

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Jun 13 2024

S.C. SUPREME COURT

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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

\_\_\_\_\_  
REPLY BRIEF  
\_\_\_\_\_

In its merits brief, the State largely proceeds with a verbatim argument to that of its response to the Petition for Certiorari and the request for rehearing below. The State has not further meaningfully engaged with the arguments expanded on in the Brief on the merits. This only underscores the need for this Court’s intercession on these issues: First, 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. Next, to the extent this Court agrees that the lower court’s error was imperfectly preserved below, this Court should vacate the Court of Appeals’ advisory opinion regarding admission of the forensic video. Finally, this Court should carefully 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,

review. This Court can follow other jurisdictions that have embraced a plain error review without leading to the parade of horrors feared in *State v. Torrance*, by adopting a common-sense corollary “invited error” rule.

- 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.

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 goes on to provide an accurate summary of the law applicable to cross-examination, witness pitting, and bolstering, but then misapplies those precedents to the facts of this case. State’s Response at 12-14. Indeed, as laid out in the Petitioner’s Brief on the merits, the State persists in making an argument that represents a fundamental misunderstanding of how bolstering applies in the context of cross-examination and utterly fails to engage with arguments advanced in the Petitioner’s brief analogizing the case to those involving claims of coerced confessions or faulty eyewitness identifications.

Fundamentally, what this case shares with those involving coerced confessions or impermissibly biased eyewitness identifications is the principle that even when a trial court allows evidence to be *admitted*, the defendant is permitted to challenge the veracity or reliability of that evidence before the jury. It is a bedrock principle of American constitutional law that 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. That is precisely the sort of testimony the trial court prevented the jury from hearing in this case, and which justifies reversal of the Court of Appeals and remand to the Court of General Sessions for a new trial.

- 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.

While Petitioner does not concede that the trial court's error was unpreserved, it must be conceded that the timing of the challenge to the admissibility of the forensic interview was imperfect. But even if the Court of Appeals application of this Court's error preservation laws was correct, the lower court should not have taken the additional step of issuing an advisory opinion about the propriety of the admission. 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). This was improper, and that portion of the case should be vacated. This is particularly important in the case this Court declines to adopt a limited "plain error" rule, since the current state of the law allows even the most egregious of errors to go uncorrected until cases are returned to trial courts for post conviction relief, often many years later. To allow the Court of Appeals' opinion to stand would provide appellate courts the opportunity to advisorily opine about matters that must be litigated collaterally. Any trial court reviewing a matter for collateral review will, necessarily, be compelled to adopt the advice of the appellate court rather than conducting its own review.

This Court should 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.

As it did in its return to the Petition for Writ of Certiorari, the State persists in inaccurately characterizing how Petitioner’s third ground for certiorari was presented. The petition for rehearing requested rehearing to address the need to address the conflict between the Court of Appeals apparent finding of *per se* ineffective assistance of counsel with this Court’s error preservation rules effectively prohibiting any appellate correction of such errors at trial. The only additional argument offered by the State is a brief, favorable recitation of the merits of error preservation. The Petitioner does not ask this court to jettison all error preservation rules. The Petitioner is seeking a narrowly tailored rule that allows for appellate review of only those errors which are not waived, which are plain on their face, and which affect substantial rights. The Petitioner is seeking a rule with a corollary that prohibits the invited error, or “sandbagging,” the State argues will be the inevitable result of adoption of plain error review. At a time when trial courts are backlogged for years, when the Attorney General’s office is understaffed in its post-conviction relief division, and when there is a statewide trial judge shortage, persisting *without* such a rule presents the real risk. To the extent there were any errors left unpreserved or imperfectly preserved here, there was no operative waiver of the right of confrontation by the Petitioner, the errors are plain on the face of the transcript, and they affect a substantial right; so, this Court should adopt a limited plain error rule and apply it to these facts to vacate the opinion below and remand the case for a new trial.

Respectfully submitted,

/s/ Cameron Jane Blazer

Cameron Jane Blazer  
Ninth Circuit Public Defender  
Attorney for Petitioner Brandon Clark

This 13th Day of June, 2024.