THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
General Sessions Court
William H. Seals, Jr., Circuit Court Judge

Case No. 2013-GS-21-01353
Appellate Case No. 2017-002605

The State,

Petitioner-Respondent,

v.

Bryant Christopher Gurley,

Respondent-Petitioner.

RESPONDENT-PETITIONER'S RETURN TO PETITIONER-RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly find reversible error in the trial court's admission of a video recording on which a forensic interviewer stated Respondent-Petitioner "broke the rules"?

2. Did the Court of Appeals correctly find reversible error in the trial court's admission of improper bolstering testimony of the complaining witness's counselor in answer to questioning about coaching?

STATEMENT OF THE CASE

Respondent-Petitioner, Bryant Christopher Gurley (hereafter, "Gurley"), was indicted in Florence County in 2013 on a charge of committing a lewd act upon a child under the age of 16, pursuant to former S.C. Code Ann. § 16-15-140. App. pp. 5-6. He was tried by a jury in Florence County General Sessions Court January 26-29, 2015, Judge William Seals, Jr., presiding. App. p. 8. He was found guilty, and Judge Seals sentenced him to eight years' imprisonment. App. pp. 7, 301-02, 304.

Gurley appealed, raising four claims of error and an additional claim of cumulative prejudice. App. 311. The Court of Appeals reversed his conviction, finding reversible error as to one issue (Issue 1) and one aspect of another issue (Issue 2) raised by Gurley on appeal. App. pp. 311-19, 398-405. The Court of Appeals did not address the remaining issues and arguments asserted by Gurley in Issues 2, 3, 4, and 5. App. pp. 319-330.

The unpublished opinion of the Court of Appeals was issued by a unanimous panel of the Court. App. 398-405. Because it was an unpublished opinion, it has no precedential weight. *See* Rule 268(d)(2), SCACR; App. p. 398.

Petitioner-Respondent, the State of South Carolina (hereafter, "the state"), filed a petition for rehearing *en banc* in the Court of Appeals. Gurley also sought rehearing, asking the Court of Appeals to decide the issues raised in his appeal but not ruled upon by the Court of Appeals. App. pp. 428-29. By order dated November 22, 2017, the Court of Appeals denied both petitions for rehearing. App. pp. 431-32.

The state filed a petition for writ of certiorari in this Court. Gurley also filed a petition for writ of certiorari, asking that, if this Court grants the state's petition, it also grant Gurley's petition and decide the remaining issues raised on appeal but not decided by the Court of Appeals. As to the issues addressed by the Court of Appeals, its decision was correct, and this Court should deny the state's petition for writ of certiorari.

ARGUMENT AND AUTHORITIES

This case arose from allegations first made by a child in 2013, when she was eight years of age, that several years earlier Gurley had touched her "privates" with his hand on several occasions. The incidents were alleged to have occurred during a period of time when the child, her mother, and her older sister were living in the home of Gurley's father, stepmother, and stepbrother, on occasions when Gurley, who was then a teenager and living with his mother, was visiting.

The child's trial testimony about the alleged incidents was inconsistent with her earlier statements made in a forensic interview. Although she claimed there were four incidents and stated in the forensic interview that one was in the bedroom, at trial she denied having said an incident occurred in the bedroom and she could not say where the alleged fourth incident occurred. App. p. 92; State's Exhibit 1. The child's trial testimony was also inconsistent with her counselor's testimony that the child described

only three incidents. App. pp. 114, 117. The child's testimony was also starkly inconsistent with the testimony of her mother, sister, and grandmother concerning the circumstances surrounding one of the alleged incidents, which the child claimed occurred in a car. The car incident was alleged to have occurred on an occasion when the child's mother drove herself, her daughters, and Gurley to her mother's house in Lake City. App. pp. 20, 24-28, 30-31, 83-86. The child testified only the mother got out of the car and went inside, and the incident occurred while she, her sister, and Gurley stayed in the car. App. pp. 85-86. The mother, sister, and grandmother contradicted this account, stating that everyone went inside and that, when they returned to the car to leave, the child refused to get in, became upset, and cried. App. pp. 20, 24-28, 30-31. The officer who took the initial report of the allegations and interviewed the mother did not include in his written report that the child was crying and had to be forced into the car, as these witnesses testified at trial. App. pp. 39, 41.

