THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-000806

George S. Branham, II, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF *CERTIORARI*

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IX. Knowing the trial judge would not allow him to pursue this line of questioning, trial counsel asked Jessica Scott about prior allegations of sexual misconduct against George Branham, alerting the jury to this fact without the opportunity to explain to the jury the results or circumstances of such allegations, thereby denying Mr. Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14. 20

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QUESTIONS PRESENTED

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XI. This Court should apply the cumulative error doctrine and order a new trial.

XII. Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. § 17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, § 8?

STATEMENT OF CASE

The State charged George S. Branham, II with first-degree criminal sexual conduct with a minor, alleging he committed a sexual battery with the seven-year-old daughter of his live-in girlfriend, Jessica Scott. A. 490-91. From August 22-25, 2011, the State tried Mr. Branham before the Honorable Clifton Newman and a jury. Ron Moak and Debra Barry of the Fifth Circuit Solicitor's Office prosecuted the case. Jason D. Kirincich of the Kershaw County Public Defender's Office represented Mr. Branham. The jurors convicted Mr. Branham as charged. A. 472. Judge Newman sentenced him to fifty years imprisonment. A. 488, 492. On September 2, 2011, Mr. Branham filed written motions for a new trial and to re-consider the sentence. A. 495-98. By written orders dated November 2, 2011, Judge Newman denied those motions. A. 499-500.

Mr. Branham appealed his conviction and sentence. Breen R. Stevens, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Mr. Branham and filed an *Anders*[1] brief. The Court of Appeals dismissed the appeal and granted counsel's motion to withdraw. *State v. Branham*, S.C. Ct. App Op. No. 2013-UP-346 (filed September 4, 2013). On October 24, 2013, the Court of Appeals denied Mr. Branham's *pro se* petition for rehearing. The Remittitur issued on December 5, 2013.

On August 4, 2014, Mr. Branham filed a *pro se* Application for Post-Conviction Relief ("PCR"). A. 529-74. The State served its return on January 30, 2015. A. 581-87. On January 22, 2016, appointed counsel amended Mr. Branham's PCR application. A. 588-90. On February 4, 2016, the Honorable J. Durham Cole convened an evidentiary hearing. A. 795-916. Kristy G. Goldberg represented Mr. Branham.[2] J. Clayton Mitchell, III represented the State. At the beginning of the hearing, counsel for Mr. Branham orally amended the application to include cumulative error as a ground for relief. A. 781. The Court heard testimony from Dr. Olga Rosa, Mr. Branham, and Mr. Kirincich. After hearing arguments from counsel, Judge Cole took that matter under advisement. Judge Cole subsequently requested proposed orders from both parties.

On February 12, 2019, Judge Cole singed the State's proposed order, changing only the line spacing. *Compare* A. 506-27 *with* A. 670-95. On February 25, 2019, Mr. Branham served a Rule 59(e), SCRCP Motion and Proffer of Proposed Orders. A. 593-695. By letters dated October 28, 2019 (A. 696), December 23, 2019 (A. 697-754), and January 6, 2020 (A. 755-58), Mr. Branham updated the PCR court on *Mangal v. Warden, Perry Corr. Inst.*, No. CV 6:18-106-RBH-

[1] *Anders v. California*, 386 U.S. 738 (1967).

[2] Following the evidentiary hearing, undersigned counsel substituted as counsel for Mr. Branham. A. 504. Numerous Assistant Attorney Generals appeared for the State in this case.

KFM, 2019 WL 7461668 (D.S.C. Dec. 18, 2019), *report and recommendation adopted,* No. 6:18-CV-00106-RBH, 2020 WL 42859 (D.S.C. Jan. 3, 2020) ("*Mangal II*"). On February 10, 2020, the State responded to Mr. Branham's Rule 59(e) motion. A. 761-76. By written order dated May 20, 2020, the PCR court denied the motion. A. 528. This petition for a writ of *certiorari* follows.

STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, a defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); *cf. Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

The second prong of *Strickland* requires a defendant establish this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id. "*In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188,

810 S.E.2d 836, 843 (2018)[3] (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

This Court's "standard of review in PCR cases depends on the specific issue before" it. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017) ("*Mangal I*"). This Court will "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Id*. This Court will "not defer to a PCR court's rulings on questions of law." *Id*. "Questions of law are reviewed de novo, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.* "On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, [this Court] appl[ies] an abuse of discretion standard." *Id*.

