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STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

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Appellate Case No. 2014-000693

ANTHONY BRIGGS, #342410, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER

BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

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II. The PCR court erred when it found Counsel ineffective for failing to object to the qualification of Arroyo-Staggs as an expert witness, when she was qualified in the area of child abuse assessment, for failing to object to Arroyo-Staggs' alleged bolstering testimony, and for eliciting alleged bolstering testimony from Arroyo-Staggs, where such findings were based upon improper consideration of the facts and an error of law.

A. The PCR judge erred in finding Counsel was ineffective for not objecting to the qualification of Arroyo-Staggs as an expert witness

B. The PCR Judge erred in finding Counsel was ineffective for not objecting to alleged bolstering testimony

III. The PCR court erred in granting Respondent's application where no evidence of probative value supports the PCR court's finding that Counsel was ineffective for failing to request a jury charge regarding expert testimony

STATEMENT OF THE CASE

Anthony Neil Briggs ("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 May 2009 term of the Spartanburg County Grand Jury for criminal sexual conduct with a minor, first offense (2009-GS-42-2627). Respondent was subsequently indicted at the August 2010 term of the Spartanburg County Grand Jury for lewd act upon a minor (2010-GS-42-4657). Max B. Singleton, Esquire, ("Counsel") represented Respondent. Respondent was tried before the Honorable J. Derham Cole and a jury. On August 26, 2010, the jury convicted him of both charges as indicted and Judge Cole sentenced him to imprisonment for life for criminal sexual conduct with a minor and a concurrent term of fifteen years for lewd act upon a minor.

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 court erred in denying his motion for a directed verdict because the victim never testified that any penetration occurred during the assault. (App. p. 495). The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Briggs, Op. No. 2012-UP-323 (S.C. Ct. App. filed May 30, 2012). The remittitur was returned on June 19, 2012.

Respondent subsequently filed an application for post-conviction relief ("PCR") on June 26, 2012. Respondent filed an Amended Application for Post-Conviction Relief filed November 1, 2013. Petitioner made its Return on June 26, 2013. An evidentiary hearing into the matter was convened on November 12, 2013, at the Spartanburg County Courthouse before the Honorable Robin B. Stilwell. Respondent was present at the hearing and was represented by Jeremy A. Thompson, 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, Judge Stilwell granted Respondent's PCR application by written order dated February 4, 2014. Petitioner filed a timely 59(e) Motion and Judge Stilwell denied the motion by written Order on February 28, 2014. Petitioner subsequently filed a Petition for Writ of Certiorari with this Court and Respondent filed a cross-petition. Thereafter, this Court granted certiorari as to Petitioner's questions I and II by Order dated July 18, 2016.

STATEMENT OF THE FACTS

Victim, who was six years old at the time of trial, testified that Respondent used to live with her, her siblings, and her mother. (App. pp. 128-32). Victim testified that Respondent touched her private with his private and that he put his mouth on her private (App. p. 132, line 21-p. 134, line 18). She stated this happened in the living room on the lay-out couch while her mother was at work and her siblings were at school. (App. p. 134, line 21-p. 135, line 7).

Judy Petty corroborated Victim's testimony when she testified that Victim indicated she had been sexually assaulted, that she told her it happened "in the living room on like a pull-out couch[,]" (App. p. 149, lines 3-11), and that it had happened when her "bubba was at school and her mommy was at work." (App. p. 149, lines 12-14). Petty also testified that victim was "teary-eyed," "looked a little scared," and told her not to tell anyone when she disclosed the abuse to her. (App. p. 148, line 23-p. 149, line 5). Arroyo-Staggs likewise testified Victim disclosed to her a sexual assault. (App. p. 173, lines 10-12). Wiley Garrett, Victim's therapist, testified—without providing details—that Victim disclosed a sexual assault to him as well. (App. p. 22-24). Victim's grandmother also testified that Victim disclosed to her that Respondent had assaulted her and that the assault occurred on the pull-out couch. (App p. 331, lines 18-24). Finally, Wendy Richards, Victim's mother, testified Victim told her about the sexual assault. (App. p. 359, lines 7-8).

Michele Arroyo-Staggs was qualified as "an expert in the field of child abuse assessment and treatment." (App. p. 162, lines 16-18). She was also the forensic interviewer who interviewed Victim for the Child's Advocacy Center, however she was not qualified as a forensic interviewer. Arroyo-Staggs testified Victim was five years old at the time of the interview. (App. p. 176, line 18). Arroyo-Staggs testified that as part of her interview, she looks for

"coaching" of the child. (App. p. 172). She defined coaching as whether "the child is being coerced to think about the trauma from somebody else's viewpoint perspective for words" and that she looks for coaching to "explore alternate explanations as to why this may have happened, [or] why is the child saying that something happened or didn't happen." (App. p. 172). She testified she looks for the following indicia of coaching in her interviews: (1) whether the child is using age-appropriate terminology; (2) what the child's behavior as far as reactions are during the interviews; (3) the demeanor and affect of the child, and (4) the background of the child and who the background is provided by. (App. p. 172).

