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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
On Appeal from Pickens County
Honorable Donald Hocker, Circuit Court Judge

BRANDON CLARK,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2023-000641

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF SERVICE

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on March 24, 2023.

QUESTIONS PRESENTED

1. Did the Court of Appeals err when it misapplied this Court's precedents in *Anderson* and *Kromah* to uphold the trial court's improper limitation on cross-examination of the forensic interviewer and when to uphold the trial court's ruling preventing Clark from presenting an expert witness in his defense?
2. Did the Court of Appeals err when it gave an advisory opinion regarding the admissibility of the forensic interview after determining the issue had not been preserved for review?
3. Should this Court revisit its error preservation rules to provide for an exception where, as here, errors are so plain and so harmful that to delay their correction to collateral review would be unjust and wasteful of judicial resources?

STATEMENT OF THE CASE

On August 22, 2017, the Pickens County Grand Jury indicted Petitioner, Brandon Jerome Clark, for Criminal Sexual Conduct in the First Degree, indictment number 2017-GS-39-002245 (R. p. 537). In August of 2019, Petitioner proceeded to trial before the Honorable Donald Hocker. The jury returned a verdict of guilty, and on August 22, 2019, Judge Hocker sentenced Clark to twenty-five years in prison. A timely notice of intent to appeal was served on August 28, 2019, and received in the Court of Appeals on September 3, 2019, and the direct appeal perfected. On October 5, 2022, a three-judge panel of the South Carolina Court of Appeals heard argument in the case. On February 8, 2023, the Court of Appeals affirmed the conviction in a published opinion. State v. Clark, No. 5968 (S.C. Ct. App. Feb. 8, 2023). A timely petition for rehearing was filed and then denied on March 24, 2023. This petition for writ of certiorari follows.

REASONS CERTIORARI SHOULD BE GRANTED

This Court should grant certiorari to clarify that the holdings in *Anderson* and *Kromah* serve as limitations on the state's ability to use forensic examinations or testimony about forensic examination methodology to bolster child victims in their cases-in-chief, but *do not* limit defendants in cases involving child victims from contesting the substance or methodology when recordings of those examinations are played before a jury through either cross examination or the presentation of direct testimony. To the extent the lower court's error was imperfectly preserved below, this Court should further grant certiorari to vacate the Court of Appeals' advisory opinion regarding admission of the forensic video and to revisit its rules regarding error preservation, recognizing there are some errors so plain and so harmful that they must be corrected on direct, rather than collateral, appeal.

FACTS OF THE CASE

On March 20, 2017, A.G., a five-year-old girl, and her father presented at the Baptist Easley Hospital. R. 147. He reported to hospital staff that A.G. had disclosed a sexual assault by her mother's boyfriend. At the hospital, A.G. spoke to numerous adults and answered their questions, while her parents discussed the situation with law enforcement, hospital staff, a child advocate, and a representative of the South Carolina Department of Social Services. R. 321-322. A.G. reported that the abuse had taken place two days earlier. R. 209. Later, on March 28, 2017, A.G. went to the Julie Valentine Children's Center for a forensic interview conducted by Amber Hiott Cheney. R. 42. Shortly after the interview began, A.G. told Cheney, somewhat unprompted, "there was somebody sticking their finger in my mouth. . .. and there, there behind me. . . .but they're never going to come back. It's my mom's boyfriend, his name is B, and it only gots one B." R. 498; Court's Ex. 8. She went on to say, "he stick his finger in my butt, the front and the back, and he sticks his finger in my mouth. . . . when my mom was asleep and Sissy was asleep, I was screaming." *Id* at 499. She told Cheney that it only happened once and that her abuser took her out of her bed and downstairs on the couch. *Id.* She said her clothes stayed on but also that he made her take her shorts off. *Id.* at 501. She said that "B" took off her panties and that after the abuse occurred, he took her back upstairs. *Id.* She told the interviewer that her abuser "peed" on her with "his big fat butt" and stuck his finger in her butt. *Id* at 502. When asked what color the pee was, she replied, "like the color I'm wearing, I'm wearing blue and white." *Id.* She said it felt "like ice coming down my butt." *Id.* at 504. Later, pressed for more details, she said that when he put his fingers in her butt, "it feeled like a rock in my butt." *Id.* at 507.

