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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Spartanburg
The Honorable J. Derham Cole, Post-Conviction Relief Judge

Opinion No. 5372 (S.C. Ct. App. filed December 30, 2015)

Appellate Case No. 2016-000610

FARID A. MANGAL, #320609, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PEITIONER.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals err in reversing the PCR judge's finding that counsel was not ineffective for failing to object or move for a mistrial in response to bolstering testimony given by Dr. Henderson where the PCR judge never made such a ruling and where the court of appeals considered testimony that was not raised at the evidentiary hearing or in the motion to alter or amend?

STATEMENT OF THE CASE

Farid A. Mangal ("Respondent") is currently incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. He was indicted at the August 2004 term of the Spartanburg County Grand Jury for criminal sexual conduct ("CSC") with a minor, first degree (04-GS-42-3400). Respondent was also indicted at the August 2006 term for incest (06-GS-42-2830) and CSC with a minor, second degree (06-GS-42-2831) and the October 2006 term for lewd act or attempt to commit a lewd act upon a child under sixteen (06-GS-42-4217). He was subsequently indicted at the January 2007 term for CSC with a minor second degree (06-GS-42-4869).[1] Lawrence W. Crane, Esquire, ("Counsel") represented Respondent.

Respondent was tried before the Honorable J. Mark Hayes II and a jury. On March 16, 2007, the jury convicted him of all charges and Judge Hayes sentenced him to concurrent terms of confinement for thirty years for CSC with a minor, first degree, twenty years on each charge of CSC with a minor, second degree, fifteen years for lewd act on a minor, and one year for incest.

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Mangal, Op. No. 2009-UP-113 (S.C. Ct. App. filed March 4, 2009). A Petition

[1] This indictment was true billed by the Grand Jury on December 28, 2006.

for Rehearing was filed on behalf of Respondent and denied by written Order on May 4, 2009. A Petition for Writ of Certiorari was filed on Respondent's behalf and was subsequently denied by the South Carolina Supreme Court on December 17, 2009. The Remittitur was issued on December 22, 2009.

Respondent subsequently filed an application for post-conviction relief ("PCR") on January 6, 2010. Petitioner made its Return on May 13, 2010. An evidentiary hearing into the matter was convened on April 7, 2011, at the Spartanburg County Courthouse. Respondent was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Petitioner. Following the hearing and testimony from Counsel and Respondent, the Honorable J. Derham Cole denied Respondent's PCR application by written Order dated January 6, 2012, finding Respondent failed to satisfy his burden of proving trial counsel was ineffective. (App. pp. 616-22). Respondent filed a timely Motion to Alter or Amend, arguing that the PCR judge failed to rule on the issue of whether trial counsel was ineffective for failing "to object to the testimony of Dr. Henderson that, in her opinion, the victim had been sexually abused." (App. p. 630). Respondent specifically referenced page 252 of the trial transcript. (App. p. 630). Respondent made a return to the motion, (App. pp. 634-38), and Judge Cole denied the motion on July 6, 2012, finding the issues raised in the motion "were not presented to the [c]ourt in the application or in an amendment and no testimonial evidence from the Applicant was presented in support of [the] allegations." (App. p. 639).

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected. On December 30, 2015, the Court of Appeals reversed the PCR judge's ruling

finding that Respondent failed to satisfy his burden of proving ineffective assistance of counsel, and remanded the case for a new trial as to all charges. Mangal v. State, Op. No. 5372 (S.C. Ct. App. filed Dec. 30, 2015). Petitioner filed a Petition for Rehearing on January 11, 2016. (App. pp. 689-704). Respondent filed a Return to the Petition for Rehearing on January 22, 2016. (App. pp. 706-09) On February 22, 2016, the Court of Appeals denied the Petition for Rehearing. (App. p. 710).

