STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County
Honorable Edgar W. Dickson, Circuit Court Judge

RODNEY C. BRYAN,

Petitioner/Respondent,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent//Petitioner.

Appellate Case No. 2019-001887

RESPONDENT/PETITIONER'S BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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II.

No evidence was presented that Counsel conceded Petitioner's guilt to the thirty day offense of violating the order of protection, and to CDV as a lesser included offense of CDV-HAN over Petitioner's objection. Therefore, the holding of McCoy v. Louisiana, 138 S.Ct. 1500 (2018) is inapplicable to the present case.

III.

Probative evidence supports the PCR court's denial of relief on the claim that counsel was ineffective for not objecting to expert testimony on domestic violence on the basis that it was bolstering. The expert provided admissible testimony on the behaviors of victims of domestic abuse. Further, it was not improper for the expert to testify that Victim's behaviors were consistent with the behaviors of victims of domestic abuse. Finally, Petitioner was not prejudiced, especially given that Victim's two children were witnesses to the kidnapping and domestic violence and there was physical evidence to corroborate the existence of a physically abusive relationship.

STATEMENT OF THE CASE

Petitioner-Respondent Rodney C. Bryan (Bryan) was indicted for criminal domestic violence of a high and aggravated nature (CDVHAN), violating an order of protection, kidnapping, and two counts of spousal sexual assault. App. 807-08; 810-11; 813-14; 716-19. Robert "Theo" Williams, Sr., Esquire, represented Bryan. Assistant Solicitors Shawn Graham and Emily Howard prosecuted the case. App. p. 1.

The Honorable Judge R. Knox McMahon presided over Bryan's jury trial on July 14, 2008. App. 1. The jury convicted Bryan as indicted for CDVHAN, violation of order of protection, kidnapping, and one count of spousal sexual battery. The jury acquitted Bryan of the second count of spousal sexual battery. App. 434; 816-17. Judge McMahon sentenced Bryan to serve concurrent terms of imprisonment of ten years for spousal sexual battery, ten years for CDVHAN, thirty days for violating an order of protection, and twenty-five years for kidnapping. App. pp. 448-49; p. 809; p. 812; p. 815; p. 820.

Bryan appealed. Appellate Defender Robert Pachak submitted an Anders[1] brief arguing the following issue:

> Whether the trial court erred in ruling that two minor children of the victim could testify against [Bryan] without him being physically present in the courtroom?

App. p. 454. Also, Petitioner submitted a *pro se* brief to the Court of Appeals. This Court granted the appellate defender's motion to be relieved and dismissed the appeal. State v. Bryan, Op. No. 2010-UP-136 (S.C. Ct. App. filed Feb. 22, 2020). Bryan filed a *pro se* petition for rehearing. App. pp. 482-83. The State made its return to the petition for rehearing on April 5, 2010. App. pp. 484-95. This Court denied the petition for rehearing on April 23, 2010. App. pp. 497-98. Bryan petitioned the

South Carolina Supreme Court for a writ of certiorari to the Court of Appeals. App. pp. 499-511. The South Carolina Supreme Court denied the petition. App. pp. 513-14. The case was remitted back to the circuit court on May 28, 2010. App. 515. Bryan sought review in the United States Supreme Court (USSC). App p. 516. The USSC denied review on January 10, 2011. App. p. 569.

Petitioner filed a PCR application on February 17, 2011. App. pp. 570-83. The Honorable Edgar W. Dickson convened an evidentiary hearing on August 15, 2013 at which Petitioner appeared *pro se*. Assistant Attorney General J. Walt Whitmire represented the State. App. p. 610. Judge Dickson reconvened the evidentiary hearing upon the State's motion on November 13, 2014. App. p. 699. On February 2, 2018, Judge Dickson found Bryan was "entitled to a new appeal as a result of appellate counsel's deficient performance regarding [Bryan's] right to testify," but denied relief on all other grounds. App. pp. 741-53. The State timely moved to alter or amend pursuant to Rule 59(e), SCRE, on February 12, 2018. App. pp. 754-65. Without analysis, Judge Dickson denied the State's motion on October 19, 2019. App. pp. 804-05. On November 6, 2019, Bryan served his notice of appeal. The State served its notice of cross-appeal on November 13, 2019.

Both parties filed their respective petitions and returns to the other's petition for writ of certiorari. In addition, Bryan filed a Brief of Petitioner pursuant to White and the State in turn filed its Brief of Respondent pursuant to White. This Court, following transfer from the Supreme Court, granted the State's petition and granted Bryan's petition in part. The State files its Brief of Petitioner as the Respondent/Petitioner. Petitioner filed his Brief of Petitioner. The State's Brief of Respondent follows.

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

STATEMENT OF FACTS

On September 19, 2007, Victim's daughter (Daughter)[2] told her teacher (Mary Dooley) about some things that went on at their home. The next day, Dooley asked daughter how things were going. She then brought Daughter to the guidance counselor. App. pp. 107-08. The guidance counselor, Julie Gies, testified Daughter told her some things but then told Gies she was not supposed to talk about it. Gies next spoke with Victim's son (Son), who told Gies the same things about what happened at home. App. pp. 114-15. Gies did not interview the younger daughter. App. p. 116. Gies described the children as excited to be safe. App. pp. 118-19. Gies felt Victim may be in danger and she called Resource Officer Brian Setree. App. p. 115.

Daughter testified and confirmed she told Dooley that Petitioner gave Victim a black eye. She explained she told Dooley about what happened because "I was tired of Dad beating up Mama." App. pp. 124-25; p. 135. Daughter explained Petitioner hit Victim in the car. When they arrived home, Daughter noticed Petitioner on the side of the house with a pair of wire cutters. App. pp. 124-29. Victim put on a movie on the VCR to occupy the children. Daughter heard Victim crying, and she found Victim crying on the floor of the bathroom and Petitioner standing nearby looking angry with Victim. When Petitioner started hurting Victim in the living room, Daughter tried to call 911, but the phone did not work. Daughter went outside the house and saw the wires were cut. App. pp. 130-31. The next day, Petitioner and Victim were arguing. Petitioner was cursing at Victim. App. p. 134. Daughter attempted to go to the neighbors, but Petitioner and Victim stopped her. App. p. 149. Daughter recalled the next day Petitioner and Victim were arguing and cussing. App. p. 150.

