

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2016-000838

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**RECEIVED**

JUN 15 2016

**S.C. SUPREME COURT**

Opinion No. 5359 (S.C. Ct. App. filed November 12, 2015)  
Court of Appeals Appellate Case No. 2011-187246  
Circuit Court Case No. 2005-CP-40-2551

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BOBBY JOE REEVES, #287423,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

**I.**

Whether the Court of Appeals properly concluded that defense counsel was ineffective for failing to consult with a gynecological expert prior to trial and for failing to present the testimony of such an expert at trial?

STATEMENT OF THE CASE

For the purposes of this Return, the Respondent agrees with the Petitioner's statement of the case. See Certiorari Petition at 2-4.

## ARGUMENT

### **Standard of Review**

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Respondent must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

#### **I. The Court of Appeals correctly concluded that defense counsel was ineffective for failing to consult with, and present the testimony, of a gynecological expert.**

##### A. How the Issue Arose Below

The Respondent would note that the Petitioner does not present an overview of the facts presented at trial in its certiorari petition, so the Respondent will do so here, as the facts are important for an understanding of the Court of Appeals' ruling. The victim in this case was a ten-year old female at the time of the alleged abuse. Although the Respondent was not the victim's

father, he acted as a father figure to her as she and her mother, Dawn, lived with him while she was a young child. Even after Dawn moved to Georgia after a few years of living with the Respondent, Dawn would frequently bring the victim to South Carolina so that the victim could stay with the Respondent for the weekend. See App. p. 70, lines 1-20.

The charges in this case arose out of such a trip over the July 4, 2000, holiday weekend. The victim testified that the Respondent abused her by digital penetration at some point in time during that weekend. App. p. 17, lines 2-9. The victim did not disclose the abuse to her mother until the end of July. See App. p. 74, line 6-p. 80, line 7. On July 31, 2000, the victim's mother took the victim to the emergency room where the victim was examined by Dr. Dennis Bash. See App. p. 112, line 1-p. 113, line 21. Dr. Bash testified that he observed a healing scar on the membrane of the victim's hymen. App. p. 113, line 25-p. 114, line 16. Dr. Bash was then asked what kind of trauma could have caused the injury:

Q. So, doctor, what kind of trauma would cause the injuries that you noted on that child on the 31st?

A. Well, certainly penetration would cause that.

Q. Penetration such as penile penetration?

A. Any kind of penetration.

Q. Digital penetration?

A. Any kind of penetration.

Q. And your findings were consistent with that?

A. Yes.

Q. And as far as dating what you observed on the 31st, you said it was healing. So at least a week or older?

A. At least a week.

Q. Would it be consistent with some kind of penetration approximately thirty days earlier?

A. Yes.

App. p. 114, line 23-p. 115, line 13. Defense counsel did not ask Dr. Bash any questions about how severe the injury must have been in order to be seen a month later, nor if there were any other possible explanations for the injury. See App. p. 115, line 18-p. 117, line 10.

After Dr. Bash treated the victim, the victim was referred to Dr. Maureen Claiborne, a pediatrician, who examined the victim on August 28, 2000. See App. p. 120, line 17-p. 121, line 3. Dr. Claiborne testified that the victim had a normal evaluation and that there were no visible injuries to the victim's vaginal area. App. p. 122, lines 4-19. Despite the lack of injuries to the victim, Dr. Claiborne testified that her findings were consistent with the victim's allegations of digital penetration two months earlier. App. p. 124, lines 6-9; see also p. 127, lines 12-14. As with Dr. Bash, defense counsel did not ask Dr. Claiborne any questions about how severe the injury must have been to be seen a month after the abuse occurred, nor did he ask Dr. Claiborne if there were any other possible explanations for the injury.<sup>1</sup> See App. p. 124, line 13-p. 127, line 8.