The child's testimony was also contradicted by defense witnesses who testified that Gurley could not have been present for one incident alleged to have occurred during holidays because of where the family spent their holidays. App. pp. 203-07, 237-38, 259, 268-70, 281-82, 285. The defense also presented evidence to demonstrate that the other incidents could not have occurred in the manner described by the child. App. pp. 201-03, 235-36, 262-63, 271-72, 276, 278-79, 286-87.

Over defense objections, the trial court admitted into evidence a video recording of a forensic interview of the complaining witness. The Court of Appeals found reversible error as to the admission of this evidence. App. pp. 402-03. The trial court also allowed testimony from the child's counselor, as to which the defense raised

numerous objections. The Court of Appeals found reversible error as to one aspect of the counselor's testimony – her response to questioning about coaching. App. pp. 404-05. Because the state is seeking certiorari review of these rulings, Gurley respectfully asks this Court, if it grants the state's petition for a writ of certiorari, to also grant this petition and address the remaining issues not decided by the Court of Appeals.

I. THE COURT OF APPEALS CORRECTLY FOUND REVERSIBLE ERROR IN THE TRIAL COURT'S ADMISSION OF A VIDEO RECORDING ON WHICH A FORENSIC INTERVIEWER STATED GURLEY "BROKE THE RULES."

The state introduced a video recording of a forensic interview, which the court admitted over defense objections. Near the close of the interview, the interviewer made the statement, "B.G. [Gurley] broke the rules."[1] One of multiple defense objections to admission of the video was based on this statement, which was an opinion expressed by the interviewer concerning the child's disclosures. App. pp. 140-41. The court admitted the video, it was published to the jury during the trial, and it was played for the jurors again during their deliberations. App. pp. 142-43, 152, 300. The Court of Appeals correctly held that admission of the video was reversible error. App. pp. 402-03, 405.

This Court has emphatically announced in recent decisions a clear directive that a forensic interviewer or expert witness may not render an opinion that an alleged victim of sexual assault has told the truth and may not otherwise vouch for or bolster the alleged victim's credibility. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015); *State v. Kromah*, 401 S.C. 340, 358-360, 737 S.E.2d 490, 499-501 (2013); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This rule is grounded on the fundamental principle that the assessment of witness credibility is within the exclusive

[1] Gurley was called by his initials, "B.G." In the recorded interview and in the testimony of certain witnesses, he is referred to as "B.G."

province of the jury. *See Kromah*, 401 S.C. at 358-59, 737 S.E.2d at 499-500; *State v. McKerley*, 397 S.C. 461, 464-65, 725 S.E.2d 139, 141-42 (Ct.App. 2012); Rule 608(a), SCRE.

In *Kromah*, the Court listed five examples of the kinds of statements that a forensic interviewer should avoid. Among those examples are "a direct opinion as to a child's veracity," "any statement that indirectly vouches for the child's believability," and "any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter." *See Kromah*, 401 S.C. at 360, 737 S.E.2d at 500.

In this case, the interviewer's statement that "B.G. broke the rules" fits squarely within these categories of impermissible bolstering. The interviewer made the statement to the child after the child had told the interviewer what the child claimed had occurred. The interviewer's comment was one in a series of comments she made to the child near the end of the interview:

> Well, I am proud of you, [name redacted]. I want you to know you are not in any kind of trouble at all, and you haven't done anything wrong at all. Okay? None of this is your fault. B.G. broke the rules. Nobody ever gets to touch your private parts or make you touch theirs. I'm really, really proud of you. It takes a very brave girl to tell about what happened.

State's Exhibit 1. These comments were a clear and unequivocal expression by the interviewer that she believed the child had told the truth. Telling the child that "B.G. broke the rules" was the equivalent of telling the child she believed her. Allowing the jury to hear this opinion was tantamount to allowing the interviewer to tell the jury she believed the child. As trial counsel argued, the interviewer would not be allowed to state from the witness stand to the jury that "B.G. broke the rules." App. pp. 140-41. However, by admitting the video, the jury was able to hear exactly that statement. The

prohibition against admission of such evidence is not limited to testimony from a witness; it also applies to other forms of evidence containing an opinion as to the truthfulness of the alleged victim's account. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (written reports containing forensic interviewer's impermissible comment that children provided a compelling disclosure of abuse by defendant were inadmissible).

