

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

ANDREW ANTONIO CLEMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000941

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to call Dr. Elzbieta Syed, a pediatrician, as a witness during Petitioner's trial, where Dr. Syed examined Minor after the sexual abuse allegations arose and found Minor's hymen was intact, which indicated no trauma or penetration, and where Petitioner was prejudiced since, without Dr. Syed's testimony, the testimony of Dr. Sallie Carter, a state expert witness who maintained a portion of Minor's hymen was absent, which was consistent with penetration, went unchallenged, particularly where Dr. Carter's testimony was the only physical evidence against Petitioner?

2.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to object to the testimony of Dr. Sallie Carter, who was qualified as an expert in child sexual assault examinations, where Carter asserted that after watching Minor's forensic interview, she was "more concerned" and "more convinced" that Minor's injury was caused by penetration and that Minor's "report . . . together with an abnormal genital exam, to me in my professional opinion, that's like saying one and one is two or two and two is four. I wasn't there. I didn't see it. But I have a lot of experience in this area . . ." since this testimony constituted improper bolstering and vouching, and where Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had objected?

STATEMENT OF THE CASE

Petitioner and Minor's mother, Telfia Johnson, began dating shortly after Minor was born. Petitioner and Johnson went on to have three children together. The couple lived together "on and off" until August 2010. App. 59, l. 6 – 60, l. 10. The state alleged at trial that Petitioner sexually abused Minor, his stepdaughter, between December 2009 and August 2010 when Minor was seven and eight years old. App. 614-617.

Johnson testified that she first became aware of the allegations in January 2011 when she heard Minor and her younger daughter arguing about something that had occurred between Petitioner and Minor. App. 62, l. 24 – 63, l. 24. Johnson said Minor was reluctant to talk to her, but Johnson maintained "she [Minor] gave me enough details to know that I needed to try and get her checked out." App. 63, l. 16 – 64, l. 23.

Johnson took Minor to see her pediatrician, Dr. Elzbieta Syed. After examining Minor, Dr. Syed told Johnson "that she couldn't rule in or out anything, but that she did not think there was any penetration..." App. 65, ll. 1-22. Johnson believed a friend contacted the Department of Social Services (DSS) and reported the allegations. App. 66, ll. 10-18. After an investigation, DSS reported the allegations to law enforcement. App. 114, l. 21 – 115, l. 15. Johnson ultimately took Minor to the Foothills Alliance Child Advocacy Center for a forensic interview. App. 67, ll. 3-8. Minor was interviewed on March 28, 2011 by Stacy Gianiodis. App. 173, ll. 11-22. The interview was recorded and played for the jury. App. 179, ll. 1-2. Minor was also physically examined by Dr. Sallie Carter on April 4, 2011. App. 192, l. 1 – 193, l. 7.

Minor was ten years old at the time of trial. App. 74, ll. 13-14. She testified that Petitioner touched her in a way she "didn't like" on more than one occasion. App. 77, ll. 2-6. Minor claimed Petitioner committed lewd acts with her and showed her pornographic videos on a portable DVD

player. App. 77, l. 9 – 91, l. 17. However, she unequivocally denied that there was any vaginal or anal penetration involved in the lewd acts. App. 94, ll. 5-15.

Minor testified that Petitioner told her not to tell anyone or they would both get in “very big trouble.” She also maintained Petitioner made her and her sister pray together for “forgiveness” for their sins. App. 91, l. 18 – 92, l. 3. While Minor did claim at trial that Petitioner had her perform oral sex on one occasion, trial counsel strongly attacked this belated allegation as “convenient” given the fact that Minor had never alleged oral sex before despite repeatedly being given the opportunity to do so. App. 87, l. 10 – 88, l. 8.

T.J., Minor’s younger sister, who was nine years old at the time of trial, testified that she remembered seeing Minor run out of Petitioner’s bedroom in her “panties” and shirt. Minor ran straight into their shared bedroom. App. 99, ll. 15-24. T.J. told her mother about this incident because she “thought it was wrong.” App. 102, ll. 6-14.

One of the key issues at trial was whether any penetration, or a sexual battery, occurred. This differentiated first degree criminal sexual conduct with a minor from lewd act. Trial counsel argued in closing that the critical element of the criminal sexual conduct charge was penetration. He reminded the jury that Minor testified there was no vaginal or anal penetration in this case. Counsel further mocked the belated assertion that oral sex occurred. He asserted, “. . . and we’re just now hearing about oral sex six weeks before the trial [where it was not brought up during the forensic interview].” App. 268, ll. 2-9. Although Minor denied making up the oral sex allegation for purposes of trial, she had no explanation for her failure to reveal the alleged oral sex when she had previously been given numerous opportunities to do so. App. 218, l. 14 – 219, l. 13.

