

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jun 30 2020

SC Court of Appeals

CERTIORARI TO THE COURT OF APPEALS

MICHAEL ELDERS,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

App. Case No. 2020-000891

PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

INDEX

CERTIFICATION OF COUNSEL..... 1

STATEMENT OF ISSUE PRESENTED ON CERTIORARI..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 4

STANDARD OF REVIEW..... 9

ARGUMENT..... 9

I. The court of appeals erroneously concluded Counsel was constitutionally ineffective for failing to object to the forensic interviewer’s statement that Minor received evidence-based therapy in finding the statement “conveyed to the jury that [the interviewer] had ‘evidence’ to back up Minor’s claim that Petitioner sexually abused her,” and therefore, constituted improper bolstering testimony because (a) evidence-based therapy is a medical term simply meaning the therapy was scientifically tested and shown to help in reducing symptoms; (b) the forensic interviewer’s testimony helped Counsel’s strategy; (c) the forensic interviewer testified multiple times it was not her job to determine if Minor was telling the truth and had no opinion if Minor was truthful..... 9

 a. Counsel was not deficient because evidence-based therapy is a medical term simply meaning the therapy was scientifically tested and shown to help reduce symptoms..... 10

 b. Counsel was not deficient because the forensic interviewer’s recommendation that Minor receive evidence-based therapy helped Counsel’s trial strategy..... 12

 c. No prejudice resulted because the forensic interviewer testified multiple times it was not her job to determine if Minor was telling the truth..... 14

CONCLUSION..... 17

CERTIFICATE OF COUNSEL

Counsel for petitioner, the State, certifies that the petition for rehearing was made and finally ruled on by the court of appeals on May 22, 2020.

ISSUES PRESENTED ON CERTIORARI

- I. Did the court of appeals erroneously conclude Counsel was constitutionally ineffective for failing to object to the forensic interviewer's statement that Minor received evidence-based therapy in finding the statement "conveyed to the jury that [the interviewer] had 'evidence' to back up Minor's claim that [Elders] sexually abused her," and therefore, constituted improper bolstering testimony where (a) evidence-based therapy is a medical term meaning therapy that has been scientifically tested and shown to help reduce symptoms; (b) the forensic interviewer's recommendation helped Counsel's trial strategy; and (c) the forensic interviewer stated several times it was not her job to determine if Minor was telling the truth?

STATEMENT OF THE CASE

Michael Ray Elders was indicted in October 2009 for first-degree criminal sexual conduct (CSC) with a minor. App. 540–41. Subsequently, in February 2011, Elders was indicted for two counts of committing a lewd act upon a minor. App. 418; 543.

On February 28–March 2, 2011, Elders proceeded to a jury trial before Judge William P. Keesley. App. 1. William Y. Rast, Jr., Esquire, (Counsel) represented Elders. Assistant Solicitor Debra B. Moore prosecuted the case. The jury convicted Elders of first-degree CSC with a minor and one count of lewd act. App. 417-18. However, the jury acquitted Elders of the other count of lewd act. App. 418. Elders appealed.

Direct Appeal

On Appeal, Elders was represented by Appellate Defender Elizabeth A. Franklin-Best. However, on December 7, 2011, Elders withdrew his appeal. App. 548. The case was remitted back to the circuit court on January 6, 2012. App. 549.

First PCR Action

Elders commenced his first post-conviction relief (PCR) action on August 2, 2012. App. 427–32. Elders was represented by Tristan M. Shaffer, Esquire, in his first PCR action. App. 432. The State submitted its return on March 15, 2013, requesting an evidentiary hearing be held. App. 433–38. Thereafter, Elders amended his allegations on August 14, 2013. Supp. App. 2–3. A hearing into the matter convened on August 14, 2013, before Judge Edgar W. Dickson. App. 439. Assistant Attorney General J. Walter Whitmire represented the State. App. 439. Thereafter, on April 28, 2014, Judge Dickson denied relief and dismissed the action with prejudice. App. 503–15; Supp. App. 1. Elders did not appeal.

