THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

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

Appellate Case No. 2016-000610

Farid A. Mangal, #320609

Respondent,

v.

State of South Carolina,

Petitioner.

Brief of *Amicus Curaie* Solicitors' Association of South Carolina, Inc.

SOLICITOR J. STROM THURMOND
President, Solicitors' Association of South Carolina, Inc.
sthurmond@aikencountysc.gov
S.C. Bar No. 15606
(803) 642-1557

SOLICITOR BARRY J. BARNETTE
Member, Solicitors' Association of South Carolina, Inc.
bbarnette@spartanburgcounty.org
S.C. Bar No. 13039
(864) 596-2575

Post Office Box 11251
Columbia, South Carolina 29211-1251
(864) 260-4046

COUNSEL FOR *AMICUS CURAIE*
SOLICITORS' ASSOCIATION OF
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STATEMENT OF THE CASE

Amicus Curaie concurs with the Statement of the Case as set forth by Petitioner, the State of South Carolina.

STATEMENT OF FACTS RELEVANT TO ISSUES BEFORE COURT

Trial Testimony of Dr. Henderson

At Respondent's March 2007 trial, the State presented the testimony of Dr. Nancy Henderson, a board certified pediatrician whose practice focused on the diagnosis of child abuse, including sexual abuse, who performed a medical examination on the victim on July 9, 2004. (App. p. 147, line 11 – p. 149, line 18; p. 154, lines 4-8 .) The trial court found her qualified as an expert in the examination, diagnosis, and treatment of child sexual abuse.[1] (App. p. 152, lines 14-16.)

Dr. Henderson then testified about her physical examination of the victim, which included the use of a colposcope (a magnifying instrument with a light source used in examinations of the genital area). (Tr. p. 155, lines 14-17; 156, lines 1-5.) Her findings on examination related to the victim's genitals were as follows.

> A And the way I would describe it, it's called a crescent shape hymen because it has – it appears like a crescent shape moon. Sometimes in the normal changing it can be called angular where it goes all the way around. Bur because it kind of stops at this point up here it's called a crescent shape.
>
> And we label things like a clock. So this is twelve o'clock, six o'clock, three o'clock, and nine o'clock.

[1] In noting the trial court's qualification of Dr. Henderson as an expert in the examination, diagnosis, and treatment of child sexual abuse, the Court of Appeals simply noted that she was a pediatrician. *Mangal v. State*, 415 S.C. 310, 314, 781 S.E.2d 732, 733 (Ct. App. 2015). That is correct as far as it goes, but the record reflects that Dr. Henderson was not simply a pediatrician. A licensed physician in South Carolina since 1992, she was board certified in pediatrics, with a sub-board certification in adolescent medicine. While her practice setting included involvement in the pediatric residency program at Greenville Memorial Hospital, her medical practice primarily focused on the area of child abuse. She testified that she performed approximately 300 examinations each year – well over 3,000 since 1982 – on children who may have been abused, including sexually abused. (App. p. 147, line 11 - p. 49, line 24.) She also testified that she testifies in court approximately 10 times a year and had done so each year since she came to South Carolina. (App. p. 149, line 25 – p. 150, line 6.) *Amicus Curiae* notes that Dr. Henderson's qualification as an expert was not an issue raised by Respondent in the PCR hearing.

And so, on her exam right, right at about eight o'clock, right at this point, right at this point here, the hyment tissue looked very, very normal until you get to this point, and she had mark narrowing at that point and then it resumed very normal to the, to the rest of her exam. And there was just a tiny bit of discharge, a thin white amount of discharge, which without doing cultures it's hard for me to make any kind of judgment of that. We didn't look too concerned just looking at it. But this was the finding that I had.

Q What does narrowing at eight o'clock mean?

A Typically the hymenal tissue is pretty uniform, and pretty consistent all the way around. So, when you see marked narrowing – now, it normally, in some children, you can see a lot of variations especially when you get to adolescence. There can be a lot of changes because they have a lot of estrogen around and that causes a lot of flexibility to the hymenal tissue.

But when you see where the hymenal tisse is almost completely diminished at that one point, that's a sign of some type of penetration through the hymnal tissue.

Q All right. Thank you. Have a seat.

A (Witness returns to the stand.)

Q Doctor Henderson, do you have an opinion, within a reasonable degree of medical certainty based upon your education, training, and experience and based upon your findings on examination of victim, whether those findings are consistent with a penetrating injury?

A 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.

Q All right. Also opinion as to whether she was sexually abused, that opinion is?

A That she had been, yes, sir.

Q All right. Thank you. Answer any questions one – beg the Court's indulgence.

(Pause)

PROSECUTOR: May we approach, Your Honor?

THE COURT: Yes, sir.

(Whereupon, a bench conference was held out of the hearing of the jury at this time.)

PROSECUTOR: May it please the Court, Your Honor?

THE COURT: Yes, sir.

Q Specifically, in this case, was the hymen in tact [sic]?

