 9-13).[2]

Chad ultimately moved to terminate visitations by filing on February 18, 2009. (Appx. 119-120). Chad filed no motions regarding Nicole's visitation rights prior to that date, but Nicole did so file. (Appx. 120, ll. 9-12; Appx. 121-126; Appx. 130-31; Appx. 188-90). A hearing was scheduled for January 13, 2009. (Appx. 122, ll. 1-6; Appx. 126, ll. 3-9; Appx. 296-97). Chad denied coaching CT, and denied the disclosures were a fabrication to justify termination of Nicole's visitation rights. (Appx. 127, ll. 4-10).

No pornography was kept in the home, and the children were only permitted use of the computer with Chad or Jennifer present. (Appx. 127, ll. 15-25; Appx. 183-84). CT was not

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[2] On cross-examination, Counsel drew out from Officer Graham that CT had specifically denied Young ever touched her in a conversation with a North Carolina DSS worker. (Appx. 307-08).

permitted to see R-rated movies, and had never seen Chad and Jennifer engage in intercourse. (Appx. 128, ll. 1-7; Appx. 183-84).

CT was not medically examined until outside of the crucial 72-hour window. (Appx. 382-83). Even had she been examined shortly after the abuse, the character of the abuse was such that physical injury was not likely. (Appx. 383-84). CT's physical examination revealed no abnormalities. (Appx. 384-85). Dr. Carol Rahter opined Nicole's application of "any kind of cream or ointment" to CT's genitalia was unusual. (Appx. 385-86). Rahter also explained that "[g]reater than 90 percent of children who are sexually abused have normal exams and the majority of the reason for that is delayed disclosure." (Appx. 391, ll. 14-16).

b. Expert qualification and testimony of Denise Scearce

Denise Scearce, a counselor in private practice in North Carolina, was offered by the State as an expert in child sexual abuse counseling and treatment. (Appx. 240, ll. 20-22). Scearce's qualifications were exhaustively explored by both the State and Counsel. (Appx. 237-48). Scearce indicated 17 ½ to 18 years of postgraduate experience in providing mental health services to children and families. (Appx. 238, ll. 5-10). Scearce had testified in at least 75 custody disputes and one other criminal matter. (Appx. 238, ll. 11-15). Scearce indicated she was specifically trained as a mental health professional to work with "high conflict families in situations where it may be emotionally abusive for children or traumatizing." (Appx. 238-39). Scearce testified she maintained her continuing education requirements, and was a member of a number of professional organizations. (Appx. 240, ll. 4-10). Scearce indicated she had been qualified to testify in court as an expert in the past, for "[m]ental health issues for children, child sexual abuse and high conflict families." (Appx. 240, ll. 11-19). She is authorized to make mental disorder diagnoses. (Appx. 241, ll. 6-8). Put simply, she was trained to conduct therapy

and treat mental disorders short of writing a prescription for medication, for which she would write a referral to a psychiatrist. (Appx. 244-45). Scearce explained she regularly reads books, articles, and literature regarding child sex abuse, and maintains regular contact with experts in the field at the University of North Carolina-Chapel Hill. (Appx. 246-47). Upon inquiry by the trial court, Scearce articulated a variety of diagnoses she regularly makes. (Appx. 247, ll. 11-19). The trial court found Scearce to be an expert "in the field of child sexual abuse counseling and treatment." (Appx. 247-48). Counsel did not object Scearce's qualification.

Scearce testified that her first step in meeting a child is to ask the parents about what concerns them—here, Scearce learned CT was anxious, found curled up in a fetal position at school and prone to angry outbursts. (Appx. 249, ll. 6-13). Scearce was told CT most often presented symptoms after visiting Nicole and Young. (Appx. 249, ll. 16-20). Nobody mentioned abuse to Scearce during her initial assessment. (Appx. 250-51). Scearce was first informed of potential abuse at a November 6, 2008, session with CT. (Appx. 251, ll. 6-16). Considering the allegations that Nicole walked around naked and applied Neosporin to CT's genitalia, Scearce opined she wasn't sure it constituted abuse, but reported the allegations to DSS as a precaution. (Appx. 251-52).

Scearce explained CT's condition in their sessions together:

> She was very much in distress and there was a lot of anxiety. There was some acting out. It seemed she was more anxious than she was angry, but there was a concern that she was having trouble sleeping, she was already looking like a child who was becoming sick. When she would come to my office I would see that she had dark circles under her eyes, and when I asked her how she was sleeping at night she said, "I'm not sleeping at all," and that's when I made a referral as well to a psychiatrist to assess her for depression.

(Appx. 252-53). Scearce referred CT to a psychiatrist, who diagnosed CT with post-traumatic stress disorder and prescribed her Prozac. (Appx. 253, ll. 10-18). Scearce initially diagnosed CT

with "adjustment disorder with anxious mood[,]" concurred with the psychiatrist's diagnosis during the height of her symptoms, and returned to her original diagnosis in light of CT's condition at the time of trial. (Appx. 254-55). Victim's condition regressed after Nicole delivered the letters to CT's school, and so Scearce wrote a letter to the school addressing the situation. (Appx. 255-58). Throughout this first phase of CT's treatment, Scearce had no indication of any abuse or inappropriate actions performed by anybody other than CT's mother. (Appx. 255-56).

Scearce saw CT on January 16, 2009, at which time CT made her second disclosure. (Appx. 259-60). The counselor immediately wrote a report and sent it to DSS, who referred to law enforcement. (Appx. 260, ll. 3-19). Scearce asked CT why she did not previously mention "the second situation" when disclosing Nicole's conduct, to which CT replied "that she needed to tell me one at a time and from her standpoint meaning that she needed to tell about her mother first." (Appx. 261, ll. 3-7). Scearce explained her opinions as to why CT disclosed in stages:

> I have my opinion about why she may have done that, and of course, with the way children at this age anyway will disclose the information, you know, there was a lot of things happening during that time. I do feel that she was in a situation where she felt that she could tell about her mother first because her mother actually had made a threat about the safety of her father and her stepmother and also it was a situation where during that time [CT] didn't have contact with her mother, that the second disclosure I believe she felt safer to talk about that situation.

