THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

The Honorable D. Garrison Hill, Trial Judge
The Honorable Perry H. Gravely, PCR Judge

Appellate Case No: 2016-000283

STATE OF SOUTH CAROLINA, Petitioner,

v.

FREDERICK CHAPPELL, Respondent.

SUPPLEMENTAL APPENDIX

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ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE PERRY H. GRAVELY

Case No.: 2014-CP-23-6036

FREDERICK R. CHAPPELL,	)	
	)	
PETITIONER,	)	
	)	
vs.	)	**NOTICE OF APPEAL**
	)	
STATE OF SOUTH CAROLINA	)	
	)	
RESPONDENT.	)	
	)	

The Petitioner, Frederick R. Chappell, hereby appeals the Honorable Perry H. Gravely's January 14, 2016, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Brian P. Johnson, Esq.
522 North Church Street
Greenville, SC 29601
Attorney for Petitioner
SC Bar: 73996

Date: February 9, 2016
Other counsel of record: Karen Ratigan
P.O. Box 11549/Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

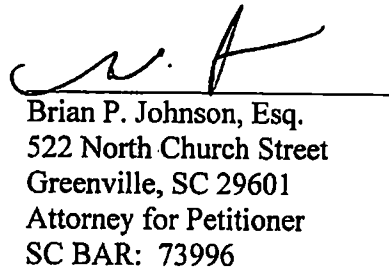
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
HONORABLE PERRY H. GRAVELY

Case No.: 2014-CP-23-6036

FREDERICK R. CHAPPELL,)	
)	
PETITIONER,)	
)	
vs.)	**PROOF OF SERVICE**
)	
STATE OF SOUTH CAROLINA)	
)	
RESPONDENT.)	
)	

I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



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Greenville, SC
February 9, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

FREDERICK R. CHAPPELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000283

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well.

STATEMENT

Petitioner Frederick Robert Chappell was convicted of lewd act upon a child and first degree criminal sexual conduct per jury trial held during the August 2012 term of the Greenville County General Sessions Court before Judge D. Garrison Hill, who sentenced petitioner to imprisonment for a period of fifteen years. Susannah C. Ross represented petitioner at trial, and Assistant Solicitor L. Mark Mayer appeared on behalf of the state. App. 1 - 273. Petitioner appealed, and after briefs were filed, his convictions and sentences were affirmed. See State v. Chappell, Unpublished Opinion No. 2014-UP-272 (Ct. App. June 30, 2014). See Supp. Appendix 16 – 17. Assistant Appellant Defender Katherine Haggard Hudgins represented petitioner on direct appeal.

On November 5, 2014, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 275 - 281. The respondent filed a return dated March 31, 2015, requesting that a PCR hearing be held in the case. App. 282 – 285. A PCR hearing was held on December 17, 2015, at the Greenville County Courthouse before Judge Perry H. Gravely. App. 287 – 306. Petitioner was present at the PCR hearing and represented by Brian P. Johnson, and Assistant Attorney General Karen Ratigan appeared on behalf of the state.

On January 14, 2016, Judge Gravely issued an Order of Dismissal therein denying and dismissing petitioner's allegations of ineffective assistance of trial counsel in the case. App. 308 – 312.

Petitioner appealed Judge Gravely's Order of Dismissal. This brief follows.

ARGUMENT

Trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well.

This case involved allegations by the prosecutrix that petitioner touched her "private" and her "bottom" with his hand and mouth while visiting at her grandmother's house when she was six and/or seven years old, and that petitioner made her touch his "private" as well. Apparently, petitioner was her grandmother's boyfriend at that time. App. 103, l. 24 – p. 117, l. 7; App. 123, lines 18-25. Petitioner did not testify at trial.

A summary of the state's witnesses' testimony follows:

1.) The prosecutrix testified that petitioner touched her private parts at her grandmother's house when she was six and/or seven years old. App. 103, l. 24 – p. 117, l. 7.
2.) The mother of the prosecutrix testified that she caught the prosecutrix "in an act with [another child]" in March 2010, and when questioned, the prosecutrix stated that "it" happened to her at grandma's house. A report in the matter was made by the mother of the prosecutrix on March 24, 2010. App. 146, l. 3 – p. 147, l. 25.
3.) Investigator Cheryl Cromartie was assigned to this case and subsequently interviewed the prosecutrix who told her that the above incident happened when she was six and/or seven years old and that it happened at her grandmother's house. App. 202, l. 25 – p. 204, l.8.
4.) Forensic Interviewer Christie Carlbery interviewed the prosecutrix on April 20, 2010, and submitted a CD of the same, which the jury viewed. App. 167, l. 14 – p. 169, l. 8.

5.) Shauna Gallaway Williams, who did not interview the prosecutrix, testified about delayed and accidental disclosure of sex abuse by children and why sexually abused children do not lie. App. 178, l. 12 – p. 196, l. 5.

6.) Dr. Nancy Ann Henderson conducted a physical examination of the prosecutrix and stated that the results were normal and that there were no signs of abuse, although she was told by the prosecutrix that a sexual assault against her occurred at her Grandma's house when she was six/seven. App. 213, l. 20 – p. 225, l. 13.

7.) Investigator Phillip Perry testified about how petitioner's cell phone had the capacity to make videos.[1]. App. 155, l. 16 – p. 159, l. 17.

On direct appeal, appellate counsel raised the following issue:

> The trial judge erred in allowing an expert in child abuse and treatment to testify generally about "child abuse dynamics" when the witness had no knowledge of the specific child in question and the expert testimony was relevant. See Supp. Appendix 1-13

The appellate issue was framed as an impermissible vouching violation based on the expert's following testimony:

> Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is – you know, has been interviewed by law enforcement, and they've been – talked to DSS, and they've talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some – someone is going to - at some point, the child is going to – it's going to become apparent among those interviewers. They're just not sophisticated enough to carry a story out over multiple interviews like that. App. 189, l. 22 – p. 190, l. 9.

---

1 The prosecutrix testified that petitioner took pictures and made videos of their physical contact via his cell phone. App. 127, l. 2 – 19.

In other words, the expert in effect advised the jury that the prosecutrix in this case was not lying, which improperly vouched for and bolstered her testimony and allegations.

With respect to this issue, the Court of Appeals affirmed per the following rationale:

> State v. Weaverling, 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible....Such testimony is relevant and helpful in explaining to the jury the typical behavioral patterns of adolescent victims of sexual assault."); id. at 475, 523 S.E.2d at 794 ("There is no requirement the sexual assault victim be personally interviewed or examined by the expert before the expert can give behavioral evidence testimony.").
>
> Chappell's contention that the expert's testimony was improper because it constituted improper vouching for the victim is not preserved for our review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (noting "[i]ssues not raised and ruled upon in the trial court will not be considered on appeal" and "[a] party may not argue one ground and trial and an alternate ground on appeal"). See Supp Appendix p. 17.

Note trial counsel's objection to the expert's testimony in question regarding the inadmissibility of the same follows:

> Ross: I'd simply object on grounds of relevancy since she hasn't actually had any experience with this case.
>
> Court: I find she is qualified. App. 184, l. 13 – 17.

During the PCR hearing, petitioner's PCR counsel argued that counsel erred in failing to specifically object to the expert's testimony on the specific ground of improper vouching by the expert witness. App. 289, l. 23 – p. 290, l. 21. Petitioner testified at the PCR hearing and admitted that "there wasn't any objection to the improper vouching and [as a result], the Court of Appeals didn't get to hear it" because trial counsel in effect failed to object on that specific basis

(improper vouching) in reference to the expert's testimony as to whether children lie about sex abuse. App. 293, lines 6 – 25; Tr. 296, lines 4 – 5; Tr. 297, lines 2 – 7.

Trial counsel testified during the PCR hearing and explained that she "didn't have a ground for objecting to vouching because [the expert in question] hadn't really said anything" and that she "didn't hear any vouching" violation. App. 302, l. 18 – p. 303, l. 25.

The PCR judge denied petitioner's allegation of ineffective assistance counsel on the ground that trial counsel should have made an impermissible vouching objection to pertinent portions of the sex expert's testimony as follows:

> This Court finds Applicant failed to meet his burden of proving trial counsel should have objected to Shauna Galloway-Williams' testimony. This Court notes trial counsel is an experienced criminal defense attorney and finds she would be aware of the risks of potential vouching by expert witnesses in cases involving the sexual abuse of a child. This Court finds there was not error in trial counsel's lack of objection during Galloway-Williams' testimony because her testimony did not contain vouching statements. The recent appellate decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) is instructive in this case (and, in fact, deals with the same expert witness testifying about the same topic of delayed disclosure of abuse by minors). This Court finds Galloway-Williams' testimony in the Applicant's case was permitted under the holding in Brown. This Court finds there was no basis for trial counsel to have made an objection to vouching.

However, the Brown case was inapplicable here because the sex expert never commented on that child's credibility; but in the case at bar, the sex expert indeed commented on the credibility of the prosecutrix's sex allegations, and the error was not harmless since a swearing contest existed between the prosecutrix and petitioner, and no forensic evidence was offered at trial in the case. App. 310 – 311.