ARGUMENTS

I. Trial counsel failed to object when the trial judge, at the State's request, qualified Children's Advocacy Center interviewer Debbie Elliott as an expert witness in child abuse assessment and forensic interviewing, contrary to *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), thereby denying George Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

When the Solicitor offered Debbie Elliott "as an expert in forensic interviewing and child abuse assessment," trial counsel did not object even though it is not necessary to qualify a Children's Advocacy Center Interviewer as an expert witness to authenticate the videotaped interview of the child and testify about personal observations. Trial counsel's failure to object deprived Mr. Branham of his right to effective assistance of counsel because it allowed Ms. Elliott to improperly bolster the importance of her interview of the child and bolster and vouch for the credibility of the child's statements and testimony. Amended PCR Application ¶ 11(c), A. 588.

[3] *See also Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (adhering to *Smalls*).

Before admitting expert testimony, the trial judge must determine "the subject matter is beyond the ordinary knowledge of the jury," "find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," and "evaluate the substance of the testimony and determine whether it is reliable." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010); *cf. State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (trial court's gatekeeping function of assuring reliability of expert testimony applies to nonscientific evidence); Rule 702, SCRE. Testimony about "personal observations and experiences" and authenticating the interview of the child do not require expert testimony. *State v. Douglas*, 380 S.C. 499, 502-03, 671 S.E.2d 606, 608 (2009). Our courts consistently find deficient performance when trial counsel failed to object to "opinion testimony" that "improperly bolstered" the child's testimony and prejudice when "the outcome of the case hinged on the [child's] credibility . . . and there was otherwise an absence of overwhelming evidence of" guilt. *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010); *cf. Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001); *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000).[4]

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

During an *in camera* hearing, Ms. Elliott testified about her interview of the child at the Carehouse Children's Advocacy Center, and the trial judge ruled admissible the videotape of the interview pursuant to S.C. Code § 17-23-175. A. 46-67, 76. During opening statements, the

[4] Numerous cases since Mr. Branham's jury trial follow *Smith*, *Dawkins*, and *Dempsey*. *E.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015), *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), *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Chappell v. State*, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019), *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

Solicitor told the jurors they would "see the forensic interview," conducted by Ms. Elliott, "a trained interviewer" at the Carehouse. A. 106-13. In front of the jurors, the trial judge, without objection, qualified Ms. Elliott "as an expert in forensic interviewing and child abuse assessment." Ms. Elliott explained a "forensic interview is a child-friendly interview that's conducted in a child-friendly setting" where "it's stressed to them that they need to tell the truth," in order to get "as clean and unbiased interview as possible." Ms. Elliott "assess[es] the child's competency," including whether the child understands "the difference between truth and lie." Ms. Elliott used the "nationally-recognized" "RATAC protocol." She explained the "Child Abuse Accommodation Syndrome" and testified "delayed reporting" is "extremely common" for "victims of child sexual assault when there is a familiar" relationship. A. 218-30.

The State introduced the videotape and Ms. Elliott testified about her interview of the child. She determined the child "understands the difference between truth and lie and the consequences of lying," opined the child was competent, reviewed the "safeguards" used "to prevent any type of influence," and opined there was nothing about the child's disclosure that would cause her "to believe it was the result of third-party influence," and, in her "expert opinion," the child's disclosure was not "affected by suggestibility or coaching." Finally, Ms. Elliott opined, "***My conclusion was that [child] had been chronically sexually abused by Bubba, George Branham,"*** and, "I felt that she was telling the truth." A. 230-42, 245 (emphasis added).

During closing arguments, the Solicitor emphasized Ms. Elliott's expert testimony including her opinion that Mr. Branham sexually abused the child. A. 451-52.

At the evidentiary hearing, trial counsel acknowledged he did not have a strategic reason for not objecting to the trial judge qualifying Ms. Elliott as an expert witness and her subsequent

testimony that vouched for the credibility of her interview and the child's testimony. A. 816-29. *See Ingle* and *Freiburger, supra.*

Because of *Dawkins* (decided in 1989), *Douglas* (decided in 2009), and *Smith* (decided in 2010), "reasonably competent trial counsel should know to object" to the qualification of a Children's Advocacy Center interviewer as expert witness and to testimony "that indicates the witness believes the [child] but does not serve some other valid purpose." *Briggs*, 421 S.C. at 325, 806 S.E.2d at 718.[5] The PCR court erred as a matter of law when it did not follow the holding of *Briggs*, *Smith*, *Douglas*, and *Dawkins.* Mr. Branham testified at trial and denied the allegations. A. 365-402. Because credibility was the crucial issue for the jurors to determine, Mr. Branham met his burden to establish deficient performance and prejudice under *Strickland*. *Smalls* and *Smith, supra.*

II. Trial counsel failed to object when Children's Advocacy Center interviewer Debbie Elliott bolstered and vouched for the credibility of her interview of the child and the credibility of the child's statements and testimony, which violated *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010) and *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001), thereby denying George Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

