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SC 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,

PETITIONER.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

- I. Whether 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 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.
 - A. Whether the Court of Appeals erred in finding that the bolstering issue was preserved with respect to any of Dr. Henderson's testimony.
 - B. Whether, even if this Court finds the bolstering issue was preserved, it was only preserved to the extent it was raised to the PCR judge, and in making its finding that counsel was ineffective, the Court of Appeals was not entitled to consider any other portion of Dr. Henderson's testimony.
 - C. Whether the Court of Appeals erred in finding counsel was ineffective for not objecting to alleged bolstering where Dr. Henderson's direct examination testimony did not constitute bolstering, counsel had a valid trial strategy in eliciting her testimony on cross-examination in an attempt to further discredit Victim, and there is no reasonable probability that the outcome would have been different had counsel objected.

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 issue raised on appeal was whether the trial judge erred in failing to grant a mistrial after the State cross-examined a witness about Respondent's prior DUI convictions. (App. p. 576, line 19-p. 577, line 25). 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 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, which this Court denied on December 17, 2009. The remittitur was returned on December 22, 2009.

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

Respondent subsequently filed an application for post-conviction relief ("PCR") on January 6, 2010. In his application, Respondent alleged that trial counsel was ineffective for failing to (1) "preserve direct appeal issue," (2) "investigate documentary evidence and witnesses," and (3) "make an additional object[ion] to the sufficiency of the curative charge or move for a mistrial." 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 Counsel was ineffective. (App. pp. 616-22). Respondent filed a timely motion to alter or amend the order denying PCR in which he argued that the PCR judge failed to rule on several issues, including the allegation that "trial counsel failed to object to the testimony of Dr. Henderson that, in her opinion, the victim had been sexually abused." (App. p. 630). Petitioner 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. John Ferguson, Esquire, perfected the appeal. Following oral argument, the Court of Appeals reversed the PCR judge's ruling 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). Petitioner subsequently filed a petition for writ of certiorari with this Court on April 11, 2016, and Respondent filed a reply to the petition on April 14, 2016. This Court granted the petition for writ of certiorari by written order dated June 16, 2016.

STATEMENT OF THE FACTS

At trial, the victim ("Victim") testified her father, Respondent, began sexually abusing her when she was ten years old, (App. p. 10, line 3-p. 13, line 18), and it happened many times over six years. (App. p. 15, lines 15-19). 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). He would also touch her inappropriately and make her take baths in front of him. (App. p. 15, lines 1-10). When she was thirteen or fourteen, Respondent installed a deadbolt lock on his bedroom door, which only he had a key to. (App. p. 17, lines 19-24). Victim said "he didn't usually do full penetration[.]" and 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). 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 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 the State. He testified:

I 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). Brother also said Victim and Respondent would be behind closed doors for twenty or thirty minutes at a time, and when they came out, she would be "visibly upset, crying, and she [would] just head to the bathroom," but he never heard them fighting over anything. (App. p. 98, lines 8-14). Brother saw this 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), and 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 the State at the trial. (App. pp. 149-52). Dr. Henderson's physical examination of Victim revealed an abnormality of the vaginal region. (App. pp. 158-59). She found "the hymen tissue looked very, very normal until . . . [a] point, and she had mark [sic] narrowing at that point. . ." (App. p. 158, lines 14-22). She 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). Dr. Henderson indicated in her report that these findings were "suspicious." (App. p. 162, line 4). The State 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 responded 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." (App. p. 159, lines 16-19). She indicated that her "opinion as to whether [Victim] was sexually abused," was that she had been. (App. p. 159, lines 19-21). She testified that "[the] term [']hymen in tact[']" is

not a medical term, and that she "does not use that terminology at all. [It is] kind of a lay terminology. . . ." (App. p. 160, lines 8-11). She stated "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," rather than "consistent" and yet testified at trial that the injury was consistent. (App. p. 161, line 7–p. 163, line 24). She stated that she indicated it was suspicious because the finding indicated on the report is "related to the actual finding on the exam," and "[t]he only thing that could be consistent or diagnostic" would be if the 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). She stated that "any kind of severe penetration into the hymenal tissue" can cause narrowing, and that it could have been caused by some other kinds of trauma rather than abuse. (App. p. 163, lines 8-13). Ultimately, she testified (during cross-examination) that "based on the history that [Victim] 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).