The sex expert in question, who was called to explain the dynamics in child sex abuse cases involving delayed and accidental closure, went beyond this topic and added that "children

don't often lie about sexual abuse incidents" and that "they don't often lie about things that are beyond their real scope of knowledge." This was error as the assessment of a witness' credibility is within the exclusive province of the jury. State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). Also, even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others and furthermore, bolstering by a witness imbued with imprimatur of an expert witness end up improperly invading the province of the jury. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015); State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). In Chavis, the sex expert's statement that she recommended that the minor not be around the defendant for any reason was tantamount to her belief in the accuser's claim of sex abuse and was therefore deemed to be improper vouching. In State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), the Court held that the introduction of the children's videotapes and reports of the forensic interviewers sessions which contained conclusions of a compelling disclosure of abuse constituted a comment on the veracity and truthfulness of the accuser's allegations, which in turn constituted improper vouching that was not considered harmless error because the children's credibility was crucial in the case.

It is improper for an expert to comment on the veracity of a child's accusations of sex abuse. State v. Jennings, supra, citing to State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) and State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000). In Dawkins, the Court held that it was improper for the therapist to indicate that he believed the victim's allegations were genuine; and in Dempsey, the Court held that improper vouching occurred when the therapist testified that ninety-five percent of children's sex allegations were true.

In Kromah, the Court held that the forensic interviewer's testimony that the minor had given a compelling finding of child abuse was the equivalent of stating that the child told the

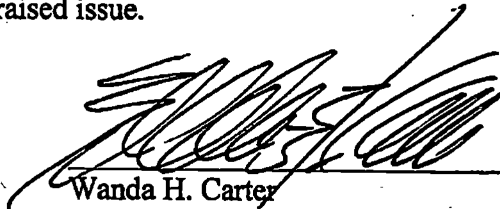
truth and was thus improper. In Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), the Court ruled that the testimony from the sex expert that he believed the child's abuse allegations constituted improper bolstering of the child's testimony. View below the Kromah Court's list of impermissible vouching examples of testimony that must be avoided in sex abuse cases:

- That the child was told to be truthful;
- A direct opinion as to a child's veracity or tendency to tell the truth;
- Any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" or abuse;
- 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.

Additionally, any sex expert's testimony that yields improper vouching is not harmless where no physical evidence exists and the case turns on the victim's credibility. In the case at bar, there was no physical evidence (cellular phone evidence) presented and the assessment of the prosecutrix's credibility was key in the case. Therefore, the sex expert's testimony in the instant case wherein she advised that children of sex abuse are not liars constituted improper vouching that was not harmless error here because this case was the classic swearing contest case sans any physical evidence. As a result, trial counsel's error in failing to object to the expert's testimony in question at petitioner's trial constituted deficient legal representation in violation of the Sixth Amendment to the extent that but for counsel's error in question, a reasonable probability exists that the outcome of petitioner's trial would have been different. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

FREDERICK R. CHAPPELL,

PETITIONER,

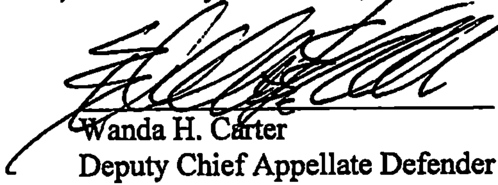
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

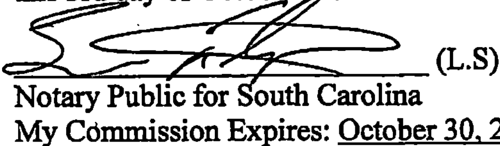
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix and Supplemental Appendix in the above referenced case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Frederick Robert Chappell, #214069, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 3rd day of October, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of October, 2016.



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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000283

FREDERICK R. CHAPPELL,

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Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I. Trial counsel did not err by not making a specific objection as to improper vouching in regards to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well. 5

CONCLUSION 9

RESPONDENT'S QUESTIONS PRESENTED

Did Trial counsel err by failing to make a specific objection as to improper vouching in regards to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well?

STATEMENT OF THE CASE

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2010 term of the Greenville County Grand Jury for lewd act upon a child (2010-GS-23-7901) and first-degree criminal sexual conduct (CSC) with a minor (2010-GS-23-7902). He was represented by Susannah C. Ross, Esquire.

After the State called the case to trial, the Applicant was found guilty. On August 7, 2012, the Honorable D. Garrison Hill sentenced the Applicant to concurrent terms of 15 years for lewd act upon a child and life imprisonment for first-degree CSC with a minor.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Chappell, Op. No. 2014-UP-272 (S.C. Ct. App. filed June 30, 2014). The remittitur was sent on July 16, 2014.

Petitioner filed a PCR application November 5, 2014. The Respondent made its return on March 31, 2015. An evidentiary hearing was held on December 17, 2015. The Applicant was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent. The Honorable Perry H. Gravely denied and dismissed the PCR application by order filed January 21, 2016.

Petitioner filed a notice of appeal. His attorney submitted a notice of appeal to the South Carolina Supreme Court on February 9, 2016. His attorney submitted a petition for writ of certiorari and appendix on October 3, 2016. This return follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Trial counsel did not err by not making a specific objection as to improper vouching in regards to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well.

Petitioner asserts that Counsel was ineffective in his representation of Petitioner in failing to make a specific objection as to improper vouching. This argument is without merit.

A.

As previously mentioned, Petitioner was sentenced to concurrent terms of 15 years for lewd act upon a child and life imprisonment for first-degree CSC with a minor. The charges stem from incidents where the Petitioner touched the victim's "private" and "bottom". (App.p.116.LL.1-6). During the course of the trial the state called Shauna Galloway-Williams as an expert in child sex-abuse and treatment to testify. Prior to being qualified as an expert, Petitioner's Counsel made an objection of relevancy with regard to Ms. Galloway-Williams' testimony since she had not been involved in the case. (App.p.184.LL.8-15). The trial judge ruled allowing Ms. Galloway-Williams to testify as an expert. (App.p.184.LL.17-19).

B.

At the PCR hearing, Petitioner made the allegation of ineffective assistance of counsel. Specially, Petitioner argued that Counsel did not object to improper vouching. (App.p.293.LL.9-13). At the hearing Counsel testified that she was mindful of potential vouching and did not believe there was any in this case. (App.p.310). In denying Petitioner's application for post-conviction relief, the PCR judge found the Petitioner failed to meet his burden of proving trial counsel should have objected to Ms. Shauna Galloway-Williams' testimony. (App.p.310). Additionally, the PCR judge found there was no error in trial counsel's lack of objection during

Galloway-Williams' testimony because her testimony did not contain vouching statements. (App.p.311). Further, the court found the recent appellate decision in State v. Brown. 411 S.C. 332,768 S.E.2d 246 (Ct. App. 2015) is instructive in this case (and, in fact, deals with the same expert witness testifying about the same topic of delayed disclosure of abuse by minors). (App.p.310). Finally, the court found that there was no basis for trial counsel to have made an objection to vouching. (App.p.310).

C.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 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. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient

performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

D.

The PCR judge did not err in its ruling that Petitioner failed to meet his burden entitling him to post-conviction relief. Here, the Petitioner alleged that the expert the state used to testify for them vouched and bolstered the creditability of the victim. In giving her testimony the expert, Ms. Shauna Galloway-Williams testified to the following:

> Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is - you know, has been interviewed by law enforcement, and they've been - talked to DSS, and they've talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some - someone is going to - at some point, the child is going to - it's going to become apparent among those interviewers. They're just not sophisticated enough to carry a story out over multiple interviews like that. (App.p.189.LL.22-25-p.190.LL.1 -9).

The expert's testimony discusses generally how children react and respond to sexual abuse. At no time did Ms. Galloway-Williams comment on the victim specifically or make mention to anything that the victim said. More specifically, Ms. Galloway-Williams' answer was in response to a question from the state which asked "Do children lie about things like - - of a sexual nature or abuse? And can you tell us the dynamics of lying and sexual abuse?" (App.p.189.LL.14-17). At no time did the witness bolster or vouch for the credibility of the

victim but merely gave her opinion. "An expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical question that is based on facts supported by the record." State V. Weaverling 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999)

At the PCR hearing the judge referenced an appellate decision in State v. Brown 411 S.G. 332, 768 S.E.2d 246 (Ct. App. 2015) that speaks to the issue the Petitioner presently addresses. In Brown, Ms. Galloway-Williams, the same expert witness in this case testified about child sex abuse and more specifically delayed disclosure of abuse by minors. The court ruled in Brown that Ms. Galloway's testimony did not amount to vouching because she never directly or indirectly commented about the creditability of the victims' allegations. That case is applicable here because there exist many of the same facts. Among them are that Ms. Galloway-Williams was never the forensic interviewer for the victim and had no prior knowledge of the facts of the case. She simply offered her expert opinion about sexual abuse among children, Additionally, during the PCR hearing the judge asked the Petitioner and his PCR Counsel about Ms. Galloway-Williams' testimony. (App.p.297.LL.10-25-p.298.LL.1 -2).