(Appx. 261, ll. 13-22). Scearce noted the disclosures and their details were different. (Appx. 261-62). Scearce testified she has never performed a "forensic interview." (Appx. 262, ll. 3-17). The counselor explored the science explaining "delayed or piecemeal disclosure by a child" in some detail, and expressed that she was not surprised by the piecemeal character of the disclosures. (Appx. 264-66). Scearce opined CT's symptoms were consistent with sexual abuse,

but the testimony was stricken upon repeated objections by Counsel. (Appx. 266-67). Scearce ceased treating CT in July or August 2009, after agreeing with Chad and Jennifer that the sessions could be exacerbating her behavioral issues. (Appx. 269-70).

On cross-examination, Scearce agreed with Counsel that "in some high conflict situations there have been cases where there has been false allegations." (Appx. 274-75). Scearce agreed with Counsel that there is no symptom checklist to determine a child has been sexually abused. (Appx. 275-76). Counsel thoroughly explored through Scearce the concerns CT and her sister had expressed regarding Nicole—Nicole expressed her desire for primary custody, threatened the children if they stuck up for their father, and as such the children were worried for their father's safety. (Appx. 278-80). Counsel drew parallels between CT's disclosures about Nicole and about Young, noting in both instances she claimed to have been touched in her privates by an adult's knuckle. (Appx. 283, ll. 3-25). Counsel challenged Scearce that the precise words of CT's second disclosure indicated contamination, i.e., that she had developed false memories through talking with others. (Appx. 284-86). Counsel further challenged Scearce on the root cause of CT's distress in the wake of Nicole's delivery of a birthday cart to her through the school, and on Scearce's decision to write a letter to the school advocating for Jennifer to be permitted on school grounds. (Appx. 289-94).

c. Expert qualification and testimony of Diane Nordeen

Diane Nordeen, of the Children's Recovery Center, was proffered outside the presence of the jury as an expert "[i]n forensic interviewing and child development." (Appx. 315-16). Nordeen has a bachelor of science in psychology. (Appx. 317, ll. 12-14). Nordeen explained her training and experience in forensic interviewing, and described it as "a specific training to elicit a statement from a child in a non-leading fashion in a child friendly manner." (Appx. 317-18).

Nordeen indicated she followed the RATAC form of forensic interviewing and affirmed the description of it offered by the prosecutor. (Appx. 318-21). Notably, Nordeen indicated 19 years of experience in working with and providing services to children. (Appx. 319, ll. 11-19; Appx. 333-34).

On cross-examination under proffer, Counsel specifically questioned Nordeen on the scientific basis of the RATAC method and its purpose:

> Q. And the – this method is recognized in the scientific laws?
>
> A. Yes, it is.
>
> Q. Tell me how that is.
>
> A. It's recognized through many research projects conducted both in its support and in an attempt to refute it. It's used – also recognized for the number of interviews that have been done using it.
>
> Q. And that method is the method that's accepted, that's generally accepted in the community I guess of forensic interviewers *to ensure reliability*?
>
> A. Yes.
>
> Q. Reliability in what way?
>
> A. *Reliability that it's not leading*, that it's a non-leading protocol to follow that allows the child to provide the details of what they've experienced in a non-leading fashion.

(Appx. 321-22) (emphasis added). Nordeen explained her purpose as an expert would not be to offer an opinion, but only "[t]o provide the information about my interview process that I used to provide the jury information regarding the process that I used." (Appx. 323, ll. 1-14). Nordeen explicitly denied she would assert CT was telling the truth. (Appx. 323, ll. 12-14). The trial court questioned why Nordeen needed to be qualified as an expert at all if she would not be offering an opinion on anything, but only explaining her methodology, at which point the prosecutor explained the need to question Nordeen on CT's development as a child. (Appx. 323-29). The trial court qualified Nordeen "as an expert in the field of forensic interviewing and

child development, more in the field of child development because I think that's where she's going to be rendering her opinion testimony rather than in the forensic interviewing portion part." (Appx. 328-29). Despite the proffer, the trial court indicated it would permit Counsel to cross-examine Nordeen on her qualifications before the jury. (Appx. 328, ll. 23-24).

Much of the same exchange occurred before the jury. Nordeen testified to her employment with the Children's Recovery Center, and described its purpose as to provide "a plea where a child can be interviewed and examined after an allegation of sexual abuse has occurred." (Appx. 331, ll. 2-14). Nordeen described herself as a forensic interviewer and described a forensic interview as "a non-leading interview that is used to elicit a factual statement from a child." (Appx. 332, ll. 3-9). Nordeen explained she followed the RATAC protocol. (Appx. 332-33). Nordeen provided a history of her training, education, and work experience. (Appx. 333-34). On cross-examination, Nordeen confirmed Counsel's description of forensic interviewing as "just simply interviewing the child where there's been some allegations." (Appx. 335, ll. 4-16). Nordeen was qualified "in the field of child development as it relates to forensic interviewing." (Appx. 335, ll. 18-20). Counsel did not object. (Appx. 335, line 17).

