

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

Appellate Case No. 2020-000806

George S. Branham, II,Petitioner,

v.

State of South Carolina,Respondent.

**GEORGE BRANHAM'S REPLY TO STATE'S RETURN TO HIS
PETITION FOR WRIT OF *CERTIORARI***

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IN REPLY

George Branham replies to the State’s return to his petition for a writ of certiorari to review this post-conviction relief (“PCR”) case (hereinafter “Petition” or “Return”).

As a threshold matter, despite drafting the order for the PCR judge—which the PCR judge signed without making any substantive changes—the Attorney General’s Office does not defend significant portions of its order in its Return. As will be seen, the State directly or implicitly concedes deficient performance under the first prong of *Strickland*¹—contrary to the conclusions of law in order of dismissal drafted by the Attorney General’s Office—when responding to Questions I, II, IV, V, and VI raised by his petition for a writ of *certiorari*. The procedure followed in this case is not fair to Mr. Branham, who has a right to have his PCR claims adjudicated by a judicial officer, pursuant to S.C. Code Ann. § 17-27-80. The procedure followed in this case is not fair to the PCR court, who the State misled in its role of “safeguard[ing] the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). The procedure followed in this case “does not serve justice nor instill public confidence when” this Court is required to review “errors such as these.” *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001).

- 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.**

George Branham contends *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), placed his trial counsel on notice to object when the prosecution attempts to qualify a forensic interviewer as an expert witness. Petition, at 5-8. The State argues, “At the time of Petitioner’s trial, in 2011,

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

it was common practice to admit forensic interviewers as experts in the field of forensic interviewing and any objections to the qualifications of such witnesses were generally unsuccessful.” Return, at 6-8. That the State had a “common practice” of disrespecting this Court’s guidance in *Douglas* is not a reason to excuse trial counsel’s deficient performance. That trial judges were not sustaining objections based on *Douglas* is not a reason to excuse trial counsel’s deficient performance because our state’s appellate courts held those trial judges erred when the witnesses in those cases improperly bolstered or vouched for the credibility of the child complaining witness. *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).

Here, qualifying the forensic interviewer as an expert witness was the gateway for Ms. Elliott offering opinions that bolstered or vouched for the child’s credibility. To establish prejudice, Mr. Branham cited cases existing at the time of his jury trial that placed his trial counsel on notice to prevent this prejudicial testimony, to wit: *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010); *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). Petition, at 6. Although the State’s Return does not address the prejudice prong of *Strickland*, regarding Question I, the State concedes trial counsel’s deficient performance in Question II—citing *Smith*, *Dawkins*, and *Kromah*—for allowing the improper opinion testimony that bolstered and vouched for the child’s credibility. Return, at 8.

Finally, the State asks this Court to apply an overly restrictive reading of *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017), by arguing *Briggs* merely “examined” and “clarified” *Douglas*. Return, at 7. *Briggs*, however, is much more significant and controls here. This Court

reminded, 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. *Briggs*, accordingly, expressly rejected the restrictive view of *Douglas* the State asks this Court to apply in Mr. Branham’s PCR Appeal.

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.

George Branham contends *Smith* and *Dawkins* placed his trial counsel on notice to object when Debbie Elliott bolstered and vouched for the credibility of her interview of the child and the credibility of the child’s testimony. *Cf. Briggs, supra*. The State concedes deficient performance under *Strickland* by acknowledging, “Although the PCR court found Petitioner failed to establish Counsel was deficient because allowing forensic interviewers to testify at the time of Petitioner’s trial was common practice and arguments that this testimony was bolstering were generally ineffective, Respondent concedes that it is abundantly clear from the case law in this area that Counsel’s failure to object was deficient.” Return, at 8 (citing *Kromah, Smith, and Dawkins*).

Although conceding deficient performance, the State argues Mr. Branham did not establish prejudice under the second prong of *Strickland*. The State’s Return does not conduct a proper analysis of prejudice. Under the prejudice prong, “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)² (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)). As this Court reminded, “[T]he existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Id.*, 422 S.C. at 189, 810 S.E.2d at 844. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.*, 422 S.C. at 191, 810 S.E.2d at 845.

