THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000435

The State of South Carolina,..........................Respondent,

v.

Stephen Douglas Berry,..................................Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner, Stephen D. Berry, certifies that the Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the Court of Appeals on November 20, 2015.

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED BY UPHOLDING THE TRIAL COURT'S ADMISSION OF TESTIMONY EXCEEDING THE ALLOWABLE SCOPE PURSUANT TO BINDING PRECEDENT?

STATEMENT OF THE CASE

In July of 2012, a Union County Grand Jury indicted Stephen Douglas Berry (Berry) for Criminal Sexual Conduct with a Minor, Second Degree, Indictment #2011-GS-44-0413. (Appendix pp. 3-4).

On July 17, 2012, Berry proceeded to jury trial before the Honorable Edward Miller. Attorney Melinda Butler represented Berry at trial. Assistant Solicitor John C. Anthony represented the State. The jury could not reach a unanimous verdict.

On February 5, 2013, Berry again proceeded to jury trial, this time before the Honorable John C. Hayes. Attorney Erik Delaney of the Union County Public Defender's office and Attorney Melissa Inzerillo of the York County Public Defender's office represented Berry at trial. John C. Anthony again represented the State.

The jury returned a guilty verdict and Judge Hayes sentenced Berry to fifteen (15) years. Berry timely served a Notice of Appeal on February 11, 2013. (App. pp. 6-7). On July 15, 2015, the Court of Appeals issued Opinion Number 5329, affirming Berry's conviction. (App. pp. 250-261). Berry timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. (App. pp. 262-269). The Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 20, 2015. (App. pp. 278-280). Following an extension, Berry now timely files this Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

The July 2012 indictment states as follows:

> That in Union County, South Carolina, between on or about May 01, 2010 and on or about __________ 2010, Stephen Douglas Berry did commit the crime of Criminal Sexual Conduct with a Minor in the Second Degree, in that the Defendant, on one or more occasion, did commit a sexual

> battery upon the victim, ___________, a minor who was at least fourteen years of age but who was less than sixteen years of age, by digitally penetrating or engaging in sexual intercourse with the victim, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or the Defendant was older than the victim, in violation of Section 16-03-655, Code of Laws of South Carolina (1976, as amended). (App. p. 4).

Before the trial started, Berry's counsel moved to limit the testimony regarding any alleged sexual acts to the dates contained in the indictment. (App. p. 12, lines 20-23). The State sought to introduce testimony that the alleged acts continued to occur beyond the dates set forth in the indictment. (App. p. 13, lines 17-23). The trial judge decided to allow the parties to start the trial and at the appropriate time the State would be allowed to proffer testimony regarding acts occurring after ______ 2010. (App. p. 19, line 19 – p. 20, line 7).

The State's first witness at trial was the victim. The victim testified that she began attending New Life Baptist Church in 2009 and that Berry was the youth pastor there at that time. (App. p. 31, lines 13-16, 22-24). The victim testified that she became close friends with Berry's daughter, who was the same age. (App. p. 32, line 22 – p. 33, line 3). Around May of 2010, Berry and his family moved to a house which was three houses down from the victim's house. (App. p. 37, lines 7-9). The victim testified that shortly following this move, Berry digitally penetrated her. (App. p. 40, lines 6-23). She went on to testify that this type of activity occurred with regularity thereafter. (App. p. 50, line 25 – p. 51, line 18). She testified that on one occasion while she was still fifteen she and Berry engaged in sexual intercourse. (App. p. 55, line 13; p. 58, line 8 – p. 59, line 12).

In ______ 2010, the victim turned sixteen years old. (App. p. 61, lines 16-18). During an *in camera* review, the victim testified that the sexual relationship between Berry and her continued after she turned sixteen in ______ 2010 until March of 2011. (App. p. 62, lines 3-8). Over the objection of Berry's counsel, the judge allowed the State to present this testimony to the jury. (App. p. 67, line 24 – p. 68, line 1; p. 68, lines 16-17).