After the trial judge qualified her, without objection, "as an expert in forensic interviewing and child abuse assessment," Ms. Elliott offered expert testimony that bolstered her interview of the child and bolstered and vouched for the credibility of the child's statements and testimony. Ms. Elliott even opined, ***"My conclusion was that [child] had been chronically sexually abused by Bubba, George Branham,"*** and, "I felt that she was telling the truth." A. 230-42, 245 (emphasis

[5] The order of dismissal, drafted by the Attorney General's Office, states, "At the time *Kromah* was decided, it was a significant departure from practices commonly employed by both prosecuting and defense attorneys, specifically those techniques that were used at the time of [Mr. Branham's] trial." A. 520. *Briggs*, *Smith*, *Douglas*, and *Dawkins* establish this conclusion is an error of law.

added). Trial counsel's failure to object deprived Mr. Branham of his right to effective assistance of counsel because it allowed Ms. Elliott to improperly bolster the importance of her interview of the child and bolster and vouch for the credibility of the child's statements and testimony. Amended PCR Application ¶ 11(d), A. 588.

As part of the gatekeeping function, trial judges must "evaluate the substance of the [expert] testimony and determine whether it is reliable." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175; *cf*. *White*, *supra*; Rule 702, SCRE. Our courts consistently find deficient performance when trial counsel failed to object to "opinion testimony" that "improperly" bolstered" the child's testimony and prejudice when "the outcome of the case hinged on the [child's] credibility . . . and there was otherwise an absence of overwhelming evidence of" guilt. *Smith*, 386 S.C. at 569, 689 S.E.2d at 633; *cf. Briggs* and *Dawkins*, *supra*.

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

As seen in Question I, the prosecution foreshadowed the importance of Ms. Elliott's expert testimony during opening statements. During trial, the State solicited opinions from Ms. Elliot about the reliability of her interview procedures, the child's truthfulness, and the lack of coaching, even having her opine that Mr. Branham sexually abused the child. During closing arguments, the Solicitor emphasized Ms. Elliott's expert opinions.

At the evidentiary hearing, trial counsel acknowledged he did not have a strategic reason for not objecting to the trial judge qualifying Ms. Elliott as an expert witness and her subsequent testimony that vouched for the credibility of her interview and the child's testimony. A. 816-29. *See Ingle* and *Freiburger, supra.*

Briggs, *Smith*, *Douglas*, and *Dawkins* placed counsel on notice to object to this testimony, and the PCR judge erred as a matter of law by not applying this precedent. Because credibility was the crucial issue for the jurors to determine, Mr. Branham met his burden to establish deficient performance and prejudice under *Strickland*. *Smalls* and *Smith, supra*.

III. Trial counsel failed to investigate the State's medical evidence and retain a forensic pediatrician to review the child's medical exam, including photographs, to testify at trial that the child's medical exam was normal, contrary to the testimony of prosecution expert witness Kathy Saunders, thereby denying George Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

The trial judge qualified Dr. Kathy Saunders,[6] a "nurse practitioner" at the Carehouse, "as an expert in the field of forensic child sexual assault examination." The prosecution introduced two photographs Dr. Saunders took during her examination of the child. State's Ex. 15 and 16; PCR Ex. A-3. Dr. Saunders opined the child's hymen had scar tissue and, "There's no question that there's been an injury," which was "consistent with past penetration." Trial counsel did not consult an independent medical expert that would have contradicted Dr. Saunders. At the PCR evidentiary hearing, Dr. Olga Rosa,[7] a medical doctor, testified Dr. Saunders' medical exam of the child was "normal." Amended PCR Application ¶ 11(e), A. 588.

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[6] Dr. Saunders is not a medical doctor. She is a registered nurse. She obtained an associate degree in nursing, a bachelor's degree in nursing, a master's degree in nursing, and doctorate of nursing practice. A. 306, 789.

[7] Dr. Olga Rosa, who is a physician at the University of South Carolina School of Medicine, Department of Pediatrics, and at Palmetto Health Children Hospital. She performs medical evaluations and assessments for children that are referred for suspected abuse and neglect. She is the director of the statewide Medical Response System to child abuse and neglect for the State of South Carolina. In this capacity, she directs, coordinates, and develops the medical response system across the state for child abuse and neglect, trains medical providers, and develops clinical guidelines for doctors that practice in this field. She also consults with solicitors and defense attorneys. She is board certified in general pediatrics and child abuse pediatrics. This Court certified Dr. Rosa as an expert in child abuse pediatrics. A. 783-86.