Here the State relies on three pieces of evidence to preclude a finding of prejudice: (1) Jessica Scott, the child’s mother, providing corroborating testimony, (2) the testimony of Dr. Connell, and (3) the testimony of Dr. Saunders. For the reasons discussed below, this Court must reject the State’s argument.

First, the mother’s testimony does not meet the “conclusive” standard under *Smalls* to negate a reasonable probability that the jurors would find a reasonable doubt. Ms. Scott was convicted for obtaining money under false pretenses on two occasions. The first time involved trading her food stamp card to a drug dealer. The second time involved \$4,000.00 in bad checks. A. 138-39. After Mr. Branham’s arrest, the child complaining witness was removed from Ms. Scott’s care by the South Carolina Department of Social Services, which requires Ms. Scott’s child visitation to be supervised. A. 140-41. Ms. Scott uses cocaine and crack cocaine. Cross-

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

examination suggested George Branham not wanting Ms. Scott to use illegal drugs became her motive to make false allegations of child sexual abuse. A. 142.

Second, Dr. Connell's testimony is not "conclusive" under *Smalls* to negate a reasonable probability that the jurors would find a reasonable doubt. He did not discover any evidence of acute injury. A. 203. He did not notice any evidence of scarring. A. 210. Rather, Dr. Connell recommend the child have an "extensive [medical] examination." A. 192-217.

Third, Dr. Saunders' testimony is not "conclusive" under *Smalls* to negate a reasonable probability that the jurors would find a reasonable doubt. Dr. Saunders' physical findings are directly disputed by the PCR testimony of Dr. Olga Rosa. Even though the State acknowledges this Court's prejudice review must be limited to "admissible testimony" and "admissible evidence," *e.g.* Return, at 8-9, the State asks this Court to consider Dr. Saunders' inadmissible opinion testimony, prohibited by *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018). *See also* Question III and IV, Petition, at 10-15, and Section III and IV, *infra*.

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.

George Branham contends his trial counsel should have retained a forensic pediatrician to refute Dr. Saunders medical testimony. Petition, at 10-13. The State argues Mr. Branham cannot establish deficient performance because his trial counsel was able to "vigorously cross-examine" Dr. Saunders. It relies on *Lorenzen v. State*, 376 S.C. 521, 657 S.E.2d 771 (2008) (citing *Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991),³ *abrogated by Smalls v. State*, 422

³ *Frasier* is not relevant to this case. *Frasier* alleged his trial counsel was deficient for not retaining a DNA expert even though the State's "DNA and secretion analyses did not implicate"

S.C. 174, 810 S.E.2d 836 (2018).⁴ Return, at 10-12. A close reading of *Lorenzen*, however, reveals Lorenzen did not establish deficient performance because he “failed to present evidence that would show a reasonable probability that, but for counsel’s failure to call expert witnesses, the result of his trial would have been different” because he “did not offer any other witnesses to testify on his behalf at the PCR hearing,” meaning it was “merely speculative that these allegedly favorable expert witnesses would have aided in his defense.” *Lorenzen*, 376 S.C. at 530, 657 S.E.2d at 776-77. Here, Mr. Branham presented the PCR testimony of Dr. Olga Rosa that directly contradicted Dr. Saunders’ physical findings. A. 783-99.

Although acknowledging *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) and *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), are authoritative, the State’s Return fails to recognize the significance of the holdings in these cases. *Ard* requires trial counsel to consult an independent expert. Trial counsel interviewing Dr. Saunders during trial cannot satisfy *Ard*’s requirement of an independent investigation. *McKnight* establishes not only trial counsel’s duty to investigate the prosecution’s medical evidence, but also the duty to present available expert testimony refuting the State’s expert.

Finally, the State argues, “Dr. Rosa testified she believed Victim had been sexually assaulted and would have testified to that opinion had she been called as a witness at trial.” Return, at 12. As discussed in Mr. Branham’s Petition, Question IV, at 13-16, and Section IV, *infra*, neither Dr. Saunders nor Dr. Rosa could properly offer this opinion, under our rules of evidence, during the trial. *Simmons, supra*.

him. *Frasier*, 306 S.C. at 60, 410 S.E.2d at 573. As seen, Dr. Saunders testimony about the child’s physical findings is directly disputed by Dr. Rosa.