THE COURT: Let me ask you a question, are you aware of any place in the transcript where they discuss the credibility of the particular victim? Did she ever make any discussions about this victim or was it just all general type comments about how victims in general react?

APPLICANT: I do know that she said that she'd never spoke to her.

THE COURT: Did she ever give an opinion as to whether this girl was telling the truth or not, in the transcript? Are you aware of anything?

APPLICANT: I'm not aware of that, to be honest with you.

BRIAN JOHNSON: I don't believe so, Your Honor.

The Petitioner made the allegation that his trial Counsel failed to object to improper vouching or bolstering by the witness but when asked by the PCR judge about any discussions regarding comments on credibility the Petitioner's response along with his PCR Counsel suggest that Ms. Galloway-Williams' testimony did not comment on the creditability of the victim. Because of this, there is probative evidence to support the PCR Court's ruling.

E.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State. 351 S.G. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

[*Signature follows*]

CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

By: ______________________
ATTORNEYS FOR RESPONDENT

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March 23, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000283

Frederick R. Chappell, ... Petitioner,

v.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
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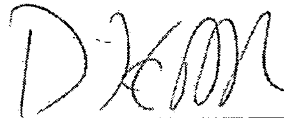
I further certify that all parties required by Rule to be served have been served.
This 23rd day of March, 2017.



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The South Carolina Court of Appeals

Frederick Robert Chappell, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000283

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Wanda H. Carter, Esquire
DeShawn Herman Mitchell, Esquire
Frederick Robert Chappell, #214069
The Honorable Perry H. Gravely

FILED
May 2, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

Perry H. Gravely, Circuit Court Judge

FREDERICK R. CHAPPELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000283

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ISSUE PRESENTED

Trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well.

STATEMENT

Petitioner Frederick Robert Chappell was convicted of lewd act upon a child and first degree criminal sexual conduct per jury trial held during the August 2012 term of the Greenville County General Sessions Court before Judge D. Garrison Hill, who sentenced petitioner to imprisonment for a period of fifteen years. Susannah C. Ross represented petitioner at trial, and Assistant Solicitor L. Mark Mayer appeared on behalf of the state. App. 1 - 273. Petitioner appealed, and after briefs were filed, his convictions and sentences were affirmed. Supp. Appendix. 1 – 14. See State v. Chappell, Unpublished Opinion No. 2014-UP-272 (Ct. App. June 30, 2014). See Supp. Appendix 15 – 17. Assistant Appellant Defender Katherine Haggard Hudgins, of the S.C. Office of Appellate Defense, represented petitioner on direct appeal.

On November 5, 2014, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 275 - 281. The respondent filed a return dated March 31, 2015, requesting that a PCR hearing be held in the case. App. 282 – 285. A PCR hearing was held on December 17, 2015, at the Greenville County Courthouse before Judge Perry H. Gravely. App. 287 – 306. Petitioner was present at the PCR hearing and represented by Brian P. Johnson, and Assistant Attorney General Karen Ratigan appeared on behalf of the state.

On January 14, 2016, Judge Gravely issued an Order of Dismissal therein denying and dismissing petitioner's allegations of ineffective assistance of trial counsel in the case. App. 308 – 312. Petitioner appealed Judge Gravely's Order of Dismissal and filed a petition for writ of certiorari on October 3, 2016, which was granted on May 2, 2018, by Order of the South Carolina Court of Appeals. This brief of petitioner follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

ARGUMENT

Trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well.

This case involved allegations by the prosecutrix that petitioner touched her "private" and her "bottom" with his hand and mouth while visiting at her grandmother's house when she was six and/or seven years old, and that petitioner made her touch his "private" as well. Apparently, petitioner was her grandmother's boyfriend at that time. App. 103, l. 24 – p. 117, l. 7; App. 123, lines 18-25. Petitioner did not testify at trial.

A summary of the state's witnesses' testimony follows:

1.) The prosecutrix testified that petitioner touched her private parts at her grandmother's house when she was six and/or seven years old. App. 103, l. 24 – p. 117, l. 7.

2.) The mother of the prosecutrix testified that she caught the prosecutrix "in an act with [another child]" in March 2010, and when questioned, the prosecutrix stated that "it" happened to her at grandma's house. A report in the matter was made by the mother of the prosecutrix on March 24, 2010. App. 146, l. 3 – p. 147, l. 25.

3.) Investigator Cheryl Cromartie was assigned to this case and subsequently interviewed the prosecutrix who told her that the above incident happened when she was six and/or seven years old and that it happened at her grandmother's house. App. 202, l. 25 – p. 204, l.8.

4.) Forensic Interviewer Christie Carlbery interviewed the prosecutrix on April 20, 2010, and submitted a CD of the same, which the jury viewed. App. 167, l. 14 – p. 169, l. 8.

5.) Shauna Gallaway Williams, who did not interview the prosecutrix, testified about delayed and accidental disclosure of sex abuse by children and why sexually abused children do not lie. App. 178, l. 12 – p. 196, l. 5.

6.) Dr. Nancy Ann Henderson conducted a physical examination of the prosecutrix and stated that the results were normal and that there were no signs of abuse, although she was told by the prosecutrix that a sexual assault against her occurred at her Grandma's house when she was six/seven. App. 213, l. 20 – p. 225, l. 13.

7.) Investigator Phillip Perry testified about how petitioner's cell phone had the capacity to make videos.[1]. App. 155, l. 16 – p. 159, l. 17.

On direct appeal, appellate counsel raised the following issue:

> The trial judge erred in allowing an expert in child abuse and treatment to testify generally about "child abuse dynamics" when the witness had no knowledge of the specific child in question and the expert testimony was relevant. See Supp. Appendix 1-13

The appellate issue was framed as an impermissible vouching violation based on the expert's following testimony:

> Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is – you know, has been interviewed by law enforcement, and they've been – talked to DSS, and they've talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some – someone is going to - at some point, the child is going to – it's going to become apparent among those interviewers. They're just not sophisticated enough to carry a story out over multiple interviews like that. App. 189, l. 22 – p. 190, l. 9.

[1] The prosecutrix testified that petitioner took pictures and made videos of their physical contact via his cell phone. App. 127, l. 2 – 19.

In other words, the expert in effect advised the jury that the prosecutrix in this case was not lying, which improperly vouched for and bolstered her testimony and allegations.

With respect to this issue, the Court of Appeals affirmed per the following rationale:

> State v. Weaverling, 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible....Such testimony is relevant and helpful in explaining to the jury the typical behavioral patterns of adolescent victims of sexual assault."); id. at 475, 523 S.E.2d at 794 ("There is no requirement the sexual assault victim be personally interviewed or examined by the expert before the expert can give behavioral evidence testimony.").
>
> Chappell's contention that the expert's testimony was improper because it constituted improper vouching for the victim is not preserved for our review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (noting "[i]ssues not raised and ruled upon in the trial court will not be considered on appeal" and "[a] party may not argue one ground and trial and an alternate ground on appeal"). See Supp Appendix p. 17.

Note trial counsel's objection to the expert's testimony in question regarding the inadmissibility of the same follows:

> Ross: I'd simply object on grounds of relevancy since she hasn't actually had any experience with this case.
>
> Court: I find she is qualified. App. 184, l. 13 – 17.

During the PCR hearing, petitioner's PCR counsel argued that counsel erred in failing to specifically object to the expert's testimony on the specific ground of improper vouching by the expert witness. App. 289, l. 23 – p. 290, l. 21. Petitioner testified at the PCR hearing and admitted that "there wasn't any objection to the improper vouching and [as a result], the Court of Appeals didn't get to hear it" because trial counsel in effect failed to object on that specific basis

(improper vouching) in reference to the expert's testimony as to whether children lie about sex abuse. App. 293, lines 6 – 25; Tr. 296, lines 4 – 5; Tr. 297, lines 2 – 7.

Trial counsel testified during the PCR hearing and explained that she "didn't have a ground for objecting to vouching because [the expert in question] hadn't really said anything" and that she "didn't hear any vouching" violation. App. 302, l. 18 – p. 303, l. 25.

The PCR judge denied petitioner's allegation of ineffective assistance counsel on the ground that trial counsel should have made an impermissible vouching objection to pertinent portions of the sex expert's testimony as follows:

> This Court finds Applicant failed to meet his burden of proving trial counsel should have objected to Shauna Galloway-Williams' testimony. This Court notes trial counsel is an experienced criminal defense attorney and finds she would be aware of the risks of potential vouching by expert witnesses in cases involving the sexual abuse of a child. This Court finds there was not error in trial counsel's lack of objection during Galloway-Williams' testimony because her testimony did not contain vouching statements. The recent appellate decision in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) is instructive in this case (and, in fact, deals with the same expert witness testifying about the same topic of delayed disclosure of abuse by minors). This Court finds Galloway-Williams' testimony in the Applicant's case was permitted under the holding in Brown. This Court finds there was no basis for trial counsel to have made an objection to vouching.