Nordeen received a referral for an interview of CT from Officer Graham on February 10, 2009. (Appx. 336, ll. 5-7). Nordeen explained the Children's Recovery Center only conducts interviews upon referral from law enforcement, doctors' offices, and therapists when there is a suspicion "that something may be going on with the child." (Appx. 336-37). Nordeen explained understanding the level of a child's development was important in determining the approach to the forensic interview. (Appx. 337-38). Nordeen denied reading any notes from prior interviews or sessions with CT in order to "keep an open mind and to consider that there might be an

alternative explanation for why the child is, you know, having the complaint or symptoms they're having." (Appx. 338, ll. 8-22). Only Nordeen and CT were present in the room during the forensic interview. (Appx. 340, ll. 3-15). The interview for the most part followed the RATAC protocol. (Appx. 340-41). Only non-leading questions were used, and an anatomical doll was utilized. (Appx. 341-43). The interview was videotaped, and that tape was introduced into evidence without objection. (Appx. 344-45). Nordeen noted the audio recording portion of the tape was of poor quality and that CT spoke softly, and so Nordeen regularly repeated CT's answers during the course of the interview. (Appx. 345-47). The forensic interview video was published to the jury.[3] (Appx. 356-57). After the interview, Nordeen recommended continuation of CT's therapy. (Appx. 357-58). Cross-examination comprised drawing Nordeen's attention to various questions throughout the interview. (Appx. 358-66).

d. The defense case

Nicole testified in Young's defense. Counsel necessarily noted Nicole's prior conviction for perjury arising out of her family court litigation with Chad. (Appx. 416, ll. 2-15). Nicole described her post-separation relationship with Chad as one plagued by Chad's persistent efforts to seize custody, such that "every time he found out something he would take [Nicole] to court." (Appx. 414-16). Nicole did not describe an amicable separation, but asserted Chad possessed "a lot of hatred and animosity" for her. (Appx. 419, ll. 20-24). Nicole admitted to a lifestyle ruled for a time by drugs and alcohol, but asserted she was able to overcome those struggles. (Appx. 420-21; Appx. 458, ll. 21-24). She described a wonderful relationship between herself, Young, and her children, bound by the limits of her visitations rights and financial ability, up until

[3] The jury was permitted a transcript of the forensic interview to follow along while the tape was played in open court, but the transcript was not permitted as an exhibit and was evidently riddled with errors.

September 2008. (Appx. 424-25; Appx. 426-27). Nicole noted the children grew distant and rambunctious. (Appx. 425-26).

Nicole testified that around Halloween 2008, during a visit, she checked CT to confirm that she had adequately washed herself in the bathtub only to discover a white discharge in genitalia. (Appx. 431, ll. 7-17). Nicole testified she directed CT to scrub with a wet washcloth, but after CT complied, her genitalia were "red as fire." (Appx. 431, ll. 17-22). Nicole recalled taking CT into a bedroom and instructing her to put Neosporin on the inflamed area, but that CT refused to do so and was upset, so Nicole did so with her knuckle, feeling that using her finger would be too intrusive. (Appx. 431-33). Nicole reported CT expressed relief from the treatment. (Appx. 432-33). Nicole testified that CT's sister occasionally needed a similar application of Neosporin, but was willing to apply it herself. (Appx. 433-34). Nicole noted that the privates were not the only hygiene issues she discovered with the children, and recalled a lice incident that became another point of conflict between her and Chad. (Appx. 434-35).

Nicole described fear of Chad and Jennifer on the part of CT. (Appx. 436, ll. 4-18). Nicole denied asking the children to live with her, but recalled CT asking why they could not do so. (Appx. 437, ll. 3-13). Nicole admitted to walking around the house naked. (Appx. 439-40). Nicole also remembered delivering the cards to the school principal as she was leaving town to relocate to Connecticut. (Appx. 449-50). Nicole asserted CT had been manipulated by Chad and Jennifer into making allegations against Young. (Appx. 451, ll. 3-25). Nicole praised Young's treatment of the children as though they were his own, and that did nothing untoward. (Appx. 452-53).

Nicole's stepmother, Deborah Skovinski, also testified to a warm family relationship in Nicole and Young's home. (Appx. 470-79). In no uncertain terms, Skovinsky declared "I

believe in Tim 100 percent." (Appx. 475, line 13). Skovinsky also testified to Chad's temper and the children's fear of it. (Appx. 475, ll. 16-19).

Aneicsa Eggers, Nicole and Young's former neighbor and parent to two children who befriended CT and her sister, similarly described a warm family environment from Nicole and Young. (Appx. 480-86). Eggers confirmed Nicole's lice story. (Appx. 483, ll. 10-22). Eggers, who is a nurse, recalled Nicole asking her about CT's hygiene issues. (Appx. 485-86).

Gail Ward, Young's sister, and Betty Jenkins, Young's mother, spoke positively of Young's character. (Appx. 486-94).

Young testified in his own defense. (Appx. 498-543). Young denied the allegations. (Appx. 503, ll. 12-16; Appx. 510, ll. 7-15; Appx. 526, ll. 18-22; Appx. 538, ll. 10-22; Appx. 542, ll. 17-20). Young described a hostile relationship between Nicole and Chad, which motivated Nicole and Young to wed. (Appx. 504-07). Young claimed CT had been manipulated by Chad and Jennifer, and had been put through hell. (Appx. 509, ll. 12-19; Appx. 526, ll. 18-19). Young denied ever being alone with CT. (Appx. 510, ll. 5-6). Young explained that Nicole left to Connecticut to be with her family after her grandmother passed, and that the two ultimately divorced under the pressure of Chad's hostility. (Appx. 511-12). Young denied any awareness of CT's "female problems[,]" indicating it was none of his business, and expressed ignorant indifference as to Nicole's use of Neosporin on CT. (Appx. 515, ll. 6-11; Appx. 538-40). Young observed the same changes in the children starting around September 2008: moody and distant. (Appx. 533-34).

e. Closing arguments and treatment of Scearce and Nordeen

Counsel opened his closing arguments by reintroducing himself and then setting forth a timeline of Young and Nicole's relationship, culminating in the rhetorical observation that "if

Tim is a perp, if he's a pervert, if he's a perp it's, I think it's reasonable for me to say to you that something might would have happened before then." (Appx. 548, ll. 10-12). Counsel pointed at the absence of factors that often coincide with the sexual abuse of children, such as child pornography or "nasty magazines." (Appx. 548, ll. 14-16).