Counsel called Dr. Medlock as an expert witness for the defense 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 the Victim's "[r]ectal examination reveal[ed] external 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 physician 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 "an impression or a presumptive diagnosis . . . [taking] what the patient tells you, history, and then you do a physical examination. And from that you come to an impression or make a presumptive diagnosis." (App. p. 251, lines 1-9). Dr. Medlock testified that the posttraumatic stress finding was a "diagnosis or impression" that the physician made "based on the information he was given on that visit[.]" (App. p. 251, lines 1-12).

Respondent also 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 also testified he installed an exterior "steel" lock on his bedroom door that required a key. (App. p. 381, line 12-p. 382, line 5). On redirect he said he installed it because his children would sneak into his room and steal money and cigarettes. (App. p. 394, lines 15-18).

ARGUMENT

- I. **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.**

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)).

- A. **The Court of Appeals erred in finding that the bolstering issue pertaining to any of Dr. Henderson's testimony was preserved.**

The Court of Appeals ruled that "the bolstering issue—as it related to Dr. Henderson's testimony" was preserved for its review. (App. pp. 684-85). Petitioner submits the Court of Appeals erred in finding the bolstering issue—in other words, whether Counsel was ineffective for not objecting to or moving for a mistrial in response to bolstering testimony—was preserved for its review with respect to *any* of Dr. Henderson's testimony.

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, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Though an applicant is 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). "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)).

At the PCR hearing, counsel for Respondent, J. Faulkner Wilkes, ("PCR counsel") asked Counsel about a very specific portion of Dr. Henderson's testimony that appeared on "page 252" of the trial transcript "on line 11." (App. p. 583, line 24–p. 584, line 1). The testimony at the PCR hearing was as follows:

Q: Now, if you will look, I noticed on page 252 Dr. Henderson was asked a question of whether—and I'm going to start on line 1.

Solicitor Leibert had asked the question: "Do you have an opinion within a reasonable degree of medical certainty based on your education, training and experience and based upon your findings on examination of [Victim] whether those findings are consistent with a penetrating injury?"

A: Yes.

Q: Which was an appropriate question under our law, I would think. But the answer on line 16 was, "she [sic] believed she had been abused."²

A: Right.

Q: Now that did not raise an objection from you.

A: It did not.

Q: Having—was there any reason not—or 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?

A: No there would not.

(App. p. 583, line 24–p. 584, line 19).

On cross-examination, the State questioned Counsel about that same testimony. (App. p. p. 594, line 23–p. 595, line 3). The testimony was as follows:

Q . . . [I]s 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.

It's not hard to say yes. It's a tricky word when you say it is consistent with penetration. You know, they just don't explain what that word consistent means.

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 then 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) (emphasis added). Though Counsel stated that he "probably should have objected," that statement had to do with whether Dr. Henderson had testified as to an ultimate issue—not about whether her testimony was bolstering. On redirect Counsel agreed that if "it [did] not fall under [704, SCRE], . . . it did not strike a cord [sic] as improper bolstering to [him] at the time of trial." (App. p. 596, lines 17-20). Counsel also testified that generally if he thought something was improper, he would have objected. (App. p. 593, lines 3-6).

PCR counsel gave an opinion that the State's question about whether Dr. Henderson's findings were "consistent with a penetrating injury" was an appropriate question under South Carolina law. (App. p. 584, lines 2-9). PCR Counsel asked Counsel: "*assuming for a moment that might be outside of 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?*"³ (App. p. 584, lines 14-18). This question *required* Counsel to *assume* that the testimony was objectionable—and not only because it might be bolstering, but *also* because it might be outside of the scope. In addition, most of the discussion at the hearing pertaining to Dr. Henderson's testimony was in the context of expert opinions on ultimate issues of fact under rule 704, SCRE. (App. pp. 595-96; p. 624). As to the issue of bolstering, Counsel never testified at the hearing about whether he

³ Earlier in the PCR hearing, PCR Counsel asked Counsel a similar question about a different issue. (App. p. 578). He asked: "Now, assuming those would be in and of themselves objectionable, would there have been any reason not to include those specifically in your argument?" (App. p. 578, lines 5-7). Counsel responded, "The answer to the question as you put it would be no. . . . *you preface it by saying if, in fact, they were objectionable* should you have objected, and I would agree that, yes, I should have." (App. p. 578, lines 8-13) (emphasis added).

thought the testimony was bolstering, nor did PCR counsel present any argument that by providing an opinion that abuse occurred, Dr. Henderson was impermissibly commenting on the veracity of the child victim. (See App. pp. 568-614). In summation, PCR Counsel argued the following:

We also brought up the issue of Dr. Henderson. I believe in this case we have no case law specifically *on allowing an expert to say in her opinion that abuse occurred*. She wasn't asked that question. She gave that answer. It did not receive an objection which we believe it should have. It was improper vouching. And I've cited to Morgan—I think Baker, Johnson and some other cases—Douglas—on that issue.

