STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

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Certiorari to Lexington County

Honorable Edgar W. Dickson, Circuit Court Judge



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MICHAEL RAY ELDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000242

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# PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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## ISSUE PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for not objecting when the forensic interviewer, Lysa Miller-Dupre, testified by giving her opinion that the minor/victim had not been coached, was not affected by suggestibility, and recommended evidence-based therapy for the minor at the Dickerson Center which was the advocacy center for children who had been sexually abused which was improper bolstering and vouching of the minor's credibility?

2. Did the PCR court err in failing to find trial counsel ineffective for not objecting to Miller-Dupre being qualified as an expert in forensic interviewing and child abuse assessment?

3. Did the PCR court err in failing to find trial counsel ineffective for not objecting to the hearsay testimony by the SANE nurse, Robin Baker, who testified that the minor told her in the pre-screening interview that she had been sexually molested by her father who had placed his finger in her pants and rubbed her private area, and made her touch his private which was outside the scope of Rule 801(d)(1)(D) SCRE and a violation of Rule 403, SCRE?

## STATEMENT

Michael Elders and Shelly Elders had been married about sixteen years at the time of the alleged incident, but had not lived together in four years. They had two children- a fourteen year old boy and twelve year old girl at the time of trial in 2011. App. 226, ll. 1 – App. 227, ll. 25. When the minor girl was eight years old, she began having visits with her father every other weekend. Sometimes her brother went also. App. 228, ll. 1 – App. 229, ll. 23.

The minor testified at trial that her father started touching her under her pants on her private parts when she first started going to visit him. She finally told her mother who took her to the police. App. 169, ll. 7 – App. 176, ll. 17.

The minor's mother, Shelly Elders, testified that her family had made allegations about Elders "over a couple of years" but she did not react. This time she received a call from her sister who told her that she had heard that Elders was touching the minor "inappropriately." When the mother asked the minor about it and threatened to take her to the doctor, the child told her that her father had touched her. The mother then took the minor to the police and then the hospital for an exam. App. 230, ll. 1 – App. 232, ll. 25.

Elders was indicted for criminal sexual conduct with a minor first degree and committing a lewd act on a minor. App. 540 – App. 545. On February 7, 28-March 2, 2011, Elders proceeded to trial before the Honorable William P. Keesley and a jury. Elders was represented by William Y. Rast, Jr., and the state was represented by Debra B. Moore. App. 1. At trial, the minor testified, and the video of her forensic interview at the Dickerson Center was published to the jury. App. 169, ll. 7 – 176, ll. 17; App. 198, ll. 18 – 24; App. 200, ll. 1 – App. 203, ll. 15.

Lysa Miller-Dupre was qualified as an expert in forensic interviewing and child abuse assessment without objection by defense counsel. App. 191, ll. 21 – App. 194, ll. 11. Miller-

Dupre interviewed the minor on July 6, 2009 at the Dickerson Center which was an advocacy center where interviews were conducted for children who were reported as being sexually abused. The minor was ten at the time. App. 191, ll. 23 – App. 192, ll. 25; App. 198, ll. 18 – 24. Miller-Dupre testified that the minor told her that her father had sexually assaulted her about a year earlier. It happened in her father's bed while her grandmother was sleeping in the same room. App. 199, ll. 1 – App. 200, ll. 24.

The solicitor then asked Miller-Dupre, in her opinion, was the minor's disclosure "affected by suggestibility or any type of coaching." Miller-Dupre responded no. Then the solicitor asked her if she had made any recommendations following the minor's disclosure. Miller-Dupre replied:

Miller-Dupre recommended the child receive evidence based therapy at the Dickerson Center. App. 203, ll. 4 – 10.

There was no objection by defense counsel. The DVD of the interview was then published to the jury. App. 203, ll. 11 – 16.