Importantly, Counsel emphasized that both children received psychotherapy treatment from Scearce, and asked "is something wrong with both of them or is just something wrong with one of them?" (Appx. 548-49). Counsel noted the letter Scearce sent describing "a high conflict situation" and re-emphasized Scearce's treatment of both children. (Appx. 549, ll. 17-24). Counsel theorized the allegations were blown up because the children enjoyed spending time with Nicole and Young, where they received more attention than at home with Chad and Jennifer. (Appx. 550-51).

Counsel returned to Scearce, noted her lack of contact with Nicole, and emphasized she was working for Chad and his attorney. (Appx. 553-54). Counsel again emphasized both children were sent to therapy, not just CT. (Appx. 554, ll. 5-8). Counsel construed Scearce as a well-meaning, if not tragic figure, who encouraged contact with Nicole to the extent that she was able in light of her employment by Chad. (Appx. 554-55). Counsel theorized Chad sent the children to Scearce with a mind to gin up symptoms and reasons to deprive Nicole of visitation. (Appx. 555-56). Counsel drew the jury's attention to CT's prior denials of abuse by Young and then dismissed the concept of "delayed reporting" as something brought up in every case. (Appx. 556-59).

Counsel walked through the timeline of events leading to Nicole's delivery of cards to the children's school, and then agreed with Scearce's observation that CT "started regressing after that[,]" offering that the overreaction by Chad and Jennifer created the problem. (Appx. 559-61).

Counsel noted the temporal proximity of the contempt hearing that was scheduled for January 13, but delayed, and the January 14 disclosure by CT, and pointed at Jennifer's testimony "danc[ing] around" whether or not she knew about the hearing. (Appx. 562-63).

CT was again taken to Scearce after the January 14 disclosure and Counsel again flipped Scearce's testimony to Young's benefit, arguing:

> Scearce is probably right because that was all the tension that was being created in that child's mind because she's been made to believe that her mother is sexually abusing her when she does that. That's been, they, they – that's been built up in her and then, and then the – and then there's a big to-do at the school probably. You don't know who saw what at the school house. You know, you don't know how embarrassed the children were. . . . That's more internal conflict creating in that little child, and I asked Ms. Scearce about her February the 5th session, and in there Ms. Scearce said, "Yes, [CT] admits that she uses tactics to get what she wants."

(Appx. 564-65). Counsel then walked through the process and protocols of North Carolina and South Carolina dealing with an allegation of sexual abuse of the severity levied against Young. (Appx. 565-66).

Counsel only mentioned Nordeen in passing but drew the jury's attention to the forensic interview, implicitly decried as unbelievable that Young could have abused CT in their 500 square foot house without anybody finding out, and argued "there is nothing to corroborate that [Young] did a thing, that he did anything." (Appx. 567-68). Counsel repeated CT's statements in the forensic interview to the effect of "I guess it was him." (Appx. 568, ll. 17-23). Counsel condemned the questions in the forensic interview as leading, suggestive, and as a contamination. (Appx. 568-69). Counsel drew the jury's attention to his cross-examination of Scearce, and her opinion that a child would not say "I wanted to finish one before I started on the

other." (Appx. 569, ll. 11-15).[4] Counsel closed with an extended metaphor about the "call on the field" being not guilty. (Appx. 570-73).

The State invited the jury to consider whether CT was an innocent child or a conniving, manipulative liar. (Appx. 575-76). The prosecution noted that "[n]othing was kept out in regards to the turmoil between Chad and Nicole" and justified Chad's decision to take the children to therapy in that context. (Appx. 577-78). The solicitor drew the jury's attention to the forensic interview, and then to the concept of delayed disclosures, asking rhetorically "[h]ow does a seven-year-old know that whenever a man licks you down there that that's wrong?" (Appx. 578-79).

The State compared the case to that of a burglary with no physical evidence, but only the identification of the perp by the victim, and asked why the sole witness in a burglary is more commonly accepted as more credible than a child in a sex abuse case. (Appx. 579-80). "That's the reason why we bring in Denise Scearce." (Appx. 580, ll. 6-7).

The State emphasized on one hand that Nicole was a convicted perjurer, but also that Nicole admitted and confirmed CT's first disclosures about the application of Neosporin and walking around naked. (Appx. 581-82). The prosecutor thereafter dispensed with the defense that the allegations were a fabrication due to the custody dispute, drawing heavily on the details provided by CT in the forensic interview and arguing by way of sarcasm that the child victim could not have planned out such details with accuracy. (Appx. 583-84). The State noted the testimony of Rahter that any injuries would have healed quickly, such that there would be no physical findings, and that such is the case in the overwhelming majority of child abuse cases. (Appx. 584-85).

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[4] Referring to Appx. 284, ll. 13-15.

The solicitor defended the validity of the forensic interview procedure. (Appx. 591, ll. 1-11). She thereafter walked through CT's forensic interview statements exploring the anatomical doll. (Appx. 591-92). The State asserted "[n]obody told her to say those things" and noted CT's recorded trend of behavioral issues at school. (Appx. 592-93). The State recalled Scearce's testimony that CT's immediate concern and fear drew from Nicole. (Appx. 593, ll. 16-24). Nordeen was only mentioned in passing throughout the closing argument.

f. Jury charge and deliberations

The trial court thoroughly charged the jury on the law as it applies to expert witnesses, explaining in part:

> If you decide that the opinion of an expert witness is not based on sufficient education and experience, or if you conclude that the reasons given in support of the opinion are not solid or sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.
>
> An expert witness' testimony is to be given no greater weight than that of any other witness simply because the witness is an expert. Further, you are not required to accept an expert's opinion, even though it is not contradicted.

(Appx. 603, ll. 15-24).

The jury convicted Young after over three hours of deliberations, including additional review of CT's testimony. (Appx. 611-19).

g. The PCR evidentiary hearing

Counsel, at the evidentiary hearing, eagerly asserted that he zealously assured the forensic examiner, Nordeen, was not permitted vouch for CT. (Appx. 770-71).