Also, during the interview, A.G. told Cheney that she had driven her mother's car, that "B" had scratched her face so she was "covered in blood." R. 516; Court Ex. 8. When Cheney introduced the question of whether anyone had ever taken pictures of her without her clothes, A.G. said that "B" had taken pictures of her with her shorts off "a long time

ago." She said he took the picture with his own eyes, because "his eyes got a camera." *Id.* at 532.

A.G. also described an incident in which "B" had "knocked out" her mommy, "knocked her head wide open." *Id.* at 523-524. The five-year-old told Cheney that she had "took her to the hospital. . . . I was driving her car." *Id.* She continued:

> She was upstairs sleeping and I was screaming. She came downstairs and she was like, B, will you shut up. And we looked at her and she looked at me, and in the meantime I was like dead, but then I came back alive, and I took my mom to the hospital because she was dead, she wasn't asleep.

Id. at 525. Cheney then asked A.G. if anyone had told her what to say, and she replied, "Yeah. . . my nanny, my daddy and my mommy." Cheney reminded A.G., that "we can only talk about things that really happened in here, okay? So did you really drive a car?" A.G. replied, "Yeah." R. 526. A few minutes later, she repeated, "They told me to say the same thing I just told you." Cheney asked, "And did that stuff really happen?" A.G. replied, "Yeah." Cheney pressed further, "What did they tell you about telling me that?" A.G. responded, "I don't know, but it didn't really come in real life, but I really driving my mom's car." R. 527. When asked what she knew about what she was coming to Cheney to talk about, A.G. responded, "All about B because B's mean to me." This interview was recorded. At trial, Brandon Clark's counsel initially consented to but ultimately objected to its reliability pursuant to S.C. Code Ann. § 17-23-175. The trial judge overruled the objection, and the video was admitted into evidence and played for the jury at trial. R. 48.

Pretrial matters

At a hearing to address pretrial matters, the trial judge addressed the admissibility of A.G.'s forensic interview. Counsel for Clark explained that she would consent to its admission, provided that her expert would be able to testify and that a certified transcript of the interview would be admitted into evidence. When the trial judge hesitated to agree to those provisos, counsel for Clark withdrew her consent to the video's admission. R. 8. The trial judge ruled that the video met the requirements of S.C. Code Ann. 17-23-175 and would be admitted. R. 22. He deferred a final ruling on the admissibility of the

transcript and the scope Clark's expert would be confined to, and the trial got underway without clarity as to whether and to what Clark's expert would be permitted to testify.

Minor Child Testimony

The State called A.G. as its first witness. Appx. to R. 1. In a brief in-camera hearing, the State, the trial judge, and counsel for Clark questioned A.G. regarding her competency to testify. At the time of the trial, two years after the initial disclosure, she was seven years old. After acknowledging in direct examination that there would be negative consequences if she did not tell the truth, on cross-examination, counsel for Clark asked, "you said you understood the consequences if you tell a lie. What does 'consequence' mean?" Appx. to R. 4. A.G. replied, "I don't know." Notwithstanding this evidence that A.G. had not fully understood the competency questions she was asked, and over objection from Clark's counsel, the trial judge found her competent to testify. Appx. to R. 5.

In her trial testimony A.G. was asked, "Who is Brandon Clark?" She replied, "The person who did this stuff to me, I think." R. 27. She went on to testify, "He pulled down my pants and peed in my private." R. 28. Asked to elaborate, she said, "That's all – all I know." *Id.* When asked if he did anything else, she responded, "no, not that I know of." *Id.* She was asked about her forensic interview: "The things that you told to Amber, is that really what happened that night?" She replied, "some of them." R. 31. "Tell me what that means," the solicitor asked. "Most of them," A.G. replied. "[T]ell me what you told Miss Amber that was true," the solicitor asked. "I forgot," A.G. replied. R. 32.

All of this testimony was elicited in direct examination. On cross-examination, A.G. acknowledged having watched the video of her interview with Amber Cheney. R. 38. Despite having been refreshed as to the contents of her interview, at no time during her trial testimony did she testify to Brandon Clark using his fingers or any other body part to enter her body. She testified only that he "peed" on her.

