The Supreme Court of South Carolina

RE: Administrative Suspension for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)

O R D E R

The South Carolina Bar has advised that William Edwin Griffin has failed to pay his license fees for 2016. Pursuant to Rule 419(d)(1), SCACR, this lawyer is hereby suspended from the practice of law. He shall surrender his certificate of admission to practice law to the Clerk of this Court by August 8, 2016.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if he has not verified his information in the Attorney Information System, he shall do so prior to seeking reinstatement.

This lawyer is warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject him to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

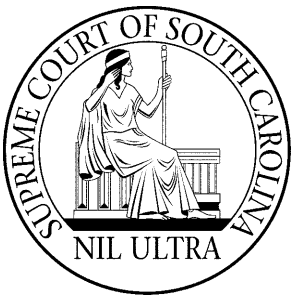
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

July 15, 2016



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 20, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nelson H. Castro, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-000021

ON WRIT OF CERTIORARI

Appeal From Horry County

The Honorable Larry B. Hyman, Jr., Circuit Court Judge
The Honorable Kristi Lea Harrington, Post Conviction Judge

Opinion No. 27648
Submitted June 17, 2016 – Filed July 20, 2016

REVERSED AND REMANDED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney General Caitlin Bazan Hastings, both of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the dismissal of his application for post-conviction relief (PCR). We grant the petition for a writ of certiorari, dispense with further briefing, reverse the order of the PCR judge, and remand this matter for resentencing.

FACTUAL/PROCEDURAL BACKGROUND

After a trial, petitioner was convicted of trafficking cocaine between twenty-eight and one hundred grams and was sentenced to fifteen years' imprisonment. Petitioner filed a timely motion for resentencing, which was denied after a hearing. Petitioner's conviction and sentence were affirmed on direct appeal. *State v. Castro*, Op. No. 2012-UP-378 (S.C. Ct. App. filed June 20, 2012).

Petitioner filed an application for PCR alleging trial counsel was ineffective for failing to object when the trial judge improperly considered petitioner's decision to exercise his right to a jury trial as a factor in sentencing petitioner. The PCR judge denied relief, finding petitioner failed to meet his burden of proving the allegation.

ISSUE

Did the PCR judge err in finding petitioner failed to prove trial counsel was ineffective in failing to object when the trial judge considered petitioner's decision to exercise his constitutional right to a jury trial as a factor in sentencing petitioner?

LAW/ANALYSIS

In this case, petitioner was charged with four drug related offenses. One month before his trial, the State offered to dismiss several of petitioner's charges and recommend a minimum sentence in exchange for petitioner's decision to plead guilty to trafficking between twenty-eight and one hundred grams of cocaine. Petitioner declined the offer, and a trial date was set for his trafficking charge. Immediately preceding the trial, the trial judge explained to petitioner that the State's plea offer was still on the table, stating the following:

> I have pre-tried this with your attorney, and I will tell you I am inclined to sentence on a plea [to] seven years. *I would not be so inclined in the event of trial.* Also, you would [sic] regardless of how this trial comes out, you would still be looking at the other three charges as well for which you could be tried and would be tried.

. . . .

Now, your attorney tells me that you do not wish to accept this offer by the State, that you want to go to trial on this charge, and ultimately for all the charges. Is that what you want to do, [petitioner]? Are you sure that's what you want to do?

(emphasis added).

Petitioner responded that he wanted to proceed to trial. At sentencing, the following colloquy occurred:

[The State]: . . . . As Your Honor is well aware, [petitioner] was offered to plead to a minimum sentence last month. He was arraigned. He chose to reject the plea offer.

[Trial Judge]: In addition, he was given the concession of dismissal of several other pending charges that have not been tried?

[The State]: That is correct, Your Honor, if he pled guilty . . . .

The State does not seek or request any mercy on this Defendant, Your Honor.

[Trial Judge]: [Petitioner], anything you want to tell me?

[Petitioner]: (Nods in the negative.)

[Trial Judge]: [Petitioner], this is classified by the Legislature in this State as not only a violent crime, but a most serious offense. It has a no probation, no suspension of

> sentence clause in the sentence.
>
> *You are different from these other defendants in that they have cooperated and they have acknowledged their responsibility for the crimes that they have committed*.
>
> [Petitioner], this is, as I said, an extremely serious offense. *The State has had to take you to trial on a case where there was overwhelming evidence of your guilt*. The jury has found you guilty, and I sentence you to incarceration in the State Department of Corrections for a period of fifteen years.

(emphasis added).[1]

Trial counsel did not object at any point during this colloquy. Trial counsel filed a timely motion for resentencing; however, at no point did trial counsel argue petitioner's sentence should be reconsidered due to the trial judge's improper consideration of petitioner's decision to exercise his right to a jury trial.

The trial judge denied the motion for resentencing, giving the following reasons for his imposition of a long sentence: (1) there was overwhelming evidence presented at petitioner's trial, including a video recording of petitioner selling approximately eighty-four grams of cocaine to a confidential informant; (2) the State might drop petitioner's pending charges if petitioner were given an "appropriate sentence;" and (3) in his opinion, fifteen years of incarceration was a mid-range sentence for trafficking. Additionally, the trial judge stated, "I certainly don't penalize anybody from going to trial . . . But acceptance of responsibility is, I believe, a valid . . .

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[1] Two co-defendants were arrested for the same transaction as petitioner. One of these co-defendants testified at petitioner's trial, revealing that, although he was originally indicted for trafficking cocaine, he pleaded guilty to a lesser offense and received a sentence of three years' imprisonment.

consideration for [t]he Court."[2]

On PCR, petitioner alleged trial counsel was ineffective in failing to object to the trial judge's consideration of petitioner's decision to exercise his right to a jury trial as a factor in sentencing petitioner.

The PCR judge found trial counsel's testimony, "[I]t just never struck me that [petitioner] was going to be punished because we went to trial, and so I didn't raise it in that context" indicated trial counsel had a "valid strategic reason" for failing to object to petitioner's sentence on that ground. Further, the PCR judge found petitioner "failed to demonstrate he would have received a different sentence if such an objection had been made" because the trial judge articulated a "number of factors" for petitioner's fifteen-year sentence, including petitioner's immigration status, petitioner's pending charges, and the overwhelming evidence presented against petitioner at trial. Accordingly, the PCR judge found petitioner did not meet his burden of proving the deficiency or prejudice required for a finding of ineffective assistance of counsel. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (to prove ineffective assistance of counsel, the applicant must show counsel's performance fell below an objective standard of reasonableness; and but for counsel's error, there is a reasonable probability the result of the trial would have been different).