Later in the hearing, Young, through PCR counsel, led Counsel down the path of exploring State v. White, 382 SC. 265, 676 S.E.2d 684 (2009), and State v. Chavis, 412 S.C.

101, 771 S.E.2d 336 (2015).[5] (Appx. 785-86). Counsel agreed "there was absolutely zero testimony as to [Scearce's] reliability, basically no testimony that could tell the jury that she knows what she's talking about[.]" (Appx. 786-87). Counsel opined he could have objected and argued a lack of evidence to support a finding under the reliability prong. (Appx. 787-88). Counsel explained his approach where he did object to Scearce was to guard against questions by the State which would turn her into "a human polygraph." (Appx. 789, ll. 10-13). Young noted Scearce was permitted to rely upon and offer hearsay testimony relying upon another doctor's finding of PTSD. (Appx. 790, ll. 2-10). Counsel noted that in retrospect he could have fought to prevent Scearce's qualification as an expert, but noted he had no reason to believe Judge Culbertson would not qualify her as an expert and that he did not wish "to do anything to make that jury think[6] that she's some great kind of witness, you know, that's got all this expertise that if she thinks these symptoms are consistent, then yeah, the child did it." (Appx. 790-91).

Young similarly raised the allegation of lacking "reliability" testimony in the context of Nordeen, to which Counsel promptly expressed, with some frustration: "I'm not real sure about how you know – how do you reach that determination that someone is reliable based on historical information, though, or what. I mean, I don't know how you do it. How do you do it?" (Appx. 794, ll. 19-23). Young emphasized that there was no evidence Nordeen ever published anything of her own subject to peer review. (Appx. 795, ll. 3-9). Counsel again questioned: "[H]ow do we determine if somebody is reliable? You know, if they're going to give testimony about something that's going to be harmful to us, and we want – how do – I guess what test do we use to look to see if they have been deemed reliable in the past?" (Appx. 795-

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[5] The transcript erroneously reads "State v. Chase."

[6] The qualification was performed in the jury's presence.

96). Asked if there was any testimony offered as to reliability, Counsel replied "I don't know what that would be." (Appx. 796, ll. 3-10). The PCR court interjected that "you can do it by prior experience" or "peer review and practice testing[.]" (Appx. 796-97). Young noted that Counsel did object to the qualification of Nordeen as an expert witness in forensic interviewing. (Appx. 797-98).

On cross-examination, the State posed that much of Nordeen and Scearce's work would be confidential, so as to hinder tests for reliability, to which Counsel replied that he consulted with "another source" in gauging the witnesses. (Appx. 805-06). Counsel repeated his belief that both witnesses would be qualified as experts. (Appx. 806-07).

The PCR court found Counsel "was deficient and that because of the nature of the evidence in this case, was clearly prejudicial." (Appx. 839-40).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. THE PCR COURT ERRED IN FINDING COUNSEL INEFFECTIVE IN NOT OBJECTING TO THE QUALIFICATION OF TWO EXPERT WITNESSES BECAUSE IT COMMITS A MIXED ERROR OF LAW AND FACT AS THERE IS NO LAW OR EVIDENCE TO SHOW THE EXPERT TESTIMONY WAS UNRELIABLE IN EITHER ITS SUBSTANCE OR ITS PERSON, AND BECAUSE THERE IS NO INEFFECTIVENESS WHERE COUNSEL ARTICULATED A VALID STRATEGIC DECISION FOR NOT OBJECTING TO THE QUALIFICATION IN THE CONTEXT OF THE FACTS OF THIS CASE.

The PCR court's order granting post-conviction relief due to Counsel's non-objection to the qualification of two expert witnesses is without merit as a matter of law and fact because there is neither a legal foundation nor any evidence to support any conclusion that either expert witness was unreliable for the purposes of expert qualification. Furthermore, the Court erred in finding Counsel ineffective where he articulated a strategic reason for not belaboring the proffer of each expert witness, which was valid in the context of the present case.

The introduction of expert testimony in courts of the State of South Carolina is governed by Rule 702, SCRE:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In applying the above rule in determining whether to admit expert testimony, the trial court must make three inquiries: "(1) whether the evidence will assist the trier of fact; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in that particular subject matter, and (3) whether the substance of the testimony is reliable."[7] State v. Jones, 423

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[7] Importantly, the State must note that Young did not challenge Counsel's treatment of the qualification of the expert witnesses under either of the first two of these three inquiries. Young was only granted relief as to Counsel's treatment of the last.

S.C. 631, 636, 817 S.E.2d 268, 270 (2018) (citing State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)). "Reliability is the central feature of Rule 702 admissibility[.]" State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686-87 (2009) (citing State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001); Council, 335 S.C. at 20, 515 S.E.2d at 518). There is no formulaic approach to apply in determining the reliability of a nonscientific expert witness. Id., 382 S.C. at 274, 676 S.E.2d at 688-89. "Reliability" for the purposes of expert qualification and admissibility is not tantamount to "perfection," and trial courts "are tasked only with determining whether *the basis* for the expert's opinion is sufficiently reliable such that it may be offered into evidence." Jones, 423 S.C. at 639-40, 817 S.E.2d at 272 (emphasis added); cf State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012) ("To be clear, the reliability of a witness's testimony is not a prerequisite to determining whether the witness is an expert. The expertise, reliability, and ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony."). Nonetheless, the Court has previously vacated a conviction for want of a particularized, personalized finding of reliability, as noted by the PCR court. State v. Chavis, 412 S.C. 101, 108-09, 771 S.E.2d 336, 340 (2015). As such, the State considers the area of expertise of each witness' testimony and the witnesses themselves in separate sections below.

a. The PCR court does not indicate how the subject-matter of the testimony of either Scearce or Nordeen was unreliable, and it could not have done so given the uniform recognition of "delayed disclosure" in child sex abuse cases, as well as the validity of the RATAC method of forensic interviewing, which was very specifically subjected to criticism throughout the trial.

