

THE STATE OF SOUTH CAROLINA
In The Supreme Court
CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas
J. Derham Cole, Post-Conviction Relief Judge

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APR 29 2016

S.C. SUPREME COURT

Farid A. Mangal, #320609

Respondent,

v.

State of South Carolina,

Petitioner.

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

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Pursuant to Rule 213, SCACR, the Solicitors' Association of South Carolina, Inc. seeks leave of this Court to participate in this matter *as amicus curiae* for the following reasons.

I.

The issues raised in this matter by Petitioner arise from a post-conviction relief proceeding include both procedural and substantive issues. The procedural issues are those related to the long-established precedent limiting appellate review to only those issues raised before and ruled upon by the lower court in order to allow for the proper development of a factual record and legal argument, so as to serve and promote justice and judicial economy. The substantive issues are related to the presentation of opinion evidence by medical expert experts. The issues necessarily involve the interpretation of this Court's prior opinions.

II.

The Solicitors' Association of South Carolina, Inc. consists of all elected Solicitors as well as their appointed, designated, and commissioned assistant solicitors. Among the purposes of the Solicitors' Association is the promotion of the due administration of justice, which includes the defense of legally obtained convictions.

III.

The decision of this Court will impact not only the conviction in this specific case, but also the standard of review in other post-conviction cases, including deference to the post-conviction relief court's findings of fact and conclusions of law based upon the record before it, and the consideration of matters not properly before the reviewing court. For example, Respondent's bolstering claim – as raised in his application and presented to and argued before the PCR Court – *was limited to* defense counsel's failure to object to Dr. Henderson's testimony on direct that her opinion was that the victim had been abused (see reference in PCR transcript, yet the Court of

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Appeals primarily relied upon Dr. Henderson's testimony elicited on cross-examination in granting Respondent relief. Because any argument that defense counsel was ineffective for eliciting such testimony was never raised to the PCR court by application, during the PCR hearing, or in the Rule 59(e) motion, the PCR court was deprived of an opportunity to hear testimony or argument on the issue – *i.e.*, whether the decision to elicit this testimony on cross-examination was part of a calculated trial strategy to discredit the state's evidence (a conclusion reasonably supported by defense counsel's closing argument, but not addressed before and by the PCR Court due to Respondent's failure to raise the issue) – and to subsequently make a ruling. Issues that are not covered in either the PCR application or at the hearing, and not ruled upon by the PCR court, may not be considered for review and serve as a basis to grant relief.

IV.

While the Court of Appeals primarily relied upon Dr. Henderson's testimony elicited on cross-examination in granting Respondent relief, it also found a statement made by Dr. Henderson on direct constituted improper bolstering. When asked 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, whether those findings [were] consistent with a penetrating injury” (App. p. 159, lines 14-15), she testified that, “[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.” (Emphasis added.) (App. p. 159, lines 16-19.) Such testimony has historically been held to be admissible under Rule 702.

Although she could have testified as to *some* statements made by the victim during the medical examination upon which she relied in making her diagnosis, Dr. Henderson did not. Dr. Henderson did not give details of the alleged abuse, identify the person the victim said abused her,

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or state whether she believed victim's allegations. She simply stated her conclusion that the victim had been abused, and that her conclusion was based on her examination of the victim and the history provided by her. This did not constitute improper bolstering and was clearly admissible.

This Court's previous opinions involving the testimony of medical experts recognize that a patient's history must be considered by medical experts because it is inextricably linked to medical diagnosis or treatment. The decision of the Court of Appeals renders such testimony inadmissible, is contrary to well-settled law, and will have a *significant impact* on the presentation of the opinions of medical experts in both civil and criminal cases in this state.

V.

The interests of the South Carolina Solicitors' Association are related to those of prosecutors in general and the Petitioner herein specifically. Allowing the South Carolina Solicitors' Association to participate as *amicus* will enable the Court to hear more fully from all stakeholders, and will assist the Court in resolving this matter.

VI.

The undersigned Association does not believe that its participation as *amicus curiae* will delay the Supreme Court's consideration of this matter.


WHEREFORE, for all of the foregoing reasons, the undersigned Association respectfully requests leave of this Court to participate as *amicus curiae*, to include the filing of a Brief of *Amicus Curiae* should a writ of *certiorari* be issued, and any other action that the Court may wish; and for such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

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BY: 
COUNSEL FOR MOVANT

April 26, 2016

Spartanburg, South Carolina

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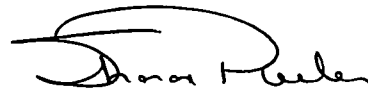
I certify that I have today served one copy of the Motion for Leave to Participate as *Amicus Curiae* on Petitioner and Respondent by depositing such in the United States Mail, first class postage prepaid, addressed to counsel of record for both Petitioner and Respondent as follows.

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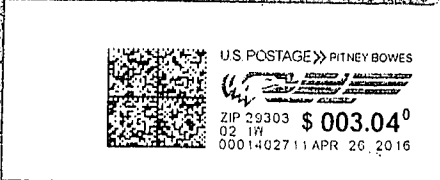


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April 26, 2016
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The Honorable Daniel E. Shearouse
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