Two witnesses testified for the defense. The first, Jessie Wheaton, testified that he lived in the home with the Respondent, that he knew the victim, and that the victim wanted the Respondent to be her father. App. p. 152, line 23-p. 155, line 18. The second, the Respondent, testified that he never abused the victim. App. p. 165, lines 1-2. The defense did not present an expert's testimony.

During closing argument, the State repeatedly argued that testimony of Dr. Bash and Dr. Claiborne could not be contradicted and proved that the Respondent abused the victim. See App. p. 191, lines 10-12; p. 192, lines 3-24; p. 202, line 13-p. 23, line 1; p. 206, lines 4-12; p. 207, lines

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<sup>1</sup> Defense counsel did ask Dr. Claiborne if the negative examination was consistent with no abuse occurring. See App. p. 127, lines 4-7. This question was immediately followed up on redirect with a reaffirmation of her testimony that her examination of the victim was also consistent with abuse. See App. p. 127, lines 12-14.

9-17; p. 208, lines 7-19; p. 211, lines 1-5.<sup>2</sup> At the conclusion of the trial, the Respondent was convicted as charged and was sentenced to fifteen years' imprisonment.<sup>3</sup>

The Respondent subsequently filed for PCR and alleged that defense counsel<sup>4</sup> was ineffective for failing to interview, and to present the testimony at trial of, a gynecological expert. See App. p. 287, lines 22-24 (PCR hearing); see also p. 280 (Amended Application for Post-Conviction Relief). In support of this allegation, the Respondent presented the testimony of Dr. Frederick Thompson, a gynecologist with over thirty years' experience. Dr. Thompson testified that there could have been multiple causes of the injury to the victim, including accidental injury or self-infliction. App. p. 295, lines 14-22. Dr. Thompson further testified that the injury to the victim "would have to be fairly substantial ... to see 30 days later in its various stage of healing." App. p. 303, lines 19-21. He also described how severe the injury would have to be in order to be seen a month after its infliction:

Q. Would it be something that you would expect would require—would it be an injury so severe that you would expect someone to go to a doctor about it?

A. Again, you're given someone who may or may not have the expected degree of intelligence. There's a fear involved. There's all sorts of reasons why people fail to seek medical attention, but if your child was bleeding, *I would think this would alarm them enough that they would probably want to go to a caregiver of some sort.* Again, there's a lot of pain involved. Again, there would probably be some reaction.

If it was a fairly minor laceration, perhaps it not [sic] require any medical attention at all. It would heal on its on [sic].

*Q. If it were a fairly minor laceration, would you expect to see it 30 days later?*

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<sup>2</sup> Two pages of the State's closing argument—pages 214 and 215 of the original trial transcript—are missing and cannot be located.

<sup>3</sup> The two pages where the verdict is read aloud—pages 228 and 229 of the original trial transcript—are also missing and cannot be located.

<sup>4</sup> This Court recently disbarred defense counsel. See *In re Stockholm*, 415 S.C. 645, 785 S.E.2d 361 (2016).

*A. Probably not.*

App. p. 303, line 23-p. 304, line 14 (emphasis added). Additionally, Dr. Thompson testified that it would be difficult to date when the victim's injury occurred and that it would be difficult to conclude what caused the injury:

A laceration would be very difficult to date, I think exactly, as to how long it had been there, and certainly difficult to say what exactly had caused that particular injury if there was not any other evidence of trauma.

App. p. 301, lines 5-9. Lastly, Dr. Thompson testified that he "fail[ed] to see" how Dr. Claiborne could testify that a normal exam "was evidence of abuse." App. p. 301, line 22-p. 302, line 3.

Defense counsel testified that he knew that the State intended to admit evidence of physical trauma through the testimony of the doctors. App. p. 337, lines 21-23. He further testified, however, that he did not consult with an expert prior to the trial and that he could not recall if he discussed retaining an expert's services with the Respondent. App. p. 337, line 14-p. 339, line 5. His only explanation for not doing so was that "there was a question about money." App. p. 339, lines 3-4.