Laurie Caldwell, a former employee of the South Carolina Law Enforcement Division (SLED), was offered by the state to be qualified as an expert in forensic interviewing and child abuse assessment. Defense counsel objected to her qualification as an expert because "there was nothing in her testimony to indicate that she would have a better opinion then somebody else." App. 300, ll. 1 – Ap. 303, ll. 25. The judge qualified her as an expert in the field of child abuse assessment. App. 322, ll. 22 – App. 323, ll. 10. The judge noted trial counsel's "exception." App. 324, ll. 1 – 5. Laurie Caldwell never talked with the minor child in this case. App. 332, ll. 18 – 24. During cross examination she said in response to counsel's question:

> **Q:**An interviewer, a forensic interviewer, is not to determine whether or not the child is telling the truth or lying?

> **A:** Yes, that's part of our job is to render an opinion on whether or not the child has given a credible disclosure.
>
> Q:A forensic interviewer is supposed to determine whether or not the child is telling the truth or not?
>
> A:Yes. We render our opinion of whether or not the child has given a credible disclosure.

App. 335, ll. 3 – 18.

In her direct testimony, Caldwell testified primarily about delayed disclosure by children of sexual abuse. App. 324, ll. 6 – App. 332, ll. 13. Caldwell said specifically that children don't tell right away especially "when it's inside an unit like a family or a real trusted friend; there's this huge thing of secrecy." App. 328, ll. 15 – 25. Caldwell also related that when the perpetrator was someone the child trusted like a parent, the child felt trapped and learned to accommodate as a means of survival. There was no objection by defense counsel to the testimony. App. 329, ll. 9 – 22.

Robin Baker was the emergency room nurse at Lexington Medical Center who performed the sexual assault exams as the SANE nurse at the time of this incident. App.260, ll. 14 – App. 261, ll. 20. She was qualified as an expert in the field of sexual assault examination. App. 263, ll. 24 – App. 264, ll. 2.

She testified that she obtained the history from the child before the exam about what happened. According to Robin Baker, the minor told her that she had been "sexually molested, that someone, that her father had placed his finger down her pants and had started rubbing around her private areas and that it hurt." The minor also told her that it hurt to urinate. App. 265, ll. 2 – App. 266, ll. 18.

The minor continued to tell the nurse that she was "just walking around and he just put his hands down her pants." The minor explained that her uncle, Johnny Hutto, saw it and got

"really, really mad." The minor heard her uncle tell her father that "that's not right because that's your daughter." App. 266, ll. 19 – 25.

The nurse continued to ask the minor questions, and the child told her that the touching hurt. The minor child told the nurse that her father made her touch his private parts under his clothes. Then her father asked her if her friend, B.J., would play truth or dare with him. App. 267, ll. 1 – 23.

Robin Baker then testified about the physical exam she performed on the minor child. She took photographs of the minor's vaginal and anal areas. She found redness on the outside of the vaginal area. She took four photographs of the redness which were admitted into evidence. The trial judge ordered that these four photos-Exhibits 3 – 6, be sealed after the trial. App. 271, ll. 5 –App. 273, ll. 6.

The nurse then explained the photographs and redness in detail. When asked for her opinion, Robin Baker said the trauma or injuries were "consistent with a sexual assault." App. 273, ll. 9 - App. 275, ll. 4. Then the nurse admitted that the trauma could have been caused by an urinary tract infection if she had been diagnosed with such an infection but she had not. She explained that it was the "rubbing friction" that caused the redness and irritation which made it appear to be a sexual assault. App. 275, ll. 5 –App. 276, ll. 11. The nurse also admitted that feces on the area would irritate it. However, she stated that based on what the child told her and the redness, her finding was that it was sexual abuse. App. 282, ll. 1 – App. 283, ll. 25.

The solicitor argued in her closing that the forensic interviewer, Miller-Dupre, believed the minor child although the defense attorney said that she did not believe the child. Then the solicitor argued that the most "compelling" witness was Robin Baker, the SANE nurse. App. 386, ll. 1 – 22. The solicitor argued:

> Mr. Rast made a big deal about Lysa Miller-Dupre doesn't believe the minor. She didn't say that. She said she can't make a determination whether she's telling the truth or a lie. But I asked her: Was that interview problematic? And she said no. She does believe her, ladies and Gentlemen. Otherwise, the record would say it was problematic. It wasn't.
> I submit, Ladies and Gentlemen, our most compelling witness was Robin Baker, the sexual assault nurse examiner. She told you, yes, she has to get the history of the assault. That's important to gather so that when she looks at the physical evidence, they match the story that's given.