FACTUAL HISTORY

At trial, the victim ("Victim") testified that her father, Respondent, began sexually abusing her when she ways ten years old (App. p. 10, line 3-p. 13, line 18), and that it happened many times over six years. (App. p. 15, lines 15-19). She testified it began with an episode in which he rubbed his penis between her legs and around her anal area and there was some penetration. (App. p. 12, line 12-p. 13, line 8). She also testified he would touch her inappropriately and make her take baths in front of him. (App. p. 15, lines 1-10). Victim testified that when she was thirteen or fourteen Respondent installed a dead bolt lock onto his bedroom door that only he had a key to (App. p. 17, lines 19-24). Victim testified that "he didn't usually do full penetration[,]" and that she could "only think of a couple of times that he would [have] done that because he was scared that [she] would . . . get pregnant[.]" (App. p. 19, lines 4-7). Victim testified that he fully penetrated her vaginally for the first time when she was fourteen or fifteen. (App. p. 20 line 13-p. 21, line 10). She testified her brothers were sometimes present in the home when the abuse would occur, and that "they had no idea what was going on[,]" although "they saw [her] coming out of his room upset, every once in a while." (App. p. 27, lines 14-20). Victim also testified that after she disclosed the abuse and her father left the home, she started

drinking and smoking cigarettes. (App. p. 65, lines 5-16). She also testified that she cut herself once or twice when Respondent first went to jail. (App. p. 33, lines 14-15).

One of Victim's brothers ("Brother") also testified at trial on behalf of Petitioner. He testified that:

> [he] would see [Respondent and Victim] go in her room or maybe I . . . just didn't know where they were, and . . . couldn't find them. So, I'd go and I'd knock on the door, on his or her door . . . and I jiggled the door handle and it was locked. And I asked . . . is anybody in there and he would answer. He said we're talking, just go away, and, you know, the door was locked. So, I didn't understand. You know, if he had something to yell at her about or say to her, he usually just did it out in the open.

(App. p. 97, line 17-p. 98, line 3). He testified they would be behind closed doors for twenty or thirty minutes and that when they came out, she would be "visibly upset, crying, and she just head to the bathroom[.]" (App. p. 98, line 8). He testified he saw it happen twenty or thirty times over the years. (App. p. 98, lines 15-16). Brother also testified that Respondent installed a keyed lock on his bedroom door around 2000 or 2001. (App. p. 107, lines 2-3). The State introduced photographs of the lock. (App. p. 100, lines 12-15).

Dr. Nancy Henderson, a pediatrician, was qualified as an expert "in the examination, diagnosis, and treatment of child sexual abuse" on behalf of Petitioner at the trial. (App. pp. 149-52). She testified that, based on her examination of Victim, she found "the hymen tissue looked very, very normal until . . . [a] point, and she had mark narrowing at that point. . ." (App. p. 158, lines 14-22). She further testified that "[t]ypically the hymenal tissue is pretty . . . consistent all the way around. . . . But when you see where the hymenal tissue is almost completely diminished at that one point, that's a sign of some type of penetration . . . ." (App. p. 158, line 24-p. 159, line 8).

The State then asked Dr. Henderson whether she had "an opinion, within a reasonable degree of medical certainty based upon [her] education, training, and experience and based upon [her] findings on examination of Victim, [about] whether those findings [were] consistent with a penetrating injury[.]" (App. p. 159, lines 14-15). She gave the following response: "[b]ased on the history that she shared with me and based on my examination I felt that it was consistent with a, that she had been abused." (App. p. 159, lines 16-19). The State then asked "opinion was to whether she was sexually abused, that opinion is?" and she replied: "That she had been, yes, sir." (App. p. 159, lines 19-21). Dr. Henderson also testified that "[the] term [']hymen in tact['] is not really a medical term at all . . . . I don't use that terminology at all. [It is] kind of a lay terminology. . . ." (App. p. 160, lines 8-11). She also testified that "there can be full penetration without any kind of trauma to the hymenal tissue." (App. p. 160, lines 17-18). She confirmed that in Victim's case there was "a narrowing consistent with penetration[.]" (App. p. 160, lines 19-21).