However, the Brown case was inapplicable here because the sex expert never commented on that child's credibility; but in the case at bar, the sex expert indeed commented on the credibility of the prosecutrix's sex allegations, and the error was not harmless since a swearing contest existed between the prosecutrix and petitioner, and no forensic evidence was offered at trial in the case. App. 310 – 311.

The sex expert in question, who was called to explain the dynamics in child sex abuse cases involving delayed and accidental closure, went beyond this topic and added that "children

don't often lie about sexual abuse incidents" and that "they don't often lie about things that are beyond their real scope of knowledge." This was error as the assessment of a witness' credibility is within the exclusive province of the jury. State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). Also, even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others and furthermore, bolstering by a witness imbued with imprimatur of an expert witness end up improperly invading the province of the jury. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015); State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). In Chavis, the sex expert's statement that she recommended that the minor not be around the defendant for any reason was tantamount to her belief in the accuser's claim of sex abuse and was therefore deemed to be improper vouching. In State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), the Court held that the introduction of the children's videotapes and reports of the forensic interviewers sessions which contained conclusions of a compelling disclosure of abuse constituted a comment on the veracity and truthfulness of the accuser's allegations, which in turn constituted improper vouching that was not considered harmless error because the children's credibility was crucial in the case.

It is improper for an expert to comment on the veracity of a child's accusations of sex abuse. State v. Jennings, supra, citing to State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) and State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000). In Dawkins, the Court held that it was improper for the therapist to indicate that he believed the victim's allegations were genuine; and in Dempsey, the Court held that improper vouching occurred when the therapist testified that ninety-five percent of children's sex allegations were true.

In Kromah, the Court held that the forensic interviewer's testimony that the minor had given a compelling finding of child abuse was the equivalent of stating that the child told the

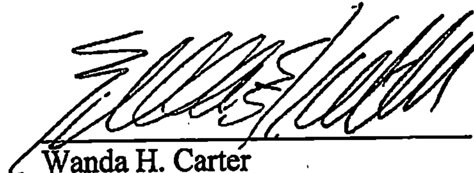
truth and was thus improper. In Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), the Court ruled that the testimony from the sex expert that he believed the child's abuse allegations constituted improper bolstering of the child's testimony. View below the Kromah Court's list of impermissible vouching examples of testimony that must be avoided in sex abuse cases:

- That the child was told to be truthful;
- A direct opinion as to a child's veracity or tendency to tell the truth;
- Any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" or abuse;
- 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.

Additionally, any sex expert's testimony that yields improper vouching is not harmless where no physical evidence exists and the case turns on the victim's credibility. In the case at bar, there was no physical evidence (cellular phone evidence) presented and the assessment of the prosecutrix's credibility was key in the case. Therefore, the sex expert's testimony in the instant case wherein she advised that children of sex abuse are not liars constituted improper vouching that was not harmless error here because this case was the classic swearing contest case sans any physical evidence. As a result, trial counsel's error in failing to object to the expert's testimony in question at petitioner's trial constituted deficient legal representation in violation of the Sixth Amendment to the extent that but for counsel's error in question, a reasonable probability exists that the outcome of petitioner's trial would have been different. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court reverse his convictions and sentences in this case and remand for a new proceeding.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Perry H. Gravely, Circuit Court Judge

FREDERICK R. CHAPPELL,

PETITIONER,

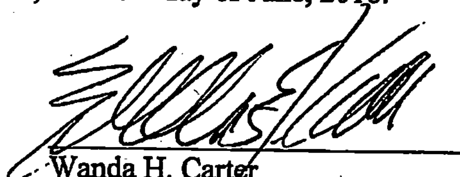
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

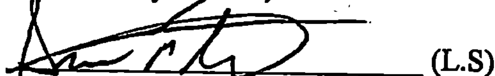
The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Frederick Robert Chappell, #214069, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 28th day of June, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of June, 2018.


(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000283

FREDERICK R. CHAPPELL, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE

Did the PCR court properly deny Petitioner's application for post-conviction relief as Trial Counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. During its December 2010 term, the Greenville County Grand Jury indicted Petitioner for lewd act upon a child (2010-GS-23-7901) and first-degree criminal sexual conduct (CSC) with a minor (2010-GS-23-7902). Susannah C. Ross, Esquire, represented Applicant. On August 6, 2012, Petitioner proceeded to trial before the Honorable D. Garrison Hill and a jury. The jury convicted Petitioner of both charges. On August 7, 2012, Judge Hill sentenced the Applicant to concurrent terms of fifteen years for lewd act upon a child and life imprisonment for first-degree CSC with a minor.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. Petitioner raised one issue on appeal the following issue on appeal: Did the trial judge err in allowing an expert in child sexual abuse and treatment to testify generally about "child abuse dynamics" when the witness had no knowledge of the child in question and the expert testimony was irrelevant? The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Chappell, Op. No. 2014-UP-272 (S.C. Ct. App. filed June 30, 2014). The Court found Petitioner's contention that the expert's testimony was improper because it constituted improper vouching for the victim was not preserved for appellate review. See (2003) (noting be considered on State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 "[ijssues not raised and ruled upon in the trial court will not appeal" and "[a] party may not argue one ground and trial and an alternate ground on appeal"). The remittitur was sent on July 16, 2014.

On November 5, 2014, Petitioner filed an application for post-conviction relief. Petitioner alleged ineffective assistance of counsel in that trial counsel allowed the expert's testimony, which "constituted improper vouching." Respondent made its return on March 31, 2015 requesting an evidentiary hearing be convened. An evidentiary hearing was held on December 17, 2015, at the Greenville Courthouse before the Honorable Perry H. Gravely. Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented Respondent. Thereafter, Judge Gravely denied and dismissed the PCR application by order filed January 21, 2016.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner submitted a Petition for Writ of Certiorari and Appendix on October 3, 2016. Respondent filed a return to Petitioner's petition for writ of certiorari on March 23, 2017. On May 2, 2018, this Court granted certiorari. This brief of Respondent follows.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the reviewing court. It will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The PCR court properly denied Petitioner's application for post-conviction relief as Trial Counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony.

Petitioner asserts trial counsel erred in failing to enter a specific improper vouching objection to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well. This argument is without merit. Here, the PCR court properly denied Petitioner's application for post-conviction relief as Trial Counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony.

During trial, the State called Shauna Galloway-Williams to testify. (App.p.178). Ms. Galloway-Williams testified she was employed as the executive director of the Julie Valentine Center, a child abuse and sexual assault recovery center that provides a "full range of services," including education, prevention, investigation, and treatment services related to child abuse and sexual assaults. (App.p.178-79). Although the Center also provided forensic interviews for potential victims, Ms. Galloway-Williams did not conduct a forensic interview of the victim in this case. (App.p.179, lines 20-24). Ms. Galloway-Williams then testified regarding her background, education, and training, and stated that it was her understanding that the purpose of her testimony was to share information related to dynamics of child sexual abuse. (App.p.180-82).

When the State moved to qualify Ms. Galloway-Williams as an expert in "child sexual abuse and treatment," defense counsel was permitted voir dire. (App.p.184, lines 1-12). Trial

counsel asked one question as follows: "So you have not seen the video of [the victim], you've not met with her, talked to her, or any of her family members related, specifically, to this case?" (App.p.184, lines 8-11). Ms. Galloway-Williams stated she had not. (App.p.184, line 12). Trial counsel then told the trial judge, "I'd simply object on grounds of relevancy since she hasn't, actually, had any experience with the – with this case." (App.p.184, lines 13-15). The trial judge acknowledged the objection but found Ms. Galloway-Williams qualified as an expert in the stated field under the Watson case[1] and Rules 702, 401, and 403. (App.p.184, lines 16-19). The judge then gave a charge regarding expert and opinion testimony and advised that the credibility of the expert testimony was to be determined by the jury. (App.p.184, line 20 – p. 185, line 2). Ms. Galloway-Williams continued with her direct testimony and Appellant raised no objections to any of the testimony elicited. (App. p.185-96). The issue of the expert witness's testimony was raised on direct appeal and the Court of Appeals found Petitioner's contention that the expert's testimony was improper because it constituted improper vouching for the victim was not preserved for appellate review.

At the PCR hearing, Petitioner made the allegation of ineffective assistance of counsel. Specially, Petitioner argued that Trial Counsel did not object to improper vouching. (App.p.293). At the evidentiary hearing Trial Counsel testified that she was mindful of potential vouching and did not believe there was any in this case. (App.p.310). In denying Petitioner's application for post-conviction relief, the PCR judge found the Petitioner failed to meet his burden of proving trial counsel should have objected to Ms. Shauna Galloway-Williams' testimony finding there was no error in trial Counsel's lack of objection during Galloway-Williams' testimony because

[1] Presumably, the trial judge was referring to Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), a case dealing with the qualification of expert witnesses and the reliability of expert testimony.

her testimony did not contain vouching statements. (App.p.310-311). Further, the court found the recent appellate decision in State v. Brown. 411 S.C. 332,768 S.E.2d 246 (Ct. App. 2015) was instructive in Petitioner's case (and, in fact, deals with the same expert witness testifying about the same topic of delayed disclosure of abuse by minors). (App.p.310). Furthermore, the PCR court found that there was no basis for Trial Counsel to have made an objection to vouching. (App.p.310).