Petitioner argues the PCR judge erred because the transcript of the pre-trial conference and sentencing colloquy reveal that the trial judge abused his discretion when he improperly considered petitioner's decision to proceed to trial as a factor in sentencing petitioner to fifteen years' imprisonment. Petitioner further argues, if counsel had objected to the sentence on that ground, there is a reasonable probability the trial judge would have sustained the objection and modified the sentence, or, at the very least, the objection would have been preserved for appellate review.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. Const. amend. VI. When a trial judge considers the fact that the defendant exercised his or her constitutional

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[2] On direct appeal, petitioner argued the trial judge abused his discretion by improperly considering petitioner's decision to exercise his right to a jury trial when sentencing petitioner. The Court of Appeals held this issue was not preserved for review.

right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion. *See Davis v. State*, 336 S.C. 329, 520 S.E.2d 801 (1999) (holding counsel was ineffective in failing to object when the trial judge indicated the reason he sentenced Davis more harshly than two similarly-situated offenders who, unlike Davis, had pled guilty was because those offenders admitted their guilt); *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995) (holding the trial judge abused his discretion when the judge considered the fact that Hazel did not plead guilty in declining to grant Hazel's request for sentencing under the Youthful Offender Act).

We hold the statements made by the trial judge clearly reveal he improperly considered petitioner's decision to exercise his right to a jury trial in sentencing petitioner. The PCR judge erred in concluding that, because the trial judge "articulated that [petitioner's] sentence was based on a number of factors," petitioner failed to prove he was prejudiced by counsel's deficient performance. Rather, a trial judge abuses his or her discretion when he or she *considers* the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant. Thus, although evidence from the record of other, valid reasons for a sentence might aid an appellate court in determining whether the trial court improperly considered a defendant's decision to proceed to trial during sentencing, those other sentencing factors do not negate the abuse of discretion that occurs when one of the sentencing factors considered by the trial judge was the defendant's decision to proceed to trial. *See Davis*, *supra* (holding the trial judge abused his discretion by *considering* the fact that the defendant exercised his right to a jury trial in sentencing the defendant); *Hazel*, *supra* (same); *State v. Follin*, 352 S.C. 235, 257-58, 573 S.E.2d 812, 824 (Ct. App. 2002) ("We caution the Bench that a trial judge abuses his or her discretion in sentencing when the judge *considers* the fact that the defendant exercised the right to a jury trial.") (emphasis added); *see also State v. Brouwer*, 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001) (remanding for a new sentencing hearing pursuant to *Hazel*, *supra*, stating, "Although the [trial judge] herein also stated it had never, and never would, 'punish someone for exercising their right to a jury trial,' we believe the mere disavowal of wrongful intent cannot remove the taint inherent in the [trial judge's] commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence."). Accordingly, regardless of the fact that the trial judge considered the overwhelming evidence presented against petitioner, as well as his his pending charges and immigration status, in sentencing petitioner, and, despite the fact that the trial judge stated he was not "punishing" petitioner for choosing to exercise his right to a jury trial, the trial judge unequivocally *considered* petitioner's decision to reject a plea offer and proceed to trial as a factor in sentencing petitioner. This was improper.

Further, we find there is no evidence to support the PCR judge's finding that trial counsel articulated a "valid strategic reason" for failing to object to the trial judge's improper consideration of petitioner's decision to proceed to trial in sentencing petitioner. *See Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (stating that, in reviewing a PCR judge's decision, this Court is concerned only with whether there is any evidence of probative value to support that decision). Instead, counsel's testimony from the PCR hearing reveals no strategic discretion was employed by counsel on this matter at all. *See Foye v. State*, 335 S.C. 586, 518 S.E.2d 265 (1999) (counsel's performance did not constitute valid strategy where counsel did not even consider the question and thus failed to use discretion in employing an appropriate strategy).

CONCLUSION

Because trial counsel was deficient in failing to object to the trial judge's improper consideration of petitioner's decision to exercise his right to jury trial in sentencing petitioner, and, had the objection been preserved for appeal, an appellate court would have held the trial judge abused his discretion, we hold the PCR judge erred in denying petitioner's application for PCR. Accordingly, we reverse the PCR judge's denial of relief and remand for resentencing.

REVERSED AND REMANDED.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN, and FEW, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ronald Wade Moak, Respondent.

Appellate Case No. 2016-001018

Opinion No. 27649
Submitted June 21, 2016 – Filed July 20, 2016

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Ronald Wade Moak, of Camden, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand with conditions. We accept the Agreement and issue a public reprimand with conditions as stated hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts and Law

Matter I

Respondent agreed to represent Client A on three matters for a flat fee of $2,500: a criminal domestic violence charge, a Department of Social Services paternity case,

and a possible divorce. Ultimately, respondent collected $2,785 in fees, but also represented Client A on an additional criminal domestic violence charge as well as an animal control charge.

A few days after beginning the representation, respondent filed a divorce complaint and a motion for an emergency hearing on Client A's behalf. Although respondent provided information for the domestic action, respondent did not provide him with a copy of the complaint. The temporary hearing was continued because Client A's wife was incarcerated in another county. Respondent did not seek to have the hearing rescheduled and did not adequately explain the status of the case to Client A. When Client A later waivered on whether he wanted to pursue the divorce, respondent considered the matter abandoned but did not clearly communicate that to Client A. At times, respondent's communications with Client A and his daughter caused Client A to believe the divorce action was proceeding.

Respondent admits that, at times, he failed to respond to Client A's reasonable requests for information about the action. He did not notify Client A when he received a 365-day benchmark notice from the family court or when the case was dismissed.

Client A obtained a divorce with assistance from another lawyer. Thereafter, Client A filed a complaint with ODC under the mistaken belief respondent never filed a divorce action on his behalf.

Respondent admits that his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); and Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information).

Matter II

Client B sought respondent's assistance with a child visitation issue. Respondent recommended Client B reach a visitation agreement with the child's father which respondent could then submit to the family court for adoption as an official court order. Respondent agreed to represent Client B for $500, which included a court appearance and filing fees. The fee agreement was not reduced to writing. Client

B understood respondent would file the visitation agreement upon payment of $350 with the balance due later.

Client B paid respondent $350. Respondent did not place the unearned fees into a trust account. He states he does not maintain a trust account because most funds he receives are earned fees.

Client B and the child's father presented respondent with their handwritten agreement in late October or early November 2014. Respondent advised he would immediately file the agreement so a hearing could be scheduled before the Christmas holidays.

However, respondent did not file anything on Client B's behalf and did not communicate with her further. Respondent did not respond to Client B's telephone calls or texts. Respondent admits he failed to communicate with Client B; he asserts his failure to communicate was due to personal problems related to his mother's death. Respondent further states he did not know how to reach Client B after he lost contact with Client B's aunt who had referred Client B to him.

In May 2015, Client B filed a complaint against respondent. In January 2016, respondent refunded the $350 paid by Client B.

Respondent no longer accepts domestic cases.

Respondent admits that his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall deposit into trust account unearned legal fees and expenses paid in advance, to be withdrawn only as fees are earned or expenses incurred); and Rule 1.16(d) (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect client's interests, such as refunding any advance payment of fees or expenses that have not been earned or incurred).

Matter III

Respondent agreed to represent Client C in a state post-conviction relief (PCR) action. Client C was seeking relief from a conviction related to a pending federal charge and believed obtaining relief from his state conviction would help him resolve his federal charge. Client C pled guilty on the federal charge and was sent to a federal prison in another state before his PCR action reached the docket.

