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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

Opinion No. 6140

THE STATE, RESPONDENT,

V.

MARCUS ALEXANDER WIGFALL, APPELLANT

APPELLATE CASE NO. 2023-000236

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Marcus A. Wigfall requests that this Court grant rehearing. Appellant does not ask this Court to reconsider its decision as to Issue I that Desch's testimony—that she interviewed Minor 1 about the alleged abuse and recommended the case be staffed with law enforcement—was inadmissible bolstering which was not harmless. However, very respectfully, Appellant asserts this Court misapprehended and/or overlooked his arguments

as to Issue 1 and Issue 2 regarding Desch's testimony and Minor 1's testimony about a mental health assessment and counseling.[1]

Appellant argued in his in his brief that: 1) The trial court erred where it admitted evidence that upon interviewing Minor 1 about the alleged abuse, the forensic interviewer recommended that the case be staffed with law enforcement and that Minor 1 receive a mental health assessment, where testimony which vouches for a complainant's credibility is inadmissible, since the evidence conveyed to the jury that Minor 1 was credible because her case was referred for follow-up. And: 2) The trial court erred where it admitted evidence Minor 1 received counseling after she disclosed the alleged abuse, where testimony which improperly bolsters the credibility of the complainant is inadmissible, since the evidence conveyed to the jury that Minor 1 was credible because counseling was given.

As to the first portion of Appellant's Issue 1, this Court held the "trial court erred in allowing Desch to testify about law enforcement involvement." *State v. Wigfall*, Op. No. 6140 (S.C. Ct. App. filed March 11, 2026) (Howard Adv. Sh. No. 10 at 9, 22). This Court explained Desch's "testimony references the investigatory purpose our supreme court has explained should not be mentioned to the jury—the forensic interviewer's purpose to allow law enforcement to decide whether to conduct a criminal investigation." It cited, *inter alia*, *State v. Anderson*, 413 S.C. 212, 221, 776 S.E.2d 76, 80 (2015) ("There is to be no testimony . . . that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted."). *State v. Wigfall*, Howard Adv. Sh. No. 10 at 21. This Court found the error was not harmless, explaining the "State's case relied on Minor 1's credibility and Desch's improperly admitted testimony bolstered her credibility[.]" *State v. Wigfall*, Howard Adv. Sh. No. 10 at 26-

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[1] The State has indicated that it intends to seek rehearing by filing a request for an extension of time to serve and file its petition for rehearing in this case.

30. This Court noted "Minor 1's testimony was the only direct evidence of sexual abuse," and the "record illustrates the jury struggled with how much of Minor 1's testimony it believed[.]" It cited, *inter alia*, *Chappell v. State*, 429 S.C. 68, 81, 837 S.E.2d 496, 503 (Ct. App. 2019) ("our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime"). *State v. Wigfall*, Howard Adv. Sh. No. 10 at 27-30.

However, as to the second portion of Appellant's Issue 1, and as to Appellant's Issue 2, this Court rejected Appellant's argument that the admission of Minor 1's testimony she received counseling after she disclosed the alleged abuse and Desch's testimony Minor 1 received a mental health assessment were in error because they conveyed to the jury Minor 1 was credible. This Court cited to, *inter alia*, *State v. Makins*, 433 S.C. 494, 860 S.E.2d 666 (2021), and *State v. Eubanks*, 437 S.C. 458, 878 S.E.2d 335 (Ct. App. 2022). *State v. Wigfall*, Howard Adv. Sh. No. 10 at 22-26. This Court found the testimony was similar to that given in *Makins*, and that Appellant's argument was rejected in *Makins*. *State v. Wigfall*, Howard Adv. Sh. No. 10 at 25. This Court also rejected Appellant's argument that Desch's testimony she made a "standard" recommendation was an impermissible comment on the credibility of a class of persons to which the victim belongs, reasoning that "if the interviewers are making the same referrals for every child, they are not undertaking any analysis into whether those children are being truthful." *State v. Wigfall*, Howard Adv. Sh. No. 10 at 26, n. 6.