App. 386, ll. 3 – 17.

Elders did not testify at his trial. App. 2-App. 3.

The jury returned verdicts of guilty on the CSC with a minor first degree charge and the lewd act charge of touching the genital area of a child. The jury found him not guilty of the lewd act where he put the child's hand on his penis. App. 417, ll. 12 – App. 418, l. 19. The judge sentenced Elders to thirty years on the CSC and fifteen years on the lewd act with both charges running concurrent. App. 424, ll. 16 – App. 425, ll. 5.

Elders filed a notice of appeal which he later withdrew. App. 548.

On August 2, 2012, Elders filed an application for post-conviction relief (PCR). The state filed a return on March 15, 2013. An evidentiary hearing was held on August 14, 2013 before the Honorable Edgar W. Dickson. Petitioner Elders was represented by Tristan M. Shaffer, and the state was represented by J. Walt Whitmire. App. 439.

At this first PCR hearing, Elders did not testify but presented his claims of ineffective assistance of counsel through his PCR attorney. App. 440. Elders claimed that his trial attorney was ineffective for not objecting when the forensic interviewer improperly vouched for and bolstered the credibility of the minor victim when the interviewer recommended the child receive therapy and had not been coached. Basically, the interviewer said the interview was not

"problematic" which PCR counsel argued meant she believed the minor. App. 453, ll. 2 – 9; App. 493, ll. 6 – App. 494, ll. 11; Supp. App. 2-3.

Elders' PCR attorney said trial counsel was ineffective for not objecting to the interviewer being qualified as an expert in forensic interviewing. App. 504; App. 510. Elders' attorney argued that trial counsel was ineffective for not objecting to the hearsay statement of the SANE nurse which went beyond time and place as she said the child identified her abuser as her father. App. 482, ll. 2 – App. 483, ll. 10; Supp. App. 2-3. Counsel also argued that the nurse said there could have been other causes of the redness such as excessive wiping. App. 450, ll. 1 – App. 451, ll. 9.

Trial counsel testified at the PCR hearing that this was mainly a credibility case. Elders said he was not guilty "the whole time." Elders always wanted a trial. He wanted to prove that the entire incident was "concocted by his estranged wife and others." App. 456, ll. 16 – App. 458, ll. 21. Trial counsel admitted that he never consulted an expert, and did not hire an investigator. App. 459, ll. 1 – App. 460, ll. 25.

Trial counsel said that the forensic interviewer who interviewed the child did not say the minor child was telling the truth which left him room to argue that the child was not. However, he admitted that he did not object when the interviewer said the child was not being coached and she recommended the child receive therapy. He admitted that those statements taken individually could make the jury think the interviewer believed the minor child. He said it was up to the jury. App. 466, ll. 1 – 24. When confronted about the interviewer not finding the interview problematic, trial counsel said it could be argued that the expert interviewer believed the minor. App. 467, ll. 1 – 18.

Trial counsel knew that the law at the time of trial was that an expert could not say if someone is telling the truth or lying. App. 470, ll. 1 – 18. Trial counsel testified that he did not object to the hearsay testimony of the SANE nurse when she went beyond time and place in telling that the minor said that her father molested her. App. 482, ll. 10 – App. 483, ll. 22.

PCR counsel argued to the court that trial counsel allowed the minor child's credibility to be bolstered through several witnesses. App. 495, ll. 19 – App. 496, ll. 9.

On April 28, 2014, Judge Dickson issued an order denying Elders' PCR application and dismissing it with prejudice. App. 503 – App. 515. Judge Dickson found that trial counsel was not ineffective for not objecting to the forensic interviewer because the "clinical professional" did not bolster the victim's testimony when she testified that she recommended therapy for the child victim.