Here, the PCR court properly denied Petitioner's application for post-conviction relief as trial counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony. "An expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical question that is based on facts supported by the record." See Weaverling, 337 S.C. at 474-475, 523 S.E.2d at 794. "[E]ven though 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, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court stated:

> "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013).

In Brown, this Court found that an expert witness's testimony regarding the behavioral characteristics of child sex abuse victims was not only "relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse," but that such testimony did not constitute improper bolstering because the expert: (1) did not testify as a forensic interviewer; (2) never interviewed the victims; (3) did not prepare a report for her testimony; (4) did not express an opinion regarding the general credibility of child sex abuse victims' allegations; and (5) did not express an opinion regarding the credibility of the specific minor victims in the case. State v. Brown, 411 S.C. 332, 341, 768 S.E.2d 246, 251 (Ct. App. 2015). Further, the Court specifically noted "the fact that [the expert witness's] testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony improperly bolstered their accounts [of the abuse]," because the expert's testimony "merely offered reasons why children might delay disclosing instances of sexual abuse to assist the trier of fact's understanding of the complex dynamics of child victims in sexual abuse cases." Id. at 345, 768 S.E.2d at 253.

In the case at bar, at no time did the witness bolster or vouch for the credibility of the victim but merely gave her opinion about the dynamics of sexual abuse in children for which she was an expert in. In giving her testimony the expert, Ms. Shauna Galloway-Williams testified to the following at trial:

> Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is - you know, has been interviewed by law enforcement, and they've been - talked to DSS, and they've talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some - someone is going to - at some point, the child is going to - it's going to become apparent among those interviewers. They're just not sophisticated enough to carry a story out over multiple interviews like that. (App.p.189-190).

Here, the expert's testimony discussed generally how children react and respond to sexual abuse. At no time did Ms. Galloway-Williams comment on the victim specifically or make mention to anything the victim said. More specifically, Ms. Galloway-Williams' answer was in response to a question from the state which asked "Do children lie about things like - - of a sexual nature or abuse? And can you tell us the dynamics of lying and sexual abuse?" (App.p.189). This kind of testimony provided by the State's expert was intended to explain the dynamics of child sexual abuse and how children react to questions being asked by adults. The testimony did not indicate the child was telling the truth, instead it merely offered a rationale and explanation for children's behavior when it comes allegations of sexual abuse. Moreover, the expert witness had no personal experience with victim or the facts of her case, did not testify she believed victim, victim was telling the truth, or victim's behavior suggested she was telling the truth. Cf. State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (finding testimony to constitute improper bolstering in a child sexual abuse case where the witness testified she recommended Chavis not be around the victim for any reason, which could only be interpreted as a statement the witness believed the victim's claim Chavis had sexually abused her); State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (instructing forensic interviewers should not testify about a child's veracity or tendency to tell the truth, vouch for a child's believability, state they made a compelling finding of abuse, assert they believed the child, or indicate the child's behavior suggests the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding a forensic interviewer's testimony constituted improper vouching where the interviewer testified the victims provided compelling disclosures of abuse by Jennings and provided details consistent with the background information provided by the victims' mother, the police report, and other children); State v. McKerley, 397 S.C. 461,

465-466, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding a forensic interviewer's testimony to be improper where the interviewer testified about giving an opinion as to whether something happened and about consistent information and compelling findings). As a result, Ms. Galloway-Williams did not improperly bolster or vouch for the credibility or believability of the victim.

Furthermore, during the PCR hearing the PCR judge referenced State v. Brown 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). In Brown, Ms. Galloway-Williams, the same expert witness in this case testified about child sex abuse and more specifically delayed disclosure of abuse by minors. The court ruled in Brown that Ms. Galloway's testimony did not amount to vouching because she never directly or indirectly commented about the creditability of the victims' allegations. That case is applicable here because there exist many of the same facts. Among them are that Ms. Galloway-Williams was never the forensic interviewer for the victim and had no prior knowledge of the facts of the case. She simply offered her expert opinion about sexual abuse among children, Additionally, during the PCR hearing the judge asked the Petitioner and his PCR Counsel about Ms. Galloway-Williams' testimony. (App.p.297-298).

> PCR Court: Let me ask you a question, are you aware of any place in the transcript where they discuss the credibility of the particular victim? Did she ever make any discussions about this victim or was it just all general type comments about how victims in general react?
>
> Petitioner: I do know that she said that she'd never spoke to her.
>
> PCR Court: Did she ever give an opinion as to whether this girl was telling the truth or not, in the transcript? Are you aware of anything?
>
> Petitioner: I'm not aware of that, to be honest with you.
>
> PCR Counsel: I don't believe so, Your Honor.

The Petitioner made the allegation that his trial counsel failed to object to improper vouching or bolstering by the witness but when asked by the PCR judge about any discussions regarding comments on credibility the Petitioner's response along with his PCR Counsel suggest that Ms. Galloway-Williams' testimony did not comment on the creditability of the victim. Because of this, the expert witness's testimony did not constitute improper vouching.

Furthermore, Respondent acknowledges this Court's decision in Brown held among other factors the expert witness's testimony did not constitute improper bolstering because the expert did not express an opinion regarding the general credibility of child sex abuse victims' allegations. Brown, 411 S.C. at 341, 768 S.E.2d at 251. It is important to note at the time of Petitioner's trial in 2012, Brown had not been decided. No South Carolina court has ever required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). The relevant time frame for analysis is when the alleged ineffectiveness occurred. Id. at 310. While the rules of preservation require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). Therefore, trial counsel cannot reasonably be held ineffective for failing to object based on case law that had not even been decided at the time of trial.. Because of this the PCR court properly denied Petitioner's application for post-conviction relief as trial counsel was not ineffective for failing to object to the testimony of the expert witness as the testimony was appropriate and did not improperly bolster the victim's testimony.

CONCLUSION

For the foregoing reasons, this Court should affirm the post-conviction relief court's denial of relief.

Respectfully submitted,

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October 29, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000283

FREDERICK ROBERT CHAPPELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

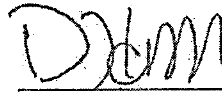
Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 29th day of October, 2018.



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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frederick Robert Chappell, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000283

ON WRIT OF CERTIORARI

Appeal from Greenville County
Perry H. Gravely, Post-Conviction Relief Court Judge

Opinion No. 5704
Heard November 5, 2019 – Filed December 31, 2019

REVERSED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Taylor Zane Smith, of Columbia, for Respondent.

THOMAS, J.: Petitioner Frederick Robert Chappell appeals the dismissal of his post-conviction relief (PCR) application, arguing the PCR court erred in denying his claim for ineffective assistance of counsel because his trial counsel did not

object when the State's expert witness gave improper bolstering testimony. We reverse.

FACTS AND PROCEDURAL HISTORY

On December 14, 2010, a Greenville County Grand Jury indicted Chappell for first-degree criminal sexual conduct with a minor and lewd act upon a child, and the State called the case to trial in August 2012. On August 7, 2012, after a two-day trial, the jury convicted Chappell of both counts, and the trial court sentenced him to life in prison.[1] Chappell appealed, arguing this court should reverse his convictions because the State's expert witness gave improper vouching testimony. However, in June 2014, this court affirmed Chappell's convictions and held that Chappell's improper vouching claim was not preserved for review. *State v. Chappell*, Op. No. 2014-UP-272 (S.C. Ct. App. filed June 30, 2014).

On November 5, 2014, Chappell filed a PCR application, claiming he received ineffective assistance of counsel because his trial counsel failed to object when the State's expert gave improper bolstering testimony. The PCR court held an evidentiary hearing on December 17, 2015. In an order dated January 21, 2016, the PCR court dismissed Chappell's application, finding the State's expert did not make any improper vouching statements. In May 2018, this court granted a writ of certiorari to review the PCR court's ruling.

At trial, the nine-year-old victim testified her grandmother's former boyfriend, Chappell, had sexually abused her several times when she and her siblings visited her grandmother's home.[2] She alleged that Chappell touched her "private" and "bottom" with his hands and mouth and sometimes forced her to touch his "private." After the victim testified, the jury watched video of a forensic interview in which the victim described the abuse and identified Chappell as the perpetrator.

The court then held a hearing to determine the admissibility of testimony from the State's expert witness, Ms. Shauna Galloway-Williams. During voir dire, Galloway-Williams testified that she had never interviewed the victim and had not seen the video of the victim's forensic interview. Over trial counsel's objection, the court qualified Galloway-Williams as an expert in child sexual abuse and treatment.

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[1] The trial court sentenced Chappell to life imprisonment for the first-degree criminal sexual conduct with a minor and a concurrent term of fifteen years' imprisonment for the lewd act upon a child.
[2] The victim disclosed the sexual abuse in March 2010. She was seven years old.