Counsel cross-examined Dr. Henderson about why, on her report, she had "checked suspicious . . . . [b]ut not consistent[.]" (App. p. 161, line 7-p. 163, line 24). Dr. Henderson testified that "[t]he only thing that could be consistent or diagnostic would be if . . . a child . . . was pregnant or had a positive STD," but that "[w]hen there's narrowing . . . of the hymenal tissue, there are other reasons that can cause that." (App. p. 162, line 23-p. 163, line 4). Dr. Henderson continued, "So, I can't say, based on that finding alone, if I don't have the history of that by itself, even if she denied everything, would have been very suspicious for abuse." (App. p. 162, line 14-p.163, line 7). Ultimately, she testified

that "based on the history that she shared, and she denie[d] any other kind of trauma to that area, . . . my conclusion is . . . as I stated." (App. p. 163, lines 10-24).

The following exchange also took place between Counsel and Dr. Henderson on cross-examination:

> Q: But you testify in sexual abuse cases for the State of South Carolina, do you not?
>
> A: I testify in the patients that I examine.
>
> Q: All right. And so, you are basing your decision on information you received from Victim which may or may not be true?
>
> A: I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient."
>
> Q: I understand that.
> Again, you're assuming that what she tells you is true, are you not?
>
> A: Based on the way she shared it and all the information that she shared, yes.

(App. p. 164, lines 9-22). Counsel also questioned her as to whether Victim made certain specific statements to her including whether she told her what the allegations were, when the abuse began, that she had been subjected to pregnancy tests, and that she had social problems at school. (App. p. 164, line 25-p. 167, line 25).

In closing argument, Counsel referred to Dr. Henderson's testimony, stating:

> In her written report it said the condition may be related to what [Victim] is complaining about. But we learned that the reason she determined this might be sexual battery is because [Victim] says it was. She gets all of her information from [Victim], the one who started this thing, and I submit to you is not telling the truth from the jump. . . . remember what [Dr.] Henderson said? From the physical exam by itself, if she had seen only the physical exam, she would not rule sexual abuse. However, she listened to [Victim], what she was saying, and because of that, she ruled sexual abuse. She believes [Victim].

(App. p. 481, lines 8-17).

Counsel produced Dr. Medlock as an expert at the trial to rebut Dr. Henderson's testimony. (App. pp. 209-51; App. p. 581, line 24-p. 583 line 13). Dr. Medlock testified that Victim "denie[d] sexual activity" during a visit on October 20, 2003, (App. p. 224, lines 5-8), and that the Victim's "[r]ectal examination . . . was in normal limits. (App. p. 224, lines 18-19). He also testified that it would be his "interpretation" that "if [the hymen] is in tact, . . . it would indicate there's not been sexual activity," (App. p. 228, lines 2-5), and that "if the vagina had been penetrated [he] would expect the hymen to . . . not be in tact." (App. p. 247, lines 1-2).

Dr. Medlock also testified that a note in Victim's medical records, made by another doctor in his practice, indicated she suffered from posttraumatic stress secondary to sexual abuse." (App. p. 251, lines 1-4). Dr. Medlock stated this finding was "a presumptive diagnosis . . . [taking] what the patient [relates], history, and then you do a physical examination. And from that . . . you come to an impression . . . or make a presumptive diagnosis. . . . based on the information . . . given on that visit[.]" (App. p. 251, lines 1-12).

Respondent testified at trial. (App. p. 325-96). He denied the allegations of abuse. (App. p. 369, line 22-p. 372, line 16). He testified on cross examination that he did not take his children behind a closed door to discipline them. (App. p. 381, lines 3-11). He testified that he installed an exterior "steel" lock on his bedroom door, which required a key. (App. p. 381, lines 12-p. 382, line 5). He stated on redirect that he installed it because his children would sneak into his room and steal money and cigarettes. (App. p. 394, lines 15-18).

