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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**May 06 2021**  
S.C. SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

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Appellate Case No. 2020-000891

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MICHAEL ELDERS

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

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**BRIEF OF PETITIONER**

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## **STATEMENT OF ISSUE ON CERTIORARI**

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

## STATEMENT OF THE CASE

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

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

### Direct Appeal

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

### First PCR Action

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

### Austin PCR Action

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

### PCR Appeal

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

The Court of Appeals granted certiorari to review the following issues:

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

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

After briefing and oral argument, the Court of Appeals reversed the PCR court. *Elders v. State*, Op. No. 2020-UP-093 (S.C. Ct. App. filed Apr. 8, 2020). In its opinion, the Court of Appeals held Counsel was ineffective for failing to object to the forensic interviewer testifying that Minor received evidence based therapy because the “statement conveyed to the jury that [the interviewer] had ‘evidence’ to back up Minor’s claim that Elders sexually abused her. This was an uncontradicted direct comment on Elders’ guilt by a forensic interviewer who was qualified as an expert by the trial court. Trial counsel’s failure to object was sufficient to undermine confidence in the outcome of the trial.” *Id.* at 3. The Court of Appeals did not rule on the second issue presented. *Id.* at 2 n.1. The State petitioned for rehearing on April 23, 2020. The Court of Appeals denied the petition for rehearing on May 22, 2020. The State subsequently filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted in part on March 26, 2021.

## STATEMENT OF THE FACTS

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

Counsel waived making an opening statement at trial. App'x 164. The State first called Officer Desiree Busko to testify. App'x 165. Busko testified that on June 28, 2009, she was called into work to speak to Mother. App'x 165. Busko testified Mother reported a sexual-assault that occurred at Elders' residence, in the City of Cayce. App'x 166. Mother informed Busko the assault occurred the night before, June 27, at approximately 7:30 pm. App'x 166. Mother told Busko she found out about the assault from Minor. App'x 168.

Minor testified at trial she started spending time with Elders when she was approximately eight-years-old, and her older brother would sometimes go with her to visit. App'x 170. She testified she is no longer allowed to visit Elders because he touched her private parts. App'x 171. When she would visit, Minor would sleep in the same bed as Elders, where the assault usually happened. App'x 176. Elders began touching Minor during her visits, when she was eight-years-old, and he would touch her often. App'x 171–72. Minor testified Elders touched her approximately ten times. App'x 175. Elders would put his hand in her pants and touch her on the

outside and inside her “front private part” but would not touch her anywhere else. App’x 172–73. Elders also made Minor put her hand down his pants. App’x 173. Minor also testified she did not tell anyone because she was scared and because Elders told her not to tell anyone. App’x 173. However, she finally told her mother. App’x 174. At the time of her disclosure to her mother, Minor indicated Elders had touched her about two days prior. App’x 175.

On cross-examination, Minor testified she and Elders slept in her Uncle George’s room, and there was no door to the bedroom. App’x 178–79. She testified the touching occurred in her uncle’s room, and she denied ever saying it happened in her grandmother’s room. App’x 179–80. Minor told her mother about the touching because her mother asked, though she initially denied it and only admitted to the touching after her mother continued asking. App’x 180–81. Minor did not recall how many times the touching occurred and could not recall where she was when Elders told her to touch his penis. App’x 181–82. Minor also testified she told the people at the Dickerson Center Elders had not made her touch him, but Elders did make her touch his penis. App’x 182. Elders always touched her privates and would insert his finger inside her, which felt cold. App’x 183; 185. At this point, Counsel asked Minor:

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

A: (No response.)

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

A: Yes, sir.

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

A: Yes, sir.

Q: She told you that, didn’t she?

A: (No response.)

Q: *Are you looking at your mother?*

A: (No response.)

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

A: No, sir.

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

A: No, sir.