The PCR court denied relief on this issue, concluding:

This Court finds that Applicant has failed to prove deficient performance of Trial Counsel for failure to interview and present a medical expert. Further, Trial Counsel testified that he had not retained a medical expert because Applicant did not have the funds to do so. Dr. Thompson testified in the PCR hearing that he could not determine the cause of the injury. The testimony at trial was the observed injury to Victim's genitals was consistent with some type of penetration. A doctor could not state with certainty the exact cause of the injuries discovered and the determination of the cause of the injury was a question for the jury. The medical evidence described at trial was circumstantial evidence. Dr. Thompson's testimony did not make it any less likely that Applicant had committed the crime, in fact, the substance of his testimony at the PCR hearing only confirmed that the cause of the injuries was unclear. Accordingly, this Court finds that Trial Counsel was not

deficient for failure to interview and present a medical expert at trial.  
This allegation is hereby denied and dismissed.

App. p. 377.

The Respondent subsequently sought certiorari from this Court, which then transferred jurisdiction to the Court of Appeals. In a published opinion, the Court of Appeals reversed the PCR court, concluding that “trial counsel was deficient because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State’s medical evidence presented at trial.” Supp. App. p. 71. The Court of Appeals dismissed any contention that defense counsel had a “legitimate trial strategy” for failing to consult with an expert because “[t]rial counsel recalled he failed to meet with an expert witness because ‘there was a question about money,’ but he also stated he could not recall whether he discussed this issue with Reeves at all.” Supp. App. p. 71. The Court of Appeals also concluded that if defense counsel had consulted with the Respondent and had the Respondent been unable to pay for an expert, then defense counsel could have sought funding for an expert through S.C. Code § 17-3-50(B). Supp. App. p. 71 (footnote 5). With regard to Strickland’s prejudice prong, the Court of Appeals found that the Respondent was prejudiced by defense counsel’s failure to call an expert witness at trial because Dr. Thompson “provided additional ways the injury could have occurred, including self-infliction or by accident” and because “Dr. Thompson opined Victim’s scars would have had to have been substantial to be seen one month after the incident. However, at trial, Dr. Bash’s testimony does not indicate the injury was substantial.” Supp. App. p. 72. The Respondent respectfully submits that the Court of Appeals properly found defense counsel ineffective, and that this Court should deny certiorari.

#### B. Discussion

The Petitioner argues that the Court of Appeals erred in reversing the PCR court for three reasons: (1) “the Court of Appeals erroneously determined Reeves established the requisite

prejudice based on the testimony of Dr. Thompson”; (2) “the Court of Appeals incorrectly found trial counsel’s performance was deficient for failing to consult with a gynecologist to challenge the State’s medical evidence”; and (3) “the Court of Appeals inaccurately surmised Reeves was indigent without proper evidence in the record to support such a finding.” Certiorari Petition at 7-8. The Respondent contends that all three arguments are meritless and do not rise to the level of “special and important reasons” to grant certiorari. Rule 242(b), SCACR.<sup>5</sup> Accordingly, the Respondent respectfully requests that this Court deny the Petitioner’s certiorari petition.

*1. The Court of Appeals Properly Determined Defense Counsel’s Performance Was Deficient<sup>6</sup>*

The Petitioner’s primary argument regarding defense counsel’s deficiency centers on its contention that defense counsel had “an entirely logical and legitimate trial strategy” “to attack the accuracy of Victim’s claims by showing her mother’s lack of credibility.” Certiorari Petition at 13. The Respondent asserts that the Court of Appeals correctly concluded that defense counsel did not provide “a legitimate trial strategy for failing to consult with an expert before trial or call a medical expert witness to testify at trial.” Supp. App. p. 71.

As a general rule, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, *supra*, 446 U.S. at 691. This Court has further recognized that the failure to present favorable expert witness testimony at trial constitutes ineffective assistance of counsel. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008).

“Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d

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<sup>5</sup> The Respondent would note that the Petitioner does not mention Rule 242 in the certiorari petition, nor does the Petitioner identify if any of Rule 242(b)’s enumerated considerations warrant review in this case.

<sup>6</sup> The Respondent addresses the issues in a different order than the Petitioner in order to present them in a more traditional Strickland analysis of deficiency first, then prejudice second.

514, 517 (2000). “The presumption of adequate representation based on a valid trial strategy,” however, “disappears when trial counsel acknowledge[s] there was **no** trial strategy.” Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (emphasis in original). Even where a trial strategy is articulated, “it is measured under an objective standard of reasonableness.” Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Here, the Petitioner argues that defense counsel’s testimony that he met with the Respondent and decided to argue that “the child’s mom had been convicted [sic], against Bobby” at trial constitutes a strategic decision, made in consultation with the Respondent, *not* to consult with an expert prior to trial. App. p. 338, line 14. This line of argument creates a strategic decision out of whole cloth. Defense counsel was clear in his testimony that he could not recall discussing hiring an expert with the Respondent prior to trial. See App. p. 339, lines 4-5 (“I know I never did talk to an expert, but whether Bobby and I talked about that, I cannot tell you.”) Consequently, the Petitioner’s supposed strategy for defense counsel of “electing to focus on attacking the credibility of Victim’s allegations and strong motivation for fabrication rather than concentrate on physical evidence he already knew would be lacking” was never actually articulated by defense counsel. Certiorari Petition at 16. The Petitioner’s argument presupposes a discussion between the Respondent and defense counsel wherein various strategies were explored and one out of the many was selected. While that is certainly how trial preparation should proceed, defense counsel did not testify that he ever engaged in such a discussion with the Respondent. Consequently, the Court of Appeals did not err in concluding that defense counsel did not articulate a valid strategic reason for failing to consult with an expert because he never articulated such a reason at all.

Moreover, even if defense counsel, after discussion with the Respondent, did decide not to consult with an expert prior to trial, despite all evidence to the contrary, then such a strategy would

certainly not be a valid one. Defense counsel knew that the case was going to come down to a credibility battle between the Respondent and the victim and that the State would present evidence of physical abuse to the victim. See App. p. 338, lines 18-23. By not consulting with a gynecological expert, defense counsel had no possible avenue to counteract the State's inevitable argument that the victim was injured as a result of abuse. As noted by the Second Circuit in Eze v. Senkowski, 321 F.3d 110 (2nd Cir. 2003),

A lesson to be learned from Lindstadt v. Keane, 239 F.3d 191 (2nd Cir. 2001)] and Pavel v. Hollins, 261 F.3d 210 (2nd Cir. 2001)] is that when a defendant is accused of sexually abusing a child and the evidence is such that the case will turn on accepting one party's word over the other's, the need for defense counsel to, at a minimum, consult with an expert to become educated about the "vagaries of abuse indicia" is critical. See id. at 224; Lindstadt, 239 F.3d at 201. The importance of consultation and pre-trial investigation is heightened where, as here, the physical evidence is less than conclusive and open to interpretation.

321 F.3d at 128. Here, the evidence was certainly "less than conclusive and open to interpretation" because, as Dr. Thompson testified, there were other possible explanations for the victim's injury and it would have had to have been a significant injury to be seen a month after infliction. Id. Defense counsel, however, did not possess that knowledge since he failed to do even a basic consultation with an expert prior to trial.