Forensic Interviewer Testimony

Amber Hiott Cheney was called next by the State. Cheney testified that she met with A.G. on March 28, 2017, to conduct a "child-friendly" interview in relation to the investigation of her disclosure of sexual abuse. R. 42. She testified that her interview was neutral, fact-finding and non-biased. R. 43. She authenticated the State's copy of the video of her interview of A.G., and the court admitted the video into evidence as State's Exhibit 1, noting "previous discussions." R. 43-44. At the close of the State's direct examination of Cheney, but before cross-examination by Clark's counsel, the video was played for the jury.

On cross-examination, counsel for Clark began by inquiring about Cheney's purported neutrality. R. 49. This prompted an objection by the State, which was heard *in camera*. The State objected to the scope of cross-examination, but Clark's counsel noted that Cheney had testified to her unbiased neutrality on direct. Rather than immediately rule on the objection, the Court directed Clark's counsel to continue her intended examination in camera, which she did:

> Q: Okay. When you interview children, is it not the best practice to ask non-leading and open-ended questions?
>
> A: That is correct.
>
> THE COURT: Okay. And let me – let me just stop you. As part of the – one of the factors under 175 is that even though I didn't – I didn't detail each factor in my ruling, that is one of the things that I need to find, that there was no leading questions. I didn't think Ms. Cheney throughout the interview really asked any leading questions. That – that was – that's one of the bases for my ruling for allowing the interview to come in.
>
> MS. BARWICK: Judge, it's not just leading questions, it's open-ended questions that need to be asked during these forensic interviews. Over and over and over and over again, there were yes-no questions.
>
> And there were questions assuming an answer that hadn't been given yet. And there's been examples. And I was going to go through them.

R. 53.

The Court allowed the in-camera examination to continue, during which Cheney acknowledged that the exercise in "correcting" her when she got details wrong did not result in A.G. correcting her at all. She further admitted paraphrasing what A.G. had said. R. 54-55. The trial judge said, "I'm going to allow this line of questioning. . . As far as being a neutral interviewer, I mean, that's – I guess she – I don't know if I would necessarily classify it as opening the door. But I'll allow this – this line of testimony." Trial R. 58. Counsel for the State placed her objection on the record, citing *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (S.C. 2015), for the principle that "there is to be no testimony to such things as technique." R. 58. Counsel for Clark responded, "[T]hat's where the state is trying to introduce evidence as technique, not cross-examining about the failed technique." *Id*. She continued, "[I]f I can't effectively cross-examine this witness, I can't effectively represent my client and put up a defense. We have to be able to attack . . . the methodology." R. 59. The trial judge then directed Clark's counsel to question the witness – still *in camera* – as to her training and background, but said, "I'm not going to allow any cross-examination related to techniques. . . The case is clear, it says no testimony. . . . If you want to get – proffer anything else related to technique, here's your chance to do it." R. 60.

Counsel for Clark clarified the holding in *Anderson*: "[T]he purpose behind that is to prevent improper bolstering. I'm not trying to bolster. I'm trying to say that the technique that was used may have influenced it the other way." R. 60. The trial judge again directed her to conduct whatever inquiry she wanted for the record in camera. R. 62. Again, Clark's counsel led Cheney through the technique employed in the interview, highlighting instances where A.G. failed to correct her, or she inaccurately paraphrased A.G., she failed to ask open-ended questions of A.G., or she introduced new concepts to A.G. R. 63-73. At multiple points during the cross-examination, Cheney expressed frustration because she could not remember her exact words and did not have a transcript to refer to. R. 73, 75, 89. Clark's counsel again asked for a ruling on the admissibility of the transcript, and again the trial court declined to rule. R. 78.

The examination continued, and Clark's counsel asked Cheney about the framing of her instruction to A.G. for what they could talk about in the interview:

> Q: Okay. So, in essence, saying, only tell me the things that really happened is the same thing as telling the child, tell me the truth?
>
> A: I don't – I think there's a difference, which is why it's allowed to say that versus saying, tell me the truth.
>
> Q: Is that not just a newfangled way of changing it up to get around the case – the recent case law that's been out?
>
> A: I can't testify to that because I didn't make the protocol. All I can say is that when I was trained in that you're allowed to say, tell me about things that really happened. R. 79.