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

Minor testified no one other than Elders touched her. App'x 187. She testified despite the touching, she still wanted to go to Elders' house to see her friend. App'x 188. She also testified there were times when Elders said her brother could not come to the house, and she did not want to go when her brother did not go because she knew what would happen—that Elders would put his hand down her pants. App'x 188. When she visited, she usually slept in her uncle's or her grandmother's room, but Elders always slept with her. App'x 189. Elders would put his hand down her pants and put his finger into her vagina. App'x 189–90. Minor did not scream when Elders touched her because she was scared, and she did not tell her mom because she was embarrassed. App'x 188. She also did not tell the people at the Dickerson Center about Elders making her touch his penis because she was nervous. App'x 189.

Lysa Miller-Dupre, the forensic interviewer at the Dickerson Center, testified after Minor. The trial court qualified Miller-Dupre as an expert in forensic interviewing and child abuse assessment. App'x 194. Miller-Dupre explained how a forensic interview is conducted and the RATAC protocol. App'x 194. She testified, "*It's not my job to determine whether the child is*

*telling the truth in the interview*, but through this protocol and through these different questionnaires, I can determine if the child is definitely functioning at her age level.” App’x 195 (emphasis added). Miller-Dupre testified that at the end of every interview, she asks the child if anyone had talked to them before the interview about the assault or about what they should or should not say during the interview. App’x 199.

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

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

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

Next, Katelyn Bradley, Victim's cousin, testified. She testified on the night of June 27<sup>th</sup>, she had a conversation with Christy Kirkland. App'x 211. She further testified after that conversation she called her mother, because she did not know what to do. App'x 212.

On cross examination, Bradley explained she was told that Johnny Hutto had seen Elders feeling on Victim's leg. App'x 212–13. She also testified this was the first time anything had been brought out about Elders molesting Victim, but there had always been thoughts about it from Victim's mother's family. App'x 213. Bradley elaborated no one had any evidence of any inappropriate behavior. App'x 213. She also testified Elders neither drinks nor does drugs, but Victim's mother used to do cocaine. App'x 213–14.

Felicia Schwall, Bradley's mother and Victim's aunt, then testified. She testified Bradley informed her that Christy Kirkland told her there was some stuff going on between Victim and Elders. App'x 215. After learning this information, she then called Victim's mother. App'x 215.

On cross-examination, she testified there was touching and improper displays going on—that Elders had Victim on his lap and was making Victim touch him. App'x 216. She further testified Bradley told her Christy Kirkland saw this behavior, and Christy had mentioned this to her previously. App'x 216–17. Schwall elaborated she called Victim's mother early in the morning, about 3:30 or 4, and told her she thought she needed to pick Victim up because “stuff may be going on.” App'x 217. She also testified she has seen Elders giggling, smacking Victim on her butt, and pulling Victim down into his lap. App'x 218.

The State then called Mother to testify. She testified Elders did not claim Victim as his until she was about eight years old; and at that point, Victim and Elders began spending time together. App'x 228. Once Victim began visiting Elders, Victim's older brother would only visit Elders once a month. App'x 229. Victim also acted as if she did not want to go over to Elders'

house. App'x 230. Mother also testified her family made allegations Elders was abusing Victim, but when she asked Victim, Victim denied anything was happening. App'x 230. She further testified she received a call from her sister, Schwall, about Elders touching Victim, and she told Victim what she had heard and that she needed to tell the truth. App'x 230–31. She elaborated when she woke Victim up, she asked her about the abuse, and Victim initially denied it but then started crying and stated Elders had touched her. App'x 232. She testified she then called Elders, who responded Victim was a “fucking little liar.” App'x 231. Mother also testified she went to the police to make a report and also took Victim to the hospital for an exam. App'x 232. Victim did not talk to Mother about what happened, but went to the Dickerson Center for counseling. App'x 233, 234.