Moreover, the Petitioner's argument posits that defense counsel made a strategic choice to pursue one of two opposing strategies: attacking the victim's credibility or attacking the persuasiveness of the physical evidence. However, the strategies are complimentary, not opposing. If the allegation of abuse was made up, then it would make sense that the victim's mother seized upon an unrelated injury to the victim to craft an allegation against the Respondent. Dr. Thompson's testimony would have been all the more important to show that it was more likely, not less likely, that the victim lied about the abuse because she should have had a much more

significant injury than the one she suffered from in order for the injury to still be healing a month after the abuse. By failing to consult with an expert, defense counsel left a gaping hole in his trial strategy: how to combat the State's repeated arguments that "[t]en year old girls who have not been sexually molested do not have healing scar tissue in their hymen" and that "[t]here is no other explanation other than she was penetrated." App. p. 202, lines 19-22. Consequently, if defense counsel deliberately chose not to consult with an expert for strategic reasons, then that strategy was not objectively reasonable because he needed such an expert for his chosen strategy to work at trial. Accordingly, the Respondent submits that the Court of Appeals correctly determined that defense counsel's performance was deficient, and that certiorari should be denied.

*2. The Court of Appeals Correctly Determined that Defense Counsel had an Obligation to Seek Funding for an Expert Witness*

As noted above, the Petitioner argues, as one of its three main reasons for granting certiorari, that "the Court of Appeals inaccurately surmised Reeves was indigent without proper evidence in the record to support such a finding." Certiorari Petition at 7-8. The Petitioner, however, confines its substantive argument on this issue to a footnote. While the Respondent acknowledges that the footnote is lengthy, the Respondent questions whether the Petitioner has abandoned this issue by confining its argument entirely to a footnote. See Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 137, 530 S.E.2d 643, 654 (footnote 10) (Ct. App. 2000) ("Although Sierra Club contends in a footnote that the circuit judge erred in relying on statements made by DHEC's or Laidlaw's counsel that Laidlaw complied with the locations standards, Sierra Club did not sufficiently argue the issue to preserve it for appeal.") To the extent that the Petitioner has preserved its argument for appeal, the Respondent contends that it is meritless.

The Petitioner argues that “the Court of Appeals misapprehended Reeves’s alleged indigency status” “by finding or even suggesting that Reeves was indigent.” Certiorari Petition at 16 (footnote 3). The Petitioner further envisions a doomsday scenario where the Court of Appeals’ opinion in this matter is utilized by criminal defense attorneys to “empty [the Office of Indigent Defense’s] coffers to aid private counsel on retained cases at the cost of crucial funds needed to support our state’s public defender system and those truly indigent defendants who cannot afford to retain counsel in the first place.” Certiorari Petition at 16 (footnote 3). The Respondent submits that these arguments are unfounded and should be rejected.

The Respondent would note that the Court of Appeals never found that the Respondent was indigent, or even suggested that the Respondent was indigent at the time of trial. Instead, the Court of Appeals merely concluded that “[i]f Reeves was indigent and could not afford to pay for an expert, the South Carolina Office of Indigent Defense could have provided the funds needed to secure an expert witness.” Supp. App. p. 71 (footnote 5). This conclusion was borne out of trial counsel’s only actual explanation for failing to consult with an expert: the Respondent may not have had the ability to pay for one. That explanation, however, is not a valid reason for failing to consult with an expert. See generally State v. Schoonmaker, 143 N.M. 373, 382, 176 P.3d 1105, 1114 (N.M. 2008) (“A defendant's inability to pay for necessary experts is not a trial tactic or strategy, and cannot be used to justify defense counsel's failure to consult with or call such experts as witnesses.”); Ex parte Briggs, 187 S.W.3d 458, 467 (Tex. Crim. App. 2005) (“There is no suggestion that trial counsel declined to fully investigate [the victim]'s medical records because he made a strategic decision that such an investigation was unnecessary or likely to be fruitless or counterproductive. ... The decision was made because he had not been paid for experts.”).<sup>7</sup>

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<sup>7</sup> The Respondent would note that the Petitioner did argue that the Respondent’s inability to pay for an expert excused defense counsel’s failure to consult with an expert in its Brief of Respondent filed below with the Court of Appeals.