The comment by the interviewer at the conclusion of the interview, which unequivocally expressed her belief the child was being truthful, is the kind of opinion evidence the *Kromah* line of cases prohibits. *See, e.g., Chavis*, 412 S.C. at 108-09, 771 S.E.2d at 340 (expert's recommendation that victim "not be around [defendant] for any reason" could only be interpreted as her believing victim's claim that defendant sexually abused her); *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (interviewer's report that child made "compelling finding" of abuse was equivalent of stating child was telling the truth); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (interviewer's reports that children made "compelling disclosure" could only be interpreted to mean interviewer believed children were being truthful). Like the comments in those cases, the statement that Gurley "broke the rules" is the equivalent of the interviewer saying she believed the child, and the video containing this comment should not have been admitted into evidence. The Court of Appeals' decision of this issue was correct and was mandated by this Court's precedents.

Admission of the video containing this statement was not harmless. As noted above, the child's allegations were not contemporaneous with the alleged incidents. The state's evidence was not strong. The only inculpatory evidence against Gurley was the testimony of the child. There was no corroborating physical evidence and no testimony from any eyewitness concerning the allegations. Indeed, according to the child, her

college-aged sister, was ***present in the car*** when one of the incidents was alleged to have occurred, but the sister did not testify in corroboration of the child's account. In fact, the sister, mother, and grandmother contradicted the particulars of the child's account of the incident in the car, undermining the child's credibility. Moreover, defense witnesses testified to the circumstances that existed on the occasions of other alleged incidents, circumstances that prevented those incidents from having occurred as the child alleged. The case depended entirely on whether the jury believed the child, and her credibility was questionable on many levels – the internal inconsistency of her own statements and the contradiction of those statements by both prosecution and defense witnesses. Where the case against Gurley was very weak, the effect of admitting the interviewer's statement that Gurley "broke the rules" and that vouched for the child's truthfulness cannot be deemed harmless. The Court of Appeals correctly analyzed the evidence and correctly found the error in the admission of the video was not harmless. App. p. 405.

In its petition for writ of certiorari, the state attempts to circumvent the controlling precedents and have this Court uphold the admission of the video based on procedural arguments that have no merit. The state first contends Gurley's claim of error as to the admission of the video is unpreserved because he failed also to raise on appeal a claim of error as to the rulings on other objections the defense raised at trial with respect to the video, including objections that the requirements of S.C. Code Ann. § 17-23-175 were not satisfied. To the contrary, the objection that formed the basis for the appellate challenge to admission of the video was raised in the court below as an ***additional*** ground for exclusion of the video, apart from the court's evaluation of the statutory criteria, and it was argued separately by counsel.

Both attorneys argued their positions on the admissibility or inadmissibility of the video under the statute. App. p. 139, line 24 – p. 140, line 19 (Gurley's argument); App. p. 141, line 6 – p. 142, line 1 (state's argument). The defense also raised the ***separate*** and ***distinct*** objection that the video contained inadmissible bolstering testimony in the comment by the interviewer that "B.G. broke the rules." App. p. 140, line 20 – p. 141, line 1. The court asked for argument by the state as to that objection. App. p. 142, line 2. The state made its argument as to this aspect of the defense's objection. App. p. 142, lines 3-23. The court agreed with the state's position as to this objection, stating, "I think so too." App. p. 142, line 24. This ruling was clearly preserved for appellate review, and the issue was squarely raised on appeal. Gurley's decision not to challenge the trial court's rulings on the other grounds of the defense objections at trial did not waive the objection to the offending, bolstering comment by the interviewer. That claim of error was properly preserved, and the unanimous panel of the Court of Appeals correctly decided the issue on its merits.

The state next argues that, when the trial court overruled the defense's objection to the video based on the offending, bolstering comment by the interviewer, the burden rested on the defense to ask the court to redact that comment and allow the remainder of the video to be admitted, and by failing to do so, the defense somehow forfeited the right to appellate review of the trial court's ruling on its objection. This argument is baseless, for multiple reasons.