Respectfully, *State v. Makins*, 433 S.C. 494, 860 S.E.2d 666 (2021), should be distinguished from this case. This Court noted in *Makins*, testimony from the therapist, Rich, that she provided therapy to the minor, was not bolstering and that the Supreme Court rejected

this argument in *Makins*. *State v. Wigfall*, Op. No. 6140 at 22-26. Critically, however, in *Makins*, there was a valid evidentiary purpose for Rich's testimony. The minor in *Makins* was five years old when the abuse began and eight years old when she disclosed and was interviewed. *See State v. Makins*, 428 S.C. 440, 443, 835 S.E.2d 532, 534 (Ct. App. 2019), rev'd, 433 S.C. 494, 860 S.E.2d 666 (2021). Rich's testimony was needed because the minor in *Makins* produced a graphic drawing with Rich which explained the allegations. The Supreme Court concluded "Rich's testimony as Minor's treating therapist was required to lay the foundation for introducing Minor's graphic drawing into evidence. Minor's drawing and her disclosure to Rich were the basis of the most serious charge against Makins—first-degree CSC with a minor. Therefore, Rich's testimony served a purpose other than to vouch for Minor's credibility." *State v. Makins*, 433 S.C. at 504–05, 860 S.E.2d at 672. Similarly, in *State v. Eubanks*, which was cited to by this Court, the testimony of the mental health professionals that the child had post-traumatic stress disorder and received trauma-focused therapy "was probative to show Child suffered some trauma and to refute Eubanks's contention that nothing happened, or that if anything inappropriate happened, it happened while both were asleep." *State v. Eubanks*, 437 S.C. at 475, 878 S.E.2d at 345.

In this case, unlike *Makins* and *Eubanks*, there was no valid purpose for Desch's testimony. Minor 1 was sixteen at disclosure; Desch did not lay a foundation for other evidence. She did not refute the defendant's story. Instead, Desch's testimony she referred Minor 1 for a mental health assessment and Minor 1's testimony that she did receive counseling, impermissibly bolstered the witness's credibility. *See Briggs v. State*, 421 S.C. 316, 806, S.E.2d 713 (2017) (witness's testimony was improper where there was no other purpose for it other than to bolster the victim's credibility). Desch's testimony fell outside the guidelines for the proper

scope of forensic interviewers. *See State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (forensic interviewer should avoid testimony that indicates to the jury the interviewer believes the child's allegations or the child's behavior indicated the child was telling the truth).

The testimony regarding a mental health assessment and counseling should have been excluded. Testimony by the forensic interviewer, Alix Desch, that she interviewed Minor 1 and, as a result, referred Minor 1 for an assessment of her mental health needs, improperly invaded the jury's role in determining witness credibility. Appellant correctly objected to the testimony as vouching for Minor 1's credibility. The trial court's admission of this evidence was error.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. Makins*, 433 S.C. at 501, 860 S.E.2d at 670 (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). "[A] witness cannot bolster the credibility of another witness because doing so invades the province of the jury." *Makins*, 433 S.C. at 502, 860 S.E.2d at 670-71 (citing *Briggs v. State*, 421 S.C. at 328, 806 S.E.2d at 719). "[I]t 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." *State v. Kromah*, 401 S.C. at 358-59, 737 S.E.2d at 500.

"[A] forensic interviewer may not be permitted to give testimony that improperly bolsters the credibility of the victim." *Briggs*, 421 S.C. at 323, 806 S.E.2d at 717 (citing *State v. Douglas*, *supra*). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs*, 421 S.C. at 324, 806 S.E.2d at 717. A forensic interviewer should avoid the following kinds of statements at trial:

> that the child was told to be truthful; a direct opinion as to a child's veracity or tendency to tell the truth; **any statement that indirectly vouches for the child's believability**, such as stating the interviewer has made a 'compelling finding' of abuse; **any statement to indicate to a jury that the interviewer believes the**

> **child's allegations in the current matter; or an opinion that the child's behavior indicated the child was telling the truth.**

State v. Kromah, 401 S.C. at 360, 737 S.E.2d at 500 (cleaned up) (emphasis added).