"[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (emphasis original). This duty includes the duty to investigate the prosecution's medical evidence and present expert testimony refuting the State's expert. *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008).

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

Dr. Foy Connell, the emergency room doctor that examined the child, testified his medical exam of the child, performed the night of the allegations, did not discover any evidence of acute injury. A. 203. He did not notice any evidence of scarring. A. 210. Dr. Connell recommend the child see Dr. Susan Luberoff for an "extensive [medical] examination."[8] A. 202.

Referencing two photographs taking during the examination of the child, Dr. Saunders testified the shape of the child's hymenal tissue was annular, which "means that the opening to her vagina had a complete collar of skin all the way around the opening of the vaginal introitus or the vaginal opening."[9] She testified attenuation of the hymenal tissue from 5:00 to 7:00 o'clock area

[8] Dr. Luberoff is a pediatrician, who trial court judge have qualified as an expert witness in child abuse pediatrics. *See, e.g. State v. Dial*, 405 S.C. 247, 252, 746 S.E.2d 495, 498 (Ct. App. 2013); *State v. Williams*, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013).

[9] Dr. Saunders further testified an annular hymen is a normal finding, explaining:

> And there are several different shapes that that tissue can present in, just as if we all have eyes, but they may be blue, green, brown in color. She had the annular presentation which simply means that the opening to her vagina had a complete collar of skin all the way around the opening of the vaginal introitus or the vaginal opening.

A. 317.

represented "a loss of hymenal tissue [that] does not occur by accident." She also observed "the outer layers of the vaginal opening were red and irritated." She claimed she observed an "a-vascular pattern," which is "scar tissue." Dr. Saunders opined her medical findings were "consistent with past penetration." A. 304-29.

In closing arguments, the Solicitor argued, "Is she missing part of her hymen? Is that corroboration? We would submit it is. She is corroborated." A. 428. The Solicitor argued the "scar tissue on the vagina of a 7-year old child" and the "attended hymen where it's kind of rubbed out" corroborated the child's testimony. A. 431; *see also* A. 453-54 (solicitor arguing medical evidence corroborates the child's testimony).

The PCR court qualified Dr. Rosa as expert in child abuse pediatrics. A. 783-86. Dr. Rosa reviewed the child's medical records from a prior visit to the Lexington Medical Center, Dr. Connell's emergency room medical exam, and Dr. Saunders' medical exam, including the photographs. Dr. Rosa agreed with Dr. Saunders regarding the appearance of redness and the shape of the hymen. Dr. Rosa, however, testified the redness is "common at that age" because children "don't clean them[selves] that well." Dr. Rosa disagreed "with Dr. Saunders regarding the presence of the avascularity area or scar tissue, as well at the attenuated region from 5 to 7:00 on the hymen, on the posterior hymen." Dr. Rosa testified there was not any scar tissue. Dr. Rosa opined that Dr. Saunders' medical exam of the child was "normal exam except for the redness," which is a common finding. A. 786-92.

At the PCR evidentiary hearing, trial counsel acknowledged he did not retain an independent medical expert, A. 829-30, even though the trial record demonstrates he was aware "[t]here are certain things in Dr. Saunders' report that could be contradictory" and appreciated the importance of the photographs by moving the trial court to let him review the photographs and allow him an

opportunity discuss the photographs with Dr. Saunders, A. 27, 829. Trial counsel, however, never offered a valid strategic reason for not retaining an independent medical expert to review the medical evidence, including Dr. Saunders' photographs, and testify at trial. A. 829-30. *See Ingle* and *Freiburger, supra.*

Ard and *McKnight* required trial counsel to independently investigate the State's medical evidence and present expert testimony to contradict the prosecution's case. The PCR court erred as a matter of law by not applying *Ard* and *McKnight*. Trial counsel's failure to do so prejudiced Mr. Branham because the prosecution was allowed to argue to the jurors, incorrectly, that Dr. Saunders' medical exam corroborated the child's statements and testimony.[10] Because credibility was the crucial issue for the jurors to determine, Mr. Branham met his burden to establish deficient performance and prejudice under *Strickland*. *Smalls* and *Smith, supra*.