At the PCR hearing, counsel for Respondent, J. Faulkner Wilkes ("PCR counsel") specifically referred to Dr. Henderson's testimony on "page 252 . . .on line 11." (App. p. 583, line 24-p. 584, line 1). PCR counsel questioned Counsel about that testimony, specifically, her testimony that "she believed [sic] she had been abused." (App. p. 584, line 9-10).[2] PCR counsel asked: "assuming for a moment that that might be outside the scope of what she would be able to testify to or improper bolstering, would there have been any reason not to raise an objection to that testimony?" to which Counsel replied "[n]o, there would not." (App. p. 584, lines 14-19).

On cross examination, the State questioned Counsel about Dr. Henderson's testimony on page 252 of the trial transcript, in which she testified "I felt that it was consistent with a—that she had been abused." (App. p. p. 594, line 23-p. 595, line 3). The relevant testimony was as follows:

> Q . . . .Now, is that something that you expected the state to ask her, whether or not her opinion was that victim had been abused?
>
> A Not only did I expect it, but if she had answered any other way I would have been shocked, because Dr. Henderson's testimony is canned testimony. And she'll testify the same way in every trial.
>
> . . .
>
> So no. I figured they would ask it and I figured she'd answer that way. That's not the first time I've been with Dr. Henderson.
>
> . . .
>
> Q And she actually abused [sic] versus the penetrating injury. Was that something that you would have normally objected to knowing that that was the ultimate issue that they were asking?
>
> A I probably should have objected.

[2] Petitioner notes that the actual text in the trial transcript was as follows: "Based on the history that she shared with me and based on my examination I felt that it was consistent with a—that she had been abused." (App. p. 159, lines 16-18).

(App. p. 595, line 2-p. 596, line 1).

The State also questioned Counsel about Rule 704 of the South Carolina Rules of Evidence regarding opinions as to ultimate issues by an expert. (App. p. 596, lines 2-4). Counsel agreed that Dr. Henderson's testimony from page 252 "probably" fell under that rule. (App. p. 596, lines 2-10). On redirect PCR counsel asked Counsel if Dr. Henderson's testimony "did not strike a cord [sic] as improper bolstering to [him] at the time of trial[,]" and Counsel testified that "[i]t did not." (App. p. 596, lines 17-20). Counsel also testified at the hearing that generally if he thought something was improper, he would have objected. (App. p. 593, lines 3-6). PCR counsel never referred to any other portion of Dr. Henderson's testimony apart from that referenced on page 252 of the trial transcript.

STANDARD OF REVIEW

A reviewing court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). The reviewing court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, reviewing courts "[give] great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)). However, this Court will "review questions of law de novo, and 'will reverse the decision of the PCR court when it is controlled by an error of

law.'" Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014), reh'g denied (Dec. 3, 2014), cert. denied, 135 S. Ct. 2387 (2015) (quoting Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

ARGUMENT

The court of appeals erred in reversing the PCR judge's finding that counsel was not ineffective for failing to object or move for a mistrial in response to alleged bolstering testimony where the PCR judge never made such a finding and where the court considered testimony that was not raised at the PCR hearing or in Respondent's motion to alter or amend.

Petitioner submits that the court of appeals erred in finding that Counsel was ineffective for failing to object or move for a mistrial in response to alleged bolstering testimony for the following reasons: (1) the argument was not preserved for an appellate court's review; (2) the court of appeals erred in reviewing the bolstering issue de novo since the PCR judge made no findings as to the issue; (3) the argument that Counsel was ineffective for failing to move for a mistrial was abandoned; (4) even if this Court finds the issue was preserved, Respondent nevertheless failed to satisfy both prongs of Strickland, because the statements were not bolstering and there was no reasonable probability the outcome of Respondent's trial would have been different.