See State v. Whitner, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) (forensic interviewer may not "invade the province of the jury by vouching for the credibility of the alleged victim"); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (trial court erred in "allowing the State to introduce the reports because they allowed the forensic interviewer to improperly vouch for the children's veracity); *State v. Douglas*, 380 S.C. 499, 505, 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissenting) (forensic interviewer vouched for victim's veracity by testifying she determined victim needed a medical exam—the only reasonable conclusion to be drawn from the testimony was based on her training she believed victim was being truthful). *See also Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010) (testimony by forensic interviewer that she found victim's statement to be believable and had no reason not to be truthful bolstered victim's credibility); *Thompson v. State*, 423 S.C. 235, 244, 814 S.E.2d 487, 492 (2018) (failure to object to testimony of detective and forensic interviewer which conveyed to jury they believed victim was telling the truth about abuse was deficient performance).

Alix Desch, a forensic interviewer, interviewed Minor 1 about her disclosures. Desch's testimony on direct was only four pages long. She stated: 1) she worked at a child advocacy center; 2) her job was to assist law enforcement with investigations by "interviewing victims"; 3) she had interviewed Minor 1 twice; 4) she referred Minor 1 to mental health professionals; and 5) she referred the case to a multidisciplinary team who would meet with law enforcement investigators. Desch's statement she referred Minor to a mental health professionals was improper because it indirectly vouched for Minor 1's credibility. The appellate courts of this

State have held there are legitimate functions for the testimony of a forensic interviewer at trial. Desch did not perform those functions.

Instead, the State entered prohibited evidence through Desch. "It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations." *State v. Kromah*, 401 S.C. at 358, 737 S.E.2d at 499. Desch was not put up for a purpose that has been found to be legitimate, such as to lay the foundation to admit a recording of the forensic interviews. The recordings were inadmissible since Minor 1 was seventeen at the time of interview. *E.g.*, S.C. Code Ann. § 17-23-175 (requirements for admissibility of out-of-court statement of child sexual abuse victim under age of twelve); *State v. Whitner*, 399 S.C. at 559, 732 S.E.2d at 867 (forensic interviewer's testimony was for limited purpose of laying proper foundation for admission of videotape and did not vouch for credibility of alleged victim). Nor did Desch give testimony about child sexual abuse dynamics: the State put up a blind expert on that subject but that was a different witness. *See, e.g.*, *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 271 (2018) ("behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized").

Instead, Desch indirectly conveyed to the jury that she believed Minor 1 because she determined Minor 1 should be referred for a mental health assessment. *See Briggs*, 421 S.C. at 329, 806 S.E.2d at 720 (forensic interviewer's testimony improper where it indirectly revealed she believed disclosure was truth). In *Briggs*, the Supreme Court explained that although forensic interviewers may aid law enforcement in determining whether a criminal investigation is warranted, this function is not a proper topic for the jury's consideration. *Briggs*, 421 S.C. at 328, 806 S.E.2d at 719. "Improper bolstering is testimony that indicates the witness believes the victim, but does not serve some other valid purpose. Improper bolstering also occurs when . . .

there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth." *Chappell v. State*, 429 S.C. at 75, 837 S.E.2d at 499–500 (cleaned up). There was no permissible purpose for Desch's testimony other than to vouch for Minor 1's credibility. Desch's testimony invaded the province of the jury and its admission was error.

This problem was not saved by the fact that Desch said the recommendation to refer the case for mental health action was a "standard" recommendation. *See Chappell v. State*, 429 S.C. at 78, 837 S.E.2d at 501 ("a comment on the credibility of a class of persons to which the victim belongs is a comment on the credibility of the victim"). This implied Desch believed children did not lie about sexual abuse.

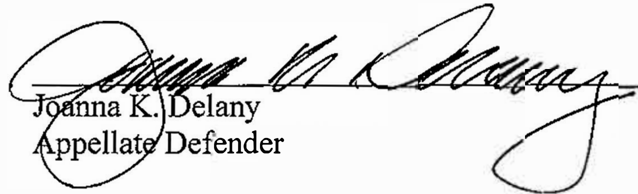
The solicitor asked Minor 1: "after this and after you told, did you go to some counseling?" Appellant objected to bolstering, but Minor 1 was permitted to answer affirmatively. This testimony improperly encouraged the jury to conclude that Minor 1 was telling the truth because counseling was given.