Arroyo-Staggs testified Victim's demeanor was withdrawn and shameful and that she asked to be excused to go to the bathroom when she began asking questions about who lived in Victim's household. (App. p. 174). When asked whether she noticed any signs of coaching during her interview with Victim, Arroyo-Staggs stated "in the first interview I really tried to . . . assess that, as well as the second interview, and I did not find any evidence. (App. p. 174).

She testified Victim drew pictures of the incident which included herself and Respondent on top of the covers on the pull-out couch, and contained details concerning the color of his genitalia and public hair. (App. pp. 175).

On re-cross examination, the following took place between Counsel asked Arroyo-Staggs:

> Q: You say it's not uncommon for children of her age not to remember specific dates.
>
> A: Correct.
>
> Q: Would they remember something that happened around Christmas or their birthday?
>
> A: In this particular situation those are happy events. They're not traumatic events in most of the children that I know of. . . and those dates are always on the same day. They are annual things. They have reminders. School reminds them

when Christmas is. They know when their birthdays are because they have birthdays. It's a consistency and there's a routine.

. . .

Q: Okay. I guess what I'm trying to ask is if she can't pinpoint the time, not, you know, a specific date or-but around a holiday or a birthday or something like that, I guess, I mean, how can you assess if she's telling—I mean, how can you as an expert determine if she's telling the truth if she can't tell you exactly around about the time when it happened, around some specific event or holiday?

A: I can definitely assess it, which I have I believe accurately and appropriately, again, basing it on age appropriateness, information she's provided. And I don't even recall in the interviews if I asked specifically what date that that occurred. So it can be that I didn't ask.

Q: Right. But doesn't it concern you that when you ask a child how many times it happened and they say one and then they go all the way up to a thousand times, that doesn't concern you?"

(App. p. 195, line 21-p. 197, line 17). Arroyo-Staggs went on to answer that it did not concern her because the "disclosure based on the appropriateness of the—what I saw, what I heard, her statements, behavior and affect—were all appropriate for her age." (App. p. 198, lines 1-4).

Demetrius Martin, who was confined with Respondent in a pod at the Spartanburg County Detention Center, testified Respondent said he "rubbed his penis between legs butt area and until he ejaculated. (App. p. 294, lines 20-22). Martin testified Respondent said he "had the case beat" because he did not penetrate Victim. (App. p. 295, lines 1-2). Dwight Lamar Spears, another inmate at the detention center, testified Respondent came to see him almost daily to talk about his case, and that he admitted he "used to ride [Victim] on his lap playing horsy with her. And he said that one time he ejaculated. She asked what it was, and he told her it was snot." (App. p. 304, lines 15-19).

Victim's mother, Wendy Richards, testified regarding jails calls between herself and Respondent. (App. p. 357-60). She testified that when she told Respondent she was taking the

victim to Dr. Nancy Henderson "to see if she had been touched," Respondent said "You need to tell them that she F's herself." (App. p. 358 lines 19-21). She also testified Respondent told her "No face, no case." (App. p. 358, lines 23-25). Cantrell also testified that during her interview with him, Respondent started crying and "told [her] he was sick and he needed help" (App. p. 262, lines 17-19), and that when he made that statement, "He was not requesting medical attention. He was referring to the allegations that he was sick and needed help. And he was going to tell me what he did." (App. p. 280, lines 5-7). Dr. Nancy Henderson, who was qualified as an expert the field of child sexual abuse, pediatrics, (App. p. 210), testified that Victim's anal and vaginal exams were normal (App. p. 220, lines 11-18). On cross-examination Dr. Henderson agreed Victim's exam did not show acute signs of abuse. (App. p. 227, lines 20-23). She also testified that "it is not uncommon . . . to see a child weeks, months, even years sometimes after there's—they have been abused and it's just coming forward to have normal exams." (App. p. 218, line 24–p. 219, line 4).

ARGUMENT

I. The PCR court erred when it found Counsel ineffective for failing to object to the qualification of Arroyo-Staggs as an expert witness, when she was qualified in the area of child abuse assessment, failing to object to improper vouching by Arroyo-Staggs, and for eliciting improper vouching testimony, when the finding was based upon improper consideration of the facts and an error of law.

In a post-conviction relief proceeding, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). This Court should reverse the PCR judge's factual findings where the record lacks "any evidence of probative value" to sustain them. See Ard v. Catoe, 372 S.C. 318, 331, 542 S.E.2d 590, 596 (2007). Likewise, this Court must reverse the PCR court's decision "when it is controlled by an error of law." Id. at 331, 642 S.E.2d at 596.

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.