(App. p. 613, lines 4-12).

Respondent argued the PCR court failed to rule on the issue of whether "trial counsel failed to object to the testimony of Dr. Henderson that in her opinion the victim had been sexually abused." (App. p. 630). In his motion to alter or amend, Respondent again specifically referenced only the testimony that appeared on page 252 of the trial transcript, and argued that this "testimony could reasonably have been construed by the jury as Dr. Henderson vouching for the victim's veracity, such that it should have been excluded under Rule 403, SCRC, . . . and further that it constituted improper bolstering." (App. pp. 630-31). In denying Respondent's motion to alter or amend pursuant to Rule 59(e), SCRCP, the PCR court ruled that the issue of whether counsel was ineffective for failing to object to bolstering was "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).

Though PCR counsel stated that he cited those cases, there is no evidence in the Appendix as to where he did so or where he made any argument in connection with those cases. But, certainly, PCR Counsel did not make those arguments at the hearing itself, nor did he explain how those cases applied. (See App. pp. 568-615). Moreover, as a result, the PCR court

never had the opportunity to hear testimony or argument on the issue or make a ruling on the issue based on what was presented at the hearing. The Court of Appeals also recognized that Counsel admitted "he probably should have objected when [Dr. Henderson] *gave an opinion on the ultimate issue.*" (App. pp. 684-85) (emphasis added). Yet, the court also acknowledged that because Dr. Henderson was an expert 'in the examination, diagnosis, and treatment of child sexual abuse," "it was proper for her to opine that based on her examination, Victim's injuries were consistent with sexual abuse." (App. p. 686). Accordingly, even the court's opinion itself reflects that there is a real question as to whether the bolstering issue as a whole was ever properly raised to the PCR judge.

Based on the above, there is no clear indication that the bolstering issue was preserved with respect to any of Dr. Henderson's testimony, and Petitioner submits that the PCR court properly held that the issue was not presented to it. Therefore, the Court of Appeals erred in finding the bolstering issue was preserved, and this court should reverse.

B. Even if this Court finds the bolstering issue was preserved, it was only preserved to the extent it was raised to the PCR judge, and in making its finding that counsel was ineffective, the Court of Appeals was not entitled to consider any other portion of Dr. Henderson's testimony.

Even if this Court finds the Court of Appeals properly ruled the bolstering issue was preserved for review, it was *only* preserved with respect to that portion of Dr. Henderson's testimony that was presented to the PCR court, and the court erred in considering other portions of her testimony. Specifically, the Court was not entitled to consider Dr. Henderson's cross-examination testimony.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron, 395 S.C. at 465, 719 S.E.2d at 642 (citing 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, LLC, 338 S.C. at 422, 526 S.E.2d at 724. Though an applicant is 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). These 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." Lewis, 398 S.C. at 329, 739 S.E.2d at 285.

Here, the Court of Appeals erred in considering Dr. Henderson's cross-examination testimony in reaching its decision that Counsel was ineffective because that testimony was never presented to the PCR court. The court's opinion heavily relied on Dr. Henderson's cross-examination testimony⁴ in making its ruling. 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).

Even though the court found that the bolstering issue was preserved as to Dr. Henderson's

⁴ In addition, the court's opinion obscures the reality of where this testimony came from by failing to make it clear that the testimony was elicited *by Counsel*.

testimony, it was not entitled to search the entirety of her testimony for instances of potentially deficient attorney conduct. Rather, in determining whether Respondent had satisfied his burden of proving ineffective assistance of counsel, the Court of Appeals was constrained by the preservation rules to limit its inquiry only to the testimony that was actually presented to the PCR court.