When Client C's case first appeared on the docket, respondent sought and received a continuance to explore having his client transferred for the hearing. By the time the case was docketed a second time respondent realized an order of transportation was not possible. Although respondent asserts he unsuccessfully attempted to reach Client C's family, he never wrote Client C or attempted to call him to explain what was happening with his case.

On June 15, 2015, Client C emailed respondent from prison requesting the status of his PCR action and he complained that respondent had not responded to communications from Client C's wife. Respondent did not respond to the email.

In July 2015, respondent represented Client C at the PCR hearing without advising Client C that the hearing had been scheduled. Respondent did not advise Client C that the judge orally denied the PCR at the end of the hearing. Respondent maintains that, after he received the written order several months after the hearing, he sent a copy of the order to Client C. Client C reports he has not heard from respondent and still does not know the status of his PCR.

The PCR order indicates respondent presented no evidence in support of Client C's primary complaint against his guilty plea counsel.

Respondent admits that his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); and Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information).

Respondent also admits his conduct in each of these matters constitutes grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: (it shall be ground for discipline for lawyer to

violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We find respondent's misconduct warrants a public reprimand.[1] Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Further, within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission). Within one (1) year of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School. Respondent shall provide proof of his completion of each program to the Commission no later than ten (10) days after the conclusion of each program.

PUBLIC REPRIMAND.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN and FEW, JJ., concur.

[1] Respondent's disciplinary history includes a letter of caution issued in 2015. Like the current matter, the letter of caution also cites Rule 1.3 and Rule 1.4 of the Rules of Professional Conduct. *See* Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in subsequent disciplinary proceeding against lawyer unless the caution or warning contained in letter of caution is relevant to the misconduct alleged in new proceedings).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Paul Winford Owen, Jr., Respondent.

Appellate Case No. 2016-001060

Opinion No. 27650
Submitted June 23, 2016 – Filed July 20, 2016

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John P. Freeman, Esquire, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand with conditions. We accept the Agreement and issue a public reprimand with conditions as set forth hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

By order dated October 27, 2015, respondent was sanctioned by the Honorable David R. Duncan, a judge of the United States Bankruptcy Court for the District of

South Carolina, and assessed a fine of $5,000.00. The sanction arose out of respondent's conduct in a bankruptcy court hearing held on August 25, 2015. At the time of the hearing, the parties were in binding arbitration and respondent's arguments were still under consideration by the arbitrator. Nevertheless, during the bankruptcy hearing, respondent made arguments based on the United States Supreme Court decision in *Jesinoski v. Countrywide Home Loans*, 574 U.S. ___, 135 S.Ct. 790, 190 L.Ed.2d 650 (2015). Respondent admits the arbitration proceeding was the sole forum before which to raise his argument under *Jesinoski* and that he should not have presented the *Jesinoski* argument to the bankruptcy court. As a result of respondent's conduct, the bankruptcy court and opposing party were required to endure a proceeding which was groundless.

Further, respondent admits that, at the hearing, he told Judge Duncan he was proceeding at the direction of the Bankruptcy Trustee when, in actuality, he was responsible for the argument. Respondent later wrote a letter to Judge Duncan in which he called attention to his misstatement and apologized to all concerned.

Respondent acknowledges the Court deserves no less than complete, candid disclosures which are truthful at the time they are made. He agrees his misstatement regarding the Bankruptcy Trustee was not excused by his corrective disclosure in his letter to the bankruptcy court.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 3.1 (lawyer shall not bring or defend proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so that is not frivolous); Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal); Rule 3.4 (lawyer shall not knowingly disobey obligation under rules of tribunal); 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand.[1] Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (Commission). Within six (6) months of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School and shall provide proof of completion of the program to the Commission no later than ten (10) days after the program has concluded.

PUBLIC REPRIMAND.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN and FEW, JJ., concur.

[1] Respondent's disciplinary history includes an admonition issued in 2007. *See* Rule 7(b)(4), RLDE (admonition may be used in subsequent proceeding as evidence of prior misconduct solely upon issue of sanction). Further, in 2005, he entered into a deferred disciplinary agreement which cites some of the Rules of Professional Conduct respondent admits violating in the current matter. *See In the Matter of Toney*, 396 S.C. 303, 721 S.E.2d 437 (2012) (Court can consider prior deferred disciplinary agreement involving similar misconduct in concluding lawyer's disciplinary history demonstrates pattern of misconduct).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter Thaddaeus T. Viers, Respondent.

Appellate Case No. 2016-001034

Opinion No. 27651
Submitted June 22, 2016 – Filed July 20, 2016

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Dylan Ward Goff, of James E. Smith Jr., PA, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed three (3) years or disbarment. Respondent requests the Court impose the suspension or disbarment retroactively to April 11, 2012, the date of his interim suspension. *In the Matter of Viers*, 397 S.C. 517, 727 S.E.2d 27 (2012). ODC joins the request for retroactive imposition of the sanction. We accept the Agreement and disbar respondent from the practice of law in this state, retroactively to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

On January 5, 2012, respondent was arrested and charged with Harassment 1st degree. In March 2012, respondent was indicted on the additional charge of Stalking. By letter dated April 3, 2012, respondent self-reported these criminal charges to ODC. As noted above, on April 11, 2012, the Court placed respondent on interim suspension. *Id.*

In January 2013, respondent was indicted on the additional charges of Petit Larceny and Burglary 1st.

All of the criminal charges involved respondent's conduct and interactions with his ex-girlfriend.

On January 8, 2014, respondent pled guilty to Harassment 2nd degree. He was sentenced to sixty (60) days in jail (to be served on weekends), one (1) year of probation, required mental health counseling, fees/fines in the amount of $133.90, and ordered to have no contact, either directly or indirectly, with the victim. The remaining criminal charges of Stalking, Burglary 1st, and Petit Larceny were marked nolle prosequi on January 24, 2014. Respondent has paid all fees/fines related to the guilty plea.

Matter II

Respondent was indicted on fourteen (14) counts of criminal conduct relating to his representation of Marlon Weaver. On April 15, 2015, respondent pled guilty to engaging in a monetary transaction in property derived from unlawful activity which is a violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2. Specifically, respondent admitted he engaged in a monetary transaction which had some effect on interstate or foreign commerce, the monetary transaction involved criminally derived property with a value of greater than $10,000, respondent knew the transaction involved funds that were the proceeds of some criminal activity, and the funds were in fact proceeds of mail fraud.

On October 20, 2015, respondent was sentenced for the criminal conduct. He was committed to the custody of the United States Bureau of Prisons to be imprisoned

for a total term of thirty-seven (37) months. Upon release from imprisonment, respondent was ordered to be on supervised release for a term of three (3) years. In addition, respondent is held jointly and severally liable for restitution in the amount of $875,000 to be paid to SafeCo Insurance Company. Respondent is required to make monthly payments of not less than $1,000 beginning thirty (30) days after his release from imprisonment.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as lawyer in other respects); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent further admits he has violated the provisions of Rule 417, SCACR.