A You know that term hymen in tact [sic] is not really a medical term at all. So, I really don't know exactly – you know, I don't use that terminology at all. That's kind of a lay terminology and –

Q In your experience in over 3,000 exams, does the hymen, hymen have to be torn for there to be a penetrating injury?

A No, there does not especially when a child has reached puberty and there is that estrogen effect to the hymenal tissue, that allows the hymenal tissue to stretch in a remarkable way and so that there can be full penetration without any kind of trauma to the hymenal tissue.

Q Okay. In this case, we actually have a narrowing consistent with penetration?

A Yes, sir.

Q All right. Thank you. Answer any questions [defense counsel] may have.

(App. p. 158, line 5 – p. 160, line 23.) No objections were made by Respondent to Dr. Henderson's testimony as to her findings or opinion.

On cross-examination, Respondent's trial counsel (hereafter trial counsel) then questioned Dr. Henderson about the differences between her testimony on direct – that the condition of the hymen was consistent with sexual abuse – and the conclusion she reached in her written report. Trial counsel had her concede that, on her written report, while she could have indicated the significance of the physical findings as consistent with sexual abuse, she did not. Instead, she checked the box for "suspicious" and elsewhere wrote that it "may be related to the incident." (App. p. 161, line 4 – p. 162, line 13.) Dr. Henderson testified that, because other types of trauma could have caused the damage to the hymen, she was unable to conclude based upon its appearance – just that finding

alone – that it was caused by the incident. For that reason she indicated in the report that it was suspicious of abuse. She further testified that her ultimate opinion that the condition of the hymen was consistent with a penetrating injury and sexual abuse was based upon the physical finding during the genital exam along with the history that the victim shared. (App. p. 162, line 12 – p. 163, line 24.)

On further examination by Respondent's trial counsel, Dr. Henderson was asked whether she was basing her opinion on information she received from the victim which "may or may not be true?" (App. p. 164, lines 12-14.) She stated, "I based it on information received from my patient, which is invaluable information any doctor receives when they are examining a patient." (App. p. 164, lines 15-17.) When asked specifically whether she assumed the victim's information was true, Dr. Henderson said that "[b]ased on the way she shared it and all the information that she shared, yes." (App. p. 164, lines 19-22.)

Dr. Henderson then, when asked, shared that the victim had told her that Respondent had sexually abused her beginning when she was 10 years old and, at some point, that abuse involved vaginal and anal intercourse leading her to have been subjected to two pregnancy tests. (App. p. 165, line 2 – p. 166, line 19.) Dr. Henderson also testified that while knowing about any school problems, including suspensions for performing oral sex on a young man, having alcohol, excessive tardiness, and something else, would be useful in determining a plan for the victim, it was not relevant to how she performed her examination. (App. p. 166, line 22 – p. 167, line 25.) She concluded her cross-examination by essentially testifying that there is no set age at which a female no longer has a hymen, and that she had seen very sexually active teenagers who have totally

normal exams. (App. p. 168, lines 1-12.)

PCR Application, Hearing and Appeal

In his initial application, Respondent did not challenge either the trial testimony of Dr. Henderson as to her findings and opinion or his trial counsel's failure to object to such. (App. pp. 557-562.)

A hearing on the PCR application was conducted on April 7, 2011. At that hearing, Respondent's PCR counsel (hereafter PCR counsel), referring to the trial transcript, questioned his trial counsel about Dr. Henderson's testimony:

> 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 11.
>
> 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 the 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 believed she had been abused."
>
> 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.)

Then, on cross-examination, the State questioned Respondent's trial counsel

about Dr. Henderson's testimony on direct examination at trial.

Q In regards to the testimony of Dr. Henderson, I believe you looked at her testimony on page 252 where the state asked her in regards to whether or not her findings were consistent with a penetrating injury.

And her answer was, "I felt that it was consistent with a – that she had been abused."

And the very next question from the state was also opinion as to whether or not she was sexually abused. The opinion is that she had been, yes, sir.

Now, is that something that you expected the state to ask her, whether or not her opinion was that the 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.

Q. Okay. Now, are you aware of – there's a rule I believe in Rules of Evidence, Rule 704, that regards opinion on ultimate issue by an expert.

A Right.

Q And that mentions whether or not it's not objectionable because it's dealing with an ultimate issue to be decided by the trier of fact. Do you think this falls underneath that rule?

A It probably does, yes.

(App. p. 594, line 23 – p. 596, line 11.)

On redirect examination, PCR counsel asked trial counsel if, at the time of trial, Dr. Henderson's testimony[2] "struck a cord" as improper. Trial counsel said that it did not. (App. p. 596, lines 17-20.)

At the conclusion of the hearing, 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 and put some of that in my little outline for the Court as to why we believe that.[3]

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

The PCR court subsequently issued its order denying Respondent's application for relief. (App. pp. 616-622.) Respondent filed a Rule 59(e) motion in which he argued, *inter alia*, the PCR court failed to address his assertion that trial counsel was ineffective for failing to object to Dr. Henderson's direct examination testimony that in her opinion, based on her findings and the history provided by the victim, that the victim had been abused, because this testimony was improper bolstering and should have been excluded under Rule 403, SCRE. (App. pp. 630-633.) The PCR court denied the motion, finding

[2] *Amicus Curaie* reminds the Court that the only testimony of Dr. Henderson referred during the examination of trial counsel at the PCR hearing (App. pp. 570 – 597) was her testimony on *direct* examination, and all specifically referred to page 252 of the trial transcript (which is page 159 of the Appendix).