1. Scearce: CT's condition, child abuse dynamics, delayed disclosure.

Scearce's expert opinions pertained to CT's condition and health, as well as opinions as to why she may have disclosed in a delayed and piecemeal manner. As to the first subject, CT's poor mental health, adjustment disorder, PTSD, and general acting out—none of that has ever been a fact in controversy. Nobody disputes that CT suffered from numerous behavioral issues during the time period in question, and indeed witnesses for both the prosecution and the defense testified to CT behaving abnormally, though they prescribed different causes for her behavior. Young, through Counsel at trial, argued strenuously that CT's behavior was the understandable and inevitable consequence of Chad and Jennifer's overreaction and corrupting influence on her amid an exceedingly toxic custody dispute.

As to the second subject, "the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized." Jones, 423 S.C. at 636, 817 S.E.2d at 271; see also State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible."); State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) ("Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior."); People v. Carroll, 740 N.E.2d 1084, 1090 (N.Y. 2000) ("We have long held that expert testimony regarding rape trauma

syndrome, abused child syndrome or other similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand[.]"); W.R.C. v. State, 69 So.3d 933, 939 (Ala. Crim. App. 2010) (finding expert testimony to delayed disclosure admissible).

Generally, "[e]xpert testimony that abused children often delay reporting the abuse . . . informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused." Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. App. Ct. 2003). Further, "disclosure in child abuse cases is generally delayed because of coercion, guilt, or some other reason, [and thus] there will be no physical evidence to corroborate the victim's allegations. Therefore . . . expert testimony will . . . assist the jury in understanding the evidence." People v. Beckley, 456 N.W.2d 391, 402 (Mich. 1990); see State v. Carpenter, 556 S.E.2d 316, 321 (N.C. Ct. App. 2001) (finding expert testimony on delayed disclosure is "clearly instructive and helpful to the jury in understanding the evidence since the nature of the sexual abuse of children places lay jurors at a disadvantage").

Scearce's expert testimony was particularly crucial in the case at bar, given Young's counter-allegations that CT was coached and corrupted, an admitted liar, and that the delay in disclosure was artfully constructed around a potential contempt hearing arising out of the custody dispute. Scearce's testimony explaining CT's mental health condition, as well as reasons as to why she would delay in disclosing the abuse was absolutely critical to the fact-finder in working through the cynical defense presented.

Young offers no remotely meritorious challenge to the validity of behavioral characteristics testimony, but rather only generally refers to the non-specific use of "experts in an

effort to provided [sic] legitimacy to and support the credibility of child sexual abuse victims." (Return to Petition for Writ of Certiorari at 10). Put more plainly, Young vaguely gestures to the entire field of behavioral characteristics and suggests it is impermissible bolstering. As set forth in the substantial string of citations above, testimony as to the behavioral characteristics of sexual assault and delayed disclosures in child sex abuse cases is a valid, thoroughly researched, and repeatedly upheld basis for expert testimony; the field of research is not an implicit remark that the witness believes the victim. See Briggs v. State, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017) (Improper bolstering: "a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim."). As such, that subject-matter provided a valid and reliable basis for Scearce's qualification as an expert.[8]

Young protests that the State misconstrues Tapp, and decries the State's interpretation as "absolutely preposterous." (Return to Petition for Writ of Certiorari at 11). Young offers that "[i]f the [P]etitioner's logic were the actual law of this state, then every witness who had training, education, and experience in a particular field would be an expert as long as the thinking in that field was deemed reliable." Id. That is actually exactly the State's position and is the law of this state. The purpose of the reliability prong to the trial court's gatekeeping function is not to permit the court to pass upon which witnesses are believable and which witnesses are not, but rather it is to ensure that juries are not wrongfully led to untenable conclusions by junk science. See, e.g. Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137, 159 (1999) (Scalia, J., concurring) ("[I]t is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky.") (emphasis original); United States

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[8] While the State notes that Scearce's specific testimony did not express any opinion as to CT's credibility, such that she did not engage in any impermissible bolstering, the basis for relief and issue at bar is strictly whether the expert witnesses should not have been qualified as such for want of reliability testimony.

v. Crisp, 324 F.3d 261 (4th Cir.,2003) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)) (explaining the purpose of Daubert's gatekeeping function is an attempt to ensure the courts screen out "junk science"). The trial court keeps out junk scientists by way of review of their training, education, and/or experience in the field, and by the methodology they employ in reaching their findings.

The area of expertise at issue in the testimony Scearce provided was facially reliable and commonly accepted. Both sides of the trial relied upon Scearce's testimony at great length. Accordingly, the PCR court erred in granting relief on the basis of Counsel's non-objection to Scearce's qualification as an expert witness.

2. Nordeen: the RATAC method and child development.

Nordeen was offered as an expert in "forensic interviewing and child development[,]" but was ultimately qualified as an expert "in the field of child development as it relates to forensic interviewing." (Appx. 315; Appx. 335, ll. 18-20)).[9] Testimony as to only personal observations and experiences, and to a forensic interview with a victim, do not require expert qualification. State v. Douglas, 380 S.C. 499, 502-03, 671 S.E.2d 606, 608 (2009).[10] That a witness engaged a victim in the role of a forensic interviewer does not foreclose the possibility that he or she may be qualified as an expert in another subject area or areas. State v. Cartwright, Op. No. 27842

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[9] The trial court questioned whether expert qualification in forensic interviewing was necessary, referring without citation to Supreme Court rulings to that effect. The State asserted that it was necessary in order to explain the RATAC method and testify that it was followed, but the trial court noted that expert qualification was not necessary for such testimony. Upon Nordeen's ultimate qualification during proffer, the State confirmed the trial court's observation that Nordeen's opinions would draw from her experience in child development, not forensic interviewing. (Appx. 323-29).