On cross-examination, Mother testified DSS became involved when the allegations involving Elders arose. App'x 236. She also testified she has had Elders arrested multiple times for unrelated offenses, none of which resulted in convictions. App'x 240. Counsel had Mother read her statement into the record, and highlighted in that statement, she used both “sexually assaulted” and “privates” to describe what happened to Victim. App'x 238–39, 241. She testified although “sexual assault” is not a child’s phrase, the adults around Victim had been using that term. App'x 241–42. She also testified all of her children use the term “privates” to describe their genitals. App'x 241. When asked whether or not Victim looked at Mother during her testimony, Mother responded: “Yeah, she kept looking at me. I’m her mother. I’m her support.” App'x 242. She also denied Victim would do what Mother wanted her to do, adding “if you’re insinuating that I put my daughter through a trial like this to get to somebody, you’re crazy.” App'x 242.

Investigator Danielle McCord of the City of Cayce Police Department testified next. She testified she met with Victim on June 30<sup>th</sup> and obtained statements from both Victim and Mother.

App'x 251. Investigator McCord also testified based on the forensic report, she obtained a warrant for Elders' arrest. App'x 252. She elaborated she located Elders at his home and informed him he was under arrest for criminal sexual conduct, and she did not ask Elders any questions at that time. App'x 252, 255. She further elaborated Elders immediately asked if the arrest was in reference to Victim and that "they were liars." App'x 255. She also testified the term "sexual assault" is a term "we all commonly use." App'x 255.

During cross-examination, McCord disagreed with Counsel that "kids don't use the words private" and testified she has heard some Victim victims of sexual abuse describe their genitals as privates, while others use the terms penis or vagina. App'x 256–57. She also testified Mother told her Johnny Hutto had seen Elders put his hand down Victim's pants. App'x 257. She further testified she did not speak with Hutto. App'x 257. Investigator McCord also testified Elders had no prior convictions. App'x 258.

The State then presented the testimony of Robin Baker, who was a former SANE nurse at Palmetto Health Richland. Baker was qualified as an expert in sexual assault examination. App'x 264. She testified she performed an exam on Victim on June 29, 2009. App'x 265. She testified at the start of each exam, she ask about the events that occurred, what led to the events, where the victim hurt, if they received any injuries and, if so, where, if there was any penile penetration, if there was any ejaculation and, if so, where did it occur, and whether or not there was any type of oral, vaginal, or anal sex. App'x 265. She further testified Victim complained of painful urination and stated she had been sexually molested—that Elders had placed his finger down her pants and started rubbing her privates, which hurt. App'x 266. Victim stated she was there because Elders was touching her in her private places, and she was just walking around, and he put his hand down her pants. App'x 266. Victim told Elders to leave her alone. App'x 266. Victim also told her

Johnny Hutto also saw this happen, and Hutto got really mad. App’x 266. Victim indicated she was touched in her “private,” underneath her clothes. App’x 267. Victim also indicated this hurt. App’x 267. Victim stated Elders had not touched her anywhere else, but Elders made her touch “his private,” which felt “really, really bad.” App’x 267. Victim said she had touched Elders under his clothes—that Elders unzipped his pants, “pulled it out,” nothing happened, and “it stayed the same.” App’x 267. When asked who did this to her, Victim stated Elders did. App’x 267. Victim also told her Elders asked if her friend, Brittany Jones, would play truth or dare with him<sup>1</sup>. App’x 267. Baker testified she examined Victim from the pubis to the anus and saw redness on Victim’s labia majora. App’x 270–71. Baker opined this injury was consistent with sexual assault caused by some type of friction. App’x 274–75. She further opined this injury could have been caused by a urinary tract infection (UTI), but Victim was not diagnosed with a UTI. App’x 275. Baker testified in her medical opinion, she believed Victim had been sexually assaulted based on Victim’s history and injuries. App’x 276.