IV. Trial counsel failed to object to testimony by Rebecca Scheffer and Kathy Saunders about hearsay statements contained in the Child Advocacy Center interview and the medical history provided by the Child's father, which exceed the scope of Rule 801(d)(1)(D), SCRE, violated *State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985) and *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997), and improperly bolstered the child's statements and testimony, which violated *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010) and *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001), thereby denying George Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

Rebecca Scheffer, the registered nurse who performed a sexual assault examination on the child the night of the allegations, testified the child said Mr. Branham sexually assaulted her. Dr. Saunders testified about the history she obtained from the child's father, who did not testify at trial, including specific allegations about the alleged assault and that Mr. Branham perpetrated the

[10] The PCR order, drafted by the Attorney General's Office, concluded Mr. Branham did not establish prejudice because Dr. Rosa believed the child had been sexually assaulted—based on her historical statements—not the normal medical exam. A. 793-94, 798. This Court must reject that conclusion of law because it is contrary to *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) and *Mangal II.*

assault. Dr. Saunders based her opinion, in part, on the history provided to her by the child's father and the Children's Advocacy Center interview. Trial counsel's failure to object deprived Mr. Branham of his right to effective assistance of counsel because it allowed these witnesses to bolster and vouch for the credibility of the child's statements and testimony. Amended PCR Application ¶ 11(i)(b), A. 589.

Rule 801(d)(1)(D), SCRE allows testimony about statements made by a complaining witness in a criminal sexual conduct case limited to the time and place of the incident. *See also Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) ("The forensic interviewer's testimony substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D), SCRE."). Although Rule 803(4), SCRE provides a limited hearsay exception "for purposes of medical diagnosis or treatment and describing medical history," "[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions" and should never be used as a tool to prove facts properly proved by other witnesses." *State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985). *See State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997) (a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim. In this case, however, the fact that Burroughs asked if he could have a hug before he assaulted the victim in no way can be viewed as "reasonably pertinent" to the victim's diagnosis or treatment).

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

Ms. Scheffer testified the child provided the following information:

> Mom caught Bubba trying to touch me in the hallway. Bubba has touched me with his nuts a lot of times. I bled on time – not last night. Mom saw him with his pants down and my pants down as usual.

Ms. Scheffer summarized the sexual assault exam she performed and testified about the evidence she collected. Her sexual assault examination form, which was introduced into evidence, contained a lot of questions about the particulars of the alleged sexual assault, and the Solicitor asked Ms. Scheffer to read this information to the jurors. A. 260-76; State's Ex. 9; PCR Ex. 1 and 2.

Dr. Saunders later testified about the medical history provided to her by the child's father, including allegations that Mr. Branham "went in the hallway," "pulled the child's pants down," "pulled his pants down," and was having sex with the child." She also had reviewed Ms. Elliott's interview. R. 313-15. He opinion about past penetration was based, in part, on history obtained from the child's father and Ms. Elliott's interview. A. 327-28

At the PCR evidentiary hearing, trial counsel did not offer strategic reasons for not objecting to testimony about the child's hearsay statements. A. 830-34. *See Ingle* and *Freiburger, supra.*

This testimony by Ms. Scheffer and Dr. Saunders exceeded the scope of time and place limitation of Rule 801(d)(1)(D), *see Smith, supra,* and the limited exception for medical diagnosis and treatment of Rule 803(4), *see Brown and Burroughs, supra. Cf. Simmons*, 423 S.C. at 565, 816 S.E.2d at 573 (challenged "statements amounted to nothing more than 'hearsay shrouded in a doctor's white coat'"). "Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (citing *State v. Garner,* 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct.App.2010); *cf. id.* (same).[11] "[W]here credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to the victim's testimony is not harmless." *Jennings*, 394 S.C. at 479, 716

[11] The State might argue *Simmons* and *Jennings* are inapplicable because those cases were decided after Mr. Branham's trial. *Simmons*, however, merely applied *Brown* and *Burroughs*. *Jennings* merely applied *Dawkins, Douglas*, and *Smith*. Trial counsel, accordingly, was on notice to object. *Briggs, supra.*

S.E.2d at 94 (2011) (citing *Smith, Dawkins*, and J*olly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994)); *cf. Mangal II, supra*. Because credibility was the crucial issue for the jurors to determine, Mr. Branham met his burden to establish deficient performance and prejudice under *Strickland*. *Smalls* and *Smith, supra*.[12]

V. Trial counsel failed to object when the Solicitor asked George Branham if Jessica Scott, the child, and law enforcement are all lying, which constituted improper pitting of witnesses, thereby denying Mr. Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

During recross-examination, the Solicitor asked Mr. Branham if Jessica Scott, the child, and law enforcement were lying. The Solicitor exploited this questioning during closing arguments, arguing Mr. Branham did not have a good answer for this question. Trial counsel's failure to object deprived Mr. Branham of his right to effective assistance of counsel because it forced him to attack the credibility of the State's witnesses. Amended PCR Application ¶ 11(h), A. 589.