Austin PCR Action

Elders filed a second PCR action, alleging he was denied his right to appeal his first PCR action. App. 516–23. The State submitted its return on March 17, 2015, requesting an evidentiary hearing be held on this issue. App. 524-28. An evidentiary hearing into the matter was held on April 23, 2015, before Judge Brooks P. Goldsmith. App. 529. Elders was represented by Anna R. Good, Esquire. Assistant Attorney General J. Walter Whitmire represented the State. App. 529. At the hearing, the State consented to relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 531–32. Judge Goldsmith issued an order to this effect on January 4, 2015. App. 535–39.

PCR Appeal

Elders timely filed a notice of appeal pursuant to *Austin v. State* appealing Judge Dickson’s 2014 PCR order of dismissal. Elders then petitioned for a writ of certiorari and petitioned for a writ of certiorari pursuant to *Austin v. State* on September 6, 2016. The State filed its return to petition for a writ of certiorari and return to petition for a writ of certiorari pursuant to *Austin v. State* on February 8, 2017. This Court transferred the case to the court of appeals pursuant to Rule 243(l), SCACR, on March 2, 2017.

The court of appeals granted certiorari to review the following issues:

- I. Whether the PCR court erred in failing to find Counsel ineffective for not objecting when the forensic interviewer, Lysa Miller-Dupre, testified by giving her opinion that Minor had not been coached, was not affected by suggestibility, and recommended evidence-based therapy for Minor at the Dickerson Center which was the advocacy center for children who had been sexually abused which was improper bolstering and vouching of Minor’s credibility?
- II. Whether the PCR court erred in failing to find Counsel ineffective for not objecting to hearsay testimony by the SANE nurse, Robin Baker, who testified that Minor told her in the pre-screening interview that she had been sexually molested by her father who had

placed his finger in her pants and rubbed her private area, and made her touch his private which was outside the scope of Rule 801(d)(1)(D), SCRE, and a violation of Rule 803, SCRE?

After briefing and oral argument, the Court of Appeals reversed the PCR court. *Elders v. State*, Op. No. 2020-UP-093 (S.C. Ct. App. filed Apr. 8, 2020). In its opinion, the court of appeals held Counsel was ineffective for failing to object to the forensic interviewer testifying that Minor received evidence based therapy because the “statement conveyed to the jury that [the interviewer] had ‘evidence’ to back up Minor’s claim that Petitioner sexually abused her. This was an uncontradicted direct comment on Petitioner’s guilt by a forensic interviewer who was qualified as an expert by the trial court. Trial counsel’s failure to object was sufficient to undermine confidence in the outcome of the trial.” *Id.* at 3. The court of appeals did not rule on the second issue presented. *Id.* at 2 n.1. The State petitioned for rehearing on April 23, 2020. The court of appeals denied the petition for rehearing on May 22, 2020. The State appealed.

STATEMENT OF THE FACTS

Elders was charged with sexually abusing his daughter (Minor). Elders did not acknowledge Minor as his daughter until she was eight years old. App. 228. Once Elders acknowledged Minor was his daughter, she began visiting him every-other weekend at his residence. App. 228. Eventually, Minor disclosed to her mother (Mother) that Elders had sexually abused her. App. 232. Mother notified law enforcement about the alleged sexual abuse and also took Minor to the hospital for a physical examination. App. 232. Minor was then referred to the Dickerson Center for Children (Dickerson Center) for counseling. App. 233–34. Minor was interviewed at the Dickerson Center and the interview was recorded. Elders was arrested for sexually abusing Minor.

Counsel waived making an opening statement at trial. App. 164. The State first called Officer Desiree Busko to testify. App. 165. Busko testified that on June 28, 2009, she was called

into work to speak to Mother. App. 165. Busko testified Mother reported a sexual-assault that occurred at Elder's residence, in the City of Cayce. App. 166. Mother informed Busko the assault occurred the night before, June 27, at approximately 7:30 pm. App. 166. Mother told Busko she found out about the assault from Minor. App. 168.