By considering this testimony, the court changed the inquiry from whether Counsel was deficient for not objecting to a specific portion of Dr. Henderson's testimony to the entirely different inquiry: whether he was deficient for the way he cross-examined Dr. Henderson. But because neither the argument nor the testimony was presented in the PCR action, the PCR court was never given the opportunity to consider or rule on the question of whether Counsel was ineffective for *eliciting* Dr. Henderson's testimony on cross-examination. Dr. Henderson's testimony was presented in a very limited way in the entire PCR action. PCR Counsel only referred to Dr. Henderson's testimony appearing on page 252 of the trial transcript.⁵ (App. pp. 568-615; pp. 630-33). Never—whether in the application, the hearing, in summation, or in the motion to alter or amend—did Respondent refer to any portion of Dr. Henderson's testimony. (App. pp. 583, lines 14-p. 584, line 25; pp. 595-97; p. 613; pp. 630-33). In addition, Respondent never alleged that Counsel was ineffective *for failing to move for a mistrial* with respect to the alleged bolstering testimony—he only questioned him about the lack of an objection. At most, Respondent only raised the issue of whether Counsel was deficient for failing to *object* to Dr. Henderson's testimony on *direct* examination appearing on page 252 of the trial transcript. In addition, it was not until it considered the testimony elicited on cross-examination that the court even found that Dr. Henderson's testimony to be bolstering.

⁵ (App. p. 159, lines 11-16).

If raised at all, the only portion of her testimony that was placed at issue was her direct-examination testimony—and only a specific portion of it, at that. The testimony that the court ultimately held was bolstering was never discussed in the PCR action. See Herron, 395 S.C. at 465, 719 S.E.2d at 642 (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 was not entitled to consider that testimony in its finding that her testimony was bolstering, and it cannot serve as a basis for satisfying the two prongs of ineffective assistance of counsel. Therefore, the court erred when it considered Dr. Henderson's statements on cross-examination, because any argument that Counsel was ineffective for either eliciting such testimony or failing to object to such testimony was not preserved.

C. The Court of Appeals erred in finding counsel was ineffective for not objecting to alleged bolstering where Dr. Henderson's direct examination testimony did not constitute bolstering, counsel had a valid trial strategy in eliciting her testimony on cross-examination in an attempt to further discredit Victim, and there is no reasonable probability that the outcome would have been different had counsel objected.

Dr. Henderson's Direct Examination Testimony did not Constitute Bolstering

The court erred in finding that Counsel rendered deficient performance in not objecting to alleged bolstering because, in her direct examination, Dr. Henderson did not give an opinion on Victim's veracity, and Dr. Henderson is a medical doctor, not a forensic interviewer.

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. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (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.

To show that Counsel rendered deficient performance in not objecting to Dr. Henderson's testimony that her medical opinion was that Victim had been abused, Respondent was required to satisfy his burden of proving that the testimony actually constituted bolstering. Petitioner submits the court erred in finding that Dr. Henderson's statements on direct constituted bolstering such that Counsel was deficient for not objecting to that testimony.

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)). "Expert testimony concerning child abuse typically comes from two sources: medical evidence provided by physicians and behavioral science evidence provided by psychiatrists, psychologists, and social workers." State v. Morgan, 326 S.C. 503, 508, 485 S.E.2d 112, 115 (Ct. App. 1997) overruled on other grounds by State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). "The medical witness is often called to describe the results of the examination, offer an opinion as to the cause of any injuries, [and] establish whether penetration occurred. . . ." Id. at 514, 485 S.E.2d at 118 (citing State v. J.Q., 130 N.J. 554, 617 A.2d 1196, 1201 (1993)); See State v. Brown, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985) (recognizing that physicians can comment on a victim's history where necessary to medical conclusions and finding harmless error); see also John E.B. Myers et al., Expert Testimony in Child Sexual Abuse Litigation, 68 Neb.L.Rev. 1, 80-81 (1989)) ("An opinion that a child was sexually abused is not an opinion that the child was truthful when describing abuse Thus, an expert opinion that a child was sexually abused is not the same as an opinion on the child's truthfulness or credibility." (citations omitted)).⁶

In this case, on direct examination, Dr. Henderson stated: "[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). This statement does not constitute bolstering because she did not give her personal opinion as to whether Victim was telling the truth. She never testified to any specific details or facts regarding the incidents, but only stated on direct examination that based

⁶ Though secondary authority, the court cited to the article in Morgan and PCR counsel also referred to the article in his motion for reconsideration.

upon her physical examination and the history Victim shared with her, she concluded that the damage to Victim's hymen was "consistent with a, that she had been abused." Dr. Henderson did not give inadmissible details of the alleged assaults nor state whether she believed Victim's allegations. Rather, there was a finding from Victim's physical examination of narrowing of the hymen. Dr. Henderson identified this as suspicious, and based on the examination alone, it was unclear whether it was caused by penetration or some other trauma. But based on Victim's history denying any other kind of trauma, Dr. Henderson stated that she found the narrowing was caused by abuse. Therefore, her testimony on direct examination 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. As a medical doctor, she was entitled to give this opinion. See Rule 704, SCRE; Morgan, 326 S.C. at 508, 485 S.E.2d at 115. See also State v. Burroughs, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997) ("statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment' are admissible) (citing Rule 803(4), SCRE)). The Court of Appeals also clearly recognized this in its opinion, stating "it was proper for [Dr. Henderson] to opine that based on her examination, Victim's injuries were consistent with sexual abuse." (App. p. 686).