During the trial the State also called Kim Roseborough, a psychotherapist and social worker, as a witness. (App. p. 108, lines 14-25). The trial court found Ms. Roseborough qualified to testify as an expert in the field of child sexual abuse assessment and treatment. (App. p. 112, lines 9-14). In the course of her practice, Ms. Roseborough counseled the victim. (App. p. 113, lines 15-17). During Ms. Roseborough's testimony, Berry's counsel objected to any statements relating to Ms. Roseborough's opinion that the circumstances of the victim's disclosure were consistent with a disclosure of sexual abuse. (App. p. 118, lines 2-15). Following a lengthy discussion with counsel outside the jury's presence, the judge sustained the objection. (App. p. 121, line 8). Shortly thereafter, Berry's counsel again objected to similar testimony of Ms. Roseborough and the judge overruled the objection. (App. p. 134, lines 1-21). The judge also overruled an objection by Berry's counsel that Ms. Roseborough was not qualified to diagnose the victim with Post-Traumatic Stress Disorder. (App. p. 142, lines 3-25).

ARGUMENTS

Pursuant to Rule 242, SCACR, the Petitioner respectfully moves for a Writ of Certiorari and for this Court to review and reverse the Court of Appeals Opinion 5329 of July 15, 2015. The Court of Appeals erroneously upheld the trial court's allowance of

expert testimony regarding the victim's behavior and symptoms of post-traumatic stress disorder. The Court of Appeals' Opinion directly conflicts with existing precedent. The Court of Appeals' analysis is fundamentally flawed and this Court should review the issue and reverse.

I. The Opinion Below Conflicts with Binding Precedent Concerning the Allowed Scope of Testimony Provided by an Expert Witness

A. The Opinion Below Directly Conflicts with *State v. Kromah*.

While "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, 737 S.E.2d 490 (2013). Specifically, "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." *Id.* at 358, 727 S.E.2d at 499 (citing *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011)). After *Kromah*, it is no longer acceptable for an expert witness to indicate in any way that he or she believes the victim. The *Kromah* Court specifically discussed the impropriety of this type of testimony and how it attempts to "convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption." *Id.* at 356, 727 S.E.2d at 498.

After *Kromah*, the old line of cases addressing the proper scope of testimony by a forensic interviewer are no longer good law. In Mr. Berry's case, the Court of Appeal's Opinion relies altogether on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) and *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).

Schumpert held that "expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." *Id.* at 506, 435 S.E.2d at 862.

Weaverling found that expert testimony "concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." *Weaverling* at 474-75, 523 S.E.2d at 794 (citing *Frenzel v. State*, 849 P.2d 741 (Wyo. 1993); *State v. Lejun*, 967 P.2d 123 (Ariz. 1998)).

It is impossible to reconcile these findings with the specific holding of *Kromah* that it is improper to admit "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." *Kromah* at 360, 727 S.E.2d at 500.

In Mr. Berry's trial, Kim Roseborough, a psychotherapist and social worker, was deemed qualified to testify as an expert in the field of child sexual abuse assessment and treatment. During her testimony, she was allowed to opine: first, that there are specific trauma symptoms that children would tend to show following a sexual assault; second, what some of those symptoms are; third, that the alleged victim exhibited some of those symptoms, and; finally, Ms. Roseborough began listing those symptoms exhibited by the alleged victim. The sole purpose of this portion of Ms. Roseborough's expert testimony was to illustrate her expert opinion that the alleged victim's behavior indicated truthfulness, exactly what *Kromah* seeks to prevent because of its potential for prejudice.

The relationship between *Kromah* and the line of cases referenced above is of utmost importance and should be reconsidered by the Court. In cases like Mr. Berry's, where the sole basis of conviction is the believability of the victim, all the prosecution will need to do to secure a conviction is present testimony from an "expert" who interviewed that alleged victim and who will aver that the alleged victim appeared to be distressed. While "an expert's testimony theoretically is to be given no more weight by a

jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *Kromah* at 357, 737 S.E.2d at 499.