Minor testified at trial she started spending time with Elders when she was approximately eight-years-old, and her older brother would sometimes go with her to visit. App. 170. She testified she is no longer allowed to visit Elders because he touched her private parts. App. 171. When she would visit, Minor would sleep in the same bed as Elders, where the assault usually happened. App. 176. Elders began touching Minor during her visits, when she was eight-years-old, and he would touch her often. App. 171–72. Minor testified Elders touched her approximately ten times. App. 175. Elders would put his hand in her pants and touch her on the outside and inside her “front private part” but would not touch her anywhere else. App. 172–73. Elders also made Minor put her hand down his pants. App. 173. Minor also testified she did not tell anyone because she was scared and because Elders told her not to tell anyone. App. 173. However, she finally told her mother. App. 174. At the time of her disclosure to her mother, Minor indicated Elders had touched her about two days prior. App. 175.

On cross-examination, Minor testified she and Elders slept in her Uncle George's room, and there was no door to the bedroom. App. 178–79. She testified the touching occurred in her uncle's room, and she denied ever saying it happened in her grandmother's room. App. 179–80. Minor told her mother about the touching because her mother asked, though she initially denied it and only admitted to the touching after her mother continued asking. App. 180–81. Minor did not recall how many times the touching occurred and could not recall where she was when Elders told her to touch his penis. App. 181–82. Minor also testified she told the people at the Dickerson

Center Elders had not made her touch him, but Elders did make her touch his penis. App. 182. Elders always touched her privates and would insert his finger inside her, which felt cold. App. 183; 185. At this point, Counsel asked Minor:

Q: You and your mother and your brothers have been involved with DSS several times, have you not?

A: (No response.)

Q: DSS have come out to your house on several occasions, have they not?

A: Yes, sir.

Q: Do you remember talking to a DSS worker not too long ago that told you it would be a good idea to die your hair all one color?

A: Yes, sir.

Q: She told you that, didn't she?

A: (No response.)

Q: *Are you looking at your mother?*

A: (No response.)

Q: *Minor are you looking at your mother?*

A: No, sir.

Q: *Are you trying to get answers from your mother?*

A: No, sir.

App. 185 (emphasis added). Minor then testified her brother was not there every time she would visit Elders, and no one saw Elders touching her. App. 186–87.

Minor testified no one other than Elders touched her. App. 187. She testified despite the touching, she still wanted to go to Elders' house to see her friend. App. 188. She also testified there were times when Elders said her brother could not come to the house, and she did not want to go

when her brother did not go because she knew what would happen—that Elders would put his hand down her pants. App. 188. When she visited, she usually slept in her uncle’s or her grandmother’s room, but Elders always slept with her. App. 189. Elders would put his hand down her pants and put his finger into her vagina. App. 189–90. Minor did not scream when Elders touched her because she was scared, and she did not tell her mom because she was embarrassed. App. 188. She also did not tell the people at the Dickerson Center about Elders making her touch his penis because she was nervous. App. 189.

Lysa Miller-Dupre, the forensic interviewer at the Dickerson Center, testified after Minor. The trial court qualified Miller-Dupre as an expert in forensic interviewing and child abuse assessment. App. 194. Miller-Dupre explained how a forensic interview is conducted and the RATAC protocol. App. 194. She testified, “*It’s not my job to determine whether the child is telling the truth in the interview*, but through this protocol and through these different questionnaires, I can determine if the child is definitely functioning at her age level.” App. 195 (emphasis added). Miller-Dupre testified that at the end of every interview, she asks the child if anyone had talked to them before the interview about the assault or about what they should or should not say during the interview. App. 199.

Miller-Dupre testified she interviewed Minor on July 6, 2009, when Minor was ten-years-old. App. 198. Miller-Dupre testified she believed Minor was competent. App. 199. Miller-Dupre testified Minor told her the sexual assault started “about a year ago.” App. 199–200. She testified Minor told her the assault happened “at her dad’s house in her dad’s bed and grandma was sleeping in her room and another time it happened when he slept in another room” App. 200. Minor’s forensic interview was then moved into evidence without objection. App. 200–02.