After counsel for Clark concluded her in-camera cross-examination, counsel for the State elicited testimony from Cheney about her training and experience, at the direction of the trial judge. R. 93-94. When that was concluded, the trial judge restated his ruling: "Now, when we bring the jury out, I will allow cross-examination only on the issue of neutrality. I guess to some extent the witness did open up the door on that."

After the jury returned, counsel for Clark engaged in the limited cross-examination of Cheney without addressing any of the potential issues present in the interview that could have affected the reliability of the disclosure. R. 96-101.

When the trial reconvened the next day, counsel for Clark again placed her concerns about the admission of the forensic interview video and limitation of her cross-examination of Amber Cheney on the record:

> Ms. Barwick: When I consented to the forensic interview I personally did not stipulate to the factors listed in 17-23-175 as I did not believe the video possessed any particularized guarantees of trustworthiness. The factors in that statute that I had the most trouble with were whether it was elicited by leading questions.
>
> And as – through my cross-examination, it's apparent that I believe that they were elicited by leading investigation – or questions. Also, whether the statement presented a detailed account of the alleged offense and whether any statement – that statement had internal coherence.
>
> . . . I know at the beginning of the trial, I intended to call an expert attacking the methodology that was used creating an unreliable disclosure and that any future disclosures by those

> unreliable methods would have tainted the witness as any further testimony as to what occurred. I would not have consented to the introduction of the forensic interview had I known I would not be permitted to attack the methodology.
>
> We are arguing that what we heard from the child in her out of-court statement is not the testimony of the child, but the product of the power of suggestion of the interviewer.
>
> . . .
> We're attacking the totality of the circumstances surrounding the making of the statement. Because those circumstances don't guarantee trustworthiness of the statements. This is essential for us to be able to cross-examine, to attack the method in which the interviewer got the answers she got.
>
> . . .
> We're attacking the methodology so we can argue that the child's statements . . . we were planning on doing that through our expert. You haven't ruled as to that. But we are planning on attacking the methodology so we can argue that the child's statements are not, in fact, hers. . . .
>
> *State v. Anderson* said that the interviewer cannot talk about the importance of telling the truth and that we only tell the truth. . . what *State v. Anderson*. . . says because we're saying we did it right and this was the child's answer, that means the child must be telling the truth. And that was the danger that Anderson was trying to prevent.
>
> In this particular case, she got up – their own witness got up and testified saying she's neutral and unbiased. And then she turned around in the video and explained to the child the importance of telling us things that really happened, which is just another way of saying to tell the truth. . . and then she was – proceeded to lay out several other rules, all of which Anderson says you're not supposed to lay out the rules.

R. 120-121.

The Court responded by noting that Clark's counsel had not moved to redact portions of the interview. R. 122. Thereafter, Clark's counsel reiterated her request that the transcript of the video also be admitted into evidence and published to the jury. At the close of argument on that matter, counsel for the State reiterated, "It's not appropriate to question the technique of the forensic interviewer in these proceedings. So anything that would be used to even question that is inappropriate." R. 136.

Shauna Galloway-Williams' Testimony

The State called Shauna Galloway-Williams as a "blind expert" in child abuse dynamics. R. 331. Galloway is the director of the Julie Valentine Center, where A.G. was interviewed, but testified she did not have direct knowledge of the interview. Acknowledging the state of the case law, Clark's counsel nonetheless placed her objection on the record that the use of such experts constitutes improper bolstering, "because it can be linked to saying, yes, this is what's normal with child abuse victims, and this is what she's doing. And the questions are going to be geared, specifically, to the issues in this case, even though the answers are general in terms." R. 332. Counsel for Clark stipulated that Galloway-Williams would qualify as an expert, but the Court held an in-camera hearing to address whether her testimony would aid the trier of fact and the reliability of her process and methodology. R. 333-345. The court found that her testimony would aid the jury and that her methodology was sufficiently reliable. Galloway-Williams testified broadly as to generalities regarding the behaviors of children who are victims of abuse.