In Mr. Berry's case, Ms. Roseborough was the only witness deemed qualified to provide expert testimony. There can be no conclusion other than her testimony prejudiced the trial.

This issue is also critical because it is another example of how the law does, and must, change with the times. When *Schumpert, Weaverling,* and their progeny were decided, the Court did not possess the gatekeeping function now required of it. This mindset of the 1980's and 1990's that science was not necessary and that experts did not necessarily need to be educated to any precise degree in order to give opinion testimony has changed dramatically in recent years. *Kromah* seeks to specify in precise detail what constitutes permissible expert testimony, yet the Court of Appeals did not follow the terms provided by *Kromah.*

It is essential that this Court review and reverse the Court of Appeals in this matter for two reasons. First, the Court of Appeals sets a new and dangerous precedent which allows prosecutors to completely disregard this Court's holding in *Kromah.* Second, it is time that this Court overrule these older cases and acknowledge that they no longer embody the appropriate standard for expert testimony in cases involving alleged sexual abuse.

B. The Opinion Below Directly Conflicts with *State v. Anderson.*

Shortly after the Court of Appeals issued the Opinion in Mr. Berry's case, this Court addressed the issue again in the case of *State v. Anderson,* Op. No. 27558 (S.C. Sup. Ct. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 39). In *Anderson,* the Court

held that a forensic interviewer vouched for a minor when she testified only to those characteristics which she observed in the minor. *Id.* at 44.

This is exactly what happened in the current case. In fact, this is the identical rationalization that the Court of Appeals employed in Mr. Berry's Opinion when it found that Ms. Roseborough's testimony was admissible: "Roseborough testified to observed behaviors; testimony which is specifically allowed under *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500 (allowing witness to testify to 'any personal observations regarding the child's behavior or demeanor'). Roseborough never indicated in her testimony whether she believed the victim was telling the truth regarding the sexual abuse." *See*, Opinion, p.12.

In fact, Ms. Roseborough's testimony went beyond just discussing observed behavior and also contained testimony that the behavior demonstrated the medical condition of Post-Traumatic Stress Disorder, a medical opinion that only a medical doctor should have been allowed to assert. However, according to *Anderson*, even if Ms. Roseborough truly did solely relate her observations regarding the alleged victim's behavior to the jury, it is nevertheless improper. The *Anderson* Court held that:

> To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.4 *Compare State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim). Here, Witness Smith vouched for the minor when she testified only to those characteristics which she observed in the minor.
>
> 4The separate writing erroneously equates the testimony of an expert who offers his opinion on a fact in issue, such as whether a product was defectively designed or manufactured, with that of an expert whose testimony may

> intrude upon the jury's sole province to determine the credibility of a witness. *E.g., State v. Taylor*, 255 S.C. 268, 178 S.E.2d 244 (1970).

Opinion No. 27558, p. 44, n.4.

Additionally, as in the current case, *Anderson* is one in which the outcome "turned solely on the credibility of the minor and of the Appellant." *Id.* at 45. This was plainly stated during the oral argument for Mr. Berry's case. Respectfully, the Opinion's holding in this matter should be altered to bring it in line with existing law.

C. The Opinion Below Directly Conflicts with *Mangal v. State*.

The Court of Appeals recently considered a case exactly like *Anderson* and Mr. Berry's, in which the outcome "turned solely on the credibility of the minor," though this time in a Post-Conviction Relief proceeding. Inexplicably, the Court of Appeals reached the opposite conclusion as in the case at bar. *Mangal v. State*, Op. No. 5372 (Ct. of App. filed December 30, 2015) (Shearouse Adv. Sh. No. 51 at 10). In *Mangal*, the Court of Appeals reversed the trial court's dismissal of Petitioner's PCR application and remanded the case for a new trial.