[3] Though PCR counsel stated that he cited those cases in an outline he submitted to the court, no such document was included in the appellate record before the Court of Appeals and neither the PCR court's orders (App. pp. 616-622; 639-640), Respondent's Rule 59(e) motion (App. pp. 623-633), nor the State's Return (App. pp. 634-638) refer to any such document. Moreover, the Appendix is devoid of any sign that PCR counsel presented any actual argument involving those cases to the PCR court prior to the submission of its Rule 59(e) motion.

the issues challenged had not been presented to the court either in the PCR application or in an amendment, and that there was no testimony from Respondent supporting the allegation. (App. p. 639.)

Respondent appealed the PCR court's denial of post-conviction relief. On appeal, the State argued the bolstering issue was not preserved. The Court of Appeals disagreed, finding the issue was preserved because PCR counsel specifically mentioned the testimony during his concluding remarks and raised the issue in his Rule 59(e) motion. *Mangal v. State*, 415 S.C. at 317-18, 781 S.E.2d at 735.

ARGUMENT

I.

The Court of Appeals erred in reversing the ruling of the PCR Court on issues that were not properly preserved for appellate review. (Issue I)

In its opinion, the Court of Appeals determined the testimony from Dr. Henderson on direct examination as to her opinion and on cross-examination about the basis of her expert medical opinion amounted to improper bolstering of the victim's credibility, and that trial counsel was deficient for failing to object to it or otherwise bring it to the attention of the trial court. This was erroneous because the PCR application contained no reference to either the direct or cross-examination of Dr. Henderson as a basis for relief, and an amended application was never filed by Respondent. Moreover, while PCR counsel questioned trial counsel at the PCR hearing about his failure to object to Dr. Henderson's opinion testimony on direct examination, at no point during the PCR proceedings did PCR counsel mention trial counsel's cross-examination of Dr. Henderson. In fact, his Rule 59(e) motion (relied upon so heavily by the Court of Appeals to preserve Respondent's issue for its appellate review) referenced only the trial testimony on page 252 (which is the direct examination of Dr. Henderson) and nothing more. (App. pp. 630-31.)

Post-conviction relief is a statutory cause of action. S.C. Code Ann. Section 17-27-10, *et seq.* In order to initiate a cause of action for ineffective assistance of counsel under the Uniform Post-Conviction Procedure Act (hereafter PCR Act), an applicant must file a verified application in which *all* of the grounds upon which the application is based are set forth. Sections 17-27-40 and 17-27-50.

All grounds for relief available to an applicant under this

> chapter must be raised in his original, supplemental or amended application....

Section 17-27-90. The Legislature has also provided that the grounds must be stated with *specificity*.

> The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired. ...

Section 17-27-50.

Although it readily acknowledged Respondent's failure to comply with the PCR Act requirements[4], the Court of Appeals held the bolstering issue was preserved simply because trial counsel was questioned about Dr. Henderson's testimony during the PCR hearing, and PCR counsel mentioned it during his concluding remarks and in the Rule 59(e) motion. The Court did so citing to this Court's decision in *Simpson v. Moore*, 367

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[4] While *Amicus Curaie* has been unable to find an opinion addressing this point, it can be reasonably concluded from the PCR Act and opinions involving its interpretation that the purpose for the pleading requirements in Sections 17-27-50 and 17-27-90 is not only to provide fair notice of the specific grounds upon which relief is sought so that the State may properly respond and the PCR court adequately address, but also to allow a subsequent court to determine if an issue has been or could have been previously raised in a prior application.

As noted in its Motion for Leave to Participate as *Amicus Curiae*, among the purposes of the Solicitors' Association is the promotion of the due administration of justice, which includes the defense of legally obtained convictions. The Solicitors' Association is greatly concerned with the adverse impact of applicants' failure to comply with the pleading requirements in Sections 17-27-50 and 17-27-90 on the ability of the State to adequately prepare for and address grounds used by applicants and/or relied upon by courts to set aside convictions and/or sentences.

The failure of a PCR applicant, who bears the burden of proof in a PCR action, to properly plead or present an issue to the PCR Court adversely impacts the ability of the State to sufficiently prepare for or address the issue. The appellate courts of this State should not condone this, as they surely would not do so in any other civil action in this State. As the Supreme Court of the United States recognized in *Snyder v. Massachusetts*, 291 U.S. 97, 121 (1934), "...justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

S.C. 587, 599-600, 627 S.E.2d 701, 707-08 (2006), which considered an issue that was not raised specifically in a petitioner's application. The Court of Appeals' reliance on *Simpson* is misplaced. The opinion in *Simpson* reveals that Simpson presented evidence at his PCR hearing, but he was not allowed to amend his application to conform to the evidence presented. This Court held that Simpson should have been allowed to amend his PCR application. In the present case, the application did not include any reference to Dr. Henderson's testimony, much less that it constituted improper bolstering and that trial counsel was ineffective for either failing to object to her testimony on direct or eliciting further information on cross. Moreover, PCR counsel never requested to amend the application to conform to the evidence.[5] The Court of Appeals misapprehended and applied *Simpson*, resulting in its improper consideration of the issue.