On direct examination, Galloway-Williams testified to why children who are victims of sexual abuse might not report the abuse right away. Then, without objection from trial counsel, the following exchange occurred between the prosecutor and Galloway-Williams:

> Q: . . . Do children lie?
>
> A: Yes.
>
> Q: Okay. Do children lie about things like – of a sexual nature or abuse? And can you tell us the dynamics of lying and sexual abuse?
>
> A: Children lie. Adults lie. But children are not sophisticated liars. And what I mean by that is they really – you know, children, generally, lie to keep themselves out of trouble, you know. If you ask them if they ate the cookie and they have crumbs on their face, and they say, no, I didn't eat the cookie, that kind of lie.
>
> Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge.

Chappell argues his trial counsel was ineffective for failing to object when Galloway-Williams improperly bolstered the victim's credibility by testifying, "Children don't often lie about sexual abuse incidents."

STANDARD OF REVIEW

PCR applicants have the burden of proving their allegations by a preponderance of the evidence. *Tappeiner v. State*, 416 S.C. 239, 248, 785 S.E.2d 471, 476 (2016). "[T]his [c]ourt will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018), *reh'g denied*, (June 12, 2018). This court reviews questions of law de novo and will reverse if the PCR court's decision is controlled by an error of law. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018), *reh'g denied*, (March 29, 2018).

INEFFECTIVE ASSISTANCE OF COUNSEL

When reviewing a claim for ineffective assistance of counsel, the "court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). To rebut this presumption and succeed on an ineffective assistance claim, a PCR applicant must show (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced the outcome of the trial. *Strickland*, 466 U.S. at 687.

A. Deficient Performance

Chappell argues his trial counsel's performance was deficient because she did not object to improper bolstering testimony. "To prove trial counsel's performance was deficient, a[] [PCR] applicant must show '[trial] counsel's representation fell below an objective standard of reasonableness.'" *Smalls*, 422 S.C. at 181, 810 S.E.2d at 840 (quoting *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)). Thus, this court will find trial counsel's failure to object was deficient performance only if it was unreasonable under the prevailing professional norms at the time of trial. *Strickland*, 466 U.S. at 688.

1. Improper Bolstering Testimony

The PCR court found Galloway-Williams' testimony did not contain any vouching statements. Chappell argues Galloway-Williams improperly vouched for and bolstered the victim's credibility by testifying, "Children don't often lie about sexual abuse incidents." We agree with Chappell.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Therefore, "even though 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, 358, 737 S.E.2d 490, 499 (2013). Moreover, a witness "may not . . . give testimony that improperly bolsters the credibility of the victim." *Briggs v. State*, 421 S.C. 316, 323, 806 S.E.2d 713, 717 (2017).

Improper bolstering is "testimony that indicates the witness believes the victim, but does not serve some other valid purpose." *Id.* at 325, 806 S.E.2d at 718. Improper bolstering also occurs when a witness testifies for the purpose of informing the jury that the witness believes the victim, or when there is no other way to interpret the

testimony other than to mean the witness believes the victim is telling the truth. *Id.* at 324, 806 S.E.2d at 717; *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); *McKerley*, 397 S.C. at 465, 725 S.E.2d at 142. However, an expert's testimony is not improper bolstering "when the expert witness gives no indication about the victim's veracity. . . ." *State v. Perry*, 420 S.C. 643, 663, 803 S.E.2d 899, 910 (Ct. App. 2017), *cert. granted*, (April 19, 2018).

In support of his ineffective assistance claim, Chappell cites several improper bolstering cases involving a witness who interviewed or treated the victim before trial. *See State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015) (finding a forensic interviewer improperly bolstered the victim's credibility when she testified that she recommended the defendant not be allowed around the victim); *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (stating a forensic interviewer's testimony her interview with the victim led to a "compelling finding" of abuse was improper bolstering because it was equivalent to stating the victim was telling the truth); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (finding a forensic interviewer improperly bolstered the victim's credibility by noting in her report that the victims "provide[d] a compelling disclosure of abuse . . ."); *Smith*, 386 S.C. at 564, 568, 689 S.E.2d at 631, 633 (stating a forensic interviewer improperly bolstered the victim's credibility by testifying that the victim was believable and had no reason to lie); *State v. Dawkins*, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (stating the victim's treating psychiatrist improperly bolstered the victim's credibility by testifying that the victim's symptoms were genuine); *State v. Dempsey*, 340 S.C. 565, 569–71, 532 S.E.2d 306, 308–09 (Ct. App. 2000) (finding the victim's counselor improperly vouched for the victim's credibility by testifying that ninety-five to ninety-nine percent of allegations of child sexual abuse are true). Although we find these cases informative, we note that Galloway-Williams was an independent expert who had no contact with the victim before trial.

This court first considered whether an independent expert's testimony was improper bolstering in *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), *abrogated on other grounds by State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018). There, the independent expert testified regarding the general behavioral characteristics of child sexual abuse victims. *Id.* at 345, 768 S.E.2d at 253. The court held there was no improper bolstering testimony because the independent expert "(1) [did] not testify[] as a forensic interviewer, (2) never interviewed the victims, (3) did not prepare a report for her testimony, (4) did not express an opinion or belief regarding the credibility of child sex[ual] abuse victims' allegations, and (5) did not express an opinion regarding the credibility of the minor victims in th[e] case." *Id.* at 345, 768 S.E.2d at 252–53.

Later, in *State v. Anderson*, the supreme court warned that the State "runs the risk that the expert will vouch for the alleged victim's credibility" when it calls an expert who interviewed or treated the victim before trial. 413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015). The court advised, "[t]he better practice[] . . . is . . . to call an independent expert." *Id.* at 218, 776 S.E.2d at 79.

Since *Brown* and *Anderson*, our supreme court has considered whether the testimony of an independent expert was improper bolstering and held that an independent expert does not improperly bolster the victim's credibility by testifying to only general behavioral characteristics of child sexual abuse victims. *See State v. Cartwright*, 425 S.C. 81, 96–97, 819 S.E.2d 756, 764 (2018) (finding the independent expert's testimony was not improper bolstering because she testified in general terms and "never interviewed the victims and never stated she believed the victims were telling the truth"); *Jones*, 423 S.C. at 637 n.2, 817 S.E.2d at 271 n.2 (finding the independent expert's testimony was not improper bolstering because she gave only "generalized testimony" and did not "evaluate or interview the victims").

As an initial matter, we disagree with the State's claim that Galloway-Williams' testimony was not improper bolstering simply because she was an independent expert. Instead, the testimony of an independent expert, like the testimony of any witness, is improper bolstering if (1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness's opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth. *Briggs*, 421 S.C. at 325, 806 S.E.2d at 718; *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94; *McKerley*, 397 S.C. at 465, 725 S.E.2d at 142.

The State also argues Galloway-Williams' testimony was not improper bolstering because she did not indicate that the victim was telling the truth and gave only general testimony about the behavior of child sexual abuse victims. We disagree.

We note that much of Galloway-Williams' testimony was proper general behavioral testimony necessary to explain the often unexpected behavior of child sexual abuse victims. *See, e.g.*, *Jones*, 423 S.C. at 636, 817 S.E.2d at 271 ("[T]he law in South Carolina is settled: behavioral characteristics of sex[ual] abuse victims is an area of specialized knowledge where expert testimony may be utilized."). We find, however, that Galloway-Williams improperly commented on the victim's credibility when she testified, "Children don't often lie about sexual abuse incidents," because a comment on the credibility of a class of persons to

which the victim belongs is a comment on the credibility of the victim. *See Wiseman v. State*, 394 S.W.3d 582, 586–87 (Tex. App. 2012) ("An expert who testifies that a class of persons to which the victim belongs is truthful is essentially telling the jury that they can believe the victim in the instant case as well." (quoting *Yount v. State*, 872 S.W.2d 706, 711 (Tex. Crim. App. 1993) (en banc))); *id.* at 586 ("[It] is settled that an expert cannot give an opinion as to whether a person—or a class of persons to which the [victim] belongs—is truthful.").

Galloway-Williams' statement not only had the effect of improperly bolstering the victim's credibility; it also improperly invaded the province of the jury to determine the only issue in this case: whether Chappell sexually abused the victim. *See McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 ("The assessment of witness credibility is within the exclusive province of the jury."). Further, the State offered no permissible purpose for this testimony, and we see none. Thus, we find Galloway-Williams' statement cannot reasonably be interpreted to have served any purpose other than to improperly bolster the victim's credibility. *Briggs*, 421 S.C. at 325, 806 S.E.2d at 718 (stating improper bolstering testimony "indicates the witness believes the victim, but does not serve some other valid purpose"). Accordingly, we find the PCR court erred in finding Galloway-Williams' testimony contained no vouching statements.

The dissent would affirm Chappell's conviction because it would find that Galloway-Williams' statement was proper testimony regarding a general behavioral characteristic of child sexual abuse victims. But the practical result of Galloway-Williams' statement that "Children don't often lie about sexual abuse incidents" was to convey to the jury that the victim's allegations must be true and to encourage the jury to supplant their own credibility determination with that of Galloway-Williams. Both results are impermissible; thus, the statement was improper.