Miller-Dupre testified there was nothing about Minor's disclosure which would lead her to believe it was the product of third-party influence, and she did not believe Minor's disclosure was affected by suggestibility or coaching. App. 202-03. Finally, Miller-Dupre testified she recommended Minor for evidence-based therapy at the Dickerson Center. App. 203. This statement is what the court of appeals found Counsel should have objected to because it vouched for Minor's credibility and improperly bolstered Minor's testimony.

On cross-examination, Miller-Dupre testified it is not her job to determine whether or not Minor was telling the truth or lying. App. 205. Miller-Dupre admitted "sexually assaulted" is not a typical term for a ten-year-old, and she believed Minor heard that term from the nurse. App. 205. Miller-Dupre also indicated Minor has probably discussed the abuse not only with the people at the Dickerson Center for therapy but also with law enforcement, DSS, and nurses at the hospital. App. 208.

Counsel began his closing argument stating, "Y'all heard the evidence. This entire case started on a lie." App. 372. Counsel argued, "I don't care what [Mother] tells you . . . [t]hose are not Minor['s] words, but those are the words she used with everybody she talked to." App. 374. Counsel emphasized how Miller-Dupre testified it was not her job to determine whether Minor was telling the truth. App. 374.

Counsel argued Minor could not remember the details because "she had made it up. Her mother had told her to. She's sitting here looking over my shoulder at her mother the whole time she's testifying. She didn't say much at all." App. 375. Counsel compared Minor's testimony to her forensic interview. Counsel argued, "She's talking freely. . . . She's only ten years old, say what mama said. Goes back to what the [s]olicitor said in her opening statement, A child trusts adults. You trust your parents, trust, trust. She trusted her mama." App. 376. Counsel argued, "This

is just a situation where one lie made a snowball effect into this case that's took us three days to try." App. 377. Finally, Counsel argued why Mother would coach Minor into telling this lie. Counsel argued, "[Mother is] trying again now for the sixth time to put [Elders] in jail and he hasn't done anything." App. 378.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

- I. The court of appeals erroneously concluded Counsel was constitutionally ineffective for failing to object to the forensic interviewer's statement that Minor received evidence-based therapy in finding the statement "conveyed to the jury that [the interviewer] had 'evidence' to back up Minor's claim that Petitioner sexually abused her," and therefore, constituted improper bolstering testimony because (a) evidence-based therapy is a medical term simply meaning the therapy was scientifically tested and shown to help in reducing symptoms; (b) the forensic interviewer's testimony helped Counsel's strategy; (c) the forensic interviewer testified multiple times it was not her job to determine if Minor was telling the truth and had no opinion if Minor was truthful

The court of appeals erred in concluding Counsel was constitutionally ineffective for failing to object to the forensic interviewer's statement that Minor received evidence-based therapy in finding the statement "conveyed to the jury that [the interviewer] had 'evidence' to back up Minor's claim that [Elders] sexually abused her," and therefore, constituted improper bolstering testimony. However, Counsel was not deficient for failing to object to this statement because the

interviewer stating Minor received evidence based therapy did not improperly bolster or vouch for Minor's credibility because evidence-based therapy is a medical term of art simply conveying that Minor received therapy scientifically tested and shown to help reduce symptoms; and Counsel arguably opened the door to this line of questioning by making coaching an issue at trial. Further, the interviewer's testimony that Minor received evidence-based therapy did not prejudice Elders at trial because it did not improperly bolster or vouch for Minor's credibility. Therefore, certiorari should be granted, and this Court should reverse the court of appeals' decision and affirm the PCR court's denial of relief.

a. Evidence-based therapy is a medical term simply meaning the therapy was scientifically tested and shown to help reduce symptoms

The court of appeals found Counsel was deficient for failing to object to Miller-Dupre's testimony that Minor received evidence-based therapy because this testimony vouched for Minor's credibility and constituted improper bolstering. Specifically, the court of appeals found, "The forensic investigator's statement conveyed to the jury that she had 'evidence' to back up Minor's claim that [Elders] sexually abused her." *Elders*, 2020-UP-093 at 3. The Court of appeals erred in finding Counsel deficient for failing to object to this statement because evidence-based therapy is a medical term of art that means the therapy Minor received was scientifically tested and shown to help reduce symptoms.