On cross-examination, Baker testified a forceful rub or friction, which would be painful for a ten year old, would cause the injury. App’x 276–77. She further testified touching the outside of the vagina would cause this type of injury and would not have to be caused by any type of insertion. App’x 277. Baker also testified this injury would not have been caused by wearing jeans without underwear. App’x 277. Baker further testified after the examination, she indicated finger penetration had been attempted, but had not penetrated Victim’s vagina. App’x 279. She also testified she based her findings on what Victim told her and the redness in her genital area. App’x 282. She further testified in any sexual assault case, “you have to go by the history and by your

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<sup>1</sup> Counsel objected to this statement, stating “I don’t think that has anything to do with what she was doing in this particular case. It’s irrelevant, immaterial.” App. 267-68. The trial court overruled this objection. App. 268.

physical findings.” App’x 284. She testified had Victim not told her anything, “then I would have to still conclude, due to the redness and my background in the medical field of sexual assaults in the pediatric area, that redness is usually not there.” App’x 282. Baker also testified other causes of the redness included a UTI that became infected and feces around the area. App’x 283. She testified an attempt to insert a finger in the vagina every two weeks would cause the vagina to be red. App’x 283. During redirect, Baker testified the history and physical findings were consistent with Victim’s story and with some type of physical injury or trauma to the genital area. App’x 285.

Johnny Hutto, Elders’ cousin, then testified. Hutto testified he lived at Elders’ home “on and off” and was staying there on June 27, 2009. App’x 290–91. He witnessed Victim sitting in Elders’ lap in Elders’ truck. App’x 292. After seeing this, he told Elders he was a “sick fucker and I was going to beat his ass.” App’x 292. He never saw Elders put his hand down Victim’s pants. App’x 292. He testified Victim, Elders, and Victim’s grandmother slept in the same room, and Victim and Elders slept together. App’x 293.

On cross-examination, Hutto testified he had never seen Elders put his hand down Victim’s pants. App’x 294. He testified Victim and Elders were close, and Victim was not afraid of Elders. App’x 295. He further testified he has seen Elders blow his horn at teenage girls up the road, but has never seen Elders touch any young girl. App’x 295–96. He denied ever telling anyone he had seen Elders touch a young girl. App’x 296. Hutto then read his statement, in which he said he had seen Victim riding in the truck in Elders’ lap and Elders alleged he was teaching Victim how to drive. App’x 297.

On redirect, he testified he has never seen Elders teaching Victim’s older brother how to drive. App’x 299. He further testified he has never seen Victim’s brother on Elders’ lap. App’x 299.

The State then called Laurie Caldwell, who was recognized as an expert in Victim abuse assessment. App'x 324. Caldwell generally testified to delayed disclosure and Victim abuse sexual accommodation syndrome. *See* App'x 324–32. Caldwell testified delayed disclosure is not connected to false allegation. App'x 333. She also testified she had not spoken with Victim, nor looked at any of the statements or videos associated with this case. App'x 332.

The State rested and the defense presented its case. Elders first called Dr. John Michael Carroll, Victim's pediatrician, to testify. He was recognized as an expert in pediatrics. App'x 343. Dr. Carroll testified he had a well-check with Victim on April 9, 2009, and no complaints were made nor did anyone mention Victim was being sexually abused. App'x 344. He further testified he did not examine Victim's genitals during this exam. App'x 344. He also saw Victim for a vaccine visit on June 9, 2009, during which there were neither problems nor complaints. App'x 345–46. He saw Victim again on December 29, 2009, because she was sick, at which point neither Victim nor Mother mentioned sexual abuse nor complained of painful urination. App'x 346. He testified he had no indication Victim was sexually abused, but he had not examined Victim's genitals in some years. App'x 347. He further testified when he has examined Victim's genitals, he has never seen any redness. App'x 347. On cross-examination, Dr. Carroll testified it is uncommon for a Victim to complain to a pediatrician that they had been sexually assaulted. App'x 347. He further testified he has no training in forensic exam. App'x 347.