Defendant's Expert Witness

After the State rested, Counsel for Clark again raised the issue of the methodology employed in A.G.'s forensic interview: "The purpose of [my expert's] testimony is to attack the methodology of that interview . . . and to testify as to the matter of suggestion that was made to this child by the interviewer. Your Honor has told me that you are unwilling to allow that to happen. Is that still the case?" R. 407. The Court noted, "[W]e had some *in camera* testimony from Ms. Cheney. And we dealt with that issue and wherein I ruled that you could not get into methodology. . . . So if I didn't allow the State, would it be fair to allow you to do it?" R. 408. Clark's counsel noted that it had not been the State trying to introduce the methodology but her effort to place questions about it before the jury. R. 409. Counsel for Clark noted that the rules are clear that forensic interviewers cannot testify as to rules and methods in order to bolster or vouch for child witnesses but that having another expert review and comment on the propriety of the interview methods is

not an improper attack on the credibility of the child witness. R. 410. She further noted, "All I'm trying to do is tell the jury that the words they heard coming out of the child were not the words of the child, but the words of the interviewer." R. 410. The Court responded, "Would that not be attacking the credibility of the child? Because she, for whatever reason, was not being – either because she was being led, coerced, whatever, she was not being truthful with – with her answers. So wouldn't you be attacking the credibility of her?" The colloquy continued, and Counsel for Clark cited *Kromah* and *Anderson* to the trial court in support of her position. Ultimately, the Court placed its ruling on the record as follows:

> "[T]he reason why, again, is because of case law preventing the State from – from getting into methodology. And I think the reason for that is that if you – you know, if you try to elevate the – the methodology and the sufficiency of the methodology – the end result is to bolster the child's testimony and – which, of course, we don't want to do.
>
> So if – if the State is prevented from doing that, it would seem like the Defense would, also, be prevented from creating some issue with the methodology. Therefore, the inference being don't believe the child. And so I think we just need to stay away from that.

R. 428.

The trial judge allowed Clark's counsel to call her expert, Dr. Amanda Salas, *in camera* in order to proffer her testimony. Salas, a psychiatrist who is board certified in adult psychiatry, child psychiatry, and forensic psychiatry, testified that she had served as an expert witness in roughly 50 cases since 2009. Trial Tr. 527, 532. She testified that following best practices in child interviewing is important because "it allows you to get information from the child that is the child's information and not something that I've implanted in the child or skewed the child to report that's not in the child's words or experience. After a detailed colloquy involving her experience, the trial judge declined to allow her to testify to the jury or to qualify her as an expert. R. 456-457.

Counsel for Clark moved onto the substance of Dr. Salas' opinions generally regarding proper child-interviewing techniques and A.G.'s interview, specifically. Dr. Salas explained the importance of asking developmentally appropriate questions with a focus on open-ended questions, the importance of limiting any perceived power

differential, and creating conditions to allow them to speak in their own words without the interviewer consciously or unconsciously putting words to their experiences. R. 458. She underscored the importance of avoiding leading questions or inaccurately restating what a child says. R. 459. Dr. Salas testified that she watched the video of A.G.'s interview and reviewed the certified transcript of the interview before her testimony, and provided that in her professional opinion, "there was a substantial amount of use of suggestible techniques that were influencing the child in the interview." R. 461. She explained that, generally, preschool children like to please and look for positive feedback, and are very sensitive to power differentials. Specifically, she testified, "I saw evidence in the interview that this child, in particular, did not have the comfort level correcting the adult." R. 464. Dr. Salas also testified about the danger of bribing or punishing a child during an interview. Specifically, she said, "I saw that this interview opened up a – a wide door for increasing this child's suggestibility and relying on the power of suggestion to get information and words to come out of the child's mouth." R. 466. She gave numerous examples of the interviewer using raised inflection and a confirmatory, "right?" to elicit agreement with the interviewer. *Id.* Dr. Salas noted instances of incorrect feedback and misapplied ground rules. She noted that A.G. demonstrated very limited ability or willingness to correct the interviewer.

Dr. Salas noted numerous instances of the interviewer inaccurately parroting the child, most notably, "I remember the most remarkable one that stands out was the child had said that something happened with the finger. And the immediate response from the interviewer was that finger translated into a new noun, which was hand." R. 470.