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court

applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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." Id. at 117-18, 386 S.E.2d at 625.

As an initial matter, Petitioner submits the court erred in finding that Respondent's claim that counsel was ineffective for not objecting or moving for a mistrial in response to bolstering testimony was preserved for its review. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" Id. (quoting Wilder Corp. v. Wilke, 330 S.C. at 76, 497 S.E.2d at 733). "Imposing such a requirement on the appellant 'is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and

arguments.'" I'On. L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 739 S.E.2d 282, 285 (2012) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)).

The PCR judge denied Respondent's PCR application, finding he failed to meet his burden of proving trial counsel was ineffective. The only mention of a motion for mistrial in the PCR action was in the context of Respondent's prior DUI arrest, not with regard to alleged bolstering. (App. p. 593). At most, Respondent only raised the issue of whether Counsel was deficient for failing to object. As a result, the PCR court never had the opportunity to hear testimony or argument on the issue and subsequently make a ruling. Therefore, the court should have confined its review only to the question of whether Counsel was ineffective for failing to object during Dr. Henderson's direct testimony, not for failing to move for a mistrial. The PCR judge ruled in the order of dismissal that Counsel testified he was aware that Dr. Henderson would most likely testify that Victim had been abused, and that he felt he was prepared to counteract that testimony with the testimony of Dr. Medlock and Victim's medical records. In denying Respondent's Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, the PCR judge ruled that the issue of whether counsel was ineffective for failing to object to bolstering was not preserved. Petitioner submits that the PCR judge properly held that the issue was not preserved, and the Court of appeals erred in finding it was preserved.

Alternatively, Petitioner submits that even if this Court finds the court of appeals

properly ruled the bolstering issue was preserved for review, it erred in considering the testimony of Dr. Henderson that was elicited on cross examination, because any argument that counsel was ineffective for either eliciting such testimony or failing to object to such testimony was never raised to the PCR judge.

The only portion of Dr. Henderson's testimony that was explored in Respondent's PCR action was her direct testimony on page 252 of the trial transcript. Counsel testified that Dr. Henderson's testimony did not strike a chord as improper bolstering at the time of trial. Counsel also testified that if he thought something was improper, he would have objected.

The court of appeals should not have reached the question of whether Dr. Henderson's statements on cross-examination were bolstering. Further, the court erred in reviewing the issue de novo because the PCR judge made no findings of fact or conclusions of law regarding the bolstering issue. See McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991) (holding PCR court's conclusions insufficient for review and remanding case for a new PCR hearing).

Though the court correctly states that an applicant should be permitted to "amend his PCR application to conform to the evidence presented [at the PCR hearing]," Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992), issues that were not covered in either the application or at the hearing cannot be raised for the first time on appeal. Id. ("Amendments under [Rule] 15(b) are allowed *not to assert new claims*, but rather to conform the pleadings to the evidence presented at trial.") (emphasis added).

Furthermore, the court of appeals erred in considering Dr. Henderson's cross-examination testimony. The only testimony that was even summarily raised in

Respondent's PCR action was Dr. Henderson's direct examination testimony appearing on page 252 of the trial transcript as stated above. Her cross-examination testimony was never mentioned. However, the court's opinion nevertheless considered her cross-examination testimony.

> The Court stated the following in its opinion:
>
> > On cross-examination, Dr. Henderson elaborated on these statements and testified that "based on the history that Victim shared, and she denies any other kind of trauma to that area . . . my conclusion is . . . as I stated."
> >
> > When asked whether she based her decision on possibly untrue information from Victim, Dr. Henderson stated, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." When asked whether she assumed Victim's information was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes."