Son, seven years' old, testified that while in the car, Petitioner slammed Victim, who was

driving, into the steering wheel. Petitioner started hitting Victim with a spatula "or something" when they got home. He heard them fighting in the back bedroom as well. App. pp. 157-58. Son confirmed the phone line was cut when they tried to call for help. App. p. 158. Son tried to run to the neighbors, but Petitioner caught him, picked him up and squeezed him hard. On Saturday night, Son saw Petitioner choking Victim. Victim was turning red. When Petitioner saw Son, he stopped choking Victim. Son surmised that Petitioner did not want to kill Victim in front of Son. App. pp. 158-61.

Deputy Shannon Lovell did a welfare check on Victim. Victim had a black eye and a swollen right hand, but Victim did not want to talk about her injuries. Deputy Lovell described Victim's demeanor as sad, but not talkative. Deputy Lowell told Victim to call her if she changed her mind and wanted to talk with them. App. pp. 180-82.

Resource Officer Brian Setree, who ordered the welfare check for Victim testified an outstanding order of protection prohibited Petitioner from being in the home with Victim or the children. Officer Setree took the children into emergency custody. App. pp. 198-202. Officer Setree noted the phone line outside the house looked like it was cut and then was repaired. App. p. 204.

Victim was married to Petitioner for ten and half years. They have four children – three in common. They live on eight acres of land and the neighbor's house is not visible from the front porch. App. pp. 230-31. On March 5, 2007, Victim was granted an order of protection against Petitioner. However, Petitioner still came by the house and called Victim a lot. Victim did not call the police because if Petitioner came over and she told him she was calling the police, Petitioner

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[2] Daughter was ten years old when she testified. She has an eighteen year old sister who was not involved in the incident, a seven year old brother (Son) who testified at trial, and a five year old

would just leave. App. p. 232. She eventually let him move back in when he said he did not have a place to stay. App. p. 233.

On September 14, 2007, Petitioner woke Victim up and wanted Victim to take Petitioner to Gaston. During the car ride, Petitioner yelled at Victim and accused her of wanting to get rid of him and that she was sleeping with people. At one point, Petitioner threatened to push Victim out of the car and she crawled in the back seat to be away from him. They reached the job site in Gaston, Petitioner got out of the car, and Victim drove the car home. App. pp. 234-35.

Later, she picked Petitioner up from work, Victim was driving and Petitioner was in the passenger seat. They picked up the children from daycare. Victim was looking at Petitioner's phone while he fetched one of the children, which made him mad when he caught her. While in the car with the children, Petitioner berated Victim, accusing her of sleeping with people. Petitioner screamed at Victim and called her bad names – a whore and a slut. Victim hit Petitioner to try and stop him from saying those things in front of the children. Petitioner slammed Victim into the steering wheel. Victim felt woozy and stopped the vehicle for a bit, but Petitioner insisted she continue to drive home, and Victim did. App. pp. 236-37. It appears that Petitioner pled guilty to Criminal Domestic Violence for this conduct prior to trial. App. pp. 76-90.

Petitioner took Victim's keys while Victim tried to quickly herd the children inside. Once inside the house, Son tried to use the phone inside but there was no dial tone. Victim tried to hide in the bathroom but Petitioner came in screaming at her, pulling her hair, and choking her. Victim heard the door open and the children leaving. Petitioner went after them and returned carrying Son under his arm. Petitioner told the children to stay "in the damn house." App. pp. 235-40.

Petitioner later took the phone out and put it in a trunk. He made her move from the couch

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sister who was present in the house that weekend, but did not testify at trial. App. p. 123.

into the bedroom so Victim could not get away. That night, Petitioner made Victim have intercourse with him even though she did not want to. Petitioner held her hands down. App. pp. 241-45.

The next day, Petitioner was outside on the phone a lot. He would come inside and start yelling at her and calling her names. Victim explained she did not go for help that day "because I was kind of beat up, . . . I was just kind of just making it through the day, you know, moment to moment." Victim and the children asked Petitioner to leave. Later, Petitioner pretended to be speaking with the police on the phone and telling them he was going to hurt Victim, they needed to come get him. App. pp. 245-48 (direct quote p. 246, lines 1-5). Victim attempted to leave when she thought Petitioner went in the shower. However, he caught her before she could get away. He made her go the couch where he threatened her with a knife and choked her. Petitioner told her he would bury her in the yard. Son came in the room while Petitioner was choking Victim. Petitioner stopped then and Victim tried to catch her breath. App. pp. 249-52.

Petitioner picked Victim up by the hair and directed her to the bedroom. Petitioner told Victim he owned her, he paid for her, and that he would always own her. He told her to put on lingerie. App. pp. 253-54. Petitioner demanded oral sex from Victim, but she refused. Instead, Petitioner pushed Victim down on the bed and had intercourse with her. She did not fight Petitioner, she testified, "It was like I wasn't really even there at that point." She explained, "It was like it was happening to somebody else . . . ." App. p. 256, lines 11-19. Petitioner made her staye that night in the bed, between the wall and Petitioner so she could not leave without him knowing. App. pp. 255-56.

Victim explained she did not know if he left on Sunday or not. She did not recall much else other than sitting on the couch all day. She testified she was in a dream like state by then. Victim testified it did not matter if Petitioner had left because she already gave up. She realized if she left,

Petitioner would just get madder when he found out. App. p. 257. Nothing happened during the week until her daughter reported the abuse on Thursday. Victim testified she was just trying to make things better during that time. Petitioner said he was going to Charleston the next weekend. When a deputy showed up at the house, she did not tell the deputy what happened. App. pp. 259-60. Victim explained, "I thought there was no point to it. I thought even if he's arrested, he'd be out in a very short time, and he'd be madder that I – that I turned him in, that I told on him." App. p. 260, lines 4-7.

However, her children were taken from her and Petitioner was arrested. Victim went to her mother in law's house and spoke with Petitioner on the phone. Petitioner pressed Victim to tell law enforcement that nothing happened, that daughter was "retarded," and that it was all a lie. App. pp. 260-61. When Victim picked up the vehicle from the police compound, she found Petitioner's cell phone was in the car. She gave it to Deputy Setree. App. pp. 261-63. Exhibit 8, a video found on the cell phone, was played for the jury. App. p. 298.[3]

During cross-examination, when asked about a particular incident, Victim testified she did not remember it, and explained, "Those days were very blurry for me." App. p. 304, lines 21-24. Counsel asked if there were times Victim did not remember things "a lot." Victim answered, "When I'm hit in the head a lot, yeah." App. p. 307, lines 22-24.