Respondent admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or bring courts or legal profession into disrepute or conduct demonstrating unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactively to April 11, 2012, the date of his interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN and FEW, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Harry Pavilack, Respondent.

Appellate Case No. 2016-001400

ORDER

Following the filing of formal charges against him, respondent submitted a motion to resign in lieu of discipline pursuant to Rule 35, Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, South Carolina Appellate Court Rules. We grant the motion to resign in lieu of discipline. In accordance with the provisions of Rule 35, RLDE, respondent's resignation shall be permanent.

Within fifteen (15) days of the date of this order, respondent shall surrender his Certificate of Admission to Practice Law to the Clerk of Court and shall file an affidavit with the Clerk of Court showing he has complied with Rule 35, RLDE.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

July 15, 2016

The Supreme Court of South Carolina

In the Matter of Harvey Breece Breland, Petitioner.

Appellate Case No. 2015-001819

ORDER

On September 4, 2013, the Court accepted an Agreement for Discipline by Consent entered into between petitioner and the Office of Disciplinary Counsel, and suspended petitioner from the practice of law for one year. *In re Breland*, 405 S.C. 573, 749 S.E.2d 299 (2013). In August 2015, petitioner filed a petition for reinstatement, which was referred to the Committee on Character and Fitness. The Committee, following a hearing, issued a Report and Recommendation in which it recommends petitioner be reinstated to the practice of law. The petition for reinstatement is granted.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

July 15, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Roy Lee Jones, Appellant.

Appellate Case No. 2014-001639

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. Op. 5428
Submitted June 1, 2016 – Filed July 20, 2016

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, and William Walter Wilkins, III, of Greenville, all for Respondent.

WILLIAMS, J.: Roy Lee Jones appeals his convictions for one count of first-degree criminal sexual conduct (CSC) with a minor, one count of second-degree CSC with a minor, and two counts of lewd act upon a child. Jones argues the circuit court abused its discretion by allowing the State's witness to testify as an

expert in child sex abuse dynamics because the subject matter of her testimony was not beyond the ordinary knowledge of the jury, the State failed to prove the reliability of the substance of her testimony, she improperly bolstered the victims' credibility, and her testimony was highly prejudicial. We affirm.

FACTS/PROCEDURAL HISTORY

During the period of sexual abuse, from 2004 to 2009, Jones lived with his longtime girlfriend (Mother) and her two daughters (Older Sister and Younger Sister) in different homes in Greenville County, South Carolina. Older Sister was fifteen years old and Younger Sister was ten years old when Jones first began molesting them.

On June 24, 2014, a Greenville County grand jury indicted Jones on two counts of first-degree CSC with a minor, five counts of second-degree CSC with a minor, and two counts of lewd act upon a child. The case was called for a jury trial on July 16, 2014.

Prior to trial, Jones informed the circuit court he intended to object to the admission of testimony from the State's proposed expert, Shauna Galloway-Williams, on the ground that her testimony would improperly bolster the victims' credibility. The court indicated it would hear Jones's objection prior to the proposed expert testifying at trial. Subsequently, during jury qualification, the court asked if any of the jurors had been a victim, or had a close relative who had been a victim, of a sex crime. No jurors responded to the question. The court further asked if any jurors had been personally accused—or had a close relative who had been accused—of a sex crime and, again, no jurors responded.

At trial, Older Sister and Younger Sister (collectively "the Victims") described various incidents of abuse that started with Jones making inappropriate comments and fondling them, but eventually progressed to oral and vaginal intercourse. Older Sister testified that, when she tried to stop Jones, he would physically force her to comply, threaten to harm her and her family using witchcraft, and frequently offer her gifts and money to keep her from reporting the abuse. Older Sister stated Jones sexually abused her over one hundred times. In 2012, the Victims' aunt confronted Older Sister after Younger Sister disclosed that Jones had been molesting her. Following this conversation, Older Sister went to the police and reported that Jones had sexually abused her as well.

Younger Sister testified that Jones started sexually abusing her when she was going into the sixth grade. Jones's molestation began with fondling and progressed to vaginal intercourse, and Younger Sister ultimately contracted a sexually transmitted disease from him. After Jones beat Younger Sister for refusing to have sex with him, she told Mother that Jones had been molesting her. Mother, however, allowed Jones to continue living in the home and the molestation continued. Younger Sister also testified that Jones would give her money and then take it back after sexually abusing her. To prevent Younger Sister from reporting the abuse, Jones physically abused her and threatened to harm her family with witchcraft.

Subsequently, Mother testified regarding her relationship with Jones as well as the circumstances under which the Victims reported the molestation to her. According to Mother, Jones denied the reports when she confronted him, and she wanted to believe Jones because she loved him. Mother was also concerned the Victims would be taken away from her if they went to the police. In September 2008, though, Mother took Younger Sister to a doctor's appointment and learned Younger Sister had contracted a sexually transmitted disease. The doctor asked Younger Sister if she was sexually active, and she just looked at Mother "asking if she should say." Later, when Mother confronted Jones at home, the two got into an argument and she left the house. Mother indicated she finally kicked Jones out of the home in 2010.

The circuit court then held an in-camera hearing during which the State proffered Galloway-Williams as an expert in child sex abuse dynamics to testify regarding delayed disclosures, the disclosure process, and behavioral characteristics of nonoffending caregivers. Galloway-Williams, the executive director of the Julie Valentine Center, testified as to her extensive training and qualifications in the area of child sexual abuse. On voir dire, Galloway-Williams was unable to recall specific citations to studies or articles addressing the reliability of delayed disclosure issues, but she indicated she could provide them and stated all of her training included the studies and articles as the basis of fact. Moreover, Galloway-Williams explained the textbook she uses to teach a class at the University of South Carolina Upstate referenced articles about delayed disclosures and nonoffending caregivers. In addition, Galloway-Williams confirmed that these issues are researched and published in articles in professional journals, subjected to peer review, and uniformly accepted and used by experts and professionals in counseling and treating child sex abuse victims.

Jones objected to Galloway-Williams testifying as an expert in child sex abuse dynamics, arguing the substance of her testimony was not beyond the ordinary knowledge of the jury or reliable. Jones further contended her testimony would improperly bolster the Victims' testimony and was highly prejudicial. The circuit court overruled Jones's objection, finding the proffered expert testimony is admissible in child sex abuse cases of this nature, and the subject matter of Galloway-Williams' testimony is outside the common knowledge of the public as well as the jury pool in particular.

Thereafter, the circuit court qualified Galloway-Williams as an expert in child sex abuse dynamics over Jones's objection and she testified before the jury. During her direct testimony, Galloway-Williams testified in general terms regarding delayed disclosures, the disclosure process, and the responses of nonoffending caregivers. Nevertheless, Galloway-Williams did not specifically reference the Victims or Mother. On cross-examination, Galloway-Williams stated she never met with any of the witnesses in this case, including law enforcement, and her only knowledge of the case came from discussions with the solicitor's office one month prior to trial.