"No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness." *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998). "This kind of argumentative questioning is improper." *Id.*; *cf. State v. Brown*, 297 S.C. 27, 29, 374 S.E.2d 669, 670 (1988) ("we are compelled to reverse a conviction because the assistant solicitor forced Brown to attack the veracity of the investigating officers by inquiring whether the officers "made the story up" about Brown's participation"); *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988) ("It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness.); *State v. Hariott*, 210 S.C. 290, 298, 42

[12] The order of dismissal, drafted by the Attorney General's Office, did not address all of the challenged statements. A. 522-23. The PCR court did not correct this error in the order denying Mr. Branham's Rule 59(e), SCRCP motion, even though Mr. Branham raised this issue in his amended PCR application, (A. 589), proposed order (A. 663-65), Rule 59(e) motion (A. 605-06) and cited *Mangal II* in three letters to the court below (A. 696-760).

S.E.2d 385, 389 (1947) (prosecutor's cross-examination was improper when defendants "were forced in effect to directly attack the veracity of the state's witnesses"); *State v. Warren*, 207 S.C. 126, 35 S.E.2d 38 (1945) (cross-examination of accused as to whether sheriff had told the truth in previous testimony for state concerning statement allegedly made by accused while in jail was improper).

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

The Solicitor asked Mr. Branham, "So all these people, Jessica, [child,] Investigator Lyons, they're all lying?" R. 402. During closing arguments, the Solicitor argued:

> Now he's saying Jessica made this up.
>
> But when asked why would [child] make this up? He says, I don't know. He says that he loved [child] and still loved [child]. He said [child] loved him. I don't know why she would make this up. He didn't even throw out anybody – he didn't even throw anything out –

R. 426.

At the PCR evidentiary hearing, trial counsel did not offer any strategic reasons for not objecting. A. 58-59. *See Ingle* and *Freiburger, supra.* Relying on *Burgess, supra*, the PCR court found deficient performance but not prejudice. A. 524. *Burgess* provides no guidance about what constitutes prejudice. *Brown*, however, explained improper pitting is prejudicial and requires a new trial when the accused is "unfairly prejudiced" because "credibility was a crucial issue" issue in the case. 297 S.C. at 29, 374 S.E.2d at 670 (citing *Sapps, supra*). Because credibility was the crucial issue in this case, Mr. Branham establish prejudice under *Strickland*. *Smalls* and *Smith, supra*.

VI. Trial counsel failed to object to hearsay statements by Jessica Scott, which exceeded the scope of Rule 801(d)(1)(D) and violated J*olly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994) and *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010), thereby denying Mr.

Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

Trial counsel failed to object to testimony of Jessica Scott that repeated the child allegations against Mr. Branham. Trial counsel's failure to object denied Mr. Branham his right to effective assistance of counsel by allowing the state to present evidence that exceed the scope of Rule 801(d)(1)(D), SCRE. Amended PCR Application ¶ 11(a)&(i)(b), A. 588-89.

Rule 801(d)(1)(D), SCRE allows testimony about statements made by a complaining witness in a criminal sexual conduct case limited to the time and place of the incident. *See also Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) ("The forensic interviewer's testimony substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D), SCRE.").

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

During her direct examination, Ms. Scott repeated statements of the child, including that "he was trying to stick his private in her hole" (A. 125), and testified about statements made by a non-testifying treating physician about the child's urinary tract infections (A. 136). At the PCR evidentiary hearing, trial counsel did not offer any strategic reasons for not objecting. A. 833-34. *See Ingle* and *Freiburger, supra.*

The testimony of Ms. Scott exceeded the time and place limitation of Rule 801(d)(1)(D), SCRE. *Smith, supra*. "[W]here credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to the victim's testimony is not harmless." *Jennings*, 394 S.C. at 479, 716 S.E.2d at 94 (2011) (citing *Smith, Dawkins*, and J*olly*); *cf. Mangal II, supra*. Mr. Branham, accordingly, met his burden to establish deficient performance and prejudice under *Strickland*. *Smalls* and *Smith, supra*.

VII. Trial counsel failed to object when Kathy Saunders testified about hearsay information contained in prior medical records of the child not introduced at trial, that exceeded the scope of Rule 804(4), thereby denying Mr. Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

Trial counsel did not object when Dr. Saunders testified about hearsay information contained in prior medical records of the child, which included medical history provided by the child's father, when those treatment providers did not testify at trial and the records were not introduced into evidence. A. 323-24. Amended PCR Application ¶ 11(f), A. 588. Trial counsel's failure to objected denied Mr. Branham his rights to effective assistance of counsel because the testimony was prohibited by Rule 803(4), SCRE, *Burroughs,* and *Brown. Cf. Simmons, supra.* Because credibility was the crucial issue in this case, Mr. Branham establish prejudice under *Strickland*. *Smalls* and *Smith, supra*.