Dr. Sallie Carter, who was qualified as an expert in child sexual assault examinations, examined Minor on April 4, 2011, over two months after Minor was examined by Dr. Syed, her

pediatrician. App. 192, l. 1 – 193, l. 7. Dr. Carter maintained that the “posterior portion” of Minor’s hymen was absent, which was “an abnormal finding.” App. 195, ll. 11-14. Even though Minor specifically denied that any vaginal or anal penetration occurred, Dr. Carter was allowed to testify over objection, that after watching Minor’s forensic interview, her injuries were consistent with penetration. App. 205, l. 7 – 211, l. 21.

An Anderson County Grand Jury indicted Petitioner on December 6, 2011 for first degree criminal sexual conduct (CSC), and on April 16, 2013 for lewd act upon a child. App. 614-617. His case was called to trial on May 13, 2013 before the Honorable R. Lawton McIntosh. App. 1. Petitioner was tried in his absence after he did not appear for trial. App. 31, l. 5 – 32, l. 14. Assistant Solicitors Kristin Reeves and Lauren Price represented the state. App. 1. G. Scott Thomason represented Petitioner. App. 1. On September 12, 2013, the sealed sentence was opened by Judge McIntosh. Supp. App. 1. Petitioner was sentenced to twenty-five years for first degree CSC and fifteen years concurrent for lewd act. Supp. App. 2, ll. 1-14.

The Court of Appeals affirmed Petitioner’s convictions and sentence in an unpublished opinion. State v. Clemons, 2016-UP-436 (S.C. Ct. App. filed October 19, 2016); App. 350-351. This Court subsequently denied Petitioner’s petition for writ of certiorari by order filed December 1, 2016. App. 405.

On February 10, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 408-423. The state filed a return to this application dated May 12, 2017. App. 424-433. With the assistance of counsel, Petitioner filed a supplemental application on June 1, 2017 and an amended application on February 13, 2020. App. 434-442. An evidentiary hearing was convened on February 19, 2020 before the Honorable R. Scott Sprouse. App. 443. Assistant

Attorney General Taylor Smith represented the state. App. 443. Susannah Ross represented Petitioner. App. 443.

By order filed June 8, 2020, the PCR judge denied Petitioner relief. App. 555-607. On June 9, 2020, Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. App. 608-612. The PCR judge denied the motion by order filed June 16, 2020. App. 613.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated and Petitioner was prejudiced by trial counsel's deficient performance, this petition for writ of certiorari follows.

ARGUMENT

1.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to call Dr. Elzbieta Syed, a pediatrician, as a witness during Petitioner's trial, where Dr. Syed examined Minor after the sexual abuse allegations arose and found Minor's hymen was intact, which indicated no trauma or penetration, and where Petitioner was prejudiced since, without Dr. Syed's testimony, the testimony of Dr. Sallie Carter, a state expert witness who maintained a portion of Minor's hymen was absent, which was consistent with penetration, went unchallenged, particularly where Dr. Carter's testimony was the only physical evidence against Petitioner.

Relevant Facts

During Petitioner's jury trial, the state called Dr. Sallie Carter as a witness. Dr. Carter was qualified as an expert in child sexual assault examinations. She examined Minor on April 4, 2011, over two months after Minor was examined by Dr. Syed, her pediatrician. App. 192, l. 1 – 193, l. 7. Dr. Carter maintained that the "posterior portion" of Minor's hymen was absent, which was "an abnormal finding." App. 195, ll. 11-14. Even though Minor specifically denied that any vaginal or anal penetration occurred, Dr. Carter was allowed to testify over objection, that after watching Minor's forensic interview, her injuries were consistent with penetration. App. 205, l. 7 – 211, l. 21.

Petitioner called Dr. Elzbieta Syed as a witness during his PCR hearing. Dr. Syed, a pediatrician, had worked for Piedmont Children's Clinic for over twenty-four years. App. 449, ll. 6-16. Minor was her patient. App. 450, ll. 2-6. Dr. Syed physically examined Minor on January 28, 2011 immediately after the sexual abuse allegations arose. App. 450, ll. 7-19; App.

546. She found Minor had a “crescent hymen,” which is normal for a child Minor’s age. App. 452, ll. 10-21. Dr. Syed asserted that the border of Minor’s hymen was “smooth,” indicating Minor had not suffered any trauma or penetration at the time of the exam. App. 452, l. 22 – 453, l. 6. The report from her examination of Minor was marked as Applicant’s Exhibit No. 1 during the hearing. App. 546.