⁴ After *Smalls*, *Lorenzen* cannot “be read to suggest an appellate court gives any deference to a PCR court’s conclusions of law.” 422 S.C. at fn. 2, 181, 810 S.E.2d at 840, fn. 2.

- 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.**

The State concedes deficient performance, acknowledging “portions of Rebecca Sheffer’s and Dr. Saunders’ testimony did go beyond the time and place limitations of Rule 801(d)(1)(D)” and constituted “inadmissible hearsay testimony.” Return, at 14. The State asks this Court not to find prejudice under *Strickland* based on the testimony of the child’s mother and Dr. Saunders’ testimony about the physical findings during the medical exam. As seen in Section I above, the mother’s motive-based testimony is not “conclusive” under *Smalls* to negate a reasonable probability that the jurors would find a reasonable doubt. As discussed in Section III above, Dr. Saunders’ testimony about the physical findings is not “conclusive” because Dr. Rosa directly contradicts that evidence.

- 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.**

George Branham contends the cases cited in his Petition placed his trial counsel on notice to object when the prosecution improperly pitted him against the State’s witnesses, to wit: *Burgess v. State*, 329 S.C. 88, 495 S.E.2d 445 (1998); *State v. Brown*, 297 S.C. 27, 374 S.E.2d 669 (1988); *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988); *State v. Hariott*, 210 S.C. 290, 42 S.E.2d 385 (1947); *State v. Warren*, 207 S.C. 126, 35 S.E.2d 38 (1945). The State implicitly concedes deficient performance under *Strickland* by not discussing these cases. Return, at 14. Rather, the State asks this Court not to find prejudice because of the “significant independent evidence of Petitioner’s

guilt.” *Id.* In this section of the Return, the State does not identify what that evidence it contends precludes prejudice. Is it the improper opinion testimony of Ms. Elliott? Is it the improper hearsay of Ms. Scheffer and Dr. Saunders? Is it Dr. Saunders’ testimony about the physical findings that is directly contradicted by the PCR testimony of Dr. Rosa? Is it the motive-based testimony of the child’s mother? Regarding the former two questions, the State concedes deficient performance for allowing this testimony before jury. Regarding the latter two questions, Mr. Branham has explained throughout this pleading why that evidence does not satisfy the “conclusive” standard under *Smalls* to negate a reasonable probability that the jurors would find a reasonable doubt.

VI. Trial counsel failed to object to hearsay statements by Jessica Scott, which exceeded the scope of Rule 801(d)(1)(D) and violated *Jolly 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.

Once again, the State concedes deficient performance under *Strickland* in its counter statement of the issue by acknowledging Jessica Scotts’ “inadmissible hearsay” testimony and later by acknowledging that Mr. Branham “is correct that Counsel was deficient for failing to object to Victim’s mother’s testimony regarding Victim’s prior UTIs because it is inadmissible hearsay.” Return, at 15-16. Rather, the State argues Mr. Branham cannot establish *Strickland* prejudice “because there was significant, independent evidence establishing Petitioner’s guilt.” *Id.*

The State, once again, refers to the motive-based testimony of the child’s mother. Throughout this pleading, Mr. Branham demonstrates why that testimony does not satisfy the “conclusive” standard under *Smalls* to negate a reasonable probability that the jurors would find a reasonable doubt.

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. Trial counsel's failure to object 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.

George Branham contends the trial judge instructing S.C. Code § 16-3-657, under the unique facts of this case, violated *State v. Rayfield*, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006), and *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), both of which were decided before Mr. Branham's jury trial. The State tries to reframe this issue as a request to apply *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) retroactively. Because *Rayfield* and *Hill* placed trial counsel on notice to object to this instruction, under the facts of this case, trial counsel rendered deficient, prejudicial performance in this case.

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.

George Branham contends his trial counsel improperly introduced character evidence even though the trial judge warned trial counsel that questions about unrelated allegations were not

proper. The State asks this Court to excuse trial counsel's deficient performance as trial strategy. Return, at 19-21. The State's argument overlooks the standard of review. "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). Significantly, the trial judge recognized the problem with this line of questioning during pre-trial hearings when the trial court warned against pursuing this line of questioning. Predictably, the trial judge sustained the State's objection when trial counsel disregarded the trial judge's warning. Trial counsel's strategy was not valid, and this Court cannot excuse it as a valid trial strategy.