Elders then presented the testimony of Gene Ray Elders, Sr., Elders' father. He testified Victim and Elders got along, and Victim would hold Elders' hand. App'x 351. He further testified Victim would sit in Elders' lap, and Elders would ask her to sit on the couch; but two minutes later, Victim would go back to sitting in Elders' lap and hug on his neck. App'x 352. He testified he has never seen Elders touch Victim and has not seen Elders touch any other children. App'x

353. He testified no one has told him they saw Elders doing something wrong. App'x 353. He also testified Victim's older brother did not visit as often as Victim. App'x 352.

Next, Gene Ray Elders, Jr., Elders' brother, testified. He testified he lives in the same house as Elders, and there are no doors to the bedrooms, except for his mother's room. App'x 356. He testified Victim slept in his mother's room, and Elders would not sleep with Victim, but rather would sleep with Georgie. App'x 356. He further testified he never saw Elders doing anything wrong to Victim or to any other children, and no one has ever told him they saw something wrong. App'x 357, 358.

On cross-examination, he testified it was not always true that Victim and Elders would sleep on an air mattress in his mother's room, but Elders would sit there until Victim fell asleep. App'x 359. He also testified Hutto told Elders he was a "sick fucker," but he does not know why Hutto said that. App'x 360. He elaborated when this happened both Christy Kirkland and Victim were there. App'x 360. He further elaborated Kirkland ensured she was at the house when Victim was there, but she did not tell him she suspected abuse. App'x 362. He also testified Kirkland told him Victim did not need to be there. App'x 362.

Finally, Elders called Ashley Nicole Wooten, Elders' niece, to testify. She testified she has not seen Elders do anything to Victim and has not seen Elders touch Victim, nor any other child. App'x 364. She also testified no one ever told her Elders touched a Victim. App'x 365.

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

Counsel argued Minor could not remember the details because “she had made it up. Her mother had told her to. She’s sitting here looking over my shoulder at her mother the whole time she’s testifying. She didn’t say much at all.” App’x 375. Counsel compared Minor’s testimony to her forensic interview. Counsel argued, “She’s talking freely. . . . She’s only ten years old, say what mama said. Goes back to what the [s]olicitor said in her opening statement, a child trusts adults. You trust your parents, trust, trust. She trusted her mama.” App’x 376. Counsel argued, “This is just a situation where one lie made a snowball effect into this case that’s took us three days to try.” App’x 377. Finally, Counsel argued why Mother would coach Minor into telling this lie. Counsel argued, “[Mother is] trying again now for the sixth time to put [Elders] in jail and he hasn’t done anything.” App’x 378.

## **STANDARD OF REVIEW**

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

## ARGUMENT

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

The Court of Appeals erroneously concluded Counsel was constitutionally ineffective for failing to object to the forensic interviewer’s statement that Minor received evidence-based therapy in finding the statement “conveyed to the jury that [the interviewer] had ‘evidence’ to back up Minor’s claim that [Elders] sexually abused her,” and therefore, constituted improper bolstering testimony. Counsel was not deficient for failing to object to this statement because the interviewer who testified Minor received evidence-based therapy did not improperly bolster or vouch for Minor’s credibility because evidence-based therapy is a medical term of art simply conveying that Minor received therapy scientifically tested and shown to help reduce symptoms; and Counsel arguably opened the door to this line of questioning by making coaching an issue at trial. Further, the interviewer’s testimony that Minor received evidence-based therapy did not prejudice Elders at trial because it did not improperly bolster or vouch for Minor’s credibility. This Court should reverse the Court of Appeals’ decision and affirm the PCR court’s denial of relief.

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

The Court of Appeals found Counsel was deficient for failing to object to Miller-Dupre’s testimony that Minor received evidence-based therapy because this testimony vouched for Minor’s

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

The purportedly objectionable testimony regarding evidence-based therapy occurred during the following portion of the State’s direct examination of Miller-Dupre:

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

A: No, ma’am.