After the circuit court denied Jones's motion for a directed verdict, he took the stand in his own defense and denied molesting the Victims. Jones testified that he was a large financial provider for the family and would give them all of his money. Jones claimed he eventually "got tired of" paying all the bills, with the rest of the family failing to contribute, and decided to move out of the home. After Jones moved out, he stated Mother and the Victims still visited him often. According to Jones, the Victims brought these allegations as retaliation for him threatening to press charges against Older Sister for stealing money from him. On cross-examination, Jones admitted to a prior conviction for second-degree CSC stemming from an incident during his previous marriage.

At the conclusion of trial, the jury found Jones guilty of one count of first-degree CSC with a minor, one count of second-degree CSC with a minor, and two counts of lewd act upon a child. The jury, however, acquitted Jones of the five remaining indictments. Following the verdict, the circuit court sentenced Jones to life without parole for first- and second-degree CSC with a minor and fifteen years'

imprisonment, to run concurrently, for each count of lewd act upon a child.[1] This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Jenkins*, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). "Generally, the admission of expert testimony is a matter within the sound discretion of the [circuit] court." *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991)). This court will not disturb the circuit court's admissibility determinations absent a prejudicial abuse of discretion. *State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion whe[n] the ruling is manifestly arbitrary, unreasonable, or unfair." *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003). To show prejudice, the appellant must demonstrate "a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

LAW/ANALYSIS

Jones contends the circuit court abused its discretion by allowing Galloway-Williams to testify as an expert in child sex abuse dynamics because the subject matter of her testimony was not beyond the ordinary knowledge of the jury, the State failed to prove the reliability of the substance of her testimony, she improperly bolstered the Victims' credibility, and her testimony was highly prejudicial. We disagree.

"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." Rule 702, SCRE. The circuit court must

[1] Prior to trial, the State served Jones with notice of its intent to seek life without parole due to his 1985 conviction for second-degree CSC.

consider the following three-prong test before allowing the jury to hear expert testimony:

> First, the [circuit] court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the [circuit] court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the [circuit] court must evaluate the substance of the testimony and determine whether it is reliable.

Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

"Expert testimony may be used to help the jury determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." *Id.* at 445, 699 S.E.2d at 175.

> Expert testimony differs from lay testimony in that an expert is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training.

Id. at 445–46, 699 S.E.2d at 175.

"[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred whe[n] the probative value of such evidence outweighs its prejudicial effect." *State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) (alteration in original) (quoting *State v. Schumpert*, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993)).

> Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the abused child's often strange demeanor.

Id. at 474–75, 523 S.E.2d at 794.

In *State v. White*, our supreme court confirmed the admissibility of expert testimony and behavioral evidence in sexual abuse cases, holding such testimony was relevant regardless of the victim's age. 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004). According to the court, expert testimony "may be more crucial" when the victims are children because their "inexperience and impressionability often render them unable to effectively articulate" incidents of criminal sexual abuse. *Id.* at 414–15, 605 S.E.2d at 544.

More recently, in *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), *cert. denied*, (Aug. 6, 2015), this court addressed whether it was proper for an expert to testify regarding child sex abuse dynamics and stated the following:

> [T]he circuit court . . . found that, based on the jurors' qualifications and their responses to questions during voir dire, the empaneled jury "would not have any prior knowledge from family members or otherwise as to sex abuse directly." At trial, Appellant cross-examined the minor victims extensively regarding their delays in disclosure as well as the varying accounts of the abuse they gave authorities. Indeed, the minor victims delayed disclosing the abuse for almost three years, were unable to recall specific days or dates on which they were abused, gave varying accounts of certain instances of abuse, and divulged more facts each time they spoke about the abuse. Such behavior undoubtedly became a fact at issue in this case, raising questions of credibility or accuracy that might not be explained by experiences

> common to jurors. Accordingly, we find Galloway-Williams' specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse.
>
> Numerous jurisdictions considering this issue have similarly concluded it is more appropriate for an expert to explain the behavioral traits of child sex abuse victims to a jury. We believe the unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror with no prior experience—either directly or indirectly—with sexual abuse. The general behavioral characteristics of child sex abuse victims are, therefore, more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony.

411 S.C. at 341–42, 768 S.E.2d at 251.

In arguing Galloway-Williams' expert testimony regarding delayed disclosures and child sex abuse dynamics was not beyond the ordinary knowledge of the jury, Jones essentially mounts a direct challenge to this court's decision in *Brown*. We are not persuaded by his argument. Galloway-Williams' testimony on these topics was substantially similar to her testimony in *Brown*, and the record indicates the jury in this case likewise had no experience, either directly or indirectly, with sexual abuse. Therefore, we decline to depart from our holding in *Brown* on this settled question of law. *See id.* at 342, 768 S.E.2d at 251 (stating "the unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror with no prior experience—either directly or indirectly—with sexual abuse" and, therefore, holding it is "more appropriate for an expert qualified in the field to explain to the jury").

We further find Galloway-Williams' testimony regarding the ways in which nonoffending caregivers respond to sexual abuse was outside the realm of lay knowledge such that it was more appropriate for an expert to explain to the jury.

The State argues, and we agree, that "caregivers' actions seem counter-intuitive to people who have never experienced the horror of sexual abuse." In our view, without having any direct or indirect experience with the circumstances surrounding sexual abuse, a lay juror would not understand the reasons why a nonoffending caregiver may not act immediately to protect a child from sexual abuse occurring in the home. *See generally Watson*, 389 S.C. at 446, 699 S.E.2d at 175 ("Expert testimony may be used to help the jury determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge."); *Weaverling*, 337 S.C. at 474–75, 523 S.E.2d at 794 (stating "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible"); *see also State v. Tierney*, 839 A.2d 38, 46–47 (N.H. 2003) (holding a police officer's testimony was "erroneously admitted as lay testimony" based upon the conclusion that he could not testify regarding the level of knowledge of a nonoffending adult in a child sexual assault case because such testimony "required specialized training, experience[,] and skill not within the ken of the ordinary person"). Accordingly, we hold the circuit court properly admitted Galloway-Williams' expert testimony because nonoffending caregivers' behavior in sexual abuse cases—like delayed disclosures and child sex abuse dynamics—is a subject beyond the ordinary knowledge of the jury.

Turning to the final prong of the *Watson* test,[2] we disagree with Jones's argument that the State failed to prove the reliability of Galloway-Williams' testimony and, more specifically, whether it was subjected to peer review. "All expert testimony must satisfy the Rule 702 criteria, and that includes the [circuit] court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. In *State v. Chavis*, our supreme court concluded the testimony of child abuse assessment experts is nonscientific. 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015). As the *Chavis* court noted, our courts do not follow a formulaic approach in determining the foundational requirements of qualifications and reliability of

[2] Because Jones does not contest Galloway-Williams' qualifications as an expert, we decline to address the second prong of the *Watson* test. *See Brown*, 411 S.C. at 340 n.1, 768 S.E.2d at 250 n.1 (declining to address the second prong of *Watson* because the appellant failed to challenge the expert's qualifications).

nonscientific evidence. *Id.* at 108, 771 S.E.2d at 339; *see also White*, 382 S.C. at 274, 676 S.E.2d at 688 ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors[3] for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.").