First, the burden of proof in a criminal prosecution rests on the state, not on the defense. U.S. Const. amend. XIV; *see Sandstrom v. Montana*, 442 U.S. 510, 520 (1979), *quoting In Re Winship*, 397 U.S. 358, 364 (1970); *State v. Belcher*, 385 S.C. 597, 608,

685 S.E.2d 802, 807-08 (2009). The state is required to present evidence to establish each and every element of the crime. *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975). Subject to exceptions not applicable here, the burden rests on the prosecution and never shifts. *Id.*, 263 S.C. at 551, 211 S.E.2d at 870. If the state offers a piece of evidence that is inadmissible, the proper remedy for the defense is to object to its admission and obtain a ruling by the trial judge, and nothing more is required to preserve the claim of error. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011); *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010); *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939); *State v. Taylor*, 338 S.C. 624, 626 n.1, 527 S.E.2d 395, 396 n.1 (Ct.App. 2000). It is ***not*** the defendant's responsibility to suggest to the court how to make the evidence admissible and thereby assist the state in meeting its burden of proof. No authorities of this state have ever so held, and this Court should reject the state's burden-shifting argument out of hand.

Second, in all trial proceedings, the burden rests on the proponent of evidence to establish the admissibility of the evidence it offers. *See, e.g, State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (party offering fungible items into evidence has burden of establishing complete chain of custody as far as practicable); *State v. Davis*, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006) (burden of establishing facts which qualify a statement as an excited utterance rests with the proponent of the evidence); *Clark v. Cantrell*, 339 S.C. 369, 384-87, 529 S.E.2d 528, 536-38 (2000) (announcing four-part test proponent must meet before court will admit computer-generated animation as demonstrative evidence); *State v. Kinloch*, 338 S.C. 385, 388-89, 526 S.E.2d 705, 706-07 (2000) (party offering statement against penal interest by unavailable declarant to

exculpate the accused must meet corroboration requirement and demonstrate statement was actually made for statement to be admissible); *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct.App. 2015) (proponent of evidence has burden to offer satisfactory foundation to authenticate the evidence). This Court has never adopted a rule requiring a defendant to seek redaction of inadmissible information contained in an exhibit offered by the state against him in his criminal prosecution.

Here, the state offered the video. If the admissibility of a portion of that video was in question, the burden rested upon the state, as the proponent of the evidence, to suggest to the court that a redacted version of the video should be admitted rather than the full video, in order for the court to evaluate the admissibility of the redacted version and the merits of any defense objections to the redacted version. The rule of procedure the state now asks the Court to adopt is simply not part of this state's criminal and appellate procedure jurisprudence. Under the clear principles governing the burdens of proof and production of evidence, this Court should not adopt the rule the state now seeks.

On the merits of the issue, the state contends the comment of the interviewer that "B.G. broke the rules" did not vouch for the child's credibility but was meant to provide solace and comfort to the child. Regardless of the interviewer's purpose, the ***effect*** of the comment was nonetheless bolstering and it was therefore inadmissible. The statement came at the conclusion of the child's account of the events she claimed had occurred involving Gurley. It came in the context of the interviewer's lauding the child for telling her story and praising her bravery. The interviewer's statement that Gurley "broke the rules" could only convey to the child and to anyone else who heard and saw the

recording, including the jurors, that the interviewer believed the child's account was true. The interviewer's conclusion that "B.G. broke the rules" was clearly vouching.

The state's attempts to characterize this statement as something other than a comment on the child's believability and to somehow place it in a different context are of no avail. The context in which the comment was made emphasizes that it was an expression of the interviewer's opinion as to the child's truthfulness. The comment was made after the interviewer told the child that the interviewer was proud of her, that she was not in trouble, that she had done nothing wrong, and that none of this was her fault. After telling the child "B.G. broke the rules," the interviewer went on to tell her that "[n]obody ever gets to touch your private parts or make you touch theirs." State's Exhibit 1. The Court correctly correlated these two comments and correctly held the only way Gurley "broke the rules" was if the child was telling the truth. App. p. 403. The Court of Appeals correctly concluded there is no rational way to interpret the interviewer's statement other than as her opinion the child told the truth. *Id.* The only conclusion that can be drawn from the interviewer's entire statement is that she was telling the child she believed her. All of the interviewer's comments, including the comment that Gurley "broke the rules," conveyed her opinion that she believed the child. The entire passage and the specific comment that "B.G. broke the rules" constitute improper bolstering of the child by expressing an opinion as to her credibility.