Petitioner’s trial counsel, Scott Thomason, died before the PCR hearing, and consequently, he did not testify. App. 445, ll. 18-19. However, Kristen Reeves, the assistant solicitor who prosecuted Petitioner, testified that she provided trial counsel with a copy of Dr. Syed’s report, which reflected Syed’s findings from her examination of Minor, through the discovery process. Reeves also provided counsel with a copy of the DSS records, which referenced Dr. Syed’s examination. App. 488, l. 21 – 489, l. 7. Reeves testified that she spoke with Dr. Syed at some point before trial. She maintained that she did not call Dr. Syed as a witness at trial, not because Dr. Syed’s opinion conflicted with her theory of the case and Petitioner’s guilt, but because Dr. Syed supposedly told Reeves that she “had no sexual assault training.” App. 520, ll. 7-19.

Notably, Dr. Syed testified during the hearing that, in addition to having twenty-seven years of experience as a pediatrician, her medical training included sexual abuse and how to conduct genital exams. App. 454, ll. 1-22. She stated she had taken classes that specifically concerned sexual abuse and sexual trauma to the body. App. 458, l. 20 – 459, l. 8. During the course of her medical career, she had treated or examined around one hundred female patients who had potentially suffered from sexual abuse. App. 459, l. 16 – 460, l. 4.

The PCR judge denied Petitioner relief. He found Petitioner failed to show Dr. Syed had the proper qualifications to testify as an expert in child sexual assault examinations. App. 598.

The judge further concluded that trial counsel was not deficient for failing to present Dr. Syed as a witness or introduce the records from her examination of Minor because Dr. Syed's testimony would not have been "particularly helpful to the defense." This conclusion was based on the fact that Dr. Syed testified that, while Minor's hymen was intact, "she could not rule out the possibility that [Minor] had been sexually abused." App. 598-599. The judge also maintained that Dr. Syed lacked the qualifications to diagnose sexual assault injuries compared to Dr. Carter. App. 599.

Discussion

The PCR judge erred by finding trial counsel was not ineffective when he failed to call Dr. Syed as a witness during Petitioner's trial. Dr. Syed examined Minor after the sexual abuse allegations arose and found Minor's hymen was intact, which indicated no trauma or penetration. Significantly, Dr. Syed's examination took place in January 2011 before Dr. Sallie Carter examined Minor in April of that same year. Petitioner was prejudiced since, without Dr. Syed's testimony, the testimony of Dr. Carter, who maintained a portion of Minor's hymen was absent, which was consistent with penetration, went unchallenged, particularly where Dr. Carter's testimony was the only physical evidence against Petitioner. Dr. Syed's findings indicated either Minor suffered an injury to her hymen after Dr. Syed examined her but before Dr. Carter's examination, or that Dr. Carter's findings were unreliable or suspect.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

The state alleged at trial that Petitioner sexually abused Minor between December 2009 and August 2010. In August 2010, Petitioner moved out of the family home and no longer had any contact with Minor. In January 2011, five months later, Minor was physically examined by Dr. Syed, her pediatrician. Dr. Syed, who had practiced medicine at Piedmont Children’s Center for over twenty-four years at the time of the evidentiary hearing, found Minor’s hymen was intact and that there was no evidence of trauma or sexual abuse. It was undisputed that trial counsel was aware of Dr. Syed and her findings. The assistant solicitor who prosecuted the case testified at the evidentiary hearing that she provided counsel with a copy of Dr. Syed’s report during the discovery process. Moreover, counsel briefly mentioned Dr. Syed’s findings during trial.

Trial counsel was deficient for failing to present Dr. Syed as a witness during Petitioner’s trial and introduce her records, which included her findings, as an exhibit because Syed’s testimony would have directly challenged Dr. Carter’s testimony that Minor’s hymen was partially absent when Carter examined Minor in April 2011. See Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005), *overruled on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Dr.

Carter's testimony was the only physical evidence against Petitioner. Therefore, it was particularly powerful for the state. If counsel had presented Dr. Syed as a witness, her testimony would have called into question Dr. Carter's findings and suggested they were unreliable or would have indicated Minor suffered a penetrating injury to her hymen after January 2011, which could not have been caused by Petitioner because he no longer had any contact with Minor. Consequently, there is no evidence to support the PCR judge's finding that Dr. Syed's testimony would not have been "particularly helpful to the defense." See App. 599. For these same reasons, Petitioner was prejudiced by counsel's deficient performance as there is a reasonable probability the outcome of his trial would have been different if Dr. Syed had testified.