VIII. Trial counsel filed to object to the trial judge instructing the jurors the "testimony of and alleged victim in a criminal sexual conduct case need not be corroborated" after the Solicitor put special emphasis on this during closing arguments, which violated *State v. Rayfield*, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006), thereby denying Mr. Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

Trial counsel failed to object when the trial judge instructed the jurors S.C. Code. Ann. § 16-3-657, after the Solicitor emphasized this statute during closing argument, which elevated the testimony of the child in the eyes of the jurors. Amended PCR Application ¶ 11(g), A. 589.

This Court cautioned about the danger of instructing § 16-3-657:

> A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law.

State v. Rayfield, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006). The dissent warned this instruction "might cause confusion when read with the general charge on witness credibility," "carries a strong possibility of biasing the jury against the defendant," and is an improper comment on the

facts in violation of S.C. Const. Art. V, § 15. The dissent also noted, "Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony." *Id*. at 120-21, 251-252.

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

During its closing arguments, the State emphasized South Carolina has "a special statute . . . in a sexual assault prosecution, the testimony of the victim need not be corroborated. A. 427. Section 16-3-657 provides, "The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658. The trial judge charged the jurors about credibility of witnesses but limited the instruction by stating, "However, the testimony of an alleged victim in a criminal sexual conduct case need not to be corroborated." A. 456.

At the PCR hearing, trial counsel did not offer a reason for not objecting to the jury instruction. A. 835-36. *See Ingle* and *Freiburger, supra.*

State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011) provides some guidance for applying *Rayfield*. Our Court of Appeals observed, "Notably, the judge immediately followed [the § 16-3-657 instruction] with, 'Necessarily you must determine the credibility of witnesses who have testified in this case.'" *Id*. at 299, 379. This statement does not follow the trial judge's instruction in Mr. Branham's case. R. 456. Mr. Branham, accordingly, met his burden to establish deficient performance and prejudice under *Strickland*. *Smalls* and *Smith, supra*.

IX. Knowing the trial judge would not allow him to pursue this line of questioning, trial counsel asked Jessica Scott about prior allegations of sexual misconduct against George Branham, alerting the jury to this fact without the opportunity to explain to the jury the results or circumstances of such allegations, thereby denying Mr. Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

Trial counsel asked Jessica Scott about whether the child's brother previously alleged Mr. Branham sexually abused him. The trail judge sustained the Solicitor's objection. The jurors never learned these allegations were false. Trial counsel's questioning of Ms. Scott denied Mr. Branham his rights to effective assistance of counsel because his own attorney introduced bad character evidence that was not even true. Amended PCR Application ¶ 11(b), A. 588.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. "It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.*; *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). In a child sexual abuse case, propensity is not admissible. *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998). "A logical connection between other crime and crime charged, and not mere similarity, is needed to admit other crimes evidence to show common scheme or plan." *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). The prosecution must prove unadjudicated other bad act evidence in an *in camera* hearing "by clear and convincing evidence." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).

The facts set forth herein support this claim and, by reference, the allegations raised elsewhere in this pleading relevant to this claim are fully incorporated herein.

During a pre-trial hearing, the trial court expressed an unwillingness to allow trial counsel to inquire into allegations unrelated to this case. A. 64. During cross-examination, trial counsel asked Ms. Scott if the child's brother ever alleged Mr. Branham sexually abused him. The trial judge sustained the Solicitor's objection. Trial counsel immediately asked Ms. Scott whether anyone in her family had made false allegations of sexual abuse against Mr. Branham. The trial judge once again sustained the Solicitor's objection. A. 157-58. Later on, outside the presence of the

jurors, trial counsel informed the trial judge, "[T]here was a specific line of questioning that I wanted to go in to [sic] that involved fabrication by another one of her children." The trial judge stated, "It's pretty easy to see why that's an improper line of questioning if that's what you were trying to do." Trial counsel questioned Ms. Scott *in camera.* Ms. Scott acknowledged the child's sibling previously accused Mr. Branham of sexual abuse, but Ms. Scott's ex-husband's brother, John Scott, turned out to be the "perpetrator of that abuse." Ms. Scott denied the child's sibling was coached to make the allegations against Mr. Branham. The trial judge, once again, sustained the State's objection to this line of questioning by the defense. A. 184-90.