The state argues it did not maintain in the trial court that the interviewer was "acting" in the sense of putting on a play or stage performance, and it incorrectly asserts the Court of Appeals so found. To the contrary, the Court of Appeals did not interpret the interviewer as "acting" in the sense of "performing." Rather, the Court used the term

"acting" in the context of describing the interviewer's ***action***, meaning her ***conduct, what she did***. The Court stated it was not persuaded by the state's argument that the interviewer "was merely acting to put [the child] at ease." App. p. 403. This conclusion was in direct response to the state's claim as to the reason for the interviewer's action – to put the child at ease and make her feel safe and comfortable. The Court correctly concluded the interviewer's subjective intent in making the statement was immaterial and the relevant inquiry was whether there was any way to interpret the comment other than as an expression of the interviewer's belief the child told the truth. *Id.* The Court correctly found there was not. *Id.* Regardless of the interviewer's purpose or motivation, the expression of her belief that the child was telling the truth amounted to improper vouching for the child's credibility and rendered the video inadmissible. The Court of Appeals' decision was in keeping with the controlling precedents. *See Chavis*, 412 S.C. at 109, 771 S.E.2d at 340; *Kromah*, 401 S.C. at 358-360, 737 S.E.2d at 499-501; *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94; *McKerley*, 397 S.C. at 464-65, 725 S.E.2d at 141-42. The Court correctly reversed as to the admission of this improper bolstering evidence.

The state concludes its argument of this issue by revisiting its effort to shift the burden to the defendant to ask the trial court to redact the offending comment so as to make an inadmissible exhibit proffered by the state admissible against him. As noted above, this Court has ***never*** announced such a rule, which would be completely contrary to the due process principles undergirding criminal prosecutions and the protections of the Constitution that place the burden of proof on the state. *See* U.S. Const. amend. XIV; *Sandstrom*, 442 U.S. at 520; *Winship*, 397 U.S. at 364; *Belcher*, 385 S.C. at 608,

685 S.E.2d at 807-08; *Attardo*, 263 S.C. at 550-51, 211 S.E.2d at 870. This Court should reject the position espoused by the state and find the Court of Appeals correctly ruled inadmissible the video containing the offending, bolstering comment by the interviewer. The Court should deny the state's petition as to this issue.

II. THE COURT OF APPEALS CORRECTLY FOUND REVERSIBLE ERROR IN THE TRIAL COURT'S ADMISSION OF IMPROPER BOLSTERING TESTIMONY OF THE CHILD'S COUNSELOR IN ANSWER TO QUESTIONING ABOUT COACHING.

The state also introduced the testimony of a counselor who had been seeing the child since May 2013 and was still seeing the child as of the trial in January 2015. App. pp. 112, 121. The defense objected to her testimony on multiple grounds, including that it was improper bolstering. App. p. 101. Over defense objections, the counselor was qualified as an expert in "child sexual trauma" and allowed to testify generally concerning child victims of sexual assault, delayed disclosure, and indicators a child can give to show sexual abuse has occurred. App. pp. 101, 106-11. In addition, she was allowed to testify about her sessions with this particular child, her methodology in eliciting information from the child, the child's account of the alleged incidents, and her opinions about the information provided by the child, in particular that the child had not been coached. App. pp. 112-17.

The defense asserted numerous objections to this testimony. In addition to other objections, it objected that the testimony was improper bolstering. App. p. 101. It objected because the witness would be testifying to her own interaction with the child, would be explaining the child's testimony piece by piece, and would be getting into the statements the child had made. App. p. 101. It objected to testimony about the child's statements in the counseling sessions because the statements had not been recorded in

accordance with S.C. Code Ann. § 17-23-175. App. p. 101. It objected to testimony that this child's experience is typical of child victims, which would be highly prejudicial. App. p. 105.

Significantly, the state asked the witness if she saw any evidence that the child had been coached. App. p. 116. The defense objected, arguing that the witness could not render an opinion on that issue, which was a jury question. App. p. 116. The court overruled the objection, and the witness proceeded to explain that the child was "very detailed" and "consistent" in the information she provided, and the witness later twice reiterated that the child was "very consistent." App. pp. 116-17, 122. The defense reasserted the objection to this improper bolstering opinion testimony after the state rested its case. App. pp. 157-58.

On appeal, Gurley raised multiple claims of error with respect to the qualification of this witness as an expert and the improper testimony elicited from the witness. The Court of Appeals addressed only one facet of this issue, finding reversible error in the admission of the testimony of the witness in response to the question about coaching. The Court correctly held the witness's testimony was improper bolstering evidence. App. p. 404.