Miller-Dupre's testimony that Minor received evidence-based therapy is a neutral statement conveying Minor underwent mental health treatment—psychotherapy. The National Institute of Mental Health (NIMH) defines psychotherapy as a "term for a variety of treatment techniques that aim to help a person identify and change troubling emotions, thoughts, and behavior." The National Institute of Mental Health, *Psychotherapies*, MENTAL HEALTH INFO.,

<https://www.nimh.nih.gov/health/topics/psychotherapies/index.shtml> (last revised November 2016) (last visited April 23, 2020). The NIMH explains:

Different therapies are often variations on an established approach There is no formal approval process for psychotherapies as there is for the use of medications in medicine. For many therapies, however, *research* involving large numbers of patients has provided *evidence that treatment is effective for specific disorders*. These “*evidence-based therapies*” have been *shown in research to reduce symptoms* of depression, anxiety, and other disorders.

Id. (emphasis added). Another enlightening example of “evidence based” practices can be found in the definitions of the Office of Pretrial Intervention Coordinator Diversion Program Data and Reporting. S.C. Code Ann. 17-22-1110. Subsection 17-22-1110(2) provides: “‘Evidence-based practices’ means supervision policies, procedures, and practices *that scientific research demonstrates reduce* recidivism among individuals on probation, parole, or post-correctional supervision.” (emphasis added). Evidence-based practices are based on scientific research that show the practices are helpful in reducing recidivism, just as evidence-based therapy is based on scientific research shown to reduce symptoms of mental health disorders.

Here, Miller-Dupre testified Minor received evidence-based therapy. Based on the correct definition of evidence-based therapy shown above, this testimony simply conveyed that Minor received therapy shown by scientific research to be effective in mitigating the symptoms of a mental health disorder. Presenting the jury the label associated with the type of therapy recommended by the interviewer did not convey any opinion regarding veracity nor did it provide an opinion which bolstered or inferred additional evidence existed. Instead, the label was the proper scientific term for the type of therapy Minor received. This testimony did not vouch for Minor’s credibility and improperly bolster Minor’s testimony that Elders sexually assaulted her; rather, this testimony showed that Minor received treatment for mental health issues. Counsel was

not deficient because the statement did not vouch for or improperly bolster Minor's testimony. Therefore, certiorari should be granted because the court of appeals erred in misconstruing evidence-based therapy, its opinion should be vacated, and the PCR court's order denying relief should be affirmed.

b. The forensic interviewer's recommendation that Minor receive evidence-based therapy helped Counsel's trial strategy

The court of appeals found Miller-Dupre's testimony that she recommended Minor receive evidence-based therapy conveyed to the jury that Miller-Dupre had evidence to back up Minor's testimony Elders sexually abused her. As noted above, the court of appeals applied an incorrect definition of evidence-based therapy. However, applying the correct definition of evidence-based therapy to Miller-Dupre's statement actually helped Counsel's trial strategy.

In *Briggs v. State*, this Court recognized that since *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989), competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer improperly bolsters a victim's credibility. 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017). However, a closer look at *Briggs* shows Counsel may have had a valid reason for opening the door to such testimony, and if Counsel strategically opens the door to such testimony, the testimony is not impermissible.

In *Briggs*, this Court advised:

Under certain circumstances, it may be proper for the State to ask an expert about coaching. For example, if defense counsel accused the child's mother or father in opening statement or on cross-examination of coaching the child to make an accusation they knew to be untrue, such a line of questioning to an expert could be admissible.

One can even envision a scenario in which coaching is implied, or otherwise becomes an issue without such a direct accusation. Under any of those circumstances, where the testimony is offered to address coaching as a disputed issue, *it may be reasonable for counsel to decide not to object*.