Respectfully, this Court should grant certiorari, hold the PCR judge erred by denying Petitioner relief, and reverse his convictions and sentence.

2.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to object to the testimony of Dr. Sallie Carter, who was qualified as an expert in child sexual assault examinations, where Carter asserted that after watching Minor's forensic interview, she was "more concerned" and "more convinced" that Minor's injury was caused by penetration and that Minor's "report . . . together with an abnormal genital exam, to me in my professional opinion, that's like saying one and one is two or two and two is four. I wasn't there. I didn't see it. But I have a lot of experience in this area . . ." since this testimony constituted improper bolstering and vouching, and where Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had objected.

Relevant Facts

During Petitioner's jury trial, the state called Dr. Sallie Carter as a witness. Dr. Carter was qualified as an expert in child sexual assault examinations. She examined Minor on April 4, 2011, over two months after Minor was examined by Dr. Syed, her pediatrician. App. 192, l. 1 – 193, l. 7. Dr. Carter maintained that the "posterior portion" of Minor's hymen was absent, which was "an abnormal finding." App. 195, ll. 11-14. Even though Minor specifically denied that any vaginal or anal penetration occurred, Dr. Carter was allowed to testify over objection, that after watching Minor's forensic interview, her injuries were consistent with penetration. App. 205, l. 7 – 211, l. 21. Specifically, Dr. Carter testified that she was "more concerned" and "more convinced" after watching Minor's forensic interview and learning of her specific allegations, that Minor's injury was caused by penetration. App. 206, l. 4 – 207, l. 20.

Dr. Carter then testified:

The child [Minor] reported [during the forensic interview] that there was sexually explicit material played at least some of the time when the individual was involving her in sexual activity. And she indicated that this happened a number of times. And she indicated that it was at his invitation that she get under the blanket with him, that she do this. She indicated that he had taken her pants down, you know. So that **when you put that report by an eight-year-old child together with an abnormal exam, to me in my professional opinion, that's like saying one and one is two or two and two is four. I wasn't there. I didn't see it. But I have a lot of experience in this area.**

App. 211, ll. 10-21 (emphasis added).

Trial counsel did not object to this testimony. As mentioned above, Petitioner's trial counsel died before the PCR hearing. Consequently, he did not testify at the hearing. However, Petitioner's direct appeal counsel, Robert Dudek, was questioned during the hearing as to why he did not argue on appeal that Dr. Carter's testimony constituted improper bolstering or vouching. Dudek explained that the argument was not preserved for appellate review because trial counsel did not raise the objection at trial. However, he asserted that if the objection had been raised below, he would have raised the argument on appeal. Dudek contended, "Yes, I think if this had been objected to, then that would be definitely an issue worth raising because it would be a person who was qualified as an expert, you know, albeit without objection or by stipulation, and then allowing the expert to say - - this on page 210, [lines] 10 to 21 (Appendix page 211, lines 10-21), it seems to be vouching for the child's testimony." Dudek further asserted, citing to State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), that "it would be improper for a forensic interviewer to testify in this manner, so I don't know why it would be proper for Dr. Carter to watch the forensic interview and then give an opinion like this." App. 535, l. 10 – 537, l. 24.

The PCR judge denied Petitioner relief. He concluded Petitioner "failed to demonstrate trial counsel was constitutionally ineffective for failing to object that Dr. Carter's testimony improperly vouched for and bolstered the victim's credibility because [Petitioner] has failed to

show any prejudice resulting from trial counsel's failure to raise the objection." App. 593. The judge determined the case "was not a classic swearing contest" between Minor and Petitioner since Dr. Carter testified before watching Minor's forensic interview that Minor had an injury to her hymen that was consistent with penetration. App. 593.

Discussion

The PCR judge erred by finding trial counsel was not ineffective when he failed to object to Dr. Sallie Carter's improper testimony that both bolstered and vouched for Minor's credibility in violation of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Carter, who was qualified as an expert, maintained that after watching Minor's forensic interview, she was "more concerned" and "more convinced" that Minor's injury was caused by penetration. She further asserted that Minor's "report . . . together with an abnormal genital exam, to me in my professional opinion, that's like saying one and one is two or two and two is four. I wasn't there. I didn't see it. But I have a lot of experience in this area." Dr. Carter's testimony could only be interpreted as indicating she believed Minor was telling the truth and was therefore improper in light of this state's long standing precedent.