In addition to the requirements of the PCR Act, it is well-established that issues must be raised before and ruled upon by the lower court in order for them to be preserved for appellate review. As this Court has long recognized,

> ....error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure... that we do not reach issues which were not ruled upon by the trial court. We therefore agree that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us.... "Issue preservation rules are designed to give the trial court a fair

[5] Not only does the Act provide for the amendment of an application for PCR, Section 17-27-70(a), but Rule 15(a), SCRCP, permits an applicant to amend his application once as a matter of course at any time before or within 30 days after the State files its return, and Rule 15(b) provides that the PCR court has the discretion as to whether to allow any amendment beyond that time period. *Simpson v. Moore,* 367 S.C. at 599, 627 S.E.2d at 708. (PCR court may allow applicant to amend pleadings pursuant to Rule 15(b), SCRCP, and decision whether to allow an amendment will not be reversed on appeal absent abuse of discretion. *See also Mylin v. Allen–White Pontiac, Inc.,* 281 S.C. 174, 180, 314 S.E.2d 354, 357 (Ct. App. 1984) (power of courts to allow amendment of pleadings should not be exercised indiscriminately or to surprise or prejudice opposing party; decision is left to sound discretion of court whose exercise of such will not be disturbed unless abuse of discretion or manifest injustice.).

> opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Nevertheless, these rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it.... While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.

(Citation omitted.) *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). The intent of this long-standing appellate rule is to enable trial courts to make reasoned decisions on issues that have been appropriately developed by counsel through the presentation of evidence and legal argument both for or against any particular legal proposition. *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Just as important – both in terms of the proper development of issues for appellate review and public policy – is the opportunity for opposing counsel to adequately respond to allegations. Here, the State was unable to offer either testimony or argument to the PCR court regarding any claim that Dr. Henderson's testimony on direct and cross-examination constituted improper bolstering, because the issue of her direct testimony was not raised until after the hearing concluded (oblique reference after testimony concluded and more fully in the Rule 59(e) motion[6]), and the issue of her

[6] The Court of Appeals further erred in considering Respondent's arguments for the first time in his Rule 59(e) motion, because a party cannot use this motion to bootstrap issues that should have been raised before a court renders judgment. *See Hickman v. Hickman,* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."); *see also Dixon v. Dixon,* 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); *Susan R. v. Donald R.,* 389 S.C. 107, 118, 697 S.E.2d 634, 640 (Ct. App. 2010) (holding Husband's argument that Wife's attorney's fees award was excessive was not preserved for appellate review because Husband raised that argument for the first time in a Rule 59(e) motion). The reliance by the Court of Appeals on Respondent's Rule 59(e) motion in order to consider the issues for its appellate review is contrary to well-established practice.

testimony on cross-examination was not raised until the case was before the Court of Appeals.[7]

In this case, the application for PCR did not contain any allegation that defense counsel was ineffective for his actions or inactions related to the trial testimony of Dr. Henderson. At the PCR hearing, there were a few questions about Dr. Henderson's direct testimony and whether trial counsel thought it was improper or should have objected to it. At the *end of the hearing*, there was a reference to some cases. In the Rule 59(e) motion there was an argument *focusing solely* on trial counsel's failure to object to the opinion expressed by Dr. Henderson *on direct* examination. PCR counsel at no point in the lower court proceedings ever raised any issue regarding trial counsel's cross-examination of Dr. Henderson. The PCR court was thus deprived the opportunity to hear testimony or argument on the issue – *i.e.*, whether the decision to elicit this testimony on cross-examination was part of a calculated trial strategy by trial counsel to discredit the State's evidence (a conclusion supported by trial counsel's closing argument, but again not addressed before and by the PCR court due to Respondent's failure to raise the issue)[8] –

[7] The unfairness to the State from PCR counsel's failure to raise the issue of Dr. Henderson's cross-examination during the PCR proceedings is demonstrated in Respondent's Return to the State's Petition for Writ of Certiorari, where he argued, *inter alia,* the State's theory for trial counsel's cross-examination of Dr. Henderson was "rank speculation." Respondent's Return to Petition for Writ of Certiorari, at 2 (filed April 19, 2016). It is precisely because Respondent never raised this issue to the PCR court before or during the PCR proceedings that the State was not given a fair opportunity to explore trial counsel's strategy or to make an argument to the PCR court regarding either the direct or cross-examination of Dr. Henderson.

[8] During closing argument, Respondent's trial counsel questioned the credibility of the State's case, in particular Dr. Henderson's report and her testimony that she could not positively state the victim's injury was caused by sexual abuse by only the physical examination. (App. p. 477, line 6 – p. 481, line 17.) The crux of counsel's argument was that the entire claim was made up, concocted by the victim in part because Respondent was strict, and that this story formed the basis of Dr. Henderson's opinion.

and to subsequently make a ruling based upon the record before it.