She agreed it would have been common sense to leave the house and go to the neighbors during the weekend, but she explained she was too scared of Petitioner. App. p. 305. She later explained that when she did try and leave Saturday evening, Petitioner beat her severely and raped

[3] Counsel recalled this video as very damaging to Petitioner's case. The video shows Victim as Petitioner asks her what she wants. Victim says she wants Petitioner to stop hitting her. Counsel felt that it would be hard for a jury to let Petitioner "walk out the door" when seeing the video. App. p. 674; p.676.

her. Petitioner told her not to leave. Victim explained she could not leave because of Petitioner's intimidation. App. pp. 323-24. Victim admitted she deleted naked pictures of herself from Petitioner's cell phone before she gave it to Deputy Seetree. She told Deputy Seetree about deleting the pictures when she gave the phone to him. Victim knew about some of the pictures on the phone, but Petitioner took some of the pictures without her knowledge. App. pp. 314-16. Petitioner explained her decision to finally cooperate with the police, "I felt safe enough to do it. I thought he might be gone for a while, and he wouldn't just come back, you know. . . . I just didn't want to be hit anymore." App. p. 341, line 24 – p. 342, line 4.

Dr. Ross testified next for the prosecution. Her testimony is discussed more thoroughly in the third issue. She defined domestic violence, and in part, described it as "the blazen destruction of personhood." App. p. 347.

STANDARD OF REVIEW

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40.

ARGUMENT

I.

The PCR court does not have the authority to grant a second or supplemental direct appeal and the issue that the PCR court directed this Court to review is not preserved for review.

As discussed in more detail in the State's Brief of Petitioner, the PCR court lacked authority to "grant" a "belated appeal" and lacked authority to direct this Court to address a particular direct appeal issue because Petitioner already enjoyed his right to appeal when the appellate defender submitted an Anders brief. Therefore, this Court lacks appellate jurisdiction to conduct a supplemental direct review of Petitioner's convictions and sentences.

The procedure developed from White v. State was created to provide a remedy when a defendant's waiver of the right to an appeal did not occur freely and voluntarily. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the instant case, Bryan did not waive direct review but actually enjoyed a direct appeal. In White, the PCR court determined White did not freely and voluntarily waive the right to appeal his guilty plea convictions. The PCR court then attempted to secure a belated appeal, but the Supreme Court noted: "We know of no authority for the hearing judge granting defendant a full right of appeal and he cites none." Id. at 118-19, 208 S.E.2d at 39. The Court further noted, "it is well settled that in the absence of a notice of appeal having been given and timely served this Court has no jurisdiction over such an appeal." Id. at 119, 208 S.E.2d at 39 (citation omitted). The Court ultimately determined the trial record failed to reflect any meritorious ground for appeal and affirmed the denial of a new trial. Id.

In Poston v. State, 339 S.C. 37, 39, 528 S.E.2d 422, 423-24 (2000), the Supreme Court found the PCR court erred by granting a belated appeal on the basis that Poston did not waive his right for

counsel to petition for a writ of certiorari after his convictions were affirmed by this Court. The Supreme Court explained:

> The cases of White v. State, supra, and Davis v. State, supra, upon which the PCR judge relied in granting petitioner/respondent relief, deal with waiver of the right to direct appeal, or a first appeal of right. Those cases are not applicable here because a petition for writ of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which petitioner/respondent is entitled as a matter of right. Rule 226(b), SCACR. Since petitioner/respondent had no right to a discretionary appeal, the PCR judge erred in addressing the issue of waiver after finding appellate counsel was not ineffective.

Id. at 39-40, 528 S.E.2d at 424.

In the instant case, the term "belated appeal" is a misnomer. The PCR court ordered what is essentially a second or supplemental appeal, because Bryan already enjoyed a first appeal of right, and a defendant does not have a right to a second or supplemental appeal any more than a defendant is entitled as a matter of right to a discretionary appeal.

The appealability of an order may be raised at any time. Levi v. Northern Anderson County EMS, 409 S.C. 374, 379, 762 S.E.2d 44, 47 (Ct. App. 2014). "South Carolina . . . has made clear appellate jurisdiction can be raised by appellate courts even if none of the parties have raised it." Id. at 380, 762 S.E.2d at 47.

In Levi, a workers' compensation case, the employer appealed the single commissioner's denial of the employer's motion to dismiss to the Appellate Panel. The Appellate Panel reversed the single commissioner's order and dismissed Levi's claims. Levi then appealed to this Court and raised the issue of whether the single commissioner's order was immediately appealable. Even though Levi never raised appealability to the Appellate Panel, this Court found it could address the issue "because appealability may be raised at any point." Id. at 380, 762 S.E.2d at 47.

The appropriate remedy for ineffective assistance of appellate counsel is a new trial. See Ezell v. State, 345 S.C. 312, 315-16, 548 S.E.2d 852, 854 (2001) (stating the appropriate remedy for ineffective assistance of appellate counsel is a new trial). Relief pursuant to White v. State is "limited to situations where the PCR applicant did not knowingly and intelligently waive his right to a direct appeal." Douglas v. State, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006); see also Legge v. State, 349 S.C. 222, 224 n.1, 562 S.E.2d 618, 619 n.1 (2002) (noting the PCR court's grant of a belated appeal pursuant to White v. State due to ineffective assistance of appellate counsel was in error because White is inapplicable to cases where the applicant was not denied his right to a direct appeal).

There is no question Bryan received a direct appeal in this case. Accordingly, the PCR court erred in "granting" a belated appeal pursuant to White v. State because Bryan already had a direct appeal of his conviction and the PCR court lacked authority to order a supplemental appeal.

The issue is not preserved for review

Further, if this Court were to engage in direct review as opposed to PCR analysis, by no stretch of the imagination is the issue preserved for review because the issue was conceded by trial counsel. Trial counsel represented to the trial court that he fully discussed the right to testify with Bryan. At the conclusion of the State's case, the following colloquy occurred:

> Court: All right. Mr. Williams, do – do I need to interview Mr. Bryan with regard to his right to testify or not testify?
>
> (Sotto voce discussion between Mr. Williams and the defendant.)
>
> Mr. Williams: Your Honor, you do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying.
>
> Court: All right. With that being said the, and your advising the Court I do not need to interview him, I – I will not do so. Again, I am

> sure you've explained it to him fully and completely, and if you need any more time to discuss that with him, you certainly may have that, Mr. Williams.
>
> Mr. Williams: You Honor, I think we're okay on this.
>
> Court: All right.

App. p. 373, line 25 – p. 374, line 15. Therefore, counsel conceded and represented that Bryan understood his right to testify and that Bryan was freely and voluntarily waiving his right to testify.

As noted above, the trial court asked trial counsel if it should advise Bryan of his right to testify at trial. "A defendant's knowing and voluntary waiver of . . . constitutional rights . . . 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.'" Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999). Trial counsel not only did not object to the lack of questioning of his client, he informed the trial court, "[Y]ou do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying." The trial court clarified that trial counsel was advising the court it did not need to interview Bryan. Trial counsel stated the trial court did not to discuss the issue with Petitioner. App. pp. 373-74.