(App. p. 687). The court then ruled: "We believe there is no other way to interpret these comments other than to mean that Dr. Henderson believed Victim was truthful." (App. p. 687). The court's review of Dr. Henderson's cross-examination testimony changes the inquiry on appeal into one that was simply not before the court. Appellate courts give "great deference to the PCR court's findings of fact and conclusions of law," Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006), but in this instance, the PCR court had no opportunity to consider the question of whether Counsel was ineffective for eliciting the testimony that the court ultimately determined to be bolstering because that issue was never raised to it. Therefore, the issue was not preserved for its review. See Herron v. Century BMW, 395 S.C. at 465, 719 S.E.2d at 642 (2011) (holding at a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge). Because the issue was not preserved as to Dr. Henderson's cross-examination

testimony, the court of appeals erred in considering it in its finding that Counsel was ineffective.

The Court erred in finding that Counsel rendered deficient performance in failing to object to alleged bolstering. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317, S.C. 292, 294, 454 S.E.2d 312, 313 (1996). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)). In making a fair assessment of attorney performance, a court must make every effort 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." Strickland v. Washington, 466 U.S. at 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

The fact the testimony may have been otherwise inadmissible does not preclude the possibility Counsel had a strategic reason to elicit the testimony. See Janosky v. St. Amand, 594 F.3d 39, 48 (1st Cir. 2010) (finding no ineffective assistance of counsel where decision to elicit otherwise inadmissible hearsay testimony "was part of a calculated trial strategy aimed at poking holes in" the state's case); Krist v. Foltz, 804

F.2d 944, 947 (6th Cir. 1986) (finding no ineffective assistance of counsel for eliciting otherwise inadmissible evidence).

In this case, because the issue of whether Counsel was deficient for eliciting the cross-examination testimony (App. pp. 160-68) was not explored at the PCR stage, Counsel was never afforded an opportunity to provide an explanation or strategic reason for asking such questions. For that reason, the court exceeded its authority in making findings related to that testimony. Nevertheless, the record indicates that Counsel very well may have had a valid trial strategy in questioning Dr. Henderson in a particular manner. He testified credibility was an issue in the trial and that he never believed Victim. His closing argument evidences his attempt to use Dr. Henderson's testimony to further discredit Victim. Accordingly, the court erred in considering trial testimony elicited on cross-examination, because Counsel never had the opportunity.[3]

The court erred in finding that Dr. Henderson's statements on direct were bolstering. 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. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006) aff'd in part, rev'd in part, 380 S.C. 499, 671 S.E.2d 606 (2009) (citing Maddox v. State, 275 Ga. App. 869, 622 S.E.2d 80 (2005)). However, in this case, on direct examination, Dr. Henderson did not give her personal opinion as to whether the victim was telling the truth. She never testified to any specific details or facts regarding the incidents, but only stated during her direct examination that based upon her physical examination and

[3] Petitioner maintains, however, that the bolstering issue was also not preserved with respect to that testimony on page 159 of the Appendix (page 252 of the trial transcript).

Victim's statement regarding her medical history, she felt that the damage to Victim's hymen was "consistent with a, that she had been abused." Dr. Henderson did not give details of the alleged assaults nor state whether she believed the victim's allegations. Rather, her testimony on direct pertained solely to her medical opinion concerning her examination of the victim's hymen, which necessarily included Victim's relation of her medical history, and whether her findings were consistent with abuse. Accordingly, the court erred in finding that Dr. Henderson's direct examination testimony constituted bolstering.

The court erred in relying on cases that were decided well after Respondent's trial. Courts "have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial. State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). See also Strickland v. Washington, 466 U.S. at 690 ("reasonableness of counsel's challenged conduct . . . [must be] viewed as of the time of counsel's conduct"). State v. Jennings, 394 S.C. 473,716 S.E.2d 91 (2011) (four years after trial); State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) (eight years after trial).