Matters not raised in either the PCR application or at the PCR hearing, and thus not ruled upon by the PCR court, were improperly considered for review by the Court of Appeals and could not form the basis of its reversal. The Court of Appeals exceeded its appellate authority and decided the merits of the appeal on evidence not properly presented to or addressed by the PCR court. *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983); *see also State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003) (where it was not clear the defendant based his argument on federal or state grounds, but nowhere in the record does he cite or make reference to the warrant statute, it was error for the Court of Appeals to address the warrant statute *sua sponte* and was incorrect to base its decision on the statute); *State v. Prioleau*, 345 S.C. 404, 548 S.E.2d 213 (2001) (where defendant did not argue before trial court or Court of Appeals that victim's in-court photographic identification of defendant improperly bolstered identifications of other two victims, but where defendant instead argued that procedure was unduly suggestive, Court of Appeals erred by relying on improper bolstering as basis for reversing conviction); *State v. Silver*, 314 S.C. 483, 431 S.E.2d 250 (1993) (finding the Court of Appeals erred in treating an issue on a ground asserted on appeal that was not supported by the objection at trial); *In re Steven S.*, 315 S.C. 472, 434 S.E.2d 312 (Ct. App. 1993) (the Court of Appeals refused to address an issue on appeal where appellant failed to argue the ground at trial and the trial court was denied the opportunity to rule upon it).

The Court of Appeals ignored long-standing rules of issue preservation and the pleading requirements of the PCR Act to reach its decision. Such was clear error. *Id.*

II.

If the issues were properly before the Court of Appeals, that Court erred in holding that the opinion rendered by a medical expert on direct examination by the State – to the effect that, based upon the doctor's education, training, experience, and the medical history provided by the victim, the physical findings made during the doctor's examination of the victim were consistent with a penetrating injury and abuse – and testimony elicited from the expert on cross-examination by the defense constituted improper bolstering of the victim's credibility. (Issue II.)

Respondent claimed before the Court of Appeals, and the Court of Appeals agreed, that the testimony of Dr. Henderson on both direct and cross-examination concerning her opinion that the victim had been abused and that the victim was truthful when relating her history of abuse to Dr. Henderson amounted to improper bolstering and prejudiced Respondent's trial. *Amicus Curaie* strongly disagrees. The challenged testimony of Dr. Henderson was not improper bolstering evidence.

The South Carolina Rules of Evidence allow for a qualified expert witness to testify in the form of an opinion or otherwise when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE. Under Rule 702, a medical professional, who is properly qualified as an expert, may give an opinion concerning the scientific bases of a victim's injuries or death in a criminal trial. *State v. Commander*, 396 S.C. 254, 266, 721 S.E.2d 413, 419 (2011).

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in

evidence." Rule 703. Expert witnesses "may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Rule 705. The rules also provide that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704.

While experts may testify as to their opinions, they may not give an opinion as to the credibility of another witness, including a child victim in a sexual abuse case, because the determination of witness credibility is within the exclusive province of the jury. *State v. Kromah*, 401 S.C. 340, 358-359, 737 S.E.2d 490, 500 (2013); *State v. Dawkins,* 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989); *State v. Hill,* 394 S.C. 280, 295, 715 S.E.2d 368, 376-377 (Ct. App. 2011). Offering evidence solely for the purpose of enhancing a witness's credibility before that credibility is attacked is improper bolstering. *U.S. v. Sesere*, 413 Fed. Appx. 653, 658 (4th Cir. 2011).[9].

In the context of expert witnesses in child sexual abuse cases, the Court of Appeals has explained improper bolstering as follows.

> 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

[9] As the U.S. Court of Appeals for the Fourth Circuit stated in *U.S. v. Sesere*, *supra*, the concepts of bolstering and vouching are separate and distinct concepts. While bolstering is the offering of evidence solely for the purpose of enhancing a witness's credibility (with improper bolstering meaning that this offer is made before that credibility is attacked), vouching (which is always improper) occurs when a lawyer indicates – either in questioning or in jury argument – the lawyer's personal belief in the credibility or honesty of a witness. *Id.*, 413 Fed. Appx. at 658-659.

> beyond the ken of the average juror. Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility ... within the exclusive province of the jury.'

(Citations omitted.) *State v. Taylor,* 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013).[10]

In numerous cases, this Court and the Court of Appeals have addressed challenges to testimony in child sexual assault cases based on arguments that it constituted improper vouching or bolstering.[11] See, *e.g., State v. Kromah*, 401 S.C. at 358-359, 737 S.E.2d at 500 (error for forensic interviewer testify that, based on interview and information provided by law enforcement and DSS worker, she determined "child had given compelling – a compelling finding [for child physical abuse]"); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (error for expert to comment on veracity of child's

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[10] In his concurring opinion in *State v. Perry*, 410 S.C. 191, 207, 763 S.E.2d 603, 611 (Ct. App. 2014), Chief Judge Few explained the concept of bolstering.