In *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015), the Supreme Court found a forensic interviewer's testimony that she recommended the defendant not be around the victim for any reason could only be interpreted as the interviewer believing the victim's claim the defendant sexually abused her. The Court found the testimony improperly bolstered the victim's credibility. *Id.* Similarly, in this case, Minor 1's testimony that she received counseling imparted to the jury that a counselor believed she had been sexually abused. This should be considered in light of the erroneously admitted testimony discussed above in Issue 1, that the forensic interviewer referred Minor 1 for a mental health assessment to determine her counseling needs. The testimony indirectly conveyed the counselor's opinion on Minor 1's credibility. *Cf. Briggs v. State*, 421 S.C. at 324, 806 S.E.2d at 717 ("a witness may not give an opinion for the

purpose of conveying to the jury—directly or indirectly—that she believes the victim"); *State v. Douglas*, 380 S.C. at 505, 671 S.E.2d at 610 (Pleicones, J., dissenting) (forensic interviewer vouched for victim's veracity by testifying she determined victim needed a medical exam—the only reasonable conclusion to be drawn from the testimony was based on her training she believed victim was being truthful).

Finally, the admission of the testimony was not harmless, for the reasons recognized by this Court in determining Desch's law enforcement referral testimony was not harmless. The jury struggled with the case, deliberating for six hours, asking to be recharged twice, and ultimately acquitting on two offenses. Although Minor 1 claimed that the sexual abuse happened frequently for three years, and that her brother was always home at the time, her brother did not see any misconduct. Her mother did not see misconduct when she would come home unexpectedly between shifts. The case was dependent upon Minor 1's credibility. *See Thompson*, 423 S.C. at 249, 814 S.E.2d at 494 (PCR applicant was prejudiced by admission of forensic interviewer's bolstering testimony which vouched for victim's credibility where the only evidence petitioner was perpetrator was victim's testimony); *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (applicant prejudiced by forensic interviewer's improper bolstering of victim's credibility where the outcome of the case "hinged on the Victim's credibility regarding identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of Smith's guilt"); *Chappell v. State*, 429 S.C. at 81, 837 S.E.2d at 503 ("our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime").

Respectfully, rehearing should be granted to Appellant Marcus Wigfall as to the mental health assessment referral portion of Issue 1 and as to Issue 2.



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ATTORNEY FOR APPELLANT

This 26th day of March, 2026.

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STATE OF SOUTH CAROLINA

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Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE, RESPONDENT,

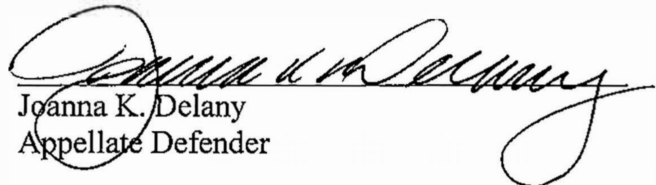
V.

MARCUS ALEXANDER WIGFALL, APPELLANT

APPELLATE CASE NO. 2023-000236

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Marcus A. Wigfall, #390220, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 26th day of March, 2026.



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ATTORNEY FOR APPELLANT

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Mar 26 2026
SC Court of Appeals

From: Mcinnis, Sara
To: Mark Farthing
Cc: Caroline Collins; Delany, Joanna
Subject: 2023-000236 The State v. Marcus A. Wigfall Petition for Rehearing
Date: Thursday, March 26, 2026 5:03:00 PM
Attachments: 2023-000236 The State v. Marcus A. Wigfall Petition for Rehearing.pdf
AG Cover Letter - PFR.pdf

Good Afternoon Mr. Farthing,

Attached for service in the above-referenced case is the Petition for Rehearing, which will be filed with the Court of Appeals today, March 26, 2026, via email filing.

Thank you,

Sara McInnis
Administrative Assistant
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Appellate Division
(803) 734-1330