

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

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Jun 30 2023

S.C. SUPREME COURT

BRANDON CLARK,

vs.

STATE OF SOUTH CAROLINA,

Petitioner,

Respondent.

Appellate Case No. 2023-000641

PETITIONERS REPLY TO THE STATE'S RETURN

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REPLY TO THE STATE'S RETURN

Petitioner renews his request that this Court grant certiorari. The purpose of the grant is 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' confrontation rights in cases involving child victims. 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.

The petition falls squarely within the considerations of Rule 242 of the Rules of Appellate procedure because it involves a decision of the Court of Appeals misapplying and misapprehending prior decisions of the Supreme Court and because it involves a substantial constitutional issue, namely the right of confrontation.

- I. **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.**

First, the state argues that because the scope of cross-examination is a matter of discretion for the trial judge, the lower court's ruling limiting Clark from fully cross examining the forensic interviewer should not be disturbed. This argument, which was made verbatim in briefing to the Court of Appeals, goes on to accurately lay out the case law applicable to cross-examination, witness pitting, and bolstering but misapplies those precedents to this case. State's Return at 12-13. Indeed, the State's argument is, like the Court of Appeals' opinion, an exemplar of a fundamental misunderstanding of how bolstering applies in the context of cross-examination.

Defendants may not be required to prove their innocence and must be permitted to meaningfully confront the witnesses and evidence propounded by the state through cross-examination. While it is improper to ask one witness to comment directly on the veracity of another, the testimony given by one witness about the circumstances or observations of another's actions or statements may impact a jury's assessment of the reliability of *either* witness' testimony. Taken out of the context of a forensic interview situation, the following hypothetical is instructive: Officer A could testify to having taken Victim B's statement. Witness C could testify that she observed the interaction between Officer A and Victim B and saw Officer A holding a gun to Victim B's head during the writing of the statement. Defense counsel can argue that the jury should use Witness C's testimony to find Victim B's statement unreliable due to coercion. Witness C's observations would be neither pitting nor bolstering. Nor is it pitting or reverse bolstering if an expert, trained in the appropriate conduct of child interviews, shares with the jury specialized knowledge of interviewing techniques that are disfavored due to their tendency to produce unreliable disclosures. That witness may then highlight instances in the forensic interview in which such techniques are used without pitting or bolstering. And once that door is open, the State may provide a competing expert or other witness to challenge the defense expert without improperly vouching or bolstering.

Instead, here, the forensic interviewer was permitted to speak with the child—and thereby to the jury—for the better part of 30 minutes with no meaningful opportunity to question her about the conduct of her interview. The right of confrontation was impermissibly abridged.

This Court should grant certiorari to correct the lower courts' misapplication of these rules and preserve the confrontation rights of people facing prosecution based on the accusations of children whose recorded statements are covered under S.C. Code Ann. § 17-23-175.

II. 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 admissibility of the forensic interview was an issue not preserved for appeal. And then the Court of Appeals issued an advisory opinion as to what it *would* have decided if the issue had been properly preserved. The State argues that the Court of Appeals opinion was not advisory in nature because it answered a question presented to the court by this Petitioner in his direct appeal. By determining that the petitioner had failed to preserve the issue, the Court of Appeals necessarily found that the issue was not a question properly before it. And then the Court of Appeals proceeded to answer anyway. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.Ed.2d 591, 598 (1999); *Hitter v. McLeod*, 274 S.C. 616, 619 (S.C. 1980). To allow this kind of advisory opinion to stand would improperly permit the Court of Appeals to predetermine the outcome of future collateral attacks on the propriety of the trial and counsel's representation. This Court should grant cert to vacate the Court of Appeals' advisory opinion.

III. 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 State urges this Court to reject Petitioner's third ground for certiorari because it was not presented in the petition for rehearing. This is simply inaccurate. The petition for rehearing reads as follows:

“Appellant respectfully requests [r]ehearing to address whether the Court's opinion reflects a *per se* finding of ineffective assistance of counsel. Appellant is aware that the South Carolina courts do not recognize “plain error” or “in *favorem vitae*” review. *State v. Torrance*, 305 S.C. 45 (S.C. 1991) (abolishing in *favorem vitae* review, once an exception to South Carolina's rigid error preservation rules). But to the extent the Court's opinion is that trial counsel waived legitimate grounds for suppression of the forensic interview and thereby forfeited all remaining right to challenge the reliability of the interview, Appellant would respectfully seek leave to argue against precedent in favor of adoption of a plain error rule in criminal cases. Such a rule would align with the comparable rule in the Fourth Circuit

Court of Appeals, a rule the existence of which has not resulted in any undue flood of reversals of convictions in the circuit. See Fed. R. Crim. P 52(b)(“A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.”). This Court and our Supreme Court should recognize that the error in acquiescing 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.”

Petition for Rehearing at 6-7.

Brandon Clark respectfully renews his petition for a writ of certiorari to address this issue.

CONCLUSION

Because the decision below from the Court of Appeals misapplies prior decisions of the Supreme Court and because substantial constitutional issues involving the right of confrontation are implicated, the Supreme Court should grant the petition and permit briefing on the merits.

Respectfully submitted,

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This 30th Day of June 2023.