> The concept of "bolstering" relates to the capacity of testimony or evidence to make other testimony or evidence more credible. Evidence that bolsters other evidence is generally relevant because it makes the existence of disputed facts more probable by enhancing the credibility of the evidence that proves those facts.

He then went on to state that under Rule 402, SCRE, that, as with any relevant evidence, a trial court may not exclude evidence that bolsters other evidence unless some constitutional, statutory, or rule-based principle of law so provides. He concluded that there are only three provisions under modern evidence law to exclude relevant evidence on the basis of improper bolstering – Rules 403 (if the probative value is substantially outweighed by the danger set out in the Rule), Rule 608(a) (credibility of a witness may only be supported by evidence in the form of opinion or reputation as to the witness' character for truthfulness or untruthfulness and only after the character of witness for truthfulness has been attacked), and Rules 802 and 801(d)(1)(B) and (D) (limitations on use of prior consistent statements).

[11] Parties and the courts have, on occasion, used these two terms interchangeably although, as set forth in the preceding paragraph and footnote 8, vouching and bolstering are separate and distinct concepts. This case involves an allegation of bolstering.

accusation of sexual abuse; introduction of forensic interviewer's reports containing interviewer's opinion that each child provided compelling disclosure of abuse by Jennings and that each child provided details consistent with the reporting of other children and information from law enforcement and mother constituted improper vouching for children's veracity; not harmless error because no physical evidence presented); *Smith v. State,* 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (forensic interviewer's testimony that victim told her defendant had sexually assaulted her and that she found victim's statement believable improperly bolstered victim's testimony); *State v. Douglas,* 380 S.C. 499, 503-504, 671 S.E.2d 606, 609 (2009) (forensic interviewer's testimony as to how interviews conducted and rapport with child established no error where only opinion expressed by her was that she concluded victim needed medical exam; there was no evidence that witness believed victim to be telling truth); *State v. Dawkins,* 297 S.C. at 393-94, 377 S.E.2d at 302 (error for prosecution in sexual assault prosecution to ask treating psychiatrist whether, based on his examination and observations of victim, he thought her symptoms were genuine, but curative instruction given when witness answered affirmatively cured any prejudice); *State v. Berry*, 413 S.C. 118, 132, 775 S.E.2d 51, 58 (Ct. App. 2015) (forensic interviewer's testimony about common behaviors and characteristics of child sexual assault victims and testimony as to behavior she observed of victim – which matched some of general behaviors she testified to earlier – did not constitute comment on credibility or veracity of victim where she never indicated whether she believed victim was telling truth in regard to sexual abuse); *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (testimony of expert in child abuse dynamics and disclosure, who testified she never met victim, was not present

for victim's testimony, and did not read any reports or statements about case, about high percentage of child abuse victim who delay reporting abuse until adulthood, reasons for delayed reporting, and why some children tolerate sexual abuse did not constitute improper bolstering of victim's testimony); *State v. Hill,* 394 S.C. at 295, 715 S.E.2d at 376-377 (inasmuch as forensic interviewer did not give opinion on whether victim was being truthful or had been coached, no error in his testimony that "he saw the types of details in victim's interview that he would for to determine whether a child had been coached"); *State v. Dempsey,* 340 S.C. 565, 568–71, 532 S.E.2d 306, 308–09 (Ct. App. 2000) (testimony by child sexual abuse counselor as to how he determined whether children are telling truth and his opinion, supported by research, that children who report sexual abuse are truthful in 95-99 percent of instances in which sexual abuse was alleged, along with his conclusion that child victim was being reliable, constituted improper vouching for the child victim).

The instant case is easily distinguishable from these other cases, because it involves the testimony of a medical doctor who performed a physical examination upon the victim and involved a physical finding. As our appellate courts have recognized in a long line of cases, the opinions of medical doctors are based, in part, on the history provided by the patients and, to the extent that the history was relied upon by the doctor to reach his opinion, it is admissible. See, *e.g., State v. Camele*, 293 S.C. 302, 305, 360 S.E.2d 307, 308 (1987) ("A physician's testimony as to a patient's history should only include those statements related to him by the patient upon which the physician relied in reaching medical conclusions."); *State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985) (ditto); *Gentry v. Watkins-Carolina Trucking Co.,* 249 S.C. 316, 322-324, 154 S.E.2d

112, 116-117 (1967) (patient's history as told to doctor is admissible *only* as information upon which doctor relied in reaching professional opinions; it is not admissible as substantive proof of facts stated and, when requested by any party, trial court should give instruction on limited use of testimony.); *Todd v. Joyner*, 385 S.C. 509, 519, 685 S.E.2d 613, 618-619 (Ct. App. 2007) (use of medical history as basis of physician's opinion and testimony of such is allowed, not as substantive proof of the facts, but rather as information upon which the expert relied in reaching his professional opinions; even though such evidence is admissible, must still be evaluated under Rule 403, SCRE); *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997) (in discussing 'statements made for the purpose of medical diagnosis or treatment' exception to hearsay rule, Court of Appeals stated, "[c]ertainly, a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim."). *See also State v. Commander*, 396 S.C. at 266-267, 721 S.E.2d at 419-420 (because anecdotal history is routinely relied on by medical professionals in fulfilling duties under S.C. Code Section 17–5–530 and is essential component of any autopsy, testimony concerning findings based on this information falls under Rule 703).