The waiver issue was not preserved for appeal as there was no objection to the trial court failing to advise Bryan of his right to testify at trial. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011) ("A litigant cannot concede an issue at trial and then raise it on appeal."); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial, but then complain on appeal); Thomas v Dootson, 377 S.C. 293, 296,

659 S.E.2d 253, 254 (Ct. App. 2008) (finding "Dr. Dootson is bound by his concessions" after issue was conceded during opening argument and during trial); State v. Brannon, 347 S.C. 85, 89, 552 S.E.2d 773, 775 (Ct. App. 2001) (finding search issue as to co-appellant Mayberry not preserved since Mayberry conceded at trial he had no standing to contest admission of evidence).

The basis of this second-swing direct review as contemplated by the PCR court is rooted in the PCR court's finding that appellate counsel was ineffective for failing to raise this issue on appeal. The quick answer is it was transparently reasonable for appellate counsel not to argue the unpreserved issue, because as directed in Dunbar, "An issue that was not preserved for review should not be addressed . . . ." 356 S.C. at 142, 587 S.E.2d at 694. Further, this Court has held appellate counsel is not ineffective for failing to raise an issue that was not preserved. See Legge, 349 S.C. at 225, 562 S.E.2d at 620 (finding appellate counsel not ineffective for failing to raise an unpreserved issue).

Petitioner relies on State v. Rivera, 402 S.C. 225, 239-40, 741 S.E.2d 694, 701-02 (2013) because in Rivera, the Supreme Court reviewed the issue of waiver of the right to testify even though defense counsel did not pose an objection to Rivera not being allowed to testify. See Br. of App. p. 7, fn 3. However, Petitioner leaves out virtually all of the unusual facts in that case. Rivera wished to testify, which he made clear to the trial judge; however his attorneys felt it was damaging to his case and advised the trial judge they would not call him to the stand. The trial judge initially planned to call Rivera to the stand as a Court's witness, but when Rivera declined to reveal his testimony in camera, the trial judge refused to allow him to testify. Through his guardian ad litem, Rivera posed an objection. The Supreme Court found that Petitioner was denied his right to testify in his own defense, finding it was not the defense attorneys' or the trial judge's decision to decide if Rivera should testify – it was Rivera's. Id. at 243-44, 741 S.E.2d at 703-04. In the instant case,

there is no indication in the trial record that Petitioner wished to testify. The record reflects an off record discussion between Petitioner and Counsel right before Counsel indicated that on record colloquy with the trial court was unnecessary. Rivera does not apply.

Troubling is that the PCR court shifted the burden of proof to the State in concluding, "The State produced no evidence as to why the issue was not addressed." App. 751. It is well settled that a PCR applicant bears the burden of proving both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984) ("First, the [applicant] must show that counsel's performance was deficient. . . . Second, the [applicant] must show that the deficient performance prejudiced the defense."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application."); Rule 71.1, SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

It was Bryan's burden to overcome the high bar of Strickland, not the State's burden of showing appellate counsel was not ineffective for not raising the weak issue. See Strickland, 466 U.S. at 669 ("Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").

Wholly absent from the PCR court's analysis is any Strickland analysis including an explanation as to why the issue would be meritorious, or analysis as to whether a reasonable likelihood for success existed if the issue was raised on direct appeal. Appellate counsel appointed

to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983); United States v. Mason, 774 F.3d 824, 828-29 (4th Cir. 2014) ("Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit." (citation and internal quotation marks omitted)). Appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). "We likewise **presume** that appellate counsel decided which issues were most likely to afford relief on appeal." Mason, 774 F.3d at 828 (emphasis added, citation and internal quotation marks omitted).

"[I]t is still possible to bring a [claim of ineffective assistance of counsel] based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259 (2000) (favorably quoting the following observation in Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985): "Generally, only when ignored issues are **clearly stronger** than those presented will the presumption of effective assistance of counsel be overcome" (emphasis added)). In the instant case, the issue is patently not preserved for review and lacking merit to suggest the possibility of reversible error.

Petitioner bore the burden to prove there was no reasonable explanation for why appellate counsel did not brief the waiver issue. However, at the PCR hearing, Petitioner never said his appellate counsel should have raised the issue. Petitioner did expressly raise other claims that his appellate counsel was ineffective. App. p. 631; p. 635; p. 732. Petitioner also complained he wanted to testify at trial. App. pp. 639-40. Trial counsel testified it was Petitioner's decision not to testify although trial counsel agreed with Petitioner's decision to not testify. App. pp. 700-01. In his pleadings, Petitioner complained it was his trial attorney's fault he did not testify. App. p. 580. The

issue was clearly expressed in the pleadings as trial attorney error, not as an omission by appellate counsel. When stating his claim during what was his pro se testimony at the PCR hearing, Petitioner stated the issue as ineffective assistance of counsel and structural error, not as ineffective assistance of appellate counsel. Petitioner told the PCR court, "And I'm challenging it both, Your Honor, as ineffective assistance of counsel and under the constitutional structural error." App. p. 642, lines 19-21. The issue of his waiver of the right to testify was not raised as ineffective assistance of appellate counsel, and Petitioner presented no evidence or even claim the issue should have been raised by appellate counsel on appeal. Accordingly, probative evidence does not support a finding that appellate counsel was ineffective, although note this issue should be reviewed de novo due to extensive errors of law discussed above.

II.

No evidence was presented that Counsel conceded Petitioner's guilt to the thirty day offense of violating the order of protection, and to CDV as a lesser included offense of CDV-HAN over Petitioner's objection. Therefore, the holding of McCoy v. Louisiana, 138 S.Ct. 1500 (2018) is inapplicable to the present case.

Petitioner complains on appeal that counsel violated his autonomy by conceding guilt during closing arguments, violating McCoy v. Louisiana, 138 S.Ct. 1500 (2018). McCoy is inapplicable because the records does not reflect that Petitioner protested counsel's strategic decision to concede guilt on two charges – each carrying thirty days imprisonment – as part of a strategy to challenge guilt to the more serious offenses Petitioner faced. Instead, Petitioner conceded guilt to at least one of these charges during sentencing.

How the issue arose.