Like the opinion evidence addressed in the cases cited in argument of the inadmissibility of the video containing the comment that Gurley "broke the rules," *supra* pp. 4-6, the only purpose for the state's question to this witness about whether the child had been coached and the witness's response that the information provided by the child was very detailed and very consistent was to convey to the jury the counselor's belief that the child was being truthful. *See, e.g., Chavis*, 412 S.C. at 108-09, 771 S.E.2d at 340;

Kromah, 401 S.C. at 359, 737 S.E.2d at 500; *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94. Like the offending evidence in those cases, this testimony cannot be interpreted in any other way. The Court of Appeals correctly held the counselor's answer to the question was impermissible bolstering of the child's credibility, in violation of the parameters of *Kromah*. *See Kromah*, 401 S.C. at 358-59, 737 S.E.2d at 500; *cf. McKerley*, 397 S.C. at 463, 725 S.E.2d at 141.

The state claims the Court of Appeals improperly distinguished *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct.App. 2011), *overruled on other grounds*, *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). In *Hill*, the witness gave no opinion as to a child's having been coached. The Court of Appeals correctly distinguished *Hill*, based on the state's specific question posed to the counselor as to whether the counselor saw evidence of coaching and the counselor's response pointing out the factual bases for her opinion that the child had not been coached. This distinction is important. The Court of Appeals correctly found the question sought the witness's opinion as to whether the child had been coached, and it further found her answer could only be interpreted as an opinion that she had not been coached, based on specific factual details of the answer given by the witness. App. p. 404. The Court correctly found the testimony elicited by this question was improper.

The state claims the answer to the question about coaching was cumulative to other passages of the witness's testimony as to the same factual details. To the contrary, the other testimony was not in the context of the counselor's giving an answer to having seen evidence of coaching. In the context of the prosecutor's question about coaching, the only way to view the witness's answer as to the factual observations she described

was that, based on those observations, she believed the child had not been coached. The context of the question posed by the state about coaching sets the answer apart from the counselor's other testimony, and that testimony is not cumulative to the impermissible bolstering that resulted from the counselor's answer to the question about coaching.

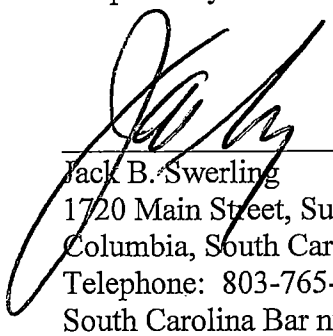
The state further complains of the Court of Appeals' reference to other testimony by the counselor – a suggestion that Gurley coached the child – to which the state claims there was not an objection. To the contrary, this testimony was elicited over multiple objections to the counselor's testimony. App. pp. 99-117. Moreover, the Court's reference to this testimony merely showed that other testimony supported the Court's conclusion the counselor suggested Gurley had coached the child. This reference does not undermine the validity of the Court's analysis of the offending answer to the question about coaching, and the Court correctly reversed on the basis of the resulting impermissible bolstering of the child's credibility.

The Court of Appeals found the counselor's testimony was impermissible bolstering and further found the error in its admission was not harmless. App. pp. 404-05. In keeping with the analysis of the prejudice resulting from the improper admission of the video, *supra* pp. 6-7, the Court of Appeals correctly found the error in the admission of the counselor's opinion as to coaching could not be deemed harmless. App. p. 405. The Court of Appeals correctly found admission of this testimony was reversible error, and this Court should deny the state's petition on this issue.

CONCLUSION

For the reasons set out above, this Court should deny the state's petition for writ of certiorari.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that I have served the Respondent-Petitioner's Return to Petitioner-Respondent's Petition for Writ of Certiorari upon Petitioner-Respondent, by mail to its counsel of record, Assistant Attorney General William M. Blitch, Jr., Post Office Box 11549, Columbia, South Carolina 29211, on January 19, 2018.

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January 19, 2018

VIA HAND-DELIVERY
The Honorable Daniel E. Shearouse
Clerk, SC Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: The State v. Bryant Christopher Gurley
Appellate Case No.: 2017-002605

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Respondent-Petitioner's Return to Petitioner-Respondent's Petition for Writ of Certiorari, along with the Proof of Service, in the above referenced matter.

By copy of this letter, I am serving William M. Blitch, Jr., Assistant Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/kas
Enclosures

cc: Clerk of Court, South Carolina Court of Appeals *(via hand-delivery)*
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