On direct examination, Dr. Henderson did no more than testify as to her examination of the victim, the physical finding from that examination, and her medical opinion – based upon her education, experience, examination of the victim, and the history provided by the victim, which was not disclosed on direct examination – that the physical finding was consistent with penetration and abuse. There was nothing improper about this testimony. See Rule 704; *Knoke v. South Carolina Dept. of Parks, Recreation*

and Tourism, 324 S.C. 136, 478 S.E.2d 256 (1996) (in wrongful death action against Department for victim's death from asphyxiation due to smoke inhalation, no error in admission of expert's opinion that lack of smoke detector was contrary to standards of care, that Department violated its duty to ensure cabin safety, and that presence of smoke detector would have provided sufficient warning for victim to escape even though embraced ultimate decision to be decided by jury); *State v. Fripp*, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012) (opinion of lay witness as to identity of person seen on surveillance tape admissible under Rule 704 despite fact that it embraced ultimate issue to be decided by jury, *i.e.*, whether Fripp was the burglar shown on the videotape). Dr. Henderson's direct examination testimony was clearly proper and did not constitute bolstering, much less improper bolstering. *Id.*

This conclusion is additionally supported by cases from other jurisdictions where the Courts have addressed challenges to a medical expert's testimony about medical history on the ground that it constitutes improper bolstering of a victim's testimony.

> In sexual abuse cases, there is an inherent conflict between (1) the need for expert medical testimony that tends to establish whether abuse has occurred and (2) the prohibition on admitting that very testimony for the purpose of bolstering a victim's credibility. Our courts have developed a significant body of case law attempting to reconcile these competing interests. An expert may not testify that sexual abuse has "*in fact*" occurred without a foundation of physical evidence supporting that opinion. Nor may an expert rely solely on interviews with a child as a basis for testifying that the child was "sexually abused." But "it is ... well-settled that testimony based on the witness's examination of the child witness and expert knowledge concerning the abuse of children in general is not objectionable because it supports the credibility of the witness or states an opinion that abuse has occurred." Furthermore, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children

> and whether a particular complainant has symptoms or characteristics consistent therewith."

(Citations omitted; emphasis added.) *State v. Bullock*, No. COA10-320 (November 2, 2010) at 7, 207 N.C. App. 749, 701 S.E.2d 403 (2010).[12] (no error in testimony of medical expert, who had examined victim, as to opinion that physical exam findings were consistent with history of sexual assault provided by victim where expert did not testify as to accuracy of victim's account or whether she believed victim). See also *Ramayo v. State*, 132 So. 3d 1224, 1226 (Fla. 2014) (proper for medical expert to give opinion that there were no physical findings to support an allegation of sexual abuse and that absence of physical findings does not necessarily disprove allegation of sexual abuse, but opinion of medical expert that sexual abuse had occurred that is based only on history provided by victim constitutes improper bolstering); *Oregon v. Southard,* 347 Or. 127, 218 P.3d 104 (2009) (medical opinion of sexual abuse not admissible in absence of physical evidence because the methodology used to reach that diagnosis is largely dependent on expert's implicit credibility assessment); *Rhode Island v. Castore,* 435 A.2d 321, 326 (R.I. 1981) (same).

Under the South Carolina authority cited throughout this Argument, the Court of

[12] *State v. Bullock*, *supra*, is an unpublished opinion found only in a disposition table in the reporters. The North Carolina Rules of Appellate Procedure allow for the citation of unpublished opinions "[i]f a party believes, [despite the fact that citation of unpublished opinions in briefs is disfavored], that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum." N.C. R. App. P. Rule 30(e)(3). The Solicitors' Association has found no case in South Carolina addressing the propriety of a medical doctor testifying that her diagnosis is based, in part, on the history provided by the patient, when challenged as improper bolstering, and very few cases outside of the State. Sixteen copies (one unstapled) of the *Bullock* opinion were provided to this Court at the time this Brief was filed, and a copy was provided to other counsel with a copy of this Brief.

Appeals erred in characterizing Dr. Henderson's opinion evidence offered on direct examination as improper bolstering.[13]

In addition, the testimony elicited by trial counsel on cross-examination of Dr. Henderson did not constitute improper bolstering as concluded by the Court of Appeals. By definition, improper bolstering occurs when a party offers evidence solely for the purpose of enhancing a witness's credibility before that credibility is attacked. See *State v. Taylor*, *supra*; *State v. Perry*, *supra*; *U.S. v. Sesere*, *supra*. The questioning of Dr. Henderson about the history provided by the victim, her reliance upon that history, and her belief that the victim was truthful in providing the history, *was not conducted to support the credibility of any witness, much less the victim*. The Record clearly demonstrates trial counsel questioned Dr. Henderson for the purpose of discrediting her and her testimony – an attempt to convince the jury that Dr. Henderson's testimony was not based on any science, but solely on the claims made by the victim.[14] As such, it could

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[13] The impact of the Court of Appeals' holding in this case affects not only the use of medical expert testimony in criminal cases – by both the prosecution and the defense – but also in civil cases, including products liability cases, workers compensation cases, and medical malpractice cases, in which an expert would normally provide opinion evidence as to the cause of injuries or damages based upon that expert's examination of the victim, findings, experience, education, and the history provided.