In addition all of the cases that the Court of Appeals relied on in reaching its decision are distinguishable from this case. Expert testimony of medical professionals should be distinguished from that of forensic interviewers. See Morgan, 326 S.C. at 508, 485 S.E.2d at 115 (noting "[e]xpert testimony [in child abuse cases] comes from two sources: *medical evidence* provided by physicians and *behavioral science evidence* provided by psychiatrists, psychologists, and

social workers.") (emphasis added). Dr. Henderson is a medical professional presenting medical evidence rather than a behavioral scientist presenting behavioral science evidence. For that reason, none of the authority on which the Court of Appeals relied in reaching its decision supports a finding that the expert opinion of Dr. Henderson constituted improper bolstering. The Court of Appeals relied on cases whose holdings pertained to testimony elicited by forensic interviewers, therapists and counselors—i.e., behavioral scientists, not physicians. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) (forensic interviewer); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (therapist); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct.App.2000) (child abuse counselor); State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011) (forensic interviewer).

In those cases involving the presentation of behavioral science evidence, the witnesses' *only* interaction with the child was listening to his or her story, and all of their statements relied solely on observations of the child's behavior. A physician, on the other hand, testifies about a medical finding or diagnosis based on a physical examination. Therefore, medical evidence presented by a physician is distinct from behavioral science evidence, and has historically been treated as such by the courts in this state. See Morgan, 326 S.C. at 508, 485 S.E.2d at 115. Therefore, the cases the Court of Appeals relied on are clearly distinguishable from the instant case and do not support a finding that Dr. Henderson's testimony was objectionable where she merely stated that she considered Victim's statements about her medical history *in conjunction with the physical examination* of Victim's vaginal area in forming a medical opinion.

The facts of those case are also distinguishable. In Chavis, the Court found the forensic interviewer's testimony "that Victim 'not be around Appellant for any reason'" could "only be

interpreted as [the witness] believing Victim's claim that Appellant sexually abused her," and therefore, improperly bolstered the victim's credibility. 412 S.C. at 108-09, 771 S.E.2d at 340. (emphasis added). There, the witness specifically referred to the accused and made an admonition—a statement that exceeded a medical opinion or diagnosis—whereas, here, Dr. Henderson's testimony merely implied that she relied on Victim's medical history in coming to a medical opinion and made no reference to the identity of the abuser. Therefore, Chavis is distinguishable from the instant case.

Likewise, in Jennings, the Court found that the trial court erred in admitting a forensic interviewer's reports because the reports allowed him to improperly vouch for the children's credibility. 394 S.C. at 480, 716 S.E.2d at 94. In each report, he stated that each child "provided a *compelling* disclosure of abuse *by appellant*," and that 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 opined "[t]here [was] 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 Dawkins, 297 S.C. at 393–94, 377 S.E.2d at 302; Dempsey, 340 S.C. at 571, 532 S.E.2d at 309). Unlike Jennings, where the witness characterized the disclosures as "compelling" and "consistent" with one another, thereby giving an opinion about the truth of the disclosures, here, in response to the State's questions on direct examination, Dr. Henderson did not characterize Victim's disclosure in any respect. Therefore, Jennings is also distinguishable from this case.

In Dempsey, the court affirmed the petitioner's conviction and upheld the trial court's ruling that a sexual child abuse counselor's testimony was vouching, but found the trial court did not abuse its discretion in denying the petitioner's motion for a mistrial because the court's

curative instruction was sufficient. See Dempsey, 340 S.C. at 309, 532 S.E.2d at 571-72. The State asked the witness in that case how she determines a child is telling the truth and whether the child responded in a way to make her believe he lying. Id. The witness also stated that "when a child says that, ninety-five to ninety-nine percent of the time, that's the truth," and 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. That expert also explicitly stated multiple times that she believed the child. See id. Again, here, on direct, Dr. Henderson gave no personal opinion as to whether she believed Victim and did not characterize Victim's statements in any way. Therefore, Dempsey is also distinguishable from this case and does not support the finding that Dr. Henderson's statement constituted bolstering.