The judge ruled that Elders failed to meet his burden to prove trial counsel was ineffective for not objecting to Miller-Dupre's qualification as an expert in forensic interviewing and child abuse assessment or for not objecting to portions of her testimony. The judge wrote: "This court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist at the time of trial." App. 510. The judge wrote that the controlling law at the time said any error qualifying Miller-Dupre as an expert was harmless. App. 510

Judge Dickson also found that trial counsel was not ineffective for not objecting to the SANE Nurse Baker testifying concerning her pre-examination interview with the minor victim which went beyond time and place when the child identified her father as her abuser. App. 510-App. 511. The judge said an objection had to name specific grounds.

Elders' PCR attorney failed to file a notice of appeal due to his "switching offices." He wrote a letter to that effect. App. 531, ll. 1 – 25.

On November 7, 2014, Elders filed a second PCR application on the grounds that he was denied his statutory right to an appeal from his first PCR. App. 516 – App. 522. The state filed a return on March 17, 2015. An evidentiary hearing was held on April 23, 2015 before the Honorable Brooks P. Goldsmith. Elders was represented by Anna R. Good, and the state was represented by Walt Whitmire. App. 529. At this PCR hearing, PCR counsel explained to the court that the first PCR attorney, Tristan Shaffer, had written a letter explaining that he had failed to timely file an appeal due to his switching offices. App. 531, ll. 22 – App. 533, ll. 11. The state consented to "Austin relief" where Elders would receive a belated appeal from his first PCR. App. 531, ll. 1 – 21.

On January 4, 2016, Judge Goldsmith issued an order granting Elders a belated appeal from his first PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The judge found that Elders did not knowingly and voluntarily waive his right to appellate review of his first PCR order. This petition pursuant to Austin follows accompanied by a petition for a writ of certiorari.

## ARGUMENT

### 1.

The PCR court erred in failing to find trial counsel ineffective for not objecting when the forensic interviewer, Lysa Miller-Dupre, testified by giving her opinion that the minor/victim had not been coached, was not affected by suggestibility, and recommended evidence-based therapy for the minor at the Dickerson Center which was the advocacy center for children who had been sexually abused which was improper bolstering and vouching of the minor's credibility.

In State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), the Supreme Court held that it was improper for the prosecutor to ask the psychiatrist who had treated the child, victim in a criminal sexual conduct with a minor case, if the symptoms of alleged child sexual abuse were genuine. Although the court found it was error, it did not warrant a mistrial.

In State v. Jennings,394 S.C. 473, 716 S.E.2d 91 (2011), the Supreme Court ruled that the error in admitting portions of the forensic interviewer's interviews with the child victims of sexual abuse which was inadmissible hearsay, was not harmless. The Court found that the interviewer stated that each child had given a "compelling disclosure of abuse" which was improper vouching of the credibility of the victims, and the children's credibility was the "most critical determination of the case." The Court held: "For an expert to comment on the veracity of a child's accusations of sexual abuse was improper." Citing State v. Dawkins, *supra.*

The Supreme Court in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), wrote that "although 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."

In State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), a forensic interviewer, Ginger Griggs, was qualified as an expert in child abuse assessment. The Court did not reach the expert issue on Griggs but found error in Griggs' recommendation that Chavis not be around the victim for any reason. The Court ruled that this recommendation could only be interpreted that Griggs believed the victim's claim of sexual abuse. The Court ruled that this recommendation was inadmissible as improper bolstering of the victim's credibility.

The Court of Appeals in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), affirmed the trial court which qualified an expert in child abuse dynamics in the child sex abuse case. The Court of Appeals ruled that this expert's testimony concerning the general behavioral characteristics of alleged child sex abuse victims did not improperly bolster the testimony of the child victims.

Brown is distinguished from Petitioner Elders' case in that the expert in Brown did not interview the child victims, did not review any incident reports, and was not present for the victims' testimony. In Elders, the expert was qualified as an expert in forensic interviewing and child abuse assessment and interviewed the child.

Brown is also distinguished because Agent Caldwell, in Elders' case, testified as an expert in child abuse assessment about the specifics of delayed disclosure and accommodation –not just in general behavioral characteristics of alleged child sex abuse. These specifics were like the specifics in Elders' case.

The Court in Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), citing State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989), ruled that improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.