[14] The record of trial counsel's cross-examination of Dr. Henderson establishes that he attacked her credibility as a neutral witness and her opinion in this case. The fact that trial counsel's strategy did not result in a different verdict or that, from the perspective of hindsight, there might have been a more successful trial strategy to employ, does not render trial court's conduct constitutionally defective or ineffective. *Maryland v. Kulbicki*, ___ U.S. ___, 136 S. Ct. 2, 4 (2015); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 634 (Ct. App. 2014). In a collateral attack upon a conviction based upon ineffective assistance of counsel, trial counsel's conduct is to be judged based on the reasonableness of counsel's challenged conduct viewed at the time of the conduct. *Id.*; *Strickland v. Washington*, 466 U.S. 688, 690 (1984). There has been no showing that the strategy was unreasonable at the time it was employed at Respondent's trial. Therefore, even if there had been error in Dr. Henderson's testimony, the Court of Appeals should have upheld the denial of PCR on the first prong of the *Strickland* analysis and never

not and did not constitute bolstering, much less improper bolstering. *Id.* The conclusion to the contrary by the Court of Appeals was error.

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reached the prejudice prong. *Sigmon v. State*, 403 S.C. 120, 742 S.E.2d 394 (2013) (in absence of evidence that trial counsel was deficient, it is not necessary for court to reach second prong of prejudice in analyzing applicant's claim of ineffective assistance of counsel). See also *Strickland v. Washington*, 466 U.S. at 687 (test for ineffective assistance of counsel requires applicant to make showing on both prongs – deficiency in performance and resulting prejudice – in order to obtain relief).

In making this assertion, the Solicitors' Association does not concede that prejudice resulted from Dr. Henderson's testimony. While there were no third party witnesses to the sexual abuse in this case and both the victim and Respondent testified, this case was more than a "she said, he said" case. The victim's evidence was corroborated by her brother, who testified that Respondent installed a keyed lock on his bedroom door and that over the years he witnessed, on 20 or 30 occasions, Respondent and the victim being behind closed or locked doors for 20-30 minutes at a time and the victim, when leaving the room, would be visibly upset, would be crying, and would head to the bathroom. (App. p. 97, line 17 – p. 107, line 3.) Therefore, the record before this Court is devoid of any evidence showing a reasonable probability that the result of the trial would have been different without the challenged testimony of Dr. Henderson.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Court of Appeals should be reversed and the PCR court's ruling that Respondent failed to prove counsel was ineffective should be affirmed.

Respectfully submitted,

SOLICITOR J. STROM THURMOND
President, Solicitors' Association of South Carolina, Inc.
sthurmond@aikencountysc.gov
S.C. Bar No. 15606
(803) 642-1557

SOLICITOR BARRY J. BARNETTE
Member, Solicitors' Association of South Carolina, Inc.
bbarnette@spartanburgcounty.org
S.C. Bar No. 13039
(864) 596-2575

Post Office Box 11251
Columbia, South Carolina 29211-1251
(864) 260-4046

COUNSEL FOR *AMICUS CURAIE* SOLICITORS' ASSOCIATION OF SOUTH CAROLINA, INC.

BY: _____
ATTORNEYS FOR AMICUS CURAIE

August 8, 2016

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

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

RECEIVED
AUG - 8 2016
SC SUPREME COURT

Appellate Case No. 2016-000610

Farid A. Mangal, #320609

Respondent,

v.

State of South Carolina,

Petitioner.

PROOF OF SERVICE

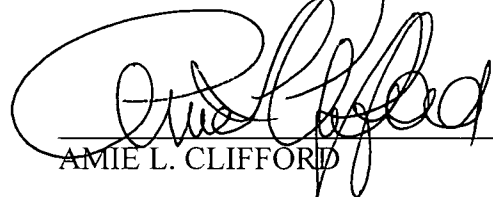
I certify that I have served the Brief of Amicus Curaie Solicitors' Association of South Carolina, Inc. and one copy of the opinion in *State v. Bullock*, No. COA10-320 (November 2, 2010) at 7, 207 N.C. App. 749, 701 S.E.2d 403 (2010) on by depositing such in the United States Mail, first class postage prepaid, addressed to counsel of record for both Petitioner and Respondent as follows.

For Petitioner:

Alicia A. Olive
Assistant Attorney General
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

For Respondent:

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



AMIE L. CLIFFORD
Post Office Box 11561
Columbia, SC 29211
(803) 343-0765

August 8, 2016

Columbia, South Carolina