At the PCR evidentiary hearing, trial counsel acknowledged he was aware the trial judge would not allow him to inquire about allegations unrelated to this case. A. 817-21. Although trial counsel advanced a strategy for introducing this evidence, the strategy did not work and cannot be considered a valid strategy, in light of the judges pre-trial ruling. *See Ingle* and *Freiburger, supra.*

The prior allegations of sexual abuse were inadmissible under Rule 404(b), *Lyle*, and *Nelson*. Even though trial counsel attempted to introduce this evidence to show it was not true, the trial judge recognized the inherently objectionable nature of the questions. The jurors were left with the impression that Mr. Branham had abused this other child. The fundamental problem with this [testimony] is that the 'bad act' evidence was not presented **by the State** as substantive evidence of guilt, nor was it introduced **by the State** in an attempt to impeach respondent's character. Instead, it was introduced largely through the questioning conducted by respondent's attorney." *State v. Warren*, 341 S.C. 349, 351, 534 S.E.2d 687, 688 (2000) (emphasis original). Additionally, this questioning prejudiced Mr. Branham because credibility was the crucial issue for the jurors to determine. *Jennings* and *Smith, supra.* Mr. Branham, accordingly, met his burden to establish deficient performance and prejudice under *Strickland*. *Smalls* and *Smith, supra*.

X. When the jurors asked to for the videotape of Debbie Elliott's interview of the child, trial counsel suggested the trial judge provide the jurors a laptop to view the videotape in the jury room, which unduly emphasized that testimony, thereby denying George Branham his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and S.C. Const. Art. I, §§ 3 and 14.

The videotape of Ms. Elliott's interview of the child is essentially videotaped testimony without an opportunity for contemporaneous cross-examination. The trial judge has the discretion to allow jurors to review portions of the testimony "*in the defendant's presence*." *State v. Carlson*, 363 S.C. 586, 601, 611 S.E.2d 283, 291 (Ct. App. 2005) (emphasis added). *See also State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). The same rule applies to audio and videotape. *State v. Winkler*, 388 S.C. 574, 585, 698 S.E.2d 596, 602 (2010) ("The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial."). "The rereading of a witness' testimony is disfavored when it unduly emphasizes that testimony." *United States v. Binder*, 769 F.2d 595, 600–01 (9th Cir. 1985) (citing *United States v. Nolan,* 700 F.2d 479, 486 (9th Cir.)). "The determination to allow a rereading or rehearing of testimony must be based on particular facts and circumstances of the case. Undue emphasis of particular testimony should not be permitted." *Id*. *Binder* explained:

> Videotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness. Since there was no physical evidence, the only evidence of acts of molestation was presented through the children's videotaped testimony. The defendant denied any criminal conduct, asserting that the children were displeased with him and their charges against him were vindictive. Credibility became a crucial issue. Under these circumstances the videotaped testimony may have taken on great significance. Allowing the jury to see and hear the children's videotaped testimony a second time in the jury room during deliberations unduly emphasized their testimony.

Id.

Trial counsel, therefore, was deficient for not objecting to the jurors receiving a copy of Ms. Elliott's interview and suggesting the trial judge allow the jurors to view the videotape on a laptop in the jury room. Amended PCR Application ¶ 11(j), A. 589. Trial counsel did not offer any strategic reasons for not objecting. A. 836. *See Ingle* and *Freiburger, supra.* Because credibility was the crucial issued for the jurors to determine, Mr. Branham was prejudiced. *Jennings, supra.* Mr. Branham, accordingly, met his burden to establish deficient performance and prejudice under *Strickland*. *Smalls* and *Smith, supra*.

XI. This Court should apply the cumulative error doctrine and order a new trial.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of "individual error" or error-by-error evaluation instead of formulating the prejudice test in light of counsel's "errors." *Cf. Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) ("the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence).

Here, trial counsel's multiple errors allowed lay and expert witnesses to repeat out of court statements of the child, bolster and vouch for the child's credibility, offer opinions about whether the abuse occurred, and present false medical evidence. In addition to allowing prosecution witnesses to convey to the jurors that the allegations were true, trial counsel allowed the Solicitor to pit Mr. Branham against the state's witnesses, introduced untrue bad act evidence about his own client, and failed to object to a jury instruction that elevated the child's testimony.

XII. Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. § 17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, § 8?

The procedure followed by the PCR court denied Mr. Branham his right to have his PCR claims adjudicated by a judicial officer. "S.C. Code Ann. § 17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). The PCR court did not do that, but rather delegated that responsibility to the Attorney General's Office. The PCR court singed the proposed order of dismissal, drafted by the Attorney General's Office, without making a single change other than the formatting. Addressing section 17-27-80 in the context of a capital post-conviction relief case, this Court "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Section 17-27-80, however, makes no distinction between capital and non-capital cases. This Court should end the practice of an advocate drafting PCR orders.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully Submitted,

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