Contrary to the Respondent's arguments, the Court of Appeals only held that if the Respondent had been indigent, then defense counsel could have tried to seek funding. It is important to note what the Court of Appeals did *not* conclude. The Court of Appeals did not conclude that the Respondent was indigent. The Court of Appeals did not conclude that a trial court would always have to grant funding to a private attorney seeking expense funds for a retained client. The Court of Appeals did not hold that the trial court would have to grant all of the funding requested by a private attorney seeking expense funds for a retained client. The Court of Appeals did not change the law that a decision to grant funding pursuant to § 17-3-50 is always "within the discretion of the trial judge." *Bailey v. State*, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). The Respondent has faith in circuit court judges to administer requests by retained attorneys for expense funds pursuant to § 17-3-50(B) fairly and equitably. Consequently, the Respondent does not believe that the nightmare scenarios presented by the Petitioner in Footnote 3 will come to pass based on the Court of Appeals' decision in this case, and contends that certiorari should not be granted to review these arguments.

*3. The Court of Appeals Correctly Determined that Defense Counsel's Deficient Performance Prejudiced the Respondent*

The primary thrust of the Petitioner's argument that defense counsel's deficient performance did not prejudice the Respondent rests on its contention that "Dr. Thompson's testimony was consistent with the two experts presented at Reeves's trial." Certiorari Petition at 11. The Respondent submits that this argument is patently meritless and should be rejected.

Initially, the Respondent would note that the Petitioner raises several arguments against Dr. Thompson's qualifications. For instance, the Petitioner argues that "Dr. Thompson was **not**

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See Supp. App. p. 57 ("Petitioner's repeated assertions that Counsel was under a duty to consult with an expert even if Petitioner did not have the funds is not controlling.") The Petitioner appears to have abandoned that argument by not raising it again in this appeal.

admitted as an expert in pediatrics or sexual assault and it is unclear what experience—if any—he has treating child sexual assault victims.” Certiorari Petition at 10 (emphases in original). The Petitioner further contends that “Dr. Thompson’s background is starkly different from the two experts presented by the State at Reeves’s trial, both [of] whom had vast experience treating pediatric victims of sexual assault.” Certiorari Petition at 11. The Respondent argues that any challenge to the opinions made by Dr. Thompson due to a lack of expertise in any area, such as pediatric gynecology, has been waived, given that the Petitioner raised no such objection to Dr. Thompson’s testimony during the PCR hearing below. See Harris v. Campbell, 293 S.C. 85, 88, 358 S.E.2d 719, 721 (Ct. App. 1987) (concluding that the failure to object to the introduction of the testimony of a witness “as that of an expert” waives the right to object to such testimony on appeal).

Turning to the merits of the Petitioner’s argument, the Respondent contends that Dr. Thompson’s testimony was not cumulative to that presented by the State’s experts at trial. As the Court of Appeals correctly found,

[Dr. Thompson] provided additional ways the injury [to the victim] could have occurred, including self-infliction or by accident. *These additional theories were not presented during trial.* In fact, the State, in its closing arguments, repeatedly argued, “There is no other explanation [for the injury] other than she was penetrated. ... And that is a fact [the defense] cannot overcome. ... that’s undisputed testimony.” Further, Dr. Thompson opined Victim’s scars would have had to have been substantial to be seen one month after the incident. *However, at trial, Dr. Bash’s testimony does not indicate the injury was substantial.*

Supp. App. p. 72 (emphasis added). Dr. Thompson’s testimony, therefore, was not cumulative to the testimony of the State’s experts as it presented both: (1) other possible explanations for the injury to the victim; and (2) reasonable doubt that the Respondent inflicted the injury to the victim given how severe it would have had to have been in order to be seen a month later.