Similarly, in Dawkins, the witness, a therapist, gave an explicit statement that he had the impression that the child's symptoms were genuine. 297 S.C. at 393, 377 S.E.2d at 302. 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," and the trial court did not abuse its discretion in denying a mistrial. Id. In this case, Dr. Henderson gave no statement on direct examination to indicate her personal impression as to whether Victim's statements were true, nor did she make any statement about Victim's credibility or whether she believed the victim. Rather, she only implied—without conveying any sense of whether she personally believed Victim's allegations—that she relied on Victim's relation of her medical history in arriving at a medical diagnosis. Unlike the therapist in Dawkins, Dr. Henderson in no way conveyed an opinion in her direct examination testimony as to whether she believed Victim's allegations. Even Dr. Medlock, who testified for the defense, stated that

physicians consider the patient's relation of her medical history along with the physical examination in formulating a medical diagnosis or impression. (App. p. 251). Therefore, Dawkins does not support the Court of Appeals' finding that Dr. Henderson's testimony constituted bolstering.

The court also referred to Hill, but in that case the court actually upheld the trial judge's ruling that the testimony in question was not bolstering. 394 S.C. at 294, 715 S.E.2d at 376. The State questioned the forensic interviewer about the sort of indicia a child might exhibit in an interview that would show he have been coached. Id. The State asked him if those were present, and he said "yes," but 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," but the court disagreed. Id. Therefore, the holding in Hill actually undermines the Court of Appeals' finding that Dr. Henderson's testimony constituted bolstering.

To the extent the Court determines the expert physician testimony does not escape the holdings in the forensic interviewer cases above, the court erred in relying on cases that were decided well after Respondent's 2007 trial in holding that such a statement constituted bolstering. 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, 466 U.S. at 690 ("reasonableness of counsel's challenged conduct . . . [must be] viewed as of the time of counsel's conduct"). Jennings, 394 S.C. 473, 716 S.E.2d 91 and Chavis, 412 S.C. 101, 771 S.E.2d 336 were decided four and eight years after trial, respectively. In making a determination about the reasonableness of Counsel's conduct, a court

must consider the legal standards that existed at the time the conduct occurred. Therefore, in evaluating Counsel's conduct in not objecting to Dr. Henderson's statement that in her medical opinion, Victim had been abused, a court cannot charge Counsel with the knowledge of any subtle distinctions in the law pertaining to bolstering that came about years after trial.

Furthermore, PCR Counsel's question asked Counsel to *assume* that it *might* be improper bolstering. (App. p. 593). The PCR court ruled in the order of dismissal that Counsel testified he was aware that Dr. Henderson would most likely testify 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. (App. p. 619). Counsel also testified that this specific testimony did not strike a chord as improper bolstering at the time of trial. (App. p. 596, lines 17-19).

Accordingly, the court erred in finding that Dr. Henderson's direct examination testimony constituted bolstering. Therefore, the Court of Appeals erred in finding that Respondent satisfied his burden of proving counsel's performance in not objecting to such statements—or for not otherwise bringing them to the court's attention—was deficient.

Counsel had a Valid Trial Strategy of Further Discrediting Victim

Even if this Court determines the Court of Appeals was not limited to Dr. Henderson's testimony presented to the PCR court, the court erred in failing to indulge a presumption that Counsel's conduct was reasonable under the circumstances. Specifically, in questioning Dr. Henderson as he did, Counsel had a valid trial strategy of attempting to further discredit Victim.

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. Furthermore, though such rulings are not binding precedent on this Court, other courts have held that the nature and scope of cross-examination is inherently a matter of trial tactics. See United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987); see also United States v. Bari, 750 F.2d 1169 (2nd Cir. 1984). Courts have also found that even where testimony may have been otherwise inadmissible, this does not preclude the possibility that 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).

Here, because it was never raised to the PCR court, Counsel never had the opportunity to defend his conduct with respect to his cross-examination of Dr. Henderson. Regardless, it is clear Counsel's trial strategy was to discredit Victim's testimony by any and every means he could. The Court of Appeals even acknowledged that in its opinion: "trial counsel repeatedly sought to attack Victim's credibility through cross-examination, and *his theory of the case* was that the

abuse allegations were fabricated by Victim and Mother."⁷ (App. pp. 687-88) (emphasis added). Therefore, it can be reasonably inferred from the record that Counsel had a valid strategic reason for questioning Dr. Henderson in the manner in which he did.