The court of appeals erred in relying on State v. Chavis, 412 S.C. 101, 108-09, 771 S.E.2d 336, 340 (finding forensic interviewer's testimony that she recommended "that Victim 'not be around Appellant for any reason'. . . . was improper bolstering of Victim's credibility."). The Court found that such testimony could "only be interpreted as [the witness] believing Victim's claim that Appellant sexually abused her." Id. at 109, 340 (emphasis added). In that case, the forensic interviewer specifically referred to the accused and made an admonition—a statement that exceeded a medical opinion or diagnosis—whereas Dr. Henderson's testimony merely implied that she relied on the

victim's medical history in reaching her conclusion and made no reference to the identity of the abuser.

Similarly, the court also erred in relying on State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding trial court erred in admitting a forensic interviewer's reports because reports allowed witness to improperly vouch for the children's credibility). The Court described the offending information in the reports as follows: "In each report, the forensic interviewer stated that during the interviews, each child had 'provide[d] a compelling disclosure of abuse by [appellant].' The forensic interviewer further stated each child "provided details consistent with the background information received from their mother, the police report, and the other children." Id. (emphasis added). The Court stated: "There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." Id. (citing State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct.App.2000)).

The language differs from Dr. Henderson's testimony because in that case, the witness characterized the victim's disclosure as "compelling" and specifically stated that they shared details consistent with one another's stories. In other words, the witness gave his own opinion about the veracity of the victims' statements in that they were "compelling" and "consistent" with one another. Here, Dr. Henderson only stated that based on the medical history that the victim shared with her, she concluded the narrowing of the hymen was consistent with abuse. The court even stated in its opinion that "it was proper for [Dr. Henderson] to opine that based on her examination, Victim's injuries were consistent with sexual abuse." In response to the State's questions on direct

examination, Dr. Henderson gave no opinion as to whether she believed her patient, nor did she characterize the victim's disclosure in any respect. Accordingly, the court erred in relying on that case.

The Court also relies on Dempsey and Dawkins. In Dempsey, the Court upheld the trial court's ruling that a sexual child abuse counselor's testimony was vouching, but affirmed the trial court's denial of the petitioner's motion for a mistrial, finding the failure to grant a mistrial was harmless error because the curative instruction was sufficient. 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000). The State asked the witness how she determines that a child is telling the truth and asked whether the child responded in a way to make her believe he was not telling the truth. Id. The witness also stated that "when a child says that, ninety-five to ninety-nine percent of the time, that's the truth." Id. The trial judge, *sua sponte*, sustained counsel's objection when the witness stated that "very, very rarely does a child say that they've been sexually abused when they haven't been. . . ." Id. The expert in that case also gave multiple explicit statements that she believed the child. See Id. Such language is far afield of the language Dr. Henderson used.

Similarly, in Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989), the witness, a therapist, gave an explicit statement that he had the impression that the child's symptoms were genuine. Defense counsel objected and moved for a mistrial. Id. The trial judge sustained the objection, but denied the motion for mistrial and gave a curative instruction. Id. This Court affirmed, finding that though the "question was improper," it was "not of such magnitude to [a]ffect the outcome." Id. In this case, Dr. Henderson gave no statement about the victim's credibility on direct examination.

In its opinion, the court also referred to State v. Hill, 394 S.C. 280, 294, 715

S.E.2d 368, 376 (Ct. App. 2011), but in that case the court actually upheld the trial judge's ruling that the testimony in question was not bolstering. Id. The State questioned the witness about what sort of indicia a child might exhibit in an interview that would indicate the child may have been coached, and the witness explained that he looked to the level and characteristics of details that the child gives in an interview. Id. The State asked him if those details were present and he testified "yes." Id. The trial judge found that the question did not elicit whether the witness thought the victim had told the truth. Id. The petitioner argued that "expert's testimony constituted a clear indication to the jury that the expert found Victim's statement credible, and [that it] should have been excluded . . . ." Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376. The court of appeals disagreed. Id. Therefore, Hill, rather than supporting the court's decision, actually undermines it.