Furthermore, the Court of Appeals only selected a small snippet of the State's closing argument to highlight, but the State's closing argument repeatedly relied on its expert witnesses to convince the jury that the only possible explanation for the victim's injury was the Respondent's assault on the victim:

The direct evidence, victim's testimony is totally and completely corroborated by every expert we had.<sup>8</sup>

But I beg you in this case, think about the experts because we didn't take this child out. ... Judge [the experts'] credibility, because they are [sic] totally, completely, corroborate this child in this case.<sup>9</sup>

But remember what Dr. Bash said when he examined victim about three weeks after the last time she had seen Bobby Reeves. There was healing scar tissue in her hymen. *Ten year old girls who have not been sexually molested do not have healing scar tissue in their hymen. There is no other explanation other than she was penetrated.*<sup>10</sup>

And again, 100 percent corroborated by the medical evidence. Three weeks later when a doctor examined her, a doctor who's a pediatric specialist and finds healing scar tissue. *It just doesn't happen on its own; not on a ten year old; not in an unsexually active ten year old. It's just not going to be there.*<sup>11</sup>

Dr. Bash examines victim on that day and finds healing scar tissue. *Again, there's no other explanation for it other than victim had been penetrated by something.* And that's undisputed testimony.<sup>12</sup>

[The Respondent] counted on the fact that there would [not] be experts up there; experts who would have the education and the training to take her revelation and call it what it was; sexual abuse.<sup>13</sup>

Dr. Thompson's testimony contradicts this view of the evidence, and it certainly does not complement it as the Petitioner posits.

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<sup>8</sup> App. p. 191, lines 10-12.

<sup>9</sup> App. p. 192, lines 12-24.

<sup>10</sup> App. p. 202, lines 16-22 (emphasis added).

<sup>11</sup> App. p. 206, lines 7-12 (emphasis added).

<sup>12</sup> App. p. 207, lines 13-17 (emphasis added).

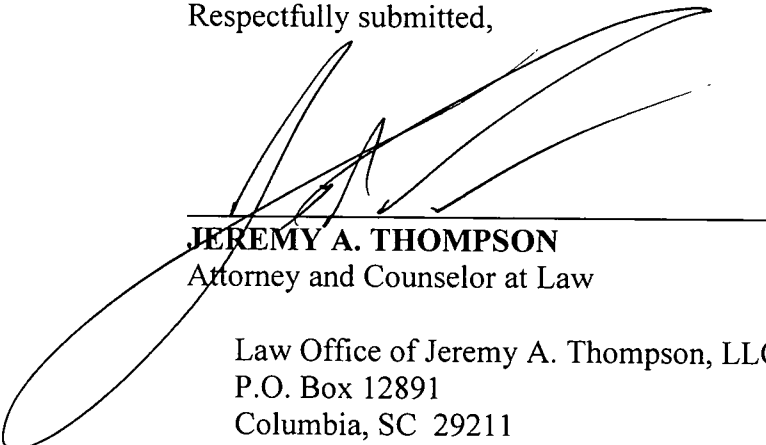
<sup>13</sup> App. p. 211, lines 1-5.

Given all of the above, the Court of Appeals correctly concluded that defense counsel's failure to consult with a gynecological expert, and to present such an expert as a witness for the defense at trial, prejudiced the Respondent and constituted ineffective assistance of counsel. The Respondent respectfully submits that this Court should deny the Petitioner's certiorari petition.

CONCLUSION

For the reasons stated, the Respondent asks this Court to deny the Petitioner's certiorari petition.

Respectfully submitted,



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**ATTORNEY FOR RESPONDENT.**

This 13<sup>th</sup> day of June, 2016.

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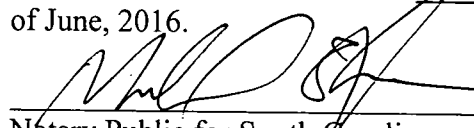
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that two copies of the Respondent's Return to Petition for Writ of Certiorari in the above-entitled case have been served upon opposing counsel, Megan Harrigan Jameson, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 13<sup>th</sup> day of June, 2016.

  
\_\_\_\_\_  
**JEREMY A. THOMPSON**  
ATTORNEY FOR THE RESPONDENT

SWORN TO BEFORE me this 13<sup>th</sup> day  
of June, 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina

(L.S.)

My Commission Expires: 7/10/2022