421 S.C. at 326, 806 S.E.2d at 718 (emphasis added).

Here, Counsel made coaching an issue when he asked Minor if she was trying to get answers from Mother while Minor was on the witness stand. App. 185. Counsel questioning Minor if she was trying to get answers from Mother strategically opened the door to questions about coaching. Miller-Dupree's statement came towards the end of her direct testimony. The State asked:

Q: Was there anything about Minor's disclosure that would cause you to believe that it was the product of third party influence?

A: No, ma'am.

Q: In your opinion, was Minor's disclosure affected by suggestibility or any type of coaching?

A: No, ma'am.

Q: And what, if any, recommendations did you make following her disclosures?

A: She was recommended for evidence based therapy at the Dickerson Center.

App. 202–03.

First, it was reasonable for Counsel not to object to Miller-Dupree's statement that Minor received evidence-based therapy because, as explained above, evidence-based therapy simply means that Minor received therapy based on scientific research shown to help reduce symptoms. The therapy's label has nothing to do with what caused the underlying symptoms.

Second, the fact Minor was recommended mental health treatment was capitalized on by Counsel as part of his trial strategy. Counsel's strategy was to attack Minor's credibility and show that she had been coached. Miller-Dupree testifying that Minor received mental health treatment—evidence-based therapy—played into Counsel's strategy and arguments. Counsel argued that

Minor was so confused by what actually happened and what her mother told her happened, she no longer knew what was the truth and what was a lie, or, as Counsel argued, “This entire case started on a lie. . . . [Minor] didn’t know the details because she had made it up. Her mother told her to. She’s sitting here looking over my shoulder at her mother the whole time she’s testifying. She didn’t say much at all. . . . She trusted her mama.” App. 372–76. Counsel’s strategy was to show that Minor did not know what was the truth and what was a lie. Minor receiving mental health treatment plays into that strategy. Therefore, it was reasonable for Counsel not to object. Counsel was not deficient for failing to object to Miller-Dupre’s testimony because evidence-based therapy is a neutral statement that did not vouch for or improperly bolster Minor’s credibility, and Minor receiving mental health treatment helped Counsel’s trial strategy that Minor had been coached so much that she did no longer knew what was the truth. Certiorari should be granted because the court of appeals misinterpreted evidence-based therapy. The court of appeals’ opinion should be vacated, and the PCR court’s order denying relief should be affirmed.

c. No prejudice resulted because the forensic interviewer testified multiple times it was not her job to determine if Minor was telling the truth

The court of appeals erred in finding Elders was prejudiced by Miller-Dupre’s testimony that Minor received evidence-based therapy, because, as explained above, this statement merely conveyed that Minor received treatment based on scientific evidence shown to reduce mental health symptoms and did not vouch for Minor’s credibility or harm Counsel’s strategy that Minor had been coached. Further, no prejudice resulted because Miller-Dupre testified multiple times it was not her job to determine if Minor was telling the truth.

“In assessing prejudice under *Strickland*, the question *is not* whether a court can be certain counsel’s performance had no effect on the outcome” *Harrington v. Richter*, 562 U.S. 86,

111 (2011) (emphasis added). “Instead, *Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Id.* (quoting *Strickland*, 466 U.S. at 696). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

Here, Miller-Dupre testified twice it was not her job to determine whether Minor was telling the truth, and she made no determination of Minor’s truthfulness. First, Miller-Dupre testified, “It’s not my job to determine whether the child is telling me the truth in the interview, but through this protocol and through these different questionnaires, I can determine if the child is definitely functioning at her age level.” App. 195. Second, on cross-examination, Miller-Dupre affirmed it was not her job to determine whether Minor was telling the truth or lying, and Miller-Dupre made no determination as to Minor’s truthfulness. App. 205.

Even so, the court of appeals found Miller-Dupre’s statement prejudiced Elders because it “conveyed to the jury that she had ‘evidence’ to back up Minor’s claim that [Elders] sexually abused her,” and “was an uncontradicted direct comment on [Elders’] guilt by a forensic interviewer who was qualified as an expert by the trial court.” *Elders*, at 3. The court of appeals erred because it failed to consider that Miller-Dupree testified it was not her job to tell if Minor was telling the truth.