During Petitioner's pro se direct testimony at the PCR hearing, Petitioner stated his claim with the following colloquy:

> Court: Okay. Go ahead now. What's next?
>
> Petitioner: Conceding guilt. In closing, [trial counsel] told the jury I was guilty three times.
>
> * * *
>
> Petitioner: Three times he stated I was guilty. I can't find my notes on that issue.
>
> Court: That's okay. I'm going to read the transcript, so I'll find out then, okay?
>
> Petitioner: Okay. It was three times. And not once did he say that I was not guilty, but yet three times he said I was guilty. And then on the third one, he said – he did say, "He's not guilty of kidnapping unless you call kidnapping holding somebody against their will, which is exactly what the statute is."

App. p. 658, line 15 – p. 659, line 13. Petitioner did not return to the claim or present any evidence on the matter.

Closing argument and Petitioner's statements at the end of trial.

Counsel challenged Victim's credibility to the jury, arguing Victim had a selective memory and that children are easily influenced. App. pp. 395-96. Counsel then argued Victim's motive was to get her children back, arguing:

> . . . I would suggest to you that her motive was to get her children back. It doesn't mean that he didn't hit her, I'll tell you that. Doesn't mean that.
>
> But it does mean that's what her motive was. Because I think it's fairly evident that he did hit her. But when you're dealing with these charges, these criminal charges, because when you hit someone, it doesn't make you guilty of two counts of sexual battery. It doesn't make you guilty of kidnapping. It doesn't make you guilty of violation of an order of protection. It doesn't make you guilty of CDVHAN. It may make you guilty of an order of protection, and it may make you guilty of a criminal domestic violence, or a simple CDV.[4]

App. p. 400, line 13 – p. 401, line 2.

Counsel used the order of protection to argue against the other charges:

> And number two, remember, she had the order of protection. She said that, "I wasn't worried about anything, because I've got this order of protection, and I know that he will do the right thing."
>
> All she's got to do is pick up the phone. And you see, that's where this case falls apart. . . .

App p. 402, lines 5-9.

Counsel returned to the prior theme: "You're not evaluating my client saying that he shouldn't hit his wife, and his wife shouldn't hit him. You're making a determination whether or not

[4] At the time of the offense, CDV carried a maximum sentence of thirty days imprisonment. S.C. Code Ann. § 16-25-20 (Supp. 2006).

he committed sexual battery, and whether or not he committed kidnapping." App. p. 404, lines 14-17. Wrapping up his closing argument, counsel told the jury:

> Now, I will tell you right now – I'm going to save you some trouble. You're not even going to have to make a decision on this. He's guilty of violation of the order of protection. Why is he guilty? Because there is an order of protection. Now, he may say that he didn't get a copy of it, because as you'll see there are no initials that shows he got a copy of it. Well, he should have known. You know, he should have known. He was paying support, and he should have known.
>
> I'll tell you what else he's guilty of. He's guilt of CDV. He hit his wife. Now, if you think back about what those children said before all the police got involved, all the DSS workers, all of these other people involved in this case, all they ever talked about was a black eye and a fight. Remember what Ms. Gies said.
>
> So find him guilty of CDV. But there is absolutely no evidence, obviously, that any of the children saw any of this sexual battery or not. Matter of fact, if you believe what she said, she said that she never said anything.

App. p. 406, line 11 – p. 407, line 5.

Counsel then argued that if the jury was looking for evidence in this case, there was evidence of a violation of CDV and evidence of a violation of an order of protection – the clear implication that the evidence was insufficient for the other, more serious charges. App. p. 407, lines 8-15.

Sentencing: During which Petitioner admitted he knew about the order of protection and that he hit his wife.

During sentencing, Petitioner apologized for "the inconvenience" of being "wrapped up into this drama between a dysfunctional family." Petitioner took responsibility as "the head of the family." App. p. 444, lines 1-8.

Petitioner averred, "I would like to say, yes, . . . I was aware of that order of protection." App. p. 444, lines 7-8. Petitioner also admitted, "I had made wrong decisions; **I admitted to striking my wife."** App. p. 444, lies 12-15.

Thereafter, Petitioner admitted, "Sir, when we got to that – when we got back to the house, I didn't disconnect the phone, but I did get the phone. She had the keys." App. p. 444, lines 22-24. This led to Petitioner admitting he kept the phone because he did not want Victim to call the police **because Victim had the order of protection and Petitioner did not want to go back to jail.** He claimed Victim gave him the car key. He graciously went to the store to buy what the family needed, since Victim did not have the car he was driving. App. p. 445, lines 2-16.

Petitioner then lamented: "She manipulated the system, and I – I don't want to get into all the details. I know the case has been tried; I'm not trying to retry it. But I'm just trying to say it's not everything that appears to be." App. p. 445, lines 17-20. He then talked about men not reporting domestic violence and complained his children were victims because they "witnessed her violence." Petitioner claimed his children helped her beat him. App. p. 446.

This led to Petitioner explaining, "But this last time I came back, I told her there'd be no more hitting me. **And yes, I did. I did hit her, Your Honor, and I apologize.**" App. p. 447, lines 1-3. **Petitioner admitted causing the black eye,** although he blamed Victim for "staging" the event. App. p. 447, lines 3-7.

Petitioner's reliance on McCoy is misplaced

Petitioner relies on an overly broad reading of McCoy v. Louisiana, 138 S.Ct. 1500 (2018) that has been rejected by several courts interpreting the holding of McCoy. In that case, facing overwhelming evidence that McCoy was guilty of triple homicide, defense counsel wanted to pursue a strategy that conceded guilt during the guilt phase and then challenged the application of the death penalty during the penalty phase. During defense counsel's representation and in open court, McCoy insisted on his innocence and objected to his counsel conceding guilt. Nonetheless, Counsel

conceded guilt during arguments at the guilt phase, explaining the evidence was "unambiguous" that McCoy "committed three murders." Id. at 1506-07.

McCoy held that when a defendant expressly asserts to counsel that the objective of his defense is to assert his innocence of the charges he is facing, "his lawyer must abide by that objective and may not override it by conceding guilt." Id. at 1509. McCoy "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505. The United States Supreme Court found that like the decision as to whether to plead guilty, waive the right to trial, or forgo an appeal, a defendant also has the autonomy to decide that the objective of his defense is to assert his innocence. Based on his attorney's concession of guilt over McCoy's objection, the McCoy court found that defense counsel violated McCoy's "[a]utonomy to decide that the objective of his defense was to assert his innocence." Id. at 1508.

Notably, the McCoy court explicitly distinguished the facts from Florida v. Nixon, 543 U.S. 175, 186 (2004) in which defense counsel explained his concession strategy to Nixon several times and Nixon did not respond favorably or unfavorably. McCoy, 138 S.Ct. at 1509-10. In the instant case, Petitioner failed to present any evidence he was unaware or surprised by counsel's strategy. Petitioner seemingly adopted counsel's strategy during sentencing, hoping to mitigate by admitting to violating the order and hitting his wife.