2. Law at the Time of Trial

The State alternatively argues that under the law existing at the time of trial, Chappell's trial counsel could not have known to object to Galloway-Williams' statement as improper bolstering. We disagree.

For an ineffective assistance claim, the PCR court must "determine whether counsel was ineffective *at the time of the alleged error*." *Pantovich v. State*, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019), *reh'g denied*, (September 27, 2019). Thus, the court must consider the law as it existed at the time of trial and

"not as it has evolved today . . . ." *Id.* at 564, 832 S.E.2d at 601. Accordingly, trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes in the law . . . ." *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

Chappell's trial was held in August 2012. At that time, our courts had not yet considered an improper bolstering case involving an independent expert. But as the State conceded at oral argument, in 2015, when this court decided the first improper bolstering case involving an independent expert, the court did not establish a new legal principle or change the existing law.[3] *See Brown*, 411 S.C. at 332, 768 S.E.2d at 246. Instead, the *Brown* court applied the existing law to a new set of facts. Accordingly, we find the law at the time of Chappell's trial indicated an independent expert, like any other witness, may not testify whether another witness is telling the truth. *See McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 ("[W]itnesses are generally not allowed to testify whether another witness is telling the truth."); *see also Briggs*, 421 S.C. at 324, 806 S.E.2d at 717 ("[A] witness may not give an opinion for the purpose of conveying to the jury . . . that [the witness] believes the victim."); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper."); *McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 ("The assessment of witness credibility is within the exclusive province of the jury."); *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) ("The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter."). Thus, Chappell's trial counsel should have known to object when Galloway-Williams testified, "Children don't often lie about sexual abuse incidents." Accordingly, we find the PCR court erred in finding Chappell's trial counsel was not deficient for failing to object.

B. Prejudice

Chappell argues he was prejudiced by trial counsel's failure to object to improper bolstering testimony because the outcome of his trial hinged on the jury's assessment of the victim's credibility. We agree.

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[3] At oral argument, the State asserted, "The *Brown* case [wa]s not necessarily a change in law as much as it [wa]s an application of the vouching line of cases to a new factual situation."

In an ineffective assistance case, "trial counsel's deficient failure to object to [improper bolstering] testimony does not remove a[] [PCR] applicant's burden to prove prejudice." *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492. To establish prejudice, a PCR applicant must show "there is a reasonable probability that, but for [trial] counsel's [deficient performance], the result of the trial would have been different." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

"The determination whether a bolstering error [prejudiced the outcome of a trial] depends on whether the case turn[ed] on the credibility of the victim." *Chavis*, 412 S.C. at 110, 771 S.E.2d at 341. The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or "relie[s] solely upon the victim's testimony to establish the details of the crime . . . ." *Thompson*, 423 S.C. at 248, 814 S.E.2d at 494; *see also Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (finding a PCR applicant was prejudiced by improper bolstering testimony because "believing [the bolstered witness] was the only way the jury could convict . . . .").

Here, we find the outcome of Chappell's trial hinged on the jury's assessment of the victim's credibility because the State presented no physical evidence, and the only evidence against Chappell was the victim's uncorroborated testimony. *See Gilchrist*, 350 S.C. at 228, 565 S.E.2d at 285 (stating the witness's credibility was essential to the decision to convict because the witness's testimony was the only evidence of guilt). Because the outcome hinged on the victim's credibility, we find there is a reasonable probability that the outcome of Chappell's trial would have been different had trial counsel objected when Galloway-Williams improperly bolstered the victim's credibility.

The dissent states that even if Galloway-Williams' statement that "Children don't often lie about sexual abuse incidents" was improper bolstering, it would find Chappell failed to show the outcome of his trial would have been different had trial counsel objected. However, our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime. *See Thompson*, 423 S.C. at 249, 814 S.E.2d at 494 (stating the PCR applicant was prejudiced by improper bolstering because the outcome of the trial "hinged on [the] [v]ictim's credibility, and there was otherwise an absence of overwhelming evidence of [the applicant]'s guilt"); *Briggs*, 421 S.C. at 333–34, 806 S.E.2d at 722–23 (finding improper bolstering testimony prejudiced

the PCR applicant's trial because there was no physical evidence any sexual abuse occurred); *Anderson*, 413 S.C. at 219–21, 776 S.E.2d at 79–81 (finding improper bolstering testimony constituted reversible error because the trial turned solely on the credibility of the victim and there was no physical evidence of abuse); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 95 ("Because the children's credibility was the most critical determination of this case, we find the admission of the [forensic interviewer's] written reports was not harmless."); *Smith*, 386 S.C. at 569, 689 S.E.2d at 633 (finding the PCR applicant was prejudiced by improper bolstering testimony because "the outcome of the case hinged on the [v]ictim's credibility regarding identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of [] guilt."); *Gilchrist*, 350 S.C. at 228, 565 S.E.2d at 285 (finding a PCR applicant was prejudiced by improper bolstering testimony because "believing [the bolstered witness] was the only way the jury could convict . . ."); *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989) (finding the admission of improper bolstering testimony mandated reversal because "the State relied solely upon [the] [v]ictim's testimony to establish the details of the crime and the identity of the perpetrator"). We see no reason to depart from those rulings.

CONCLUSION

For the foregoing reasons, we find evidence does not support the PCR court's dismissal of Chappell's PCR application. We reverse and remand for a new trial.

REVERSED.

GEATHERS, J., concurs.

SHORT, J., dissenting: Respectfully, I dissent and would affirm the PCR court. First, I find the State's independent expert's statements were not comments on the victim's credibility but were statements regarding a general behavioral characteristic of child sexual abuse victims; thus, there was no bolstering. Even if the comments were bolstering, I find Chappell has failed to establish the prejudice necessary for relief in a PCR action, which requires a showing that the result of the trial would have been different. In this case, although there was no physical evidence of abuse, the State produced a forensic video interview of the victim, the victim's own testimony before the jury, and the mother's testimony. In my view, the jury would have reached the same conclusion with or without the expert's statements. Thus, Chappell is unable to establish prejudice. I would affirm.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Greenville County
Court of Common Pleas
The Honorable Perry. H. Gravely, Circuit Court Judge
Appellate Case No. 2016-000283

FREDERICK R. CHAPPELL, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PETITION FOR REHEARING

On December 31, 2019, this Court issued a published opinion reversing the post-conviction relief court's denial of post-conviction relief and remanding Petitioner Frederick R. Chappell's case back to the court of general sessions for a new trial after finding Chappell met his burden in establishing his trial counsel was constitutionally ineffective for failing to object to testimony from a blind expert that constituted improper bolstering testimony. Chappell v. State, Op. No. 5704 (S.C. Ct. App. filed Dec. 31, 2019) (Shearouse Adv. Sh. No. 1 at 73). In reversing the post-conviction relief court and granting relief to Chappell, this Court appears to have found Chappell met his burden of establishing he was entitled to relief despite the Court's not including in the opinion an analysis of the prejudice Chappell supposedly suffered due to trial counsel's failure to object to the expert's testimony and blurred the distinction between vouching and bolstering.

In its opinion, this Court did not analyze the affect that the testimony likely had on the jury's verdict, but seems to have relied instead upon the conclusion that our appellate courts have found prejudice in each instance in which a witness improperly bolstered and the State presented no physical evidence or relied solely upon the victim's testimony to establish a defendant's guilt. Chappell, at 82-83. In Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017), our Supreme Court analyzed the prejudice to a defendant after a witness improperly bolstered by considering other evidence of guilt that was admitted at trial, including Briggs' half-heartened denials to law enforcement of having sexually abused the victim and a statement that he would not deny committing the abuse because the detectives "[knew] better", Brigg's incriminating jail phone calls, and testimony from two jailhouse informants that Briggs had made incriminating statements to them or in their presence. The Supreme Court noted that the PCR court had discounted the effect of other evidence when its damage to Briggs was compared with that of the improper bolstering, further demonstrating the Supreme Court's recognition of the importance of a prejudice analysis. Id. at 334, 806 S.E.2d at 723.

When analyzing the effect of an expert witness's improper bolstering in Thompson v. State, 423 S.C. 235, 247-50, 814 S.E.2d 487, 493-95 (2018), the Supreme Court considered the fact that the witness's testimony was that the victim's disclosure was among the most compelling the witness had seen through approximately one thousand interviews of children and the fact that the State emphasized the expert witness's testimony three times in its closing argument, as well as noting that a physician testified at Thompson's trial that the victim displayed physical signs of having been sexually abused.

The PCR court was required to "consider the totality of the evidence before the judge or jury . . . ," Strickland v. Washington, 466 U.S. 668, 695-96 (1984), and this Court should follow our Supreme Court's practice in the aforementioned cases in considering the evidence before the jury during Chappell's trial when evaluating whether Chappell has met his burden in establishing that there is a reasonable likelihood the jury would have acquitted absent the relevant testimony from the blind expert.