Here, Miller-Dupre’s testimony that Minor received therapy shown by scientific research to be effective at reducing mental health symptoms—evidence-based therapy—is a far-cry from the prejudicial improper bolstering testimony in *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018).

The prejudicial improper bolstering testimony in *Thompson*, was the forensic interviewer testifying, “I would feel comfortable in this case saying that *it’s among the most compelling interviews that I’ve conducted . . .*” 423 S.C. at 242, 814 S.E.2d at 491. The *Thompson* court

concluded this testimony was “patently inadmissible, and there was no strategic reason for trial counsel not to object,” because it clearly vouched for Minor’s credibility. *Id.* at 245, 814 S.E.2d at 492.

The prejudicial impact of the instant statement is clearly distinguishable from the statement in *Thompson*. First, because evidence-based therapy is a neutral statement describing the type of therapy Minor received, not that there was evidence Minor needed therapy as the Court misconstrued, the statement, correctly defined, did not convey Miller-Dupree’s opinion as to Minor’s credibility; therefore, it was not prejudicial. Second, the fact that Minor received evidence-based therapy played Counsel’s strategy. Counsel attacked Minor’s credibility arguing she had been coached and no longer knew what was the truth and what was a lie. Finally, the State never mentioned this term in its closing argument.

Importantly, Miller-Dupree testified twice it was not her job to determine if Minor was telling the truth. This testimony was clearly overlooked by the court of appeals. Miller-Dupree did not vouch for or improperly bolster Minor’s credibility. No prejudice resulted from Counsel’s alleged deficiency because the statement was admissible, it helped Counsel’s trial strategy, was not mentioned by the State in closing, and Miller-Dupree herself testified it was not her job to determine if Minor was telling the truth and that she had no opinion as to Minor’s truthfulness. Therefore the Court should grant certiorari, vacate the court of appeals’ opinion, and affirm the PCR court.

CONCLUSION

The court of appeals erred because Miller-Dupre did not vouch for or improperly bolster Minor's testimony by stating she recommended Minor receive evidence-based therapy. Counsel was not deficient for failing to object to Miller-Dupre's testimony that Minor received evidence-based therapy because evidence-based therapy is a neutral term describing the treatment Minor received, not why she needed the treatment. Counsel was also not deficient for failing to object because Miller-Dupre's statement helped Counsel's trial strategy that Minor had been coached so much she no longer knew the truth. Finally, no prejudice resulted from Miller-Dupre's statement because she twice testified it was not her job to determine if Minor was telling the truth, and she had no opinion whether Minor was truthful. Based on these reasons, certiorari should be granted, the court of appeals' opinion should be vacated, and the PCR court should be affirmed.

Respectfully submitted,

s/ Samuel L. Key

ALAN WILSON
Attorney General

SAMUEL L. KEY
Assistant Attorney General
SC Bar No. 103206

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

June 30, 2020

ATTORNEYS FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jun 30 2020

SC Court of Appeals

CERTIORARI TO THE COURT OF APPEALS

MICHAEL ELDERS,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for a Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Taylor D. Gilliam, Esquire
tgilliam@sccid.sc.gov

This 30 day of June, 2020.

s/ Samuel L. Key
SAMUEL L. KEY
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
skey@scag.gov

From: Samuel Key
To: ["tgilliam@sccid.sc.gov"; "Allgire, Mary"](mailto:tgilliam@sccid.sc.gov)
Cc: [Camille Henry](#)
Bcc: [Victim Services](#)
Subject: Elders v. State, Petition for a Writ of Cert
Date: Tuesday, June 30, 2020 8:36:00 AM
Attachments: [Elders v. State, Pet for a Writ of Cert.PDF](#)

Taylor,

Attached please find the State's Petition for a Writ of Certiorari in *Elders v. State*, 2020-000891, I am e-filing with the Court today.

Thanks,

Samuel



Samuel L. Key
Assistant Attorney General
Post-Conviction Relief Section

S.C. Attorney General's Office
Rembert C. Dennis Building
1000 Assembly St.
Columbia, SC 29201

Office: (803) 734-3737
skey@scag.gov

RECEIVED
Jun 30 2020
SC Court of Appeals