Jones primarily relies upon *Chavis* to support his argument that Galloway-Williams' testimony was unreliable. We find *Chavis* distinguishable, however, because the expert found to be unreliable in that case was qualified as a forensic interviewer and testified regarding the conclusions she reached after using the RATAC method to interview the victims. In contrast, Galloway-Williams testified in general terms as to child sex abuse dynamics, focusing on delayed disclosures and the responses of nonoffending caregivers. Therefore, we must determine—based upon the record before us—whether the circuit court properly discharged its gatekeeping function in determining the admissibility of Galloway-Williams' testimony by answering the threshold question of reliability. *See generally White*, 382 S.C. at 274, 676 S.E.2d at 688 (declining to offer a "formulaic approach that will apply in the generality of cases" because our supreme court "d[id] not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence").

Initially, we reject Jones's argument that "Galloway-Williams could not identify or name a single publication or study" to support her testimony or explain whether any of the studies she relied upon had been peer reviewed. A review of the record reveals Galloway-Williams did, in fact, identify a publication in support of her research. The following colloquy is instructive as to this point:

> Q: Let's focus on delayed disclosure as it relates to child victims. You said that this information has been peer reviewed. Can you tell me, or can you

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[3] *See State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (stating that, in determining whether scientific evidence is admissible, a court should look at "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures").

give me specific examples of studies, or studies that have looked at this evidence as reliable?

A: I don't have any here with me, but I could give you articles and studies that directly relate to delayed disclosure with the full citations. It would take me a little bit of time to gather that up. I didn't bring any of that with me. But during all of the training that I've been to, including the 160 hours of skills training and the other CEs that I have obtained those articles are on the basis of fact. Additionally, the text that I use for teaching the course on child maltreatment includes information about delayed disclosure and non-offending caregivers that reference these articles as well.

Q: What text is that?

A: The text is called *Child Maltreatment* and it is written by Stefanie Keen and I can't remember the second author. Dr. Keen is one of the professors at USC Upstate.

(emphasis added).

Galloway-Williams testified that her methods were published in articles in professional journals and trade publications, subjected to peer review, uniformly accepted and recognized within the area of child sex abuse experts and professionals, and relied upon for sexual abuse counseling and treatment. Galloway-Williams further testified that the Julie Valentine Center applies the same principles she explained in her testimony, and she has given multiple presentations on delayed disclosures and the role nonoffending caregivers play in the dynamics of child sexual abuse. Likewise, Galloway-Williams confirmed that these types of principles were being used by counselors across the United States.

In light of Galloway-Williams' testimony regarding her methods, we are unable to conclude the circuit court abused its discretion in finding Galloway-Williams' testimony reliable. *See, e.g.*, *State v. Rinehart*, 819 P.2d 1122, 1126 (Haw. Ct. App. 1991) (finding an expert's "testimony that her training and expertise are

acceptable in the field of sexual abuse, and that the characteristics exhibited by a sexually assaulted child are acceptable to and relied upon by experts in the field" gave rise to "a reasonable inference that [the expert]'s opinions were based upon an explicable and reliable system of analysis" and, thus, the defendant's argument "that the showing was inadequate" was not sufficient to demonstrate "the lower court abused its broad discretion in admitting [the expert]'s testimony"). In our view, the court adequately performed its gatekeeping function in ensuring the foundational requirements of her expert testimony were met in this case. *See White*, 382 S.C. at 274, 676 S.E.2d at 688 (noting "[t]he foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach"). Therefore, we find no reversible error as to the reliability issue.

Likewise, we reject Jones's argument that Galloway-Williams improperly bolstered Mother and the Victims' testimonies. "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). "The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Consequently, "it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *Kromah*, 401 S.C. at 358–59, 737 S.E.2d at 500.

Jones cites several cases in support of his argument that Galloway-Williams' testimony was unnecessary and only offered to improperly bolster Mother and the Victims' testimonies. *See State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (holding the circuit court committed reversible error by qualifying the State's witness "as an expert in child sex abuse assessment and in forensic interviewing" because the expert "vouched for the minor when she testified only to those characteristics which she observed in the minor"); *Kromah*, 401 S.C. at 356, 358, 737 S.E.2d at 498–99 (finding a forensic interviewer's testimony regarding a "'compelling finding' of physical child abuse" problematic and stating experts "may not offer an opinion regarding the credibility of others"); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper."); *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (holding "[t]he forensic interviewer's hearsay testimony impermissibly corroborated the [v]ictim's identification of [the defendant] as the assailant, and the forensic interviewer's subsequent opinion testimony improperly bolstered the [v]ictim's credibility"); *State v. Dawkins*, 297

S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (concluding the testimony of a psychiatrist who treated the victim was improper because the psychiatrist answered "yes" to solicitor's question regarding whether, based upon his examination and observations of the victim, he was "of the impression that [the victim's] symptoms [were] genuine"); *McKerley*, 397 S.C. at 465, 725 S.E.2d at 142 (noting the circuit court erred in admitting the forensic interviewer's testimony because it included "comments on the credibility of the victim's account of the alleged sexual assault"); *State v. Dempsey*, 340 S.C. 565, 571, 532 S.E.2d 306, 309–10 (Ct. App. 2000) (stating a therapist "improperly vouched for the victim's credibility by answering affirmatively when asked his opinion as to whether the child's symptoms of sexual abuse were 'genuine'").

In *Brown*, however, this court clearly "distinguished improper bolstering in cases involving experts who themselves conducted the forensic interview from cases involving independent mental health experts who addressed general behavioral characteristics." *State v. Barrett*, 416 S.C. 124, 129, 785 S.E.2d 387, 389 (Ct. App. 2016) (citing *Brown*, 411 S.C. at 343–45, 768 S.E.2d at 252–53). Unlike the experts in the cases cited by Jones, Galloway-Williams did not testify as a forensic interviewer, prepare a report for her testimony, or express an opinion or belief regarding the credibility of the Victims' allegations in this case. Importantly, Galloway-Williams never interviewed Mother or the Victims, had no knowledge of the facts of the case beyond her discussions with the solicitor's office prior to trial, and did not make any of the statements our supreme court prohibited in *Kromah*.[4] Thus, we find the cases Jones cited are factually and legally distinguishable from the instant case. In our view, *Brown* is directly on point and, therefore, we analyze Galloway-Williams' expert testimony within the confines of that decision.

