THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

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Supreme Court Appellate Case No. 2018-001355
Court of Appeals Opinion No. 2018-UP-109

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

v.

Nakia Johnson, ...................................................... Respondent-Petitioner.

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***Response to State's Petition for Writ of Certiorari by Respondent-Petitioner Nakia Johnson***

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## STATE'S STATEMENT OF QUESTION PRESENTED

The Court of Appeals erred in conflating the analysis related to the grant of a mistrial with analysis related to exclusion of evidence and finding Johnson's conviction for second degree criminal sexual conduct with a minor should be reversed.

## NIKA JOHNSON'S STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err when it found Nika Johnson was prejudiced when prosecution witness David "Kellin testified he begins forensic interviews by asking victims if they would tell the truth during the interview process" and the "trial court refused to strike this testimony or grant a mistrial."

## STATEMENT OF THE CASE

Nika Johnson's statement of the case appears in his petition for writ of *certiorari*, at 1-4, filed in this Court on July 23, 2018, which is incorporated by reference. On July 26, 2018, the State filed a cross-petition for writ of *certiorari*. This response follows.

## STATEMENT OF FACTS

Nika Johnson's statement of the facts appears in his petition for writ of *certiorari*, at 4-10, filed in this Court on July 23, 2018, which is incorporated by reference.

## ARGUMENT

**The Court of Appeals did not err when it found Nika Johnson was prejudiced when prosecution witness David "Kellin testified he begins forensic interviews by asking victims if they would tell the truth during the interview process" and the "trial court refused to strike this testimony or grant a mistrial."**

The Court of Appeals "agree[d] with [Mr.] Johnson that the forensic interview's testimony was improper under" *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) and *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) because Mr. "Kellin testified he begins forensic interviews by asking victims if they would tell the truth during the interview process" and the "trial court refused to strike this testimony or grant a mistrial." The State does not contest this conclusion of law. The Court of Appeals further

concluded, "Although we find the trial court erred in allowing Kellin to testify that he asked Victim if she would tell the truth in the forensic interview, we believe this error only requires reversal of Johnson's conviction for second degree CSC with a minor because only that conviction depended solely on the credibility of Victim." A. 589-90.

The State's petition for writ of *certiorari* does not advance any rationale for overturning the Court of Appeal's prejudice analysis. An appellate court must be able to conclude the error was "harmless beyond a reasonable doubt." *State v. Mouzon*, 326 S.C. 199, 205, 485 S.E.2d 918, 921 (1997). Although arising in the context of a post-conviction relief case, this Court's recent opinion in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) is instructive for when the State's evidence is so strong that error does not result in prejudice. *Smalls* held, "[F]or the evidence to be overwhelming such that it categorically precludes a finding of prejudice..., the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland*[1] standard of a reasonable probability. . . the factfinder would have had a reasonable doubt cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845 (internal quotations omitted). In this case, the State did not present any evidence—such as DNA, a confession, or physical evidence—so conclusive that excludes the possibility that the jurors could have a reasonable doubt if the error was removed from the case.

Because credibility of the witnesses was the central issue for the jurors to determine, the error was not harmless. *See Mouzon. Compare Kromah*, 401 S.C. at 362, 737 S.E.2d at 501 ("Based on the entire record, including the physical evidence

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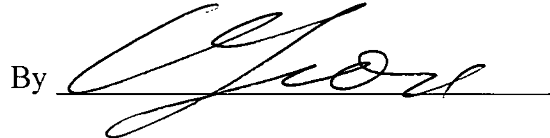
[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.") *with Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding "overwhelming" prejudice when the "case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse.").

## CONCLUSION

This Court should deny the State's petition for a writ of *certiorari*.

Respectfully Submitted,

By 

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August 26, 2018
Greenwood, South Carolina

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***Certificate of Service***

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I certify that I have served the Reponse to the State's Petition for Writ of *Certiorari* on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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August 27, 2018
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