Counsel stated that this case "came down to the credibility of the witnesses, primarily the daughter and his two sons and the wife. And I would think that anything that I could have used to impact their credibility would have been useful." (App. p. 572, lines 15-19). Counsel stated he did not "believe a word [Victim] was saying." (App. p. 581, lines 10-11). At trial, Counsel impeached Victim concerning the details about when, where, and how the abuse occurred. (App. pp. 38-39; pp. 45-53). He also impeached her testimony that her grades had severely declined due to the abuse, (App. pp. 57-59), and questioned her about the freedom she gained once her father was out of the house, insinuating she fabricated the allegations to get rid of him. (App. pp. 61-65). Counsel testified that Victim went from a "very structured," "father-dominated life" to total freedom once Respondent was out of the house, and so much so that "she started drinking and smoking and going out and, . . . [her] grades dropped and just all kinds of stuff. So, I mean, I've tried more than one of these where the sole purpose of a child testifying is to get that man out of the house. That's what happened here." (App. p. 597, lines 7-15). Counsel defended the forceful manner in which he impeached Victim. He stated that to the extent there were inconsistencies in her testimony, he brought out those inconsistencies in cross-examination of the victim. (App. pp. 581-82). He also presented Dr. Medlock's testimony and Victim's OB-GYN records to impeach Victim's testimony that she had been vaginally raped. (App. p. 583). He stated he was able to get Victim to say that Respondent "performed full-blown sex on her five or

⁷ It seems disingenuous for the court to find, on the one hand, that impeaching Victim's credibility was paramount and that this was clearly Counsel's strategy, yet on the other hand, to presume that there was no valid trial strategy involved in Counsel's questioning of Dr. Henderson, especially where he had no opportunity to defend his conduct because the issue of his cross-examination of Dr. Henderson was never raised in the evidentiary hearing.

six times in the vaginal area" beginning before 2002, and that he introduced a "medical record from 2002 [indicating] that her hymen was intact." (App. p. 582, lines 2-9). Counsel went on to explain that Dr. Medlock was a critical witness because, among other things, he "testified that in his fifty years of training, if the hymen was intact [Victim] couldn't have had sex." (App. p. 582, lines 8-12). Counsel testified that in general, if he thought something was improper he would have objected. (App. p. 593, lines 3-6).

Based on the above and on Counsel's questioning of Dr. Henderson and his closing argument, it is evident that he was seeking to use her responses on cross-examination to further discredit Victim. Counsel asked Dr. Henderson on cross-examination:

Q: . . . 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: . . . Again, you're, 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 told her certain things, including 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). Counsel referred to Dr. Henderson's testimony in his closing argument, 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) (emphasis added). Therefore, his closing argument also evidences his attempt to use Dr. Henderson's testimony to further discredit Victim. Counsel also stated at the PCR hearing that he was familiar with Dr. Henderson, that her testimony was always canned testimony, that he knew that she would testify as to whether Victim had been abused, and that he would have been "shocked" if she had testified any other way. (App. pp. 595-96).

Because it was not raised, the issue of whether Counsel was deficient for eliciting such cross-examination testimony was not explored at the PCR stage, and Counsel was never afforded an opportunity to defend his conduct. Without the benefit of having heard Counsel's explanation for why he did or did not do something, the court's decision necessarily presumed that, had Counsel had an opportunity to explain his conduct, this would not have been a valid way to impeach Victim. However, based on his statements at the PCR hearing, his questions of Victim and of Dr. Henderson, and his closing argument, the only reasonable conclusion to be drawn is that Counsel was attempting to further discredit Victim's testimony by getting Dr. Henderson to admit that, in arriving at her medical opinion, she assumed that what Victim said about the trauma to her vaginal region was true. Therefore, the court should have drawn the conclusion that Counsel had a valid tactical reason for eliciting Dr. Henderson's testimony that she assumed Victim was telling the truth. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690) (holding courts must strongly presume that "Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). Therefore, the Court of Appeals erred in failing to indulge the presumption that "under the circumstances, the challenged action might be considered sound trial strategy," Strickland, 466

U.S. at 689, in analyzing Counsel's conduct in eliciting Dr. Henderson's testimony on cross-examination, and this Court should reverse.⁸