The State argues, "[T]he PCR court found Counsel's overall trial strategy—that people were coaching Victim to lie about the alleged abuse—was objectively reasonable, based on Counsel's preparation and review of the case." Return, at 19. This State misses the point. That it is a valid trial strategy to show people were coaching the child complaining witness to lie about the allegations does not translate into introducing evidence of unrelated allegations, especially after the trial judge warned counsel not to present that evidence.

As a direct result of trial counsel's deficient performance, the jurors were left with the impression that Mr. Branham had abused this other child—even though it was known that someone else perpetrated this abuse. "The fundamental problem with this [supposed trial strategy] 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 [the defendant's] attorney." *State v. Warren*, 341 S.C. 349, 351, 534 S.E.2d 687, 688 (2000) (emphasis original).

- X. When the jurors asked 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.

George Branham contends his trial counsel should have objected to jurors being allowed to replay the videotape of Debbie Elliott's child advocacy center interview during deliberations. Petition, at 23-24. The State merely argues, "At the PCR hearing, Petitioner failed to present evidence showing that the trial court would have ruled in his favor." Return 20-21. This State, however, never addressed any of the cases cited in Mr. Branham's petition, to wit: *State v. Carlson*, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005); *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980); *State v. Winkler*, 388 S.C. 574, 585, 698 S.E.2d 596, 602 (2010); and *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.)). These cases establish that such an objection would have been sustained or, alternatively, would have preserved this issue for appeal where the appellate court would have reversed the trial court. Mr. Branham, accordingly, established prejudice.

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

In the order of dismissal (drafted by the Attorney General's Office), the PCR judge did not conduct a cumulative error analysis believing it "would be inappropriate." A. 21. George Branham argued *Strickland, Kyles v. Whitley*, 514 U.S. 419, 436 (1995), and *Williams v. Taylor*, 529 U.S. 362, 399 (2000) require a post-conviction court to consider cumulative prejudice. Petition, at 24. He further argues 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. *Id.* Despite the Attorney General's Office drafting the order of dismissal for the PCR court, the State now acknowledges multiple instances of deficient performance under the first prong of *Strickland*, meaning it is appropriate to review cumulative prejudice.

In determining whether George Branham was prejudiced by his trial counsel's performance, it is helpful to consider what this jury trial would have looked like but for trial counsel's deficient performance. The State's presentation would have been much different. Jessica Scott would have testified about the events she claimed to have witnessed, but her testimony about her daughter's statements would be limited by the rules of evidence. Ms. Scott would still face vigorous cross-examination about her motive and prior criminal history. Ms. Elliott would not be qualified as an expert and, therefore, could not offer any expert opinions. Rather, she would authenticate the videotape of her interview with the child.⁵ The State would play the video. Dr. Saunders would provide a more limited review of the child's medical history. She might or might not testify about her findings in the same manner as she did at trial.⁶ She would not testify based on hearsay or offer an opinion based on the child's hearsay statements. George Branham would testify in his own defense and deny the allegations, just as he did during his direct examination at trial. The prosecution would not be allowed to pit him against the State's witnesses, thereby

⁵ The order of dismissal provides too much consideration of Ms. Elliott's testimony, by stating, "After properly weighing the impact of Elliott's testimony against the other admissible evidence at trial, the PCR court properly found Petitioner failed to establish any resulting prejudice because he failed to show a reasonable probability of a different outcome at trial based on the other significant independent evidence establishing Petitioner's guilt." A. 9. Consideration of Ms. Elliott's testimony should be limited to her admissible testimony under Anderson when determining whether the trial result would be different.

⁶ After Dr. Rosa's report, it is very likely the State would not place Dr. Saunders in a position of giving false and misleading testimony. *Riddle v. Ozmint*, 369 S.C. 39, 48, 631 S.E.2d 70, 75 (2006) ("failure to correct false evidence is as reprehensible as its presentation).

requiring him to explain their testimony. Mr. Branham’s father would testify and corroborate his son’s testimony, just as he did at trial. Dr. Rosa would testify about her review of the child’s forensic medical exam and directly contradict Dr. Saunders’ physical findings. She would not offer an opinion based on the child’s hearsay statements.