Respondent submits that the Court, in failing to conduct a proper prejudice analysis, overlooked other evidence of Chappell's guilt and found that "the only evidence against Chappell was the victim's uncorroborated testimony. Chappell, at 82. The victim, of course, testified at trial about Chappell's abusing her sexually, which included her testimony that Chappell fondled her genitalia, had her masturbate him, ejaculated onto her, filmed the sex acts using his mobile phone, and warned her not to tell anyone. App. 115-29. The victim's mother testified at trial about her discovering the victim lying down while her sister, also a minor, was near the victim's genitalia with the victim's panties pulled to the side, leading the mother to question the victim about improper touching. App. 146. The mother's testimony included the victim's confession that improper touching had occurred at the victim's grandmother's home. App. 146-47. The jury watched a video recording of the forensic interviewer's questioning of the victim, which was admitted over trial counsel's objection, and heard testimony from the interviewer about the interview protocol she used with the victim. App. 162-69. The blind expert testified regarding delayed disclosure and typical behaviors exhibited by children who have been sexually abused. App. 186-96. When given a hypothetical scenario about two minor siblings lying with their faces near each other's genitalia while their panties are pulled to the side, the

blind expert testified that that described hypothetical behavior was "concerning . . . ." App. 198. While Respondent acknowledges the import of the victim's testimony at trial to the State's case, it is simply not true that the jury had before it no evidence of Chappell's guilt except the victim's testimony. The recording of the forensic interview likely corroborated for the jury the victim's testimony by showing its consistency over time and the genuineness of her allegations when elicited through recognized forensic technique. The victim's mother's testimony corroborated the victim's testimony by showing that the victim had consistently maintained that Chappell carried out the abusive acts at the victim's grandmother's home and established the fact that the victim had begun engaging in inappropriate sexual activity with her sister. The blind expert's testimony likely corroborated for the jury the victim's allegations by confirming the alarming nature of the victim's acts with her sister and the typicality of the victim's delayed disclosure.

As this Court did not refer to all of this evidence in its discussion regarding prejudice, it likely failed to consider the minimal effect of the expert witness's statement that children do not often lie about sex abuse allegations compared to this other evidence of Chappell's guilt. Petitioner did not argue at the PCR hearing or before this Court in reliance upon the prejudice standard articulated in Strickland; instead, Chappell argued on appeal using a harmless error standard articulated in cases before our courts on direct appeal. As this Court cited in its opinion direct appeal cases when discussing prejudice, Respondent submits the Court may have analyzed prejudice without using the proper prejudice standard, and asks this Court to reconsider its decision in light of the proper prejudice standard. Compare Strickland, at 695-96 (requiring a court conducting a prejudice inquiry to ask "if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."), and Briggs,

at 333, 806 S.E.2d at 722 (instructing an applicant "must demonstrate a 'reasonable probability' the result of the trial would have been different if [trial counsel] had not committed the errors . . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.") (quotations and citation omitted), and Thompson, at 239, 814 S.E.2d at 489 ("[A]s part of the prejudice analysis, . . . the reviewing court must therefore consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object."), with State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) (considering whether the trial court's admission of an expert's report was harmless error).

Issue Preservation

Respondent submits the Court also blurred the distinction between vouching and bolstering. In its decision, this Court noted the issue regarding the expert witness's testimony, was argued at trial, on appeal, and in PCR as one of improper vouching. Chappell at 74. The Court then found the PCR court erred in finding the witness's "testimony contained no vouching statements." Id. at 80. However, the majority of the Court's analysis focused on whether the challenged statements were improper bolstering, a question not raised to the PCR court. This Court found that the expert witness gave testimony that "had the effect of improperly bolstering the victim's credibility . . . ." Id. at 78-79. The central problem with this shift in the Court's analysis is that vouching and bolstering, by definition, are separate concepts.

In State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), our Supreme Court held that "improper vouching occurs when the prosecution places the government prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury

supports the testimony." In recent years, South Carolina appellate courts have issued several opinions on the propriety of having an expert witness testify as to his or her belief of a victim's allegations; in each of these instances, the issue has been treated as one regarding improper bolstering. See State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). Notably, the isolated statements in this Court's opinion do not involve the expert witness claiming a personal belief in the victim's testimony; rather, they deal with assertions about the general ability of children to lie and about what topics they lie and access to information, not presented to the jury, which informed the expert's testimony. This implies vouching, not bolstering, and was ruled on by the PCR court accordingly.

Problematically, this Court has sometimes used the terms "vouching" and "bolstering" interchangeably. See State v. Horlbeck, Op. No. 2012-UP-393 (S.C. Ct. App. filed June 27, 2012) (finding the use of a proffer agreement was not improper bolstering, but quoting case law concerning vouching verbatim while replacing the term "vouching" in the original with "bolstering") (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). Our Supreme Court has also improperly used the terms interchangeably. See State v. Anderson, 413 S.C. 212, 221, 776 S.E.2d 76, 80 (2015) (holding certain kinds of testimony from forensic interviews "impermissibly bolsters [a] minor's credibility . . . " and "necessarily vouches for the credibility of the [minor].").

However, such unfortunate misuse of the terms are the exceptions, not the rule. Our courts have usually drawn a sharper distinction between bolstering and vouching, or refrained from using the terms interchangeably. See Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017) (finding a witness gave improper bolstering testimony while, notably, avoiding any use of the

term "vouch" or "vouching".); see also State v. Brown, 411 S.C. 332, 345, 768 S.E.2d 246, 253 (S.C. Ct. App. 2015) (holding the trial court properly admitted the blind expert's testimony because the witness "did not inappropriately vouch for the victims' allegations and, therefore, did not improperly bolster their testimony."), abrogated on other grounds by State v. Jones, 423 S.C. 631, 817 S.E.2d 268 (2018). Courts in other jurisdictions have likewise distinguished bolstering from vouching. See United States v. Craddock, No. 08-5099, 2010 WL 489515, at *1 (4th Cir. Feb. 11, 2010) ("Vouching occurs when a prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury.") (citing United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997)). As it stands, this Court's opinion will only create further confusion over the definitions of vouching and bolstering and make it difficult for all parties to litigate these kinds of issues going forward.

Under the circumstances identified herein, the State respectfully urges this Court to reconsider this matter, grant rehearing, provide the State with an opportunity to be heard on this matter, vacate its prior opinion, and issue a new published opinion that properly analyzes the post-conviction relief court's finding that Chappell failed to establish the reasonable likelihood that trial counsel's performance affected the outcome of trial and draws a clearer distinction between "vouching" and "bolstering".

Respectfully submitted,

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January 15, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000283

FREDERICK ROBERT CHAPPELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

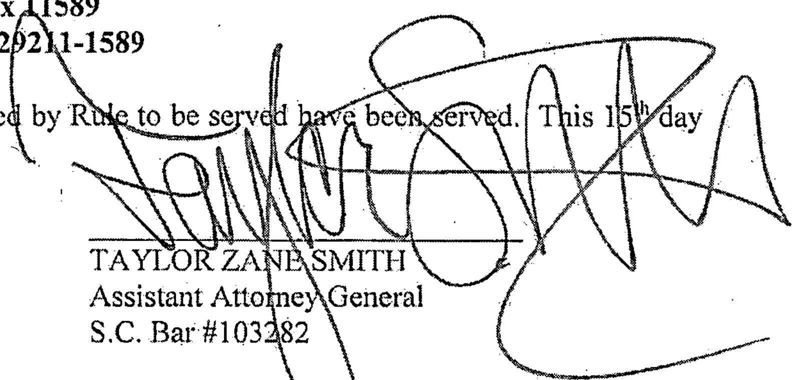
Respondent.

CERTIFICATE OF SERVICE

I, Taylor Z. Smith, certify that I have today served the within **Petition for Rehearing** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 15th day of January, 2020.



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ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

Frederick Robert Chappell, Petitioner,

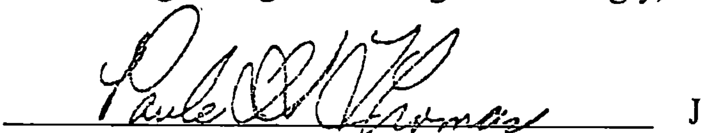
v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000283

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



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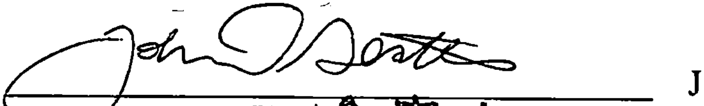

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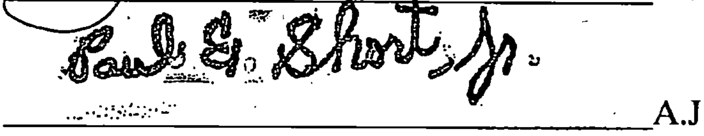

A.J.

Columbia, South Carolina

cc:
Wanda H. Carter, Esquire
Alan McCrory Wilson, Esquire
Taylor Zane Smith, Esquire
The Honorable Perry H. Gravely

FILED

February 10, 2020