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

A: No, ma’am.

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

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

App’x 202–03.

Like the testimony of any witness, an expert’s testimony constitutes improper bolstering if “(1) the witness directly states an opinion about the victim’s credibility, (2) the sole purpose of the testimony is to convey the witness’s opinion about the victim’s credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth.” *Chappell v. State*, 429 S.C. 68, 77, 837 S.E.2d 496, 501 (Ct. App. 2019) (citations omitted). For example, this Court held in *State v. Chavis* that the forensic interviewer’s recommendation the victim “not be around defendant for any reason” was inadmissible as improper bolstering because

it could “only be interpreted as [the forensic interviewer] believing Victim’s claim that [the defendant] sexually abused her.” 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015).

In contrast, Miller-Dupre’s testimony that Minor received evidence-based therapy is a neutral statement conveying Minor underwent mental health treatment—psychotherapy. The National Institute of Mental Health (NIMH) defines psychotherapy as a “term for a variety of treatment techniques that aim to help a person identify and change troubling emotions, thoughts, and behavior.” The National Institute of Mental Health, *Psychotherapies*, MENTAL HEALTH INFO., <https://www.nimh.nih.gov/health/topics/psychotherapies/index.shtml> (last revised November 2016) (last visited April 23, 2020). The NIMH explains:

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

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

Based on the correct definition of evidence-based therapy shown above, this testimony simply conveyed that Minor received therapy shown by scientific research to be effective in

mitigating the symptoms of a mental health disorder. Presenting the jury the label associated with the type of therapy recommended by the interviewer did not convey any opinion regarding veracity nor did it provide an opinion which bolstered or inferred additional evidence existed. Instead, the label was the proper scientific term for the type of therapy Minor received. Miller-Dupre's testimony, in its full context, is clearly distinct from offering an opinion that the child in question *has* or *has not* been abused, or *is* or *is not* credible—issues that are properly decided by the jury. *See State v. Worley*, 268 N.C. App. 300, 306–07, 836 S.E.2d 278, 284 (2019) (noting that neither the expert's use of the word “disclose” when summarizing what the victim told her nor the experts testimony she recommended “trauma-focused therapy” constituted impermissible bolstering of the victim's credibility); *cf. Everhart v. State*, 337 Ga. App. 348, 357, 786 S.E.2d 866, 875 (2016) (“Although credibility of a witness 'is a matter solely within the province of a jury[,]’ this court need not exclude testimony simply because a defendant argues the testimony is tangentially related to credibility) (quoting *Noe v. State*, 287 Ga. App. 728, 730, 652 S.E.2d 620 (2007) (alteration in original)).

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

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

The Court of Appeals found Miller-Dupre's testimony that she recommended Minor receive evidence-based therapy conveyed to the jury that Miller-Dupre had evidence to back up Minor's testimony Elders sexually abused her. As noted above, the Court of Appeals applied an

incorrect definition of evidence-based therapy. However, applying the correct definition of evidence-based therapy to Miller-Dupre's statement actually helped Counsel's trial strategy.

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

In *Briggs*, this Court advised:

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

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

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

Here, Counsel's strategy was to attack Minor's credibility and show that she had been coached. Counsel made coaching an issue when he asked Minor if she was trying to get answers from Mother while Minor was on the witness stand. App'x 185. Counsel questioning Minor if she was trying to get answers from Mother strategically opened the door to questions about coaching. Moreover, Miller-Dupre's testimony that she recommended Minor receive mental health treatment was capitalized on by Counsel as part of his trial strategy. Miller-Dupre testifying that Minor

received mental health treatment—evidence-based therapy—played into Counsel’s strategy and arguments.