At the conclusion of the case, the jurors would have to make credibility determinations. The jurors would have to decide the credibility of George Branham’s denials verses a young child’s allegations and her mother’s motive-based testimony. If the prosecution allowed Dr. Saunders to provide the same false and misleading testimony, then the jurors would resolve the credibility dispute between Dr. Saunders and Dr. Rosa about the physical findings during the medical exam. Because credibility of the witnesses was the crucial issue for the jurors to resolve, this case is not a case of overwhelming evidence. *See Smalls, supra*; *see also State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was “no physical evidence of sexual abuse”); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when “credibility was the most critical determination of this case”); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) (“These credibility questions and inconsistencies in the witnesses’ testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry’s guilt is overwhelming or that Berry’s guilt is the only rational conclusion that could be reached from the evidence presented.”).

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?

George Branham advocates for a rule that requires the presiding judge to draft the final order in PCR cases. Petition, at 25. The State urges this Court to continue the “common practice

for judges to ask a party to draft a proposed order for the sake of efficiency.” Return, at 23 (citing *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004)). The State even argues, “[T]he procedures employed by the PCR Court were proper and ***the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence*** presented by the Court and comports with statutory and constitutional requirements.” *Id.* (emphasis added). How can the final order ***reflect thoughtful and deliberate consideration and review of the record and evidence*** when the drafter of the order—the Attorney General’s Office—concedes on appeal that the order contains so many errors? How does a final PCR order containing so many errors contribute to “efficiency?” In reality, the order on appeal does not reflect thoughtful and deliberate consideration and review of the record and the evidence; rather, it is an advocacy pleading. In reality, there was nothing efficient about the procedures followed by the PCR court in this case. Over three years—1104 days to be exact—transpired between the conclusion of the evidentiary hearing on February 4, 2016 and when the PCR judge signed the State’s order on February 12, 2019. Almost fifteen months—450 days to be exact—transpired between Mr. Branham’s Rule 59(e), SCRCP motion on February 25, 2019 and the PCR Court’s order denying the Rule 59(e) motion on May 20, 2020.

This Court recently expressed its ongoing frustration with the validity of final orders in PCR cases during the oral argument in *Kevin S. Epting v. State*, Appellate Case No. 2017-000696, on November 21, 2019, at 11:17 – 13:05.⁷ One Justice referred to the Attorney General’s Office drafting the final PCR order as “the classic case of the fox guarding the henhouse,” observed PCR

⁷ <http://media.sccourts.org/videos/2017-000696.mp4> (last viewed June 22, 2020). *Epting* involved the Attorney General’s Office drafting the final order, the PCR judge signing the order that failed to address all the issues, and the applicant’s attorney not filing a Rule 59(e), SCRCP motion. On December 4, 2019, this Court dismissed *certiorari* as improvidently granted.

applicants have the right to have their issues litigated, and called on the criminal defense bar “to fix this problem.” Another Justice stated the entire Court shares these concerns.

In *Fishburne v. State*, this Court recognized the significant issues involved in drafting PCR orders:

[B]ecause the United States Constitution’s Sixth Amendment guarantee to a defendant’s right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party’s procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court’s order does not comply with section 17-27-80.

427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). *Fishburne* set a lofty goal for “[t]he preparation and finalization of a PCR order [to be] a collaborative effort.” 427 S.C. at 516, 832 S.E.2d at 589 (2019). The final order in this case was not a “collaborative effort.” Although Mr. Branham engaged in the process endorsed by *Fishburne*—submitting a proposed order, reviewing the final order, and filing a Rule 59(e) motion—the final order is an advocacy position drafted by “the fox guarding the henhouse,” rather than true judicial findings of fact and conclusions of law.

George Branham’s PCR case illustrates exactly why a PCR court should not delegate the judicial function of drafting final PCR orders to an advocate. The time has arrived for this Court to require judges to draft the final orders in PCR cases.

CONCLUSION

For the reasons set forth in George Branham’s petition for a writ of certiorari and this reply, this Court should grant the writ and consider the issues.

Respectfully Submitted,

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