[10] The trial took place in April 2011, prior to this Court's subsequent admonition that it could "envision no circumstance where their qualification as an expert at trial would be appropriate." State v. Kromah, 401 S.C. 340, 357 n. 5, 737 S.E.2d 490, 499 n. 5 (2013).

(S.C. Sup. Ct. filed Sept. 26, 2018) (Shearhouse Adv.Sh. No. 38 at 18-20); State v. Barrett, 416 S.C. 124, 130-31, 785 S.E.2d 387, 390 (Ct. App. 2016).

Child development and psychology has been previously approved of by courts of this state as a basis for expert qualification. See, e.g. South Carolina Dept. of Social Serv. v. Smith, 423 S.C. 60, 89-94, 814 S.E.2d 148, 163-66 (2018) (relying heavily upon testimony by "an expert in the field of psychology, specifically child development and attachment," in a custody dispute); Arnal v. Arnal, 363 S.C. 268, 292, 609 S.E.2d 821, 834 (Ct. App. 2005) (relying upon consensus of experts on subject of impact on child's development of visitation); State v. Jones, 423 S.C. at 636, 817 S.E.2d at 271 (in the specific context of minor sex abuse victims).

As was the case with Scearce, neither the PCR court nor Young offer anything to show any unreliability in the area of expertise for which Nordeen was qualified. Instead, both the order granting relief and Young's most recent filing assume the prejudice "because of the nature of the evidence in this case" without offering any probative evidence to show any unreliability of the subject matter at issue. (Return to Petition for Writ of Certiorari at 14; Appx. 840). Such weakly speculative conclusions are inadequate for Young to meet his burden or for the PCR court's order to be sustained. See, e.g. Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 324 (2002) (providing applicant must show prejudice by failure to object to Allen charge in the form of evidence to suggest the minority wished to acquit, and that mere speculation was a fatal flaw).

Nor could Young have demonstrated any unreliability. The scope of Nordeen's expert testimony was remarkably narrow and rather obvious: she explained that the level of the child's development was important to determining how to conduct the forensic interview. To some extent this testimony actually does not require expert qualification, as was the case in Douglas—anybody who has had occasion to speak to children of varying ages and intelligences knows and

understands the need to mold one's own speech to suit the developmental level of the minor audience.

The same dispute set forth in the prior subsection discussing Scearce, as to the meaning and applicability of Tapp, applies here. For the sake of brevity, the State declines to restate, but reaffirms its argument to the point set forth in the prior subsection. See supra at 28-29.

The area of expertise at issue in the testimony Nordeen provided was facially reliable and commonly accepted, to the point that it may well have not required expert qualification at all. Nordeen's testimony was extremely relevant in light of Young's defense strategy of condemning every stage of the disclosure process as corruptive and leading. Accordingly, the PCR court erred in granting relief on the basis of Counsel's non-objection to Nordeen's qualification as an expert witness.

b. The PCR court does not indicate how either Scearce or Nordeen were personally unreliable, and the record only provides fleeting criticism of the witnesses based on a limited number of experiences testifying as experts in criminal matters.

1. Scearce

Even if the Court finds that the trial court must make a finding as to the person testifying, as opposed to the reliability of the subject-matter for which the expert is qualified, contrary to Tapp and Jones (2018), but consistent with Chavis. Scearce actually *did* provide evidence as to her reliability, as well as her specific findings, though the latter was not offered during the qualification process. The extent of Scearce's *substantial* 18 years of experience providing therapy to child sex abuse victims and to the children of broken homes not only provides to satisfy the trial court's measure of her qualifications, but serves the dual purpose of showing that she is in fact a reliable expert in the field and not a Dr. Nick Riviera—a serial bungler.

Notably, as Young protests in the Return to Petition for Writ of Certiorari, and as was noted in the Statement of the Facts above, Scearce referred CT to a psychiatrist, Stevens who actually diagnosed CT more severely than Scearce did and prescribed Prozac. The very same testimony Young decries actually justifies the qualification of Scearce as an expert witness—to whatever extent Scearce was wrong in her diagnosis, treatment, and consideration of CT it was that she *underestimated* the extent of CT's troubles resulting from Young's sexual abuse, as evidenced by her peer's review of CT's condition.

Young's aside that Scearce had only previously testified as an expert once in a criminal proceeding is a true statement with misleading effect. At the time of Young's trial, Scearce had testified "in over 75 custody cases and this is my second criminal case." (Appx. 238, ll. 14-15). Custody disputes are in fact real legal proceedings, and as evidenced by the underlying facts of this case may well be more fiercely contested than all but the most gravely serious criminal matters.

The greater thrust of Scearce's expert testimony, the reasons why a child sex abuse victim may delay in disclosing his or her abuse, is generally accepted and Scearce largely testified to the subject in the capacity of an "educator expert." See, e.g. Coble v. State, 330 S.W.3d 253 (Tx. Crim. App. 2010) (finding expert testimony about the prison classifications system and prison violence admissible despite relating to appellant personally, but was "educator-expert" evidence). The sort of methodological concerns that Young raises with his example of a habitual DNA bungler aren't present in the context of such testimony.

Accordingly, given her considerable experience and peer-review of her specific findings in this specific case, the record provides demonstrable evidence of Scearce's reliability, and the PCR court's finding of prejudice is without evidentiary support—had Counsel objected, Scearce

would have been qualified anyway, as Counsel accurately judged. As such the PCR court's finding of ineffectiveness is error.

2. Nordeen

There is similarly no evidence to demonstrate any unreliability on the part of Nordeen's testimony. The extent of Nordeen's *substantial* 19 years of experience providing services child sex abuse victims and to the children of broken homes, carried out alongside continuing training in the subject of child development, not only provides to satisfy the trial court's measure of her qualifications, but serves the dual purpose of showing that she is in fact a reliable expert in the field and not a Dr. Nick.