In the present case, no evidence was presented at the PCR hearing that Petitioner objected to trial counsel conceding guilt for violating the order of protection or conceding guilt to CDV as a lesser included offense to CDV-HAN. In Harvey v. State, 318 So.3d 1238, 1239 (Fla. 2021), the Florida Supreme Court found McCoy did not apply when Harvey complained his counsel conceded guilt to first degree murder without giving notice to Harvey or giving Harvey the opportunity to object. The Florida Supreme Court noted its earlier decision in Atwater v. State, 300 So.3d 589 (Fla.

2020) which found McCoy does not apply in cases in which the defendant does not expressly object to defense counsel conceding guilt. Harvey, 318 So.3d at 1239. The Florida Supreme Court then explained, "Harvey's claim is not a McCoy claim because Harvey does not allege that trial counsel conceded guilt over Harvey's express objection. Rather, Harvey simply alleges that trial counsel failed to consult with him in advance." Id. at 1240.

In People v. Lopez, 31 Cal.App.5th 55 (2019), defense counsel conceded Lopez's guilt to the charge of hit and run and challenged the intent element for the murder charge in the traffic death of a motorcycle rider. Lopez, who admitted drinking a substantial amount of alcohol, turned left into the motorcyclist as he drove through an intersection. The California Court of Appeals observed Lopez did not present any evidence Lopez objected to defense counsel's decision to concede guilt on the hit and run charge. The court concluded, "In sum, we have found no authority, nor has appellant cited any, allowing the extension of McCoy's holding to a situation where a defendant does not expressly disagree with a decision relating to the right to control his defense." Id. at 66.

In Commonwealth v. Alemany, 174 N.E.3d 649 (Mass. Sup. Jud. Ct. 2021), the reviewing court found the trial court did not err in rejecting the defendant's claim that his attorney pursued an insanity defense against his wishes. The case featured competing affidavits in which the trial attorneys attested they explained the insanity defense to the defendant and the defendant agreed with presenting the defense. Id. at 667. The reviewing court noted, "The defendant had numerous opportunities before and during the trial when he could have raised his concerns with defense counsel or the judge." Id. at 668. The court also noted that the case differed from McCoy because in McCoy, defense counsel did not present a defense for the guilt phase while in Alemany, an insanity defense was presented. Id. The reviewing court found the trial judge did not err in finding the defendant failed to make an adequate showing warranting an evidentiary hearing.

The present case does not present a McCoy claim. Not only did Petitioner fail to show he expressly objected to counsel's strategy of conceding guilt to a charge and guilt to a lesser included offense of another charge, but he failed to show that he was not aware of the strategy which admitted guilt to the thirty-day offenses and challenged guilt on the serious charges carrying far longer terms of imprisonment. All the record shows is that in hindsight, Petitioner did not like counsel's strategy. Moreover, during sentencing, Petitioner conceded he violated the order and he admitted hitting his wife. While it may not be clear as to whether he only admitted to hitting his wife for the charge for which he previously pled guilty, Petitioner further admitted taking her phone because he did not want to go back to jail. Absent from the sentencing proceeding is any indication that Petitioner disagreed with counsel conceding Petitioner's guilt to the lesser offenses as a tactical move. Instead, Petitioner admitted guilt during sentencing in an effort to build credibility before his segue-way into showing he was a victim and suggesting Victim manipulated the situation.

Because Petitioner presented no evidence he expressly objected to counsel's strategy, Petitioner failed to meet his burden of proving the McCoy claim, had that been his actual complaint.

III.

Probative evidence supports the PCR court's denial of relief on the claim that counsel was ineffective for not objecting to expert testimony on domestic violence on the basis that it was bolstering. The expert provided admissible testimony on the behaviors of victims of domestic abuse. Further, it was not improper for the expert to testify that Victim's behaviors were consistent with the behaviors of victims of domestic abuse. Finally, Petitioner was not prejudiced, especially given that Victim's two children were witnesses to the kidnapping and domestic violence and there was physical evidence to corroborate the existence of a physically abusive relationship.

Petitioner contends counsel was ineffective for failing to object to Dr. Ross's expert testimony on the behaviors of victims of domestic violence. This is proper behavioral testimony. Petitioner also contends that Dr. Ross's testimony that Victim's behavior was not inconsistent with the behaviors of victims of domestic violence was also not improper under the holdings of State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) and State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993).

Dr. Ross's testimony

Dr. Ross testified she has both her Masters and Doctorate degrees in Social Work from Tulane University. She is certified by the Academy of Social Workers, a national certification. She is licensed to practice independently in South Carolina. App. p. 343, lines 6-11. Dr. Ross has thirty-three years' experience as a social work practitioner, educator, and consultant. She received additional training in family violence from "probably . . . the best-known people in the country." App. p. 343, lines 15-23. She is the director of Sistercare which works with battered women and children in the five-county area. App. p. 343, line 20 – 344, line 3. Dr. Ross designs training curriculum and has trained judges, attorneys, health care professionals, and human resource managers. App. p. 344, lines 10-15. Dr. Ross teaches a course at USC Medical School on

identifying patients of domestic violence. App. p. 344, lines 20-23. Dr. Ross estimated she has seen close to 2,000 women who were victims of domestic violence in the past twenty years at Sistercare. App. pp. 344-45.

Dr. Ross explained:

> Domestic violence is a system of many abusive behaviors, which includes physical, psychological, sexual, and economic abuse. It's very critical to understand that domestic violence is about power and control exerted over an individual; and it includes inducing physical harm, fear, and dependency, and making a person and/or forcing or preventing them from doing something that they do not wish to do.

App. p. 346, line 23 – p. 347, line 5. Domestic violence will start out psychologically, by the abuser manipulating the victim's thoughts and perceptions, by berating and demeaning the victim, humiliating her and embarrassing her in front of others. The abuser will cause the victim to not believe in herself and will destroy her personhood. App. p. 347, lines 16-21.

Sexual abuse is part of the abuser exerting power and control. This may include:

> [F]orcing a person to to do something against her will, forcing her to engage in sexual acts that . . . make her feel uncomfortable, calling her sexual names, making her dress in sexually provocative ways, taking pictures of her in various sexual ways that she does not feel comfortable with.

App. p. 348, lines 8-14.

The economic factor comes into play where the abuse withholds money from the victim. The victim may not be allowed to work outside the home or the abuser may take her paycheck. The victim may be given an allowance. This puts her in a childlike dependent role and makes it more difficult for her to leave. App. p. 348, lines17-25.