Because Galloway-Williams never commented on the credibility of Mother or the Victims, but rather offered admissible expert testimony regarding the general behavioral characteristics of child sex abuse victims and nonoffending caregivers,

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[4] *See Kromah*, 401 S.C. at 360, 737 S.E.2d at 500 (holding forensic interviewers should avoid (1) stating the child was instructed to be truthful; (2) offering a direct opinion on the "child's veracity or tendency to tell the truth"; (3) indirectly vouching for the child, "such as stating the interviewer has made a 'compelling finding' of abuse"; (4) indicating "the interviewer believes the child's allegations in the current matter"; or (5) opining "the child's behavior indicated the child was telling the truth").

we find her testimony did not improperly bolster their testimonies. The fact that her testimony corroborated some of the Victims' reasons for delaying disclosure of the abuse, or Mother's failure to act when she became aware of it, does not mean Galloway-Williams' testimony improperly bolstered their accounts. *See Brown*, 411 S.C. at 345, 768 S.E.2d at 253 (stating "[t]he fact that [the expert's] testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony improperly bolstered their accounts"); *see also Weaverling*, 337 S.C. at 474, 523 S.E.2d at 794 ("An expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical question that is based on facts supported by the record." (quoting *State v. Evans*, 316 S.C. 303, 311, 450 S.E.2d 47, 52 (1994))). Galloway-Williams merely offered reasons why children might delay disclosing instances of sexual abuse, as well as why a nonoffending caregiver may have an unusual reaction upon learning of the abuse, to assist the trier of fact's understanding of the complex dynamics of sexual abuse cases. Accordingly, we find the circuit court properly admitted Galloway-Williams' expert testimony because she did not improperly bolster the Victims' testimony, or Mother's testimony, at trial.

Finally, we reject Jones's argument that Galloway-Williams' testimony was highly prejudicial and cumulative. Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." "Improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (emphasis omitted). Nevertheless, "both expert testimony and behavioral evidence are admissible . . . whe[n] the probative value of such evidence outweighs its prejudicial effect." *Weaverling*, 337 S.C. at 474, 523 S.E.2d at 794 (quoting *Schumpert*, 312 S.C. at 506, 435 S.E.2d at 862).

Based upon our review of the record, we find Galloway-Williams' testimony was not cumulative because she did not restate or improperly corroborate Mother or the Victims' testimonies. Moreover, we find the high probative value of her testimony outweighed any prejudicial effect on Jones's case. *See* Rule 403, SCRE. As in *Brown*, "Galloway-Williams' testimony was relevant to help the jury understand various aspects of victims' behavior and provided insight into the often strange demeanors of sexually abused children." 411 S.C. at 347, 768 S.E.2d at 254; *see also Weaverling*, 337 S.C. at 474, 523 S.E.2d at 794 (noting expert testimony

"assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the abused child's often strange demeanor"). Her "testimony was also crucial in explaining to the jury why child sex abuse victims are often unable to effectively relay incidents of criminal sexual abuse." *Brown*, 411 S.C. at 347, 768 S.E.2d at 254; *see also White*, 361 S.C. at 414–15, 605 S.E.2d at 544 (noting "[t]he inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior"). Further, her testimony assisted in explaining the various reactions a nonoffending caregiver may have when learning about sexual abuse occurring in the home.

As noted above, Galloway-Williams did not repeat Mother or the Victims' allegations, vouch for their credibility, or make any statements that improperly corroborated their testimonies. Further, she was not qualified as an expert in forensic interviewing. Thus, as this court stated in *Brown*,

> the concerns our supreme court expressed in *Kromah* regarding forensic interviewers testifying as experts in child sexual abuse cases are inapplicable to the instant case because the danger of prejudice—which could result from the jury giving undue weight to the expert testimony of a forensic interviewer who interviews the victim and expresses an opinion as to the child's credibility—is simply not present here.

411 S.C. at 348, 768 S.E.2d at 254. Accordingly, we find the circuit court properly admitted Galloway-Williams' expert testimony because her testimony did not improperly corroborate Mother or the Victims' testimony, was not cumulative, and its probative value substantially outweighed any prejudice Jones experienced from its submission to the jury.

CONCLUSION

Based on the foregoing analysis, the circuit court's judgment is

AFFIRMED.[5]

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

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jason Randall Morgan, Appellant.

Appellate Case No. 2014-000420

Appeal From Pickens County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5429
Heard January 5, 2016 – Filed July 20, 2016

AFFIRMED

Daniel J. Farnsworth Jr., of Farnsworth Law Offices, LLC, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General John Benjamin Aplin, and Assistant Attorney General Mary Williams Leddon, all of Columbia; and Solicitor William Walter Wilkins III, of Greenville, for Respondent.

MCDONALD, J.: Jason Randall Morgan appeals the circuit court's order awarding restitution, arguing the settlement of the initial civil action between Morgan and Victim as well as Victim's signing of a covenant not to execute bars

restitution as a condition of Appellant's probationary sentence. We disagree and affirm.

FACTS/PROCEDURAL HISTORY

On August 21, 2010, Jason Randall Morgan (Morgan) caused an automobile accident with Elizabeth Morales-Molina (Victim), generating both a civil claim for damages by Victim and a criminal prosecution against Morgan for felony driving under the influence (DUI). Victim sustained significant injuries, including a broken arm, a broken hip, and broken ribs. On November 18, 2010—independent of the criminal case—Victim and Morgan's insurance company settled the civil suit and entered a Covenant Not to Execute (Covenant). Pursuant to the Covenant, Morgan's insurance company agreed to pay $25,000, the primary liability insurance policy's limit. The Covenant reads, in pertinent part, as follows:

> Notwithstanding any judgment that may be rendered in any such lawsuit, it is the express intent of the parties that Covenantee [Morgan], his/her/its/their agents, representatives, heirs and assigns, shall never at any time, be liable to Covenantor [Victim], his/her subrogees, agents, representatives, heirs or assigns, beyond the consideration expressed herein and paid, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to [Victim] of the aforementioned sum [$25,000], [Victim], his/her subrogees, agents, representatives, heirs or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against Covenantee, by execution or otherwise, any judgment that may be rendered in any such lawsuit except as herein stated. Further, immediately upon reduction to judgment of any such lawsuit, Covenantor, his/her subrogees, agents, representatives, heirs or assigns, will provide Covenantee with an executed satisfaction of said judgment. Moreover, this COVENANT or a photocopy hereof shall be considered and serve as a satisfaction of any such judgment in any claim or lawsuit presented by

> [Victim] against [Morgan] for the aforementioned vehicular collision or incident, and can be recorded as such should Covenantor, his/her subrogees, agents, representatives, heirs or assigns fail to execute a Satisfaction of Judgment.

The Covenant expressly reserved Victim's right to bring suit against Morgan and/or any excess liability and/or underinsured motorist insurer. Further, the Covenant states "Covenantor, Covenantee and insurer expressly reserve all rights of action, claims, demands or other legal remedies against all firms, persons or entities of any nature or kind, except as modified by the terms of this COVENANT. This COVENANT is not a release, nor shall it be construed as a release of any party, person, firm or corporation."

On June 27, 2013, Morgan pled guilty to assault and battery in the second degree and was sentenced to a prison term of three years, suspended upon service of three years' probation. After eighteen months' probation, the sentence could be terminated upon payment of all associated collections.

At an October 3, 2013 restitution hearing, the State requested that Victim be awarded restitution of $238,660.10 for outstanding medical bills related to her treatment for injuries sustained in the accident. Morgan opposed restitution, arguing the Covenant operated to release Morgan's responsibility for any payment other than the $25,000 paid to settle the initial liability claim. The circuit court ordered restitution of $238,660.10 on December 17, 2013.