As was the case in considering the reliability of the area of expertise, neither the PCR court nor Young offer anything to show any unreliability in Nordeen's testimony. Instead, both the order granting relief and Young's most recent filing assume the prejudice "because of the nature of the evidence in this case" without offering any probative evidence to show any unreliability of the subject matter at issue. (Return to Petition for Writ of Certiorari at 14; Appx. 840). Such weakly speculative conclusions are inadequate for Young to meet his burden or for the PCR court's order to be sustained. See, e.g. Green, 351 S.C. at 195, 569 S.E.2d at 324 (providing applicant must show prejudice by failure to object to Allen charge in the form of evidence to suggest the minority wished to acquit, and that mere speculation was a fatal flaw).

Nor could Young have demonstrated any unreliability. The scope of Nordeen's expert testimony was remarkably narrow and rather obvious: she explained that the level of the child's development was important to determining how to conduct the forensic interview. To some extent this testimony actually does not require expert qualification, as was the case in Douglas—anybody who has had occasion to speak to children of varying ages and intelligences knows and

understands the need to mold one's own speech to suit the developmental level of the minor audience.

Accordingly, given her considerable experience, the record provides demonstrable evidence of Nordeen's reliability, and the PCR court's finding of prejudice is without evidentiary support—had Counsel objected, Scearce would have been qualified anyway, as Counsel accurately judged. As such the PCR court's finding of ineffectiveness is error.

c. Trial counsel articulated a valid trial strategy for not further challenging the qualification of the witnesses as experts.

The long and winding analysis above can well enough be cut short by a much simpler and more firmly established legal principle: "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)); see also Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770-71 (1998) (same).

Counsel articulated on the record that while he could have objected to demand more reliability evidence, he did not wish "to do anything to make that jury think that she's some great kind of witness, you know, that's got all this expertise that if she thinks these symptoms are consistent, then yeah, the child did it." (Appx. 790-91). Given Counsel's firm belief that the witnesses would be qualified as expert, Counsel had to weigh whether preserving the reliability of the experts for appeal was worth inviting the State to give yet more testimony to build up the jury's trust in the experts. Counsel opted to bite his tongue and get on with it. That is valid strategic choice, articulated plainly by Counsel. Accordingly, the PCR court was foreclosed from a finding of ineffectiveness and erred in its grant of relief.

II. THE ISSUE PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI IS PRESERVED FOR APPELLATE REVIEW

The issue before the Court of the validity of the PCR court's grant of relief on the basis of Counsel's non-objection to the qualification of the expert witnesses is preserved for appeal. "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). The Supreme Court has observed "it may be good practice for us to reach the merits of an issue when error preservation is doubtful." State v. Williams, 417 S.C. 209, 229, 789 S.E.2d 582, 593 (Ct. App. 2016) (quoting Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012)). "[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." Id.

Young correctly observes the State did not file a motion to alter or amend pursuant to Rule 59(e), SCRCP.[11] That is of no consequence. The State raised in shorter form its arguments in opposition to relief during arguments at the evidentiary hearing, which were thereafter ruled upon by the PCR court implicitly in its decision to grant relief. Young's interpretation of preservation would convert the motion to alter or amend into a first-draft appellate brief, constrained to an immovable, non-negotiable deadline of 10 days. Such has never been the purpose of the motion, and such an interpretation would only encourage parties to complex PCR matters to propose substandard orders with a mind to gaining a preservation advantage. Given the varying formality of PCR hearings, and given the Supreme Court's *extremely justified* frustration with substandard PCR orders, Young's position is untenable, and contrary to the

[11] The undersigned was uninvolved in the case at the time of the grant of relief and took no part in the process.

purposes of issue preservation, jurisprudential policy, and justice. See Reese v. State, S.C.Sup.Ct. Order dated October 18, 2018 (Shearouse Adv.Sh. No. 42 at 9) (expressing the Supreme Court's concern about sufficient orders).

The Court has already granted certiorari and in doing so to some limited extent indicated a degree of preservation. The Court should find the issues discussed above preserved in their entirety, and reach the merits of this case.

CONCLUSION

For the foregoing reasons, this Court should vacate the order granting post-conviction relief, reverse the decision of the PCR court, and enter an order denying post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: _____
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31 Oct, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Horry County
Court of Common Pleas

The Honorable Paul M. Burch, Post-Conviction Relief Judge

RECEIVED
OCT 31 2018
SC Court of Appeals

Appellate Case No. 2017-000240

STATE OF SOUTH CAROLINA,

Petitioner,

v.

TIMOTHY YOUNG,

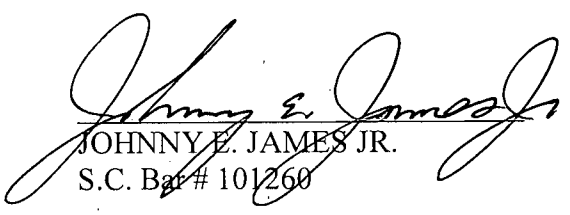
Respondent.

CERTIFICATE OF SERVICE

I, Johnny E. James Jr., certify that I have today served the within Petitioner **Brief of Petitioner** upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

David B. Tarr, Esquire
1313 Elmwood Drive, Suite B
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served. This 31st day of October, 2018.



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ATTORNEY FOR PETITIONER

ALAN WILSON
ATTORNEY GENERAL

October 31, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: **Timothy Young v. State of South Carolina**
Appellate Case No. 2017-000240
Lower Court Case 2014-CP-26-7509

Dear Ms. Kitchings:

Attached are the original and fifteen (15) copies of the **Brief of Petitioner** in the above referenced case for filing in your office. Also, per Rule 243(j) included are thirteen (13) additional copies of the Appendix.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
SC Bar #101260

JEJ/mm

cc: David B. Tarr, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)

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OCT 31 2018
SC Court of Appeals