There is no Reasonable Probability the Outcome Would have been Different had Counsel Objected to Dr. Henderson's Testimony that Victim had been Abused

The Court of Appeals also erred in finding that Respondent satisfied his burden of proving that the outcome of the 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 in response to alleged bolstering was not preserved for review and was abandoned on appeal by Respondent's failure to argue it in his brief. (App. pp. 641-52). "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. Lindsey, 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 stated in conclusory fashion 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). Second, regardless, Respondent failed to demonstrate he was prejudiced by Dr. Henderson's testimony that her "opinion as to whether [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

⁸ 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). Petitioner again submits the admissibility of Dr. Henderson's statements on cross-examination was not raised to the PCR judge, and therefore, the issue of whether Counsel was deficient in either asking if she "assumed the statements were true," or for not objecting to the answer, was not preserved.

different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. In other words, Respondent had to show not only that Counsel had a basis to object, but that had he objected, the judge would have sustained the objection, or had he moved for a mistrial, the judge would have granted it. Respondent has failed to do so.

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (citing State v. Sosebee, 284 S.C. 411, 326 S.E.2d 654 (1985)). Here, as discussed above, Dr. Henderson's testimony was distinguishable from the cases in which the courts found bolstering in that she is a physician and she gave no statement that she believed Victim. Therefore, given the trial judge's broad discretion in ruling on admissibility of evidence, it is unlikely the trial judge would have excluded the testimony. But, even if he had sustained the objection and stricken the answer, there is no reasonable probability the outcome of the proceeding would have been different.⁹ See Hill, 394 S.C. at 294, 715 S.E.2d at 376 (finding no bolstering); Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (finding judge did not abuse discretion in denying mistrial); Dawkins, 297 S.C. at 393, 377 S.E.2d at 302 (same). See also 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).

In addition, Counsel testified he did not feel that the testimony was objectionable, and had he considered it to be, he would have objected. Had Counsel not impeached Dr. Henderson about her assumption that Victim was telling the truth, the jury would have been left with only the conclusion that the abuse caused the abnormality in the hymen. Counsel had been practicing

⁹ Though Petitioner still contends the issue of Counsel's failure to move for a mistrial was not preserved, it is nevertheless highly unlikely a mistrial would have been granted given the extreme nature of the remedy, and the most Counsel would have achieved would have been a curative instruction striking the testimony. See, e.g., State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) ("The 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.").

criminal law for over thirty years, (App. p. 596), had heard Dr. Henderson testify before, and knew what her testimony would be. Even Dr. Medlock testified that a doctor has to consider his patient's statements, along with a physical exam, in making a diagnosis. Counsel fully cross-examined all witnesses and called witnesses on Respondent's behalf, including Dr. Medlock who refuted Dr. Henderson's testimony that abuse had occurred. Counsel also had Victim's OB-GYN records admitted at trial. Aside from the medical evidence, three witnesses, including Respondent, testified that Respondent had installed a keyed lock onto his bedroom door. Furthermore, Victim's brother corroborated her disclosure. He also saw Victim and Respondent come out from behind locked doors twenty or thirty times over the years, and each time Victim would be visibly upset and would head straight for the bathroom.

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. Accordingly, the Court of Appeals erred in finding that Respondent satisfied his burden of proving either deficiency or prejudice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should reverse the Court of Appeals' opinion and affirm the PCR judge's ruling that Respondent failed to prove Counsel was ineffective.

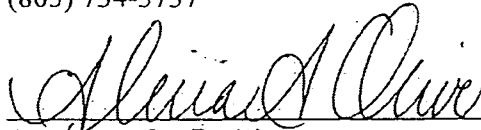
Respectfully submitted,

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July 18, 2016

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SC SUPREME COURT

THE 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

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

Appellate Case No. 2016-000610

Farid A. Mangal,.....Respondent,

v.

State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

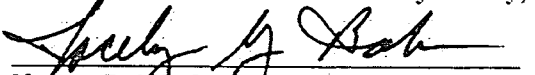
The undersigned hereby certifies that a copy of the **Brief of Petitioner** has been served upon the applicant by mailing two (2) copies in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Mr. John R. Ferguson, Esquire
Cox & Ferguson
P.O. Box 286
Laurens, SC 29360

This 18th day of July, 2016.


ALICIA A. OLIVE
ATTORNEY FOR RESPONDENT

SWORN to before me this 18th day of July, 2016.


Notary Public for South Carolina.
My Commission Expires: 12/16/2027