Counsel argued that Minor was so confused by what actually happened and what her mother told her happened, she no longer knew what was the truth and what was a lie, or, as Counsel argued, “This entire case started on a lie. . . . [Minor] didn’t know the details because she had made it up. Her mother told her to. She’s sitting here looking over my shoulder at her mother the whole time she’s testifying. She didn’t say much at all. . . . She trusted her mama.” App’x 372–76. Counsel’s strategy was to show that Minor did not know what was the truth and what was a lie. Minor receiving mental health treatment plays into that strategy.

Accordingly, it was reasonable for Counsel not to object. Counsel was not deficient for failing to object to Miller-Dupre’s testimony because evidence-based therapy is a neutral statement that did not vouch for or improperly bolster Minor’s credibility, and Minor receiving mental health treatment helped Counsel’s trial strategy that Minor had been coached so much that she did no longer knew what was the truth.

**c. No prejudice resulted because the forensic interviewer never expressed an opinion regarding Minor’s credibility and she testified multiple times it was not her job to determine if Minor was telling the truth**

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

To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). “In assessing prejudice under *Strickland*, the question *is not* whether a court can be certain counsel’s performance had no effect on the outcome . . . .” *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). “Instead, *Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Id.* (quoting *Strickland*, 466 U.S. at 696). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

Here, Miller-Dupre’s testimony that Minor received therapy shown by scientific research to be effective at reducing mental health symptoms—evidence-based therapy—is a far-cry from the prejudicial improper bolstering testimony in *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018). In that case, the forensic interviewer testified the victim’s interview was “*among the most compelling interviews that I’ve conducted . . . .*” 423 S.C. at 242, 814 S.E.2d at 491. This Court found the interviewer’s testimony “unmistakably conveyed to the jury her belief that Victim was telling the truth about the abuse.” *Id.*

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

Crucially, Miller-Dupre testified twice it was not her job to determine whether Minor was telling the truth, and she made no determination of Minor's truthfulness. *State v. Barrett*, 416 S.C. 124, 132, 785 S.E.2d 387, 391 (Ct. App. 2016) (finding the trial court did not err in admitting the testimony of the forensic interviewer who interviewed the victim where she never directly or indirectly commented on the credibility of the victim's accounts of the alleged sexual assault; never addressed the veracity of the victim or opined whether the victim was being truthful; and where she stated on cross-examination that "children lie, she could not give a diagnosis, and she was '**certainly not a human lie detector**'") (emphasis added)); *See also State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (reversing the Court of Appeals' holding that the only reasonable inference the jury could have drawn from the forensic interviewer's testimony is that she believed the victim told the truth about being sexually assaulted and finding the testimony from forensic interviewer did not prejudice defendant because interviewer testified as to her personal observations and experiences, she did not vouch for the victim's veracity, and the *only opinion she gave was that victim needed a medical examination*) (emphasis added)).

First, Miller-Dupre testified, "It's not my job to determine whether the child is telling me the truth in the interview, but through this protocol and through these different questionnaires, I can determine if the child is definitely functioning at her age level." App'x 195. Second, on cross-examination, Miller-Dupre affirmed it was not her job to determine whether Minor was telling the truth or lying, and Miller-Dupre made no determination as to Minor's truthfulness. App'x 205. The Court of Appeals nonetheless found Miller-Dupre's statement prejudiced Elders because it "conveyed to the jury that she had 'evidence' to back up Minor's claim that [Elders] sexually abused her," and "was an uncontradicted direct comment on [Elders'] guilt by a forensic interviewer who was qualified as an expert by the trial court." *Elders*, at 3. The Court of Appeals

erred because it failed to consider that Miller-Dupre testified it was not her job to tell if Minor was telling the truth.

## CONCLUSION

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

Respectfully submitted,

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May 6, 2021

ATTORNEYS FOR PETITIONER

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO THE COURT OF APPEALS

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Appellate Case No. 2020-000891

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MICHAEL ELDERS

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

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**CERTIFICATE OF SERVICE**

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

**Taylor D. Gilliam, Esquire**  
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This 6<sup>th</sup> day of May, 2021.

s/LillianMeadows  
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