In State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), the Supreme Court found that the testimony of the forensic interviewer of the young victim, that the victim had given a "compelling finding of child abuse," was the equivalent of the interviewer stating that the victim was telling the truth, and thus was inadmissible in the prosecution for the infliction of great bodily injury upon a child.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Miller-Dupre's opinion recommendations that the minor receive "evidence based therapy" and was not coached indicated that Miller-Dupre believed that the minor was telling the truth. Trial counsel had the benefit of the opinion in Dawkins. Counsel admitted that he knew an expert should not vouch for the credibility of a witness.

In Dawkins v. State, 346 S.C. 151, 154, 551 S.E.2d 260, 261 (2001), the Supreme Court found that the defendant was entitled to post-conviction relief where four witnesses testified without objection regarding the victim's out-of-court conversation with them concerning the alleged abuse.

In Elders' case, three "expert" witnesses gave testimony without objection that bolstered the minor child's out-of-court statements about abuse. Miller-Dupre, who was qualified as an expert in forensic interviewing, and Robin Baker, the SANE nurse qualified as an expert in child sexual assault examination, testified concerning the statements the minor child gave them about the sexual abuse allegedly by her father.

Caldwell, who was qualified as an expert in child abuse assessment, provided testimony about delayed disclosure which occurred in Elders' case. The minor child had told the forensic interviewer that the abuse occurred a year earlier. Caldwell also testified that the disclosure was more secretive when it was inside the family as with a parent which was the situation with Elders. This testimony about child sexual abuse was so similar to the alleged abuse in Elders' case that it amounted to bolstering of the minor's credibility.

Caldwell's testimony that the job of the forensic interviewer was to provide an opinion on whether "the child had provided a credible disclosure" served to validate the bolstering opinion of Miller-Dupre when she said the minor needed therapy and there were no problems with the interview.

Trial counsel had the benefit of knowledge of the ruling in State v. Dawkins, *supra,* and Dawkins v. State, *supra,* regarding witnesses and expert witnesses vouching for the credibility of the minor victim. Counsel should also have known about the issue raised in State v. Jennings,

*supra,* as Jennings' trial was obviously held prior to Elders' trial as the opinion in Jennings was published September 19, 2011 which was only a few months after Elders' trial.

The credibility of the child was the primary issue in Elders' case. Trial attorney described it as a "credibility case" as it depended on who the jury believed. To have three experts vouch for the credibility of the child was extremely prejudicial to Elders, and not harmless error as it most likely affected the outcome of the trial. As the Supreme Court stated in Kromah, the opinion of experts cannot help but have an effect on the jury as their opinions tend to carry more weight.

The PCR judge erred in believing that trial counsel objected to the hearsay testimony that went beyond time and place. The PCR judge in his order was referring to counsel's objection when the nurse said the child told her that her father wanted to know if her friend , B.J., would play "truth or dare" with him. App. 267, ll. 16 – App. 268, ll. 21. The PCR court erred in not finding trial counsel ineffective for allowing the bolstering of great magnitude to occur in Elders' case without an objection.

## ARGUMENT

### 2.

The PCR court erred in failing to find trial counsel ineffective for not objecting to Miller-Dupre being qualified as an expert in forensic interviewing and child abuse assessment.

In State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), the Supreme Court held that the forensic interviewer did not need to be qualified as an expert. Her only opinion was that the child needed a medical examination. The interviewer did not vouch for the child's veracity. Therefore, her testimony was not prejudicial to Douglas.

The Court of Appeals held in State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), that "in light of [the expert's] extensive inadmissible testimony bolstering the credibility of the victim...we cannot say the erroneous admission of the [expert's] testimony did not contribute to the jury's decision."

This Court, in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), wrote: "We state today that we can envision no circumstance where a forensic interviewer's qualification as an expert at trial would be appropriate." Id. at 357, n.5, 737 S.E.2d at 499, n.5.

The Court in Kromah also found that "the label of expert should be jealously guarded by the court and never loosely bandied about."

"All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

As shown, trial counsel should have been aware of the continuum of cases beginning before Elders' trial that questioned the need for a forensic interviewer to be qualified as an expert. The only purpose has been to bolster the credibility of the minor victim.