Additionally, Dr. Salas noted that the interviewer set up problematic positive and negative reinforcement in the interview. As an example, she noted that A.G. "is definitely looking for an opportunity for positive reinforcement. Because the child from the beginning of the interview starts off with being proud about how she can make a . . . five, a seven, write her name, spell a friend's name." R. 472. "[S]he's looking for the opportunity for more attention and focus on what she's capable of doing, not necessarily

giving a disclosure." But, Dr. Salas noted, "when the child deviates from giving a disclosure, the interviewer begins to withdraw. And when the interviewer starts asking more close-ended questions, which increases the risk of suggestibility, the child starts getting more positive feedback." R. 475. She continued, "And then the kid starts giving more responses to close-ended questions that are congruent with what appears to be interviewer bias." R. 475.

Dr. Salas testified that the interviewer used "bribing" in the interview. She explained that while Amber Cheney went out of the room, A.G. continued to draw on the board and was clearly enjoying that. When Cheney returned, she told A.G. she could keep drawing as long as she keeps answering her questions. Dr. Salas explained, "this is very concerning because it's telling the kid you can do what you want to do if you give me what I want from you, which is you've got to answer my questions." R. 477.

Dr. Salas testified that a child witness's disclosure can become tainted as a result of interviewer biases creating increased suggestibility in children. She testified that in her opinion the techniques and methods used by Amber Cheney tainted the interview irretrievably. R. 480.

ARGUMENTS

1. **The Court of Appeals erred when it misapplied this Court's precedents in *Anderson* and *Kromah* to uphold the trial court's improper limitation on cross-examination of the forensic interviewer and to uphold the trial court's ruling preventing Clark from presenting an expert witness in his defense.**

In determining petitioner's trial counsel was properly prevented from cross examining the forensic interviewer and properly prevented from presenting testimony expert who would call into question the circumstances and conduct of the interview, the Court of Appeals misapprehended the holdings of *State v. Anderson*, 413 S.C. 212 (S.C. 2015) and *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). If allowed to stand, the Court of Appeals' holding would frustrate the essential right of confrontation and create a special class of defendants — those accused by children — who have diminished rights

of confrontation. But the Court of Appeals' decision is not supported by this Court's precedent and cannot withstand constitutional scrutiny.

The *Anderson* and *Kromah* decisions strictly restrict the state from eliciting testimony from forensic interviewers or experts that would serve chiefly to improperly bolster the credibility of a child witness. The State may not, for example, elicit testimony to suggest that any particular technique employed by the interviewer is designed to produce more truthful or accurate disclosures by child witnesses. Instead, the state is limited in court to using the interviewer to authenticate the video but may use a so-called "blind" expert to educate the jury about other matters involving child witnesses to and victims of crime.

But the authentication colloquy is not the last time the forensic interviewer speaks to the jury. Once the video is authenticated and deemed to meet the threshold for admission under Section 17-23-175 of the South Carolina Code, the interviewer speaks, alongside the child witness, throughout any video played to the jury. The interviewer asks the child questions. Gives the child instructions. Answers questions the child might have. Steers the child to stay focused or to move on to new topics. The interviewer, every bit as much as the child, communicates vitally important evidence to the jury through this indirect and unexamined method of testimony. But applying the holding of the Court of Appeals' opinion in this case, Appellant and similarly situated defendants are completely foreclosed from asking the interviewer questions about what is said in the video. The child witness, who is called before introduction of the video in such a trial, may or may not be recalled by either party after the video is played to the jury to be cross-examined about ways in which the out-of-court statements may be subject to questions of accuracy, credibility, and veracity; but the Court of Appeals' holding forecloses any such questioning of the interviewer to attack the reliability of the information contained in the interview.