STANDARD OF REVIEW

"A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law." *State v. Dawson*, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013).

In *State v. Gulledge*, our supreme court explained, "[T]he restitution hearing is part of the sentencing proceeding." 326 S.C. 220, 228, 487 S.E.2d 590, 594 (1997); *see* S.C. Code Ann. § 17-25-322(A) (2014) ("[I]n addition to *any other sentence* which it may impose, the court shall order the defendant make restitution . . . ." (emphasis added)); *see also United States v. Anglian*, 784 F.2d 765, 769 (6th Cir. 1986), *cert. denied,* 479 U.S. 841 (1986) (a restitution order is in the nature of a sentence, and

the district court is vested with wide discretion in determining the appropriate sentence for a convicted defendant). "Therefore, during the restitution hearing, the rules governing sentencing proceedings should apply." *Gulledge*, 326 S.C. at 229, 487 S.E.2d at 595; *see Harris v. Alabama*, 542 So.2d 1312, 1314 (Ala. Crim. App. 1989) (explaining because restitution is not intended to be a civil action, a restitution hearing shall be governed by the same rules as a sentencing hearing; therefore, any evidence the court deems to have probative value may be received regardless of its admissibility under the rules of evidence). "When a question of law is presented, our standard of review is plenary." *State v. Cochran*, 369 S.C. 308, 312–13, 631 S.E.2d 294, 297 (Ct. App. 2006).

LAW/ANALYSIS

Morgan argues the circuit court erred in awarding restitution because (1) Victim signed a waiver of any further recovery from Appellant and (2) the court failed to consider the award in light of S.C. Code Ann. § 17-25-322(B) and (C) (2014).

When a defendant is convicted of a crime causing pecuniary damages or loss to a victim, section 17-25-322(A) of the South Carolina Code (2014) requires that the court hold a hearing to determine the amount of restitution due the victim as a result of the defendant's criminal acts. "[I]n addition to any other sentence which [the court] may impose, the court *shall* order the defendant make restitution or compensate the victim for any pecuniary damages." S.C. Code Ann. §17-25-322(A) (emphasis added).

Additionally, section 16-3-1110(12) of the South Carolina Code (2015) states:

> "Restitution" means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes, but is not limited to:
>
> (i) medical and psychological counseling expenses;
> (ii) specific damages and economic losses;
> (iii) funeral expenses and related costs;
> (iv) vehicle impoundment fees;
> (v) child care costs; and

> (vi) transportation related to a victim's participation in the criminal justice process.
>
> Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium.
>
> Restitution orders do not limit any civil claims a crime victim may file.

South Carolina has never directly addressed the question of whether a settlement and covenant not to execute between a victim and defendant prior to sentencing precludes restitution, but courts in other jurisdictions have considered the issue. As in the case at bar, in *Kirby v. State*, 863 So.2d 238, 240 (Fla. 2003), Kirby caused a traffic accident and settled victim's civil suit against him with the $25,000 policy limits from his automobile insurance policy. Kirby opposed restitution because the settlement agreement contained a release of liability. *Id.* at 241. The Florida supreme court discussed the purpose of restitution in the criminal context, explaining, "Unlike a civil claim for damages, the purpose of restitution is twofold: (1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." *Id.* at 242. Ultimately, the *Kirby* court held, "Because civil settlements and criminal restitution are distinct remedies with differing considerations, we hold that a settlement and release of liability on a civil claim for damages between private parties does not prohibit the trial court from fulfilling its mandatory obligation to order restitution in the criminal case." *Id.* at 240.[1]

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[1] The *Kirby* decision provides for offset in the case of a civil settlement, noting: "the amount of restitution shall be set off against any civil recovery, reflecting the Legislature's recognition that although the restitution obligation is primary, the victim should not receive a double recovery." *Id.* at 243; *see* Fla. Stat. § 775.089(8) ("An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery."). South Carolina law does not contain a provision requiring offset but as restitution is an equitable remedy, it would be reasonable to award an offset of the $25,000 paid by the liability carrier. Here, however, the medical bills remain outstanding. Victim's civil attorney did not negotiate with the

Other courts have held that a release of liability cannot foreclose the State's ability to seek restitution if the State was not a party to the agreement. *See State v. Iniguez*, 821 P.2d 194, 197 (Ariz. Ct. App. 1991) (stating the distinction between civil damages and restitution means that a victim's release of civil liability does not prevent the court from ordering the criminal law remedy of restitution); *see also Fore v. State*, 858 So.2d 982, 986 (Ala. Crim. App. 2003) (same); *People v. Maxich*, 971 P.2d 268, 270 (Colo. App. 1998) (same); *State v. Applegate*, 976 P.2d 936, 938 (Kan. 1999) (holding the State was not a party to the settlement agreement, therefore, a civil release of claims does not and cannot specifically preclude court-ordered restitution in a *criminal* case); *People v. Bernal*, 101 Cal. App. 4th 155, 162 (Cal. Ct. App. 2002) (same); *State v. DeAngelis*, 747 A.2d 289, 295 (N.J. Super. Ct. App. Div. 2000) (same); *State v. Belfry*, 416 N.W.2d 811, 813 (Minn. Ct. App. 1987) (holding "the state is not barred from seeking, or the court from imposing, reasonable restitution" even though the victims received a settlement); *Urias v. State*, 987 S.W.2d 613, 614 (Tex. App. 1999) ("[T]he settlement on behalf of the injured party with the insurance company was not a bar to the trial court ordering restitution as a condition of probation.").

These holdings are consistent with the language of South Carolina's restitution statutes, which permit, but do not require, a sentencing judge to consider factors such as the defendant's resources, the victim's resources, rehabilitative effect, and the hardship on the victim. *See* S.C. Code § 17-25-322(B). In contrast, upon the finding of a defendant's simple negligence, a civil judgment concerns only the victim's damages and is not limited to pecuniary loss. Thus, we agree with the *Kirby* court's reasoning that the constructs of restitution and civil damages are separate and distinct.

Finally, the plain language of the Covenant does not preclude further litigation between the parties, let alone restitution in the criminal court. The Covenant contemplates Victim's pursuit of further legal remedies and, as the circuit court

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providers, and the medical liens had not been addressed at the time of the restitution hearing.

found, nothing in the agreement itself extinguished the possibility of restitution in the criminal matter.[2]

CONCLUSION

We affirm the circuit court's restitution award.

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

[2] Morgan further argues the circuit court failed to consider the factors enumerated in section 17-25-322 in reaching the restitution figure. We find this argument unpreserved for our review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). The applicable restitution statutes, however, permit a defendant to petition the trial court for the modification of its order and consideration of these factors. *See, e.g.* S.C. Code § 17-25-323(A) (Supp. 2015) (stating the trial court retains jurisdiction for purpose of modifying the manner in which court-ordered payments are made) and S.C. Code § 17-25-326 (2014) ("Any court order issued pursuant to the provisions of this article may be altered, modified, or rescinded upon the filing of a petition by the defendant, Attorney General, solicitor, or victim for good and sufficient cause shown by a preponderance of the evidence.").