Petitioner respectfully submits that the PCR court erred in finding Counsel ineffective for failing to object to the qualification of Michelle Arroyo-Staggs, failing to object to improper vouching testimony and eliciting improper vouching testimony. There is no probative evidence to support the Court's findings that Counsel was deficient or that there was a reasonable probability that Respondent was prejudiced as a result of the alleged deficiency.

A. The PCR judge erred in finding Counsel was ineffective for not objecting to the qualification of Arroyo-Staggs as an expert witness.

Michele Arroyo-Staggs was qualified as an expert in the field of child abuse assessment and treatment. (App. p. 162). She testified that at the time of her employment with the Children's Advocacy Center and her involvement in the present case, she provided both forensic assessments as well as therapy for children at the Center. (App. p. 160). Arroyo-Staggs testified that she was also trained in the field of forensic interviewing and explained what a forensic interview was. (App. p. 160). However, she was not qualified as an expert in forensic interviewing.

During her testimony, Arroyo-Staggs testified that her role during a forensic interview of a child is to "find out at the child's developmental abilities . . . whether or not the child is able to know the difference between a truth and a lie." (App. p. 164). She also testified that she uses three rules in her interviews with victims, including (1) only talk about the truth, (2) no guessing, and (3) the victim is allowed to say they do not know or cannot remember. (App. p. 164).

Arroyo-Staggs provided testimony regarding the assessment of a child's competency to be interviewed as well as the process and procedures in regards to who is allowed in the interview, recording, family history obtained, and tools used. (App. p. 165-8). Arroyo-Staggs testified as to partial and delayed disclosures and how a child, specifically, might react following sexual abuse and what factors affect the disclosure. (App. pp. 168-71). She also testified as to the term "coaching," which she defined as "if and when the child is being coerced to think about the trauma from somebody else's viewpoint perspective for words." (App. pp. 171-72). Also, Arroyo-Staggs testified that part of her job is to take numerous factors in consideration and to "explore alternate explanations as to why this may have happened, why is the child saying that something happened or didn't happen." (App. p. 172).

Petitioner submits that the Court improperly relied predominantly on the Kromah case to find Counsel ineffective for failing to object to the qualification of Arroyo-Staggs as an expert and for failing to object alleged bolstering. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Kromah was not decided until 2013, three years following Respondent's trial. Id. The Court also utilized State v. Jennings, 394 S.C. 473, 716, S.E.2d 91 (2011), which was decided after Respondent's trial. Courts "have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Respondent argues that the decision in State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009), should have provided notice to Counsel that he should raise an objection to the qualification of Arroyo-Staggs. However, the witness in Douglas was qualified as an expert in the field of forensic interviewing. Here, Arroyo-Staggs was qualified as an expert in child abuse

assessment and treatment At the time of Respondent's August 2010 trial, Counsel had no obligation to object to Arroyo-Staggs' qualification as an expert based upon the later rulings in Jennings and Kromah. Therefore, the PCR Court erred in finding Counsel was deficient for not objecting to her qualification as an expert.

In addition, while Kromah specifically found a person cannot be qualified as an expert in forensic interviewing, the case did not preclude a person from being qualified in another area solely because that person also acted as a forensic interviewer. See Kromah, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. The case dealt solely with testimony regarding the interview of a child abuse victim by a forensic interviewer. It did not involve any testimony regarding behavioral characteristics of victims of trauma such as sexual abuse, nor did it relate to any other testimony an expert may give on a subject outside of forensic interviewing.

As the South Carolina Court of Appeals very recently explained:

> Expert testimony differs from lay testimony in that an expert is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training.
>
> . . . .
>
> First, the [circuit] court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the [circuit] court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the [circuit] court must evaluate the substance of the testimony and determine whether it is reliable.

State v. Brown, No. 2012-213548, 2015 WL 80630, at *3 (S.C. Ct. App. Jan. 7, 2015) (quoting Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010)).

The Kromah decision merely provided a roadmap for the use of the testimony of a forensic interviewer when testifying solely about the forensic interview. Because the issues raised in this appeal, and addressed by the Supreme Court in Schumpert and this Court in Weaverling, were not addressed in Kromah, the Kromah case is not dispositive precedent on the issue. See Hutto v. Southern Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8 (1972) ("It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.'").

The PCR court, in applying Kromah, incorrectly held that Counsel should have objected, based not on what the law actually was at the time of Respondent's trial, but what the law would become. In other words, the PCR court's ruling suggests Counsel should have been clairvoyant. The law, however, is unequivocal on this point: South Carolina courts "have never required an attorney to be clairvoyant or anticipate changes in the laws which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (holding Counsel "could not be ineffective" for failing to request a jury charge that would not have been applicable for at least other year).

Regardless, Kromah does not bar a witness from being qualified as an expert in a field other than forensic interviewing. Rather, the qualification of Arroyo-Staggs and her testimony were entirely appropriate under State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). Arroyo-Staggs was qualified as an expert in the area of "