Such a rule conflates the trial court's determination of *admissibility* of the interview with the jury's role in assessing the *credibility* of the admitted evidence. The essential function of trial counsel for any defendant is to assist the jury through

questioning of the state's witnesses in making that assessment. And while the *Anderson* and *Kromah* decisions properly limit the state from using the forensic interviewer to bolster child witnesses, those decisions do not and must not limit defendants from challenging the credibility of an admitted statement, even if the substance of those challenges opens the door to the presentation of rebuttal evidence by the State that would not have been permitted in the State's case in chief. The strategic decision by counsel for any defendant to cross examine a forensic interviewer about the conduct of the interviewer or to introduce expert testimony to challenge the reliability of an interviewer's conduct would eliminate the *Anderson* and *Kromah* prohibitions binding the state in its case in chief. *See State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008)("When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.") With the door opened by the defendant, the state would be free to pursue lines of questioning in redirect or rebuttal that would have been impermissible in the State's case-in-chief. This is the proper way to strike the balance the pursuit of which was the impetus for the *Anderson* and *Kromah* decisions.

At oral argument in the Court of Appeals, counsel for the petitioner proffered a corollary example in the *Neil v. Biggers* context. 409 U.S. 188 (1972). Where an eyewitness identification is deemed sufficiently reliable to be admissible by the trial court, the admission of that evidence proffered by the state—which arises in the natural course of the trial court's evidentiary gatekeeping role—does not preclude defendants from challenging the officers who conducted the eyewitness identification about the suggestive techniques they may have used in eliciting at that identification. Nor does a finding of admissibility in the *Biggers* context prohibit the introduction of qualified expert testimony to educate the jury about techniques and circumstances like, for example, cross-racial identification bias, that might lead to a less than reliable identification. The judge's determination of *admissibility* is not and cannot be the final word on *credibility*.

An additional example is also instructive: in cases involving in-custody confessions pretrial litigation often centers on the admissibility of such confessions where the question is whether, as a matter of constitutional law, the circumstances of the confession were so coercive as to render its admission fundamentally unfair. But where the pretrial determination does not result in suppression of an in-custody confession, that determination does not prevent the defendant from bringing the jury's attention through examination and cross-examination of witnesses to the nature and circumstances of the confession that might lead a jury to question its credibility. "Although all the evidence may be to the effect that a confession made while under arrest was a voluntary one, the jury may not be so convinced; and it is the jury who, in the final analysis, must determine the factual issue of voluntariness." *State v. Santiago*, 370 S.C. 153, 190 (S.C. Ct. App. 2006)(*citing State v. Miller*, 211 S.C. 306 (S.C. 1947)).

It is no more appropriate in the context of a case involving child sexual abuse than it is in a case involving a defendant's statement apparently confessing to homicide to supplant the jury's factfinding role as the arbiter of credibility with the judge's legal determination of admissibility. The decisions in *Anderson* and *Kromah* gave guidance to trial courts to shield against the State's improper questioning of forensic interviewers and experts in child abuse dynamics and interviewing for the purposes of bolstering the credibility of child witnesses. Rather than furthering the purposes of the limitations set forth in *Anderson* and *Kromah*, if allowed to stand, the Court of Appeals' opinion would use those decisions as sword to hold at bay proper questioning of witnesses by people accused of crime by children. While defendants will undoubtedly take a risk in eliciting testimony about the suggestive nature of forensic interviews, that is a strategic decision defendants must be allowed to make.

This court should grant the petition for writ of certiorari to address the error and make plain that the boundaries set by *Anderson* and *Kromah* are not limitations on defendants' rights of confrontation and that defendants—even those accused by a protected class of witnesses of the most odious crimes—must be permitted to challenge

the credibility of those accusers and the circumstances of their out-of-court statements and to confront *all* the witnesses against them.

2. **The Court of Appeals erred when it gave an advisory opinion regarding the admissibility of the forensic interview after determining the issue had not been preserved for review.**

The Court of Appeals held that the proper time for trial counsel to raise concerns about the reliability of the video was before its admission; here, trial counsel conditionally consented to admission of the video without making any statement as to its reliability. While counsel's subsequent objection to its admission and effort to challenge the reliability of the statement may have only imperfectly preserved the error of its admission, to the extent that this case turns on a failure to preserve error below, the Court of Appeals should not have commented on whether the forensic video would have been properly admitted had the proper procedure been followed. The Court of Appeals' opinion regarding what it deems an unpreserved issue of admissibility of evidence is advisory in nature, but an appellate court need not address other issues when a single issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.Ed.2d 591, 598 (1999). Courts in South Carolina do not render merely advisory opinions. See, e.g., *Hitter v. McLeod*, 274 S.C. 616, 619 (S.C. 1980). An appellate court renders an advisory opinion when commenting on an issue will have no practical effect on the outcome of the case.