Dr. Ross explained it is difficult for the victim of domestic abuse to leave. The psychological abuse "is the glue that keeps the woman in the relationship. She is traumatized to the point where

she feels that leaving is not an option to her." App. p. 349, line 23- p. 350, line 2. "[S]he bonds with the abuser because she knows at some point, the abuser will decide if she lives or she dies." App. p. 350, lines 2-5. Even during periods where the abuser realizes she should leave, she will be too scared, "literally frozen in fear." App. p. 350, lines 6-10. Leaving is extremely dangerous, the National Institute of Justice advises there is a 75% chance the victim will be killed when the victim attempts to leave. App. p. 350, lines 21-23. The victim also knows calling the police may result in the abuse becoming more severe. Dr. Ross lamented, "[I]n most cases it will." App. p. 351, lines 3-7. If the victim has children, leaving the abuser becomes even more difficult. App. p. 352.

If law enforcement approaches, the victim may not be cooperative because she has been traumatized and she has bonded with the abuser. She may be protective of the abuser and be dependent on the abuser. App. p. 351, line 18 – p. 352, line 4.

Dr. Ross explained that when victims are berated, demeaned, and isolated; they will – with the accumulation of negative messaging – believe they are not worth anything. In this hostage-like situation, "any type of what we would normally think of as being a common-sense decision to make, that's not a possibility to her." App. p. 353, lines 16-25. Dr. Ross further explained for a victim of domestic abuse, "She's on survival mode. She's just going through the day-to-day motions. She doesn't even remember. She knows enough to look out for her children, but it's – it's like a dream." App. p. 354, lines 3-7. When asked by the prosecutor if Victim's ability to remember or not remember was consistent or inconsistent for a victim of domestic abuse, Dr. Ross explained it was "very consistent." Dr. Ross was concerned that testifying re-traumatized Victim. App. p. 354, lines 18-25.

Dr. Ross testified that Victim's actions in trying to leave during the weekend, Victim's failure to call the police, and Victim's refusal to talk to the police were consistent with a victim of

domestic violence. App. p. 355. Dr. Ross also testified that Victim's delay in cooperating with law enforcement, until Petitioner was arrested, was consistent. Dr. Ross explained:

> That's very consistent. That's part of post-traumatic stress response. After the external threat is removed, then what happens, the autonomic neuro-system – it starts slowing down, and it kind of opens the brain up to start thinking about options. She knows she's safe. She starts remembering to the point where she can make some healthy decisions about herself and her children.

App. p. 356, lines 5-12.

Dr. Ross provided proper behavioral testimony

The Supreme Court of Hawaii observed in 1990 that "sexual abuse of children 'is a particularly mysterious phenomenon.'" State v. Batangan, 799 P.2d 48, 51 (Haw. 1990) (quoting State v. Castro, 756 P.2d 1033, 1044 (Haw. 1988)). The Hawaii Supreme Court quoted with approval the observations of other courts as follows:

> While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. . . . **[T]he routine indicia of witness credibility – consistency, willingness to aid the prosecution, straight forward rendition of the facts – may, for good reason, be lacking.** As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Batangan, 799 P.2d at 51 (quoting State v. Moran, 728 P.2d 248, 251 (Ariz. 1986) and State v. Middleton, 657 P.2d 1215, 1222 (Or. 1983) (Roberts, J., concurring)) (emphasis added).

An intermediate court in Hawaii, relying on the rational of Batangan, found expert testimony on domestic violence was admissible under Batangan's rational. State v. Cababag, 850 P.2d 716 (HI Intermediate Ct. of App. 1993). The expert testified about common occurrences for a battered woman, including minimization by the victim of the abuse, victims' ambivalence, self-blame, and

recantation. Id. at 719-20. The reviewing court found the testimony in that case probative as the victim recanted her testimony. The court also held: "This evidence of the battered housemate/spouse syndrome was relevant specialized knowledge that was unknown to the average juror and aided the jury in determining the credibility of the woman's testimony." Id. at 722.

In People v. Coons, 495 P.3d 961, 967-68 (Colo. 2021), the Colorado Supreme Court found testimony from an expert in domestic violence was relevant, including the expert's testimony on the "Power and Control Wheel" which bears similarity to Dr. Ross's testimony about the components of domestic abuse in the present case. The expert testified:

> [T]he eight different spokes of the Power and Control Wheel represent non-physical forms of abuse through which power and control are typically exerted in an intimate relationship: (1) coercion and threats; (2) intimidation; (3) emotional abuse; (4) isolation; (5) making light of the abuse, denying it happened and blaming the victim for it; (6) using children; (7) male privilege; and (8) economic abuse.

Id. The Power and Control diagram was reproduced in the text of the Court's opinion. Id.

As for South Carolina, this Court has allowed expert testimony on battered wife syndrome to support self-defense. See State v. Grubbs, 353 S.C. 374, 380, 577 S.E.2d 493, 496 (Ct. App. 2003) (discussing cases allowing battered wife syndrome evidence in support of a claim of self-defense).

In the instant case, Appellant conflates the proper evidentiary purpose of Dr. Ross's testimony, such as testimony on the role of power and control in domestic violence, with unfair prejudice. When the prosecutor refers to Dr. Ross's proper testimony and the application of the testimony to the facts of the case, this is not improper argument and it is not supportive of Appellant's necessary showing of prejudice.

"'Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and

the inference to be drawn is not beyond the ken of the average juror.'" State v. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct. App. 2013) (*quoting* State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009)).

"Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility . . . within the exclusive province of the jury.'" Taylor, at 514-515, 745 S.E.2d at 128 (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)).

In the present case, Dr. Ross did not bolster Victim's testimony merely by commenting that particular actions or inactions by Victim was consistent with the actions or inactions of victims of domestic violence. That was proper expert testimony on behaviors of victims of abuse. See State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) ("[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.") *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

In Schumpert, the victim was interviewed by Heather Odell, from the Department of Social Services, and Ruth Strait, described in the opinion as a "mental health counselor." Odell's qualification as an expert was not challenged at trial. However, the appellant did object to Strait's qualification as an expert "in the field of sexual abuse" and she testified as to the symptoms victim disclosed to her **and opined the behavioral symptoms were typical for sexual abuse.** Appellant contended Strait was not qualified to give expert testimony on rape trauma syndrome and Strait's testimony on rape trauma evidence "to prove a rape actually occurred." Schumpert, 312 S.C. at 505-06, 435 S.E.2d at 861 (emphasis added). The Supreme Court found no error, noting "trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such

evidence makes it more or less probable that the offense occurred." Schumpert, 312 S.C. at 506, 435 S.E.2d at 861-62.