For the reasons stated above, Petitioner again submits the admissibility of Dr. Henderson's statements on cross were not raised to the PCR court, and therefore, the issue of whether Counsel was deficient in either asking the question about whether she "assumed the statements were true" or for not objecting to the answer, was not preserved.

The court of appeals also erred in finding that Respondent satisfied his burden of proving that the outcome of his trial would have been different but for Counsel's alleged deficient performance.

First, the court of appeals framed the issue as a question of "whether trial counsel was ineffective for failing to object or move for a mistrial in response to Dr. Henderson's comments." However, the issue of whether Counsel's performance was deficient for his failure to move for a mistrial was not preserved for review and was abandoned on appeal by Respondent's failure to argue it in his brief. "An issue is deemed abandoned and will

not be considered on appeal if the argument is raised in a brief but not supported by authority." State v. Lindsev. 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (citing State v.Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct.App.2009)). Respondent failed to provide any authority to support his position, but simply makes the conclusory statement that Counsel "had a duty to seek a curative charge and to move for a mistrial, . . . but [Counsel] did none of these things and his client suffered accordingly." (App. p. 649-50).

Nevertheless, Respondent failed to demonstrate he was prejudiced by Dr. Henderson's testimony that her "opinion as to whether [the victim] was sexually abused" was "that she had been." To prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). In other words, Respondent was required to show not only that the testimony was inadmissible, but that had counsel objected, the trial judge would have sustained the objection, or had counsel made a motion for a mistrial, the judge would have granted it. Respondent has failed to do so. The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). Granting of motion for mistrial is an extreme measure that should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). Mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice. State v. Council, 335 S.C. 1, 515 S.E.2d 508

(1999).

Regardless, the Court erred in finding Respondent satisfied his burden of proof. Counsel testified he did not feel that the testimony was objectionable, and testified that had he considered it to be, he would have objected. Counsel also testified he had been practicing criminal law for decades and that he had heard Dr. Henderson testify before and knew what her testimony would be. In addition, to Dr. Henderson's testimony, three witnesses, including Respondent, testified at trial that he had installed a keyed lock onto his bedroom door. Counsel fully cross-examined all of the witnesses and called witnesses on Respondent's behalf, including the family doctor who refuted Dr. Henderson's testimony that abuse had occurred. Furthermore, the victim's brother corroborated her disclosure and also testified that he had seen her and Respondent come out from locked doors twenty or thirty times over the years. Counsel also had the victim's OB-GYN records admitted at trial. The court of appeals erred in finding that Respondent satisfied his burden of proving that the outcome of the trial would have been different had Counsel objected to Dr. Henderson's testimony on direct examination.

Furthermore, in Dempsy, Dawkins, and Chavis, the appellate courts found harmless error. Chavis 412 S.C. at 109, 771 S.E.2d at 340 (affirming the appellant's conviction, finding that the court's error in admitting the witness's testimony was harmless).

IV.

For the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the Court of Appeals. In requesting this relief, counsel for the State certifies a petition for rehearing was made and ruled upon by the Court of

Appeals.

Respectfully submitted,

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By: _____
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April 11, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to the Court of Appeals
Appeal from Spartanburg
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2016-000610

FARID A. MANGAL, #320609, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Petition for Writ of Certiorari and Appendix**, has been served upon opposing counsel by mailing one (1) copy in the United States mail, postage prepaid:

The Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

This 11th day of April, 2016.

Ashley Haworth
ASHLEY HAWORTH
LEGAL ASSISTANT

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 11 2016
SC SUPREME COURT

Certiorari to the Court of Appeals
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THE STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Petition for Writ of Certiorari and Appendix**, has been served upon opposing counsel by mailing one (1) copy in the United States mail, postage prepaid:

Mr. John R. Ferguson, Esquire
Cox & Ferguson
P.O. Box 286
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This 11th day of April, 2016.

Ashley Haworth
ASHLEY HAWORTH
LEGAL ASSISTANT