Trial counsel had the benefit of knowledge of the ruling in State v. Dawkins, *supra,* regarding expert witnesses vouching for the credibility of the minor victim. Counsel also had the benefit of the ruling in State v. Douglas, *supra.* Counsel should also have known about the issue raised in State v. Jennings, *supra,* as Jennings' trial was obviously held prior to Elders' trial as the opinion in Jennings was published September 19, 2011. Kromah's trial was held in 2006. Any criminal defense counsel would have known of this issue evolving. Other attorneys obviously thought enough of the issue to object.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The PCR court should have granted Elders' PCR application by finding trial counsel ineffective for not objecting. The PCR judge's ruling that trial counsel did not have the benefit of the knowledge of later case law was in error. Any criminal defense counsel would have known of this issue evolving. Other attorneys obviously thought enough of the issue to object. As shown by the cases cited above, the issue was before the legal community and was evolving.

The opinion of the forensic interviewer as an expert very likely influenced the jury heavily as the opinions of experts tend to carry more weight as described by the Supreme Court in Kromah. This was prejudicial to Elders as there was no need for Miller-Dupre to be qualified as an expert just as in Douglas and later in Kromah.

The Supreme Court in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), wrote that "although 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."

## ARGUMENT

### 3.

The PCR court erred in failing to find trial counsel ineffective for not objecting to the hearsay testimony by the SANE nurse, Robin Baker, who testified that the minor told her in the pre-screening interview that she had been sexually molested by her father who had placed his finger in her pants and rubbed her private area, and made her touch his private which was outside the scope of Rule 801(d)(1)(D) SCRE and a violation of Rule 403, SCRE.

In Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), the Supreme Court reversed the trial court's denial of Jolly's PCR application because trial counsel was ineffective for failing to object to witness' hearsay testimony that the alleged victim had told the witness that the defendant had sexually assaulted her as the testimony was not limited to time and place of the assault.

Rule 801(d)(1)(D), SCRE, provides that the sexual assault victim's prior consistent statements limited to time and place of alleged incident are not hearsay, if victim testifies at trial and is subject to cross-examination. It allows other witnesses to testify that victim complained of assault, but only as to time and place; it specifically circumscribes such testimony by excluding details or particulars. State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002); citing Rule 801(d) (1) (D), SCRE; Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002).

In State v. Jeffcoat, *supra,* the Court ruled that Rule 801(d) (1) (D) does not allow a witness to testify as to identity of alleged perpetrator if the victim testifies. In Sanchez v. State, *supra*, the Supreme Court ruled that trial counsel was ineffective for not objecting to the testimony of the mother and father of the child victim that Sanchez was the perpetrator because it was hearsay testimony since it went beyond time and place.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

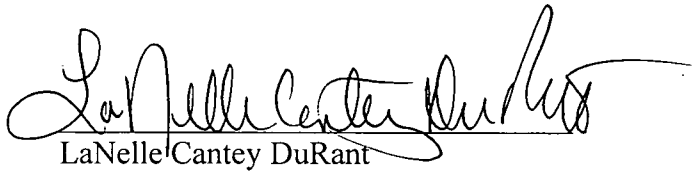
The PCR court erred in failing to find trial counsel ineffective for not objecting when the SANE nurse, Robin Baker, testified that the child told her that her father had molested her and described in detail what he allegedly did to her which was beyond time and place. Therefore, it was hearsay evidence. The nurse's opinion that the redness was the result of a sexual assault meant she believed the child. This was bolstering the credibility of the minor victim; was cumulative to the child's testimony and the testimony of the forensic interviewer, Miller-DuPre; and was prejudicial to Elders. It was not harmless error as Robin Baker was qualified as an expert which heightened her credibility with the jury even though an expert's testimony was supposed to carry no more weight than any other witness.

The fact that Robin Baker testified that the history from the child was important to be sure the physical exam and the child's story matched was extremely prejudicial and indicated that she believed the child.

## CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences vacated, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of September, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Lexington County
Honorable Edgar W. Dickson, Circuit Court Judge

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MICHAEL RAY ELDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix in this case have been served on Patrick Schmeckpeper, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Elders, #345023, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of September, 2016.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this
6th day of September, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.