During Mangal's trial, "Pediatrician Nancy Henderson testified as an expert 'in the examination, diagnosis, and treatment of child sexual abuse.'" *Id.* at 12. Dr. Henderson opined that, based on her examination of the victim, the victim's injuries were consistent with sexual abuse. *Id.* at 17. The Court found this opinion proper pursuant to the parameters of Dr. Henderson's expert qualification, but went on to hold:

> However, she stated her opinion was based not only on her examination, but also "on the history that [Victim] shared with [her]." Directly after this comment, Dr. Henderson opined that Victim had been sexually abused. On cross-examination, Dr. Henderson elaborated on these statements and testified that "based on the history that [Victim] shared,

> and she denies any other kind of trauma to that area...my conclusion is...as I stated."
>
> When asked whether she based her decision on possibly untrue information from Victim, Dr. Henderson stated, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." When asked whether she assumed Victim's information was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes."
>
> We believe there is no other way to interpret these comments other than to mean that Dr. Henderson believed Victim was truthful. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (finding a child abuse assessment expert's recommendation that the defendant should not be around the victim for any reason was improper because it could only be interpreted as the expert's believing the victim's sexual abuse claims); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding an expert's reports were erroneously admitted when there was "no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful); *Dawkins*, 297 S.C. at 393-94, 377 S.E.2d at 302 (holding a psychologist's testimony indicating he believed a victim's allegations were genuine was improper). Accordingly, Dr. Henderson's testimony was improper bolstering, and trial counsel was deficient for failing to object to it or otherwise bring it to the trial court's attention. *Id.* at 17.

The *Mangal* Court went on to describe in detail how prejudicial this kind of testimony is in cases, like the one at bar, which "lacked physical evidence and hinged on credibility. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95 (holding the erroneous admission of reports that contained vouching language was not harmless when the children's credibility was the most critical determination in the case) (citing *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) ('An...improper opinion which goes to

the heart of the case is not harmless.'))). During the trial itself, trial counsel repeatedly sought to attack Victim's credibility through cross-examination..." *Id.* at 18.

Given the similarity between *Mangal* and the current case, it is incomprehensible that the Court reached such disparate holdings. If anything, the facts of the case at bar evidence a greater prejudice than in *Mangal* because in Mr. Berry's case, the only expert witness called at trial was Ms. Roseborough. Even if this Court can somehow reconcile the drastic differences between *Kromah, Anderson,* and *Mangal* with the older *Schumpert, Weaverling,* and their progeny, there still must be a finding that testimony of this nature is more probative than prejudicial. As the Court of Appeals correctly held in *Mangal,* that becomes impossible in cases where the child's credibility is the most important determination the jury must make.

CONCLUSION

The findings and conclusions by the Court of Appeals should be reviewed by this Court. With regard to the allowed scope of testimony provided by an expert witness, the Court of Appeals deviated from binding precedent. Berry therefore respectfully requests that this Court grant the relief sought herein, inquire further into these matters, and reverse the Court of Appeals.

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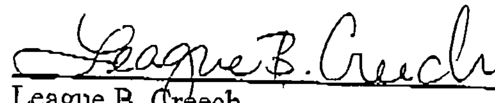

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PROOF OF SERVICE

This it to certify that I, *League B. Creech*, with the Law Firm of PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A., Attorneys for the Petitioner, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within *Petition for Writ of Certiorari* and *Appendix* to the following:

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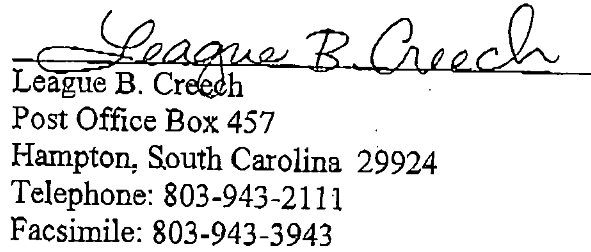
By: 

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