The Supreme Court confirmed that evidence of rape trauma suffered by an adult victim of sexual abuse was admissible to prove the offense occurred. State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004). In that case, the defendant complained that the prosecution's expert should not have been allowed to testify that the victim's symptoms were consistent with a "recent trauma sufferer." Id. at 415, 605 S.E.2d at 544. The Supreme Court disagreed, finding the expert's testimony was consistent with the probative purpose of the trauma evidence to refute the claim that the encounter was consensual and to show the sexual assault occurred. Id.

In the present case, Dr. Ross was permitted, pursuant to White and Schumpert, to testify that Victim's actions or inactions were consistent with the victim of domestic abuse. Therefore, Counsel was not ineffective for failing to object to testimony that was proper expert testimony to show an offense occurred.

When an applicant alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel.

First, the applicant must prove counsel's performance was deficient. The attorney's performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Counsel's conduct must be judged under the law as it existed at the time of trial. Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) (holding "the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); Briggs v. State, 421 S.C. 316, 322, 806 S.E.2d 713, 716-17 (2017) ("[W]e may not judge the reasonableness of counsel's performance by standards that developed later.").

The few cases prior to the 2008 trial that Petitioner relies upon to claim counsel should have objected based on bolstering do not support Petitioner's argument based on the expert testimony in the present case. In State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989), the expert's testimony that the victim's symptoms are genuine was considered bolstering. In the present case, Dr. Ross did not testify that Victim's symptoms were genuine, only that some of her actions or inactions were consistent with domestic abuse. Dr. Ross's testimony is more akin to the testimony approved of by the Supreme Court in Schumpert and White, and was not improper.

Petitioner also relies on State v. Dempsey, 340 S.C. 565, 569, 532 S.E.2d 306, 308-09 (Ct. App. 2000) in which the expert testified about the methods the expert used to determine if a child alleging sexual abuse was telling the truth. The expert concluded he found no reason to believe the child was being untruthful. The expert also advised the jury that research showed children making the allegations were telling the truth 95% to 99% of the time. Id. In the present case, Dr. Ross never said whether Victim was being truthful or hold out that her role was to determine if Victim was

telling the truth. Dempsey simply does not apply.

Petitioner further relies on S.C. Dept. of Social Services v. Lisa C., 380 S.C. 406, 409, 669 S.E.2d 647, 649 (2008). In that case, the forensic interviewer testified that the child gave a consistent disclosure, commented that the history provided by the mother was convincing, and testified that there was no apparent motivation for the child to make a false allegation of abuse. The Supreme Court found this testimony bolstering. The case was decided after Petitioner's trial, so is not proper in judging Counsel's conduct in the present case. Moreover, in that case the expert was commenting directly on the child's disclosure when using the term "consistent." In the present case, Dr. Ross was not commenting on an interview with Victim, but merely whether actions or inactions on Victim's part were consistent with the actions or inactions of victims of domestic violence, much like the testimony provided in White.

Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018) is a PCR case assessing counsel's performance during a 2008 trial. In that case, the expert testified the victim's disclosure was consistent with her own training and experience and claimed the interview was the "most compelling" she had conducted. Id. at 490-91, 814 S.E.2d at 242. In the instant case, Dr. Ross did not testify about whether an interview with Victim was consistent with her training, nor did the claim Victim's testimony was compelling. Instead, Dr. Ross's testimony was merely limited to whether certain behaviors by Victim were consistent with domestic abuse. The bolstering occurring in Thompson did not occur in the instant case.

Therefore, probative evidence supports the PCR court's finding that counsel's performance was not deficient. The testimony represented proper behavioral testimony. Based on Schumpert and White, it was permissible for Dr. Ross to testify that certain behaviors were consistent or inconsistent with victims of domestic violence. Therefore, counsel was not deficient for failing to object to the

testimony.

Further, Petitioner was not prejudiced by the purported deficiency. Unlike child sexual abuse cases, in which the issue of bolstering typically arises, this case has eyewitnesses and physical evidence. First, Daughter and Son were both witnesses to the kidnapping. Daughter observed physical abuse, she described Petitioner trying to hurt Victim. Son observed the physical abuse that rose to a high and aggravated nature when he saw Petitioner choking Victim. There is also physical evidence of the existence of an abusive relationship – the black eye – even if it does stem from the charge for which Petitioner pled guilty. The black eye on Friday precipitated the violence and abuse occurring afterwards that day and over the weekend. The injury corroborates where the events began on Friday, which led to the abuse that night and over the weekend. An officer corroborated the testimony by the children and Victim that the telephone line was cut and they repaired it. Further, trial counsel noted the damaging role of the cell phone video that was played for the jury, it depicted Petitioner tormenting Victim, and Victim asking Petitioner to stop hitting her. Trial counsel commented that the video made it hard for someone to want to let Petitioner walk out of the courtroom free. Probative evidence supports the PCR court's denial of this allegation.

CONCLUSION

For all of the foregoing reasons, the denial of the PCR application should be affirmed and Petitioner's convictions and sentences should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: _____
for David Spencer

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT-PETITIONER

July 6, 2023

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County
Honorable Edgar W. Dickson, Circuit Court Judge

RODNEY C. BRYAN, Petitioner/Respondent,

vs.

THE STATE OF SOUTH CAROLINA, Respondent//Petitioner.

Appellate Case No. 2019-00001887

PROOF OF SERVICE

I, Anne Mueller, certify that I have served a copy of the within Respondent/Petitioner's Brief Of Respondent on Lara M. Caudy, Esquire, counsel of record for the Petitioner-Respondent, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 6th day of July 2023.

Anne Mueller

Anne A. Mueller
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

From:	Anne Mueller
To:	"lcaudy@sccid.sc.gov"
Cc:	hbryant@sccid.sc.gov; David Spencer; Anne Mueller
Bcc:	Victim Services
Subject:	Rodney C. Bryan v. State, 2019-001887
Date:	Thursday, July 6, 2023 3:06:00 PM
Attachments:	Bryan Rodney - 2019-001887 - Respondent-Petitioner"s Brief Of Respondent (03327366xD2C78).PDF image001.png

Good afternoon, Ms. Caudy.

Attached to this email is the Respondent-Petitioner's Brief Of Respondent in the above PCR appeal.

We will be electronically filing our brief shortly using the Court's AIS One Drive system.

Sincerely,

Anne Mueller, Legal Assistant for Senior Assistant Attorney General David Spencer

ANNE A. MUELLER, Legal Assistant
Office of the South Carolina Attorney General
Criminal Appeals Division
Office 803-734-3727
P.O. Box 11549 êColumbia SC 29211
scag.gov