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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT

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SC Court of Appeals

V.

GERALD BARRETT,

APPELLANT

APPELLATE CASE NO. 2013-002158

Appeal from Beaufort County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5395

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case and grant rehearing on both issues. Respectfully, the Court's opinion overlooks key points that necessitate reversal of appellant's conviction. As to Issue 1, the Court errs in distinguishing State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). As to Issue 2, the Court, should correct the portion of its opinion that would allow solicitors to argue that appellate decisions—and not discovery—provide criminal defendants with notice of the State's expert witnesses. This portion of the opinion has the potential to allow rampant discovery abuse by solicitors.

Issue 1

Anderson controls the result in this case. A comparison of this case to Anderson shows no significant difference and, respectfully, this Court erred in distinguishing Anderson. In both Anderson and this case, the expert conducted a forensic interview of the complainant. In both Anderson and this case, the former forensic interviewer was given a different name by the solicitor to avoid the Supreme Court's decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). In Anderson, the new name for the forensic interviewer was an expert in "child abuse assessment." Here, the forensic interviewer was renamed an expert in "child sexual abuse characteristics and behavior." In both Anderson and this case, the renamed forensic interviewers bolstered the complainant's testimony by mirroring the allegations of abuse.

This Court acknowledges the Supreme Court's statement in Anderson that a forensic interviewer who met with the child should not be qualified as an expert, but interprets this language as merely advisory. The Anderson Court stated that to "allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will couch for the alleged victim's credibility." Id. at 218-19, 776 S.E.2d at 79. The Court stated that the forensic interviewer in Anderson "vouched for the minor when she testified only to those characteristics which she observed in the minor." Id.

The risk of improper vouching recognized in Anderson was also fully realized in appellant's case. The forensic interviewer tailored her testimony regarding delayed disclosure to fit the facts of this case. She testified that children usually "never tell" and an adult usually finds out by accident, which matched Minor's claims that she had to tell her step-grandmother because her sister told. R. 144, ll. 8 – 9. R. 145, ll. 2 – 19. R. 111, ll. 22 – 25. Twitty's testimony was tailored to match Minor's testimony that children usually tell peers, as Minor testified she told her friends and

boyfriend before her step-grandmother discovered the allegations from the sister. R. 110, l. 24 – 111, l. 21. R. 145, ll. 2 – 19. The fact that Twitty testified about characteristics that matched Minor's allegations—especially after the jury learned that she had conducted a forensic interview of Minor—could only be offered to show that Twitty believed Minor's allegations. One of Twitty's first statements to the jury was that she worked with children who "**have been** sexually abused." R. 134, l. 20 – 135, l. 4 (emphasis added). The clear inference was that Twitty believed Minor had been abused.

Furthermore, Twitty's testimony was unreliable. State v. White, 382 S.C. 265, 272-273, 676 S.E.2d 684, 687-688 (2009). Twitty's list of abuse characteristics is vague and unscientific. No research or tests were cited for these characteristics and the forensic interviewer admitted that "some" children might exhibit a combination of the characteristics. R. 40, l. 21 – 41, l. 4. Further compounding the unscientific and illogical aspect of this purported syndrome, Twitty opined that children who were abused would either behave poorly or "over excel." R. 41, ll. 5 – 14. It seems that a "syndrome" that can be diagnosed by a sufferer having completely opposite symptoms is of little probative or descriptive value. If a medical doctor gives a test to a patient for tuberculosis, one result reveals that the patient has it and the other result reveals the patient does not. But in the case of Twitty's syndrome, no matter the result of the test, the victim could have been abused. This "syndrome" is not science, it was not relevant, it was not the proper subject for expert testimony, and it was not admissible.

Issue 2

If the Court is correct in its holding in Issue 1, then it cannot be correct in holding that appellant was not prejudiced by the failure to grant a continuance. If Twitty's testimony is somehow different than the inadmissible testimony barred by Kromah and is the subject of reliable expert testimony that passes the White gatekeeping test, then it follows that the defense also needs an expert to rebut such testimony. Appellant relied on Kromah to **bar** Twitty's testimony and filed a motion to exclude her testimony the Wednesday before trial. R. 327. The next day, the State "dropped off" a "packet of information" at defense counsel's office renaming the forensic interviewer as an expert in "Child Sexual Assault Accommodation Syndrome." R. 6, l. 3 – 7, l. 2.

Failing to present expert testimony in response to the State's case prejudices a criminal defendant and the court should have granted a continuance in this matter. In McKnight v. State, 378 S.C. 33, 43-44, 661 S.E.2d 354, 359 (2008), the defendant received a new trial in part because he was prejudiced by counsel's failure to seek a continuance to secure a favorable expert's testimony. If this Court's decision stands, then defense counsel was ineffective for not anticipating that an expert witness would offer testimony on child abuse characteristics even though she filed a motion to have such testimony excluded under Kromah.

Even if the Court does not grant rehearing and reverse on this issue, it should delete from its opinion the portions indicating that a criminal defendant may be on notice of the State's expert witnesses merely through appellate decisions. These portions of the opinion have the potential to allow rampant discovery abuse by solicitors. This Court should not allow its decisions to be used by the State to promote trial by ambush. Our state's discovery rules and the requirements of Brady v. Maryland, 373 U.S. 83 (1963) "each has the same goal of ensuring the criminal defendant's right to a fair trial." State v. Kennerly, 331 S.C. 442, 454, 503 S.E.2d 214, 220 (Ct. App. 1998). Rule 5

requires disclosure, upon request by the defense, expert reports which are material to the preparation of the defense or intended to be used by the State at trial. S.C. R. Crim. P. 5(a)(1)(D).

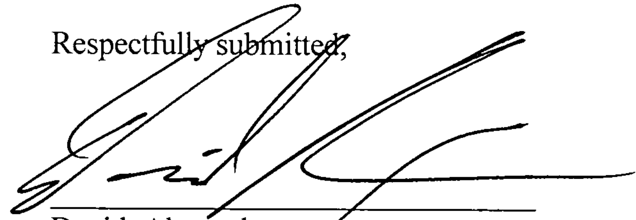
Discovery protections for criminal defendants in this State remain at the barest minimum. Civil defendants can use interrogatories, requests for production, requests for admissions, and depositions to ensure a fair trial. S.C. R. Civ. P. 26, 30, 33, 34, 36. Civil lawyers may also issue their own subpoenas. S.C.R. Civ. P. 45(a)(3). Criminal defense attorneys lack access to any of these tools. In federal prosecutions, the government has a duty to disclose expert witnesses. Fed. R. Crim. P. 16(a)(1)(G). Upon a defendant's request, the government must "give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(G). In Brady, the Court stated that the aim of due process is "avoidance of an unfair trial to the accused." Brady, 373 U.S. at 87. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Id. See also S.C. Const Art. I, § 3 (South Carolina due process clause). Refusing to grant a continuance in this case deprived appellant of due process and was an abuse of discretion.

Allowing these portions of the opinion to remain will only embolden prosecutors to ambush the defense with late disclosures of experts. As a practical matter, solicitors still retain control of when cases are called for trial. See State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). Combined with this power, this language in the Court's opinion will promote the denial of notice and time to prepare for defendants. The Court should, at a minimum, modify its opinion to prevent sanctioning future discovery abuse.

Conclusion

For the foregoing reasons, the Court should grant rehearing on both issues with the ultimate relief of reversing appellant's conviction and granting him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

This 5th day of April, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Gerald Barrett, #334201, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 5th day of April, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 5th day
of April, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.