Petitioner was prejudiced by counsel's deficient performance since there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had objected. The trial judge was aware of this Court's opinion in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), which was published four months before trial. If counsel had objected to Carter's testimony based on improper bolstering and vouching, the learned trial judge would have excluded it. If for whatever reason, the trial judge did not exclude the improper testimony, there is a reasonable probability Petitioner's convictions would have been reserved on appeal. The case came down to the credibility of Minor, particularly where Dr. Carter's finding that a portion

of Minor's hymen was absent, which she maintained was consistent with penetration, was discredited by Minor who unequivocally asserted there was no vaginal or anal penetration. See App. 94, ll. 5-15.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

The only purpose of Dr. Carter's testimony was to improperly bolster and vouch for Minor's credibility. Our courts have previously held that "the assessment of witness credibility is within the exclusive province of the jury," and that witnesses generally are "not allowed to testify whether another witness is telling the truth." See Kromah, 401 S.C. at 358, 737 S.E.2d at 499-500 (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)); See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's . . . opinion testimony improperly bolstered the Victim's credibility").

In McKerley, the trial judge allowed a witness to testify as an expert in “forensic interviewing and child abuse assessment.” 397 S.C at 463, 725 S.E.2d at 141. The “expert” had interviewed the complainant twice and concluded that both interviews were compelling for sexual abuse. She also determined that the complainant’s statements were consistent with other information she had on the case. Id. at 466, 725 S.E.2d at 142. The Court of Appeals determined there was no other way to interpret the language used in the expert’s testimony other than to mean she believed the complainant was being truthful. It further held, “In light of [the expert’s] extensive inadmissible testimony bolstering the credibility of the victim . . . we cannot say the erroneous admission of [the expert’s] testimony did not contribute to the jury’s decision,” therefore concluding the error was not harmless. Id. at 467, 725 S.E.2d at 143.

This Court has also held that it is improper “for an expert to comment on the veracity of a child’s accusations of sexual abuse.” State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); See State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed child’s allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000 (finding therapist’s testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

In Jennings, Shauna Galloway-Williams, who was qualified as an expert, interviewed the three alleged victims of sexual abuse and issued a separate report for each child that was admitted into evidence. She concluded in her reports that each child provided a compelling disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received from their mother, the police report, and the other children. Jennings, 394 S.C. at 476-481, 716 S.E.2d at 92-95. This Court held the conclusions

in the reports improperly vouched for the children's veracity and, thus, the trial judge abused his discretion by admitting the reports into evidence. The Court further held the error was not harmless because there was no physical evidence presented at trial and the children's credibility was the sole issue in the case. *Id.* at 94-95, 716 S.E.2d at 480.

Subsequently, in *Kromah*, this Court held that it is improper for a trial court to ever qualify a forensic interviewer as an expert. *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499. In so holding, the Court again emphasized that the rules of evidence do not allow witnesses to vouch for or offer opinions on the credibility of others. *Id.* The Court asserted, "It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded." *Id.* at 358, 737 S.E.2d at 499. Lastly, the Court noted that a forensic interviewer's statement that there is a "compelling finding" of physical abuse relies not just on objective evidence such as the presence of injuries, but on the statements of the victim and the interviewer's subjective belief as to the victim's believability. *Id.* at 357, 737 S.E.2d at 499.

In light of this precedent, it is apparent that Dr. Carter's testimony in this case was improper since it bolstered and vouched for Minor's allegations and credibility. After watching Minor's forensic interview and learning of her specific allegations, Dr. Carter asserted she was "more concerned" and "more convinced" that the injury to Minor's hymen was caused by penetration. She further asserted that **Minor's "report . . . together with an abnormal genital exam, to me *in my professional opinion*, that's like saying one and one is two or two and two is four. I wasn't there. I didn't see it. But *I have a lot of experience in this area.*"** Dr. Carter's testimony could only be interpreted as indicating she believed Minor was telling the

truth and that her allegations were credible. Consequently, trial counsel was deficient in failing to object.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if counsel had objected and Dr. Carter's improper testimony had been excluded. Dr. Carter's opinion that a portion of Minor's hymen was absent, which was consistent with possible penetration, was discredited by Minor who unequivocally asserted that there was no vaginal or anal penetration. Consequently, the case came down to Minor's credibility. Dr. Carter's testimony that she was "more concerned" and "more convinced" after viewing Minor's forensic interview and that ". . . one and one is two or two and two is four" indicated to the jury that Carter believed Minor was telling the truth and vouched for Minor's allegations. See Kromah, 401 S.C. at 357, 737 S.E.2d at 499 ("[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.").

Respectfully, this Court should grant certiorari and hold the PCR judge erred by denying Petitioner relief since Petitioner demonstrated both that trial counsel was deficient and that he was prejudiced by counsel's deficient performance.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing. Petitioner ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2021.