Error preservation rules prevent consideration by Courts of Appeals of errors inadequately litigated before the trial courts; in tandem, the rules preventing advisory opinions prevent appellate courts from predetermining the outcome of collateral litigation.

This court should grant the petition for writ of certiorari to correct the error.

3. **This Court should revisit its error preservation rules to provide for an exception where, as here, errors are so plain and so harmful that to delay their correction to collateral review would be unjust and wasteful of judicial resources.**

The Court of Appeals held that trial counsel failed to object to the admission of the forensic examination video and therefore failed to preserve the issue. At trial, the only evidence tendered by the state of facts to support a jury instruction on criminal sexual conduct in the first degree was the child witness' statements made in the forensic interview. If trial counsel committed error by the delay in her objection to the video's admission, it was an error of the most grievous sort, particularly if the Court of Appeals restrictions on cross examination are permitted to stand.

Petitioner respectfully asks this Court to revisit our state's longstanding rejection of a "plain error" rule. Such a rule is not without precedent in other jurisdictions and is even expressly permitted by rule in the Federal Rules of Criminal Procedure: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). The United States Supreme Court has outlined the narrow circumstances under which such plain errors are subject to direct appellate review: 1) there must be an error or deviation from a legal rule not waived by the defendant; 2) the error must be plain, clear, or obvious; and 3) the error must prejudicially affect substantial rights. *United States v. Olano*, 507 U.S. 725 (1993).

This Court should recognize that the error in consenting to the video's admissibility was plain on its face; that the error affected Clark's substantial rights; and that the error seriously affected the fairness of the proceeding against him—indeed, trial counsel expressed regret to the trial court about the concession after other rulings upon which she had conditioned her acquiescence to the video's admission. And if that was error, the error was manifestly harmful, since the only time the child witness made factual allegations of criminal sexual conduct with a minor in the first degree was during the forensic interview video.

A narrowly tailored plain error rule would act to swiftly correct the most serious flaws in trial court proceedings and would prevent the years of litigation delays occasioned by waiting to address obvious defects until a case is ripe for post-conviction review. *See also*, *United States v. Freeman*, 24 F.4th 320, 331 (4th Cir. 2022) (finding ineffective assistance of counsel on direct appeal and citing *Massaro v. U.S.*, 538 U.S. 500, 508 (2003)("We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal.")).

This Court should further reject the cynicism of earlier Courts' views of the lawyers who represent criminal defendants in trial courts; in abolishing *in favorem vitae* review for capital cases, Justice Toal wrote of the dangers of such review: "This encourages defense attorneys to purposefully allow error to occur (such as improper solicitor argument or erroneous charge by the judge) in a case they feel they are losing at trial, thereby tainting the trial, while taking comfort that this Court will reverse a conviction based upon the unobjected-to error." *State v. Torrance*, 305 S.C. 45, 65 (1991). Apart from being a troubling judgment of the motives of an entire class of lawyers, all of whom swore the same oath upon admission to the bar as prosecutors, insurance defense lawyers, real estate lawyers, and judges, there is no glory to be had for the lawyer who becomes known for "winning" on appeal for failing to properly object or otherwise defend a case at trial. Further, much of the bad lawyer behavior portended in *Torrance* is easily prevented by adoption of a corollary rule, embracing the "invited error" doctrine. The invited error doctrine provides that "a court cannot be asked by counsel to take a step in a case and

later be convicted of error, because it has complied with such request. *See, e.g., U.S. v. Jackson*, 124 F.3d 607, 617 (4th Cir. 1997).

Because the error in this case—even if this Court finds it imperfectly preserved or unpreserved—is so plain, so substantial, and so prejudicial as to seriously affect the fairness of the trial, this Court should grant the petition for writ of certiorari and adopt a limited plain error standard of review in criminal cases.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari and allow further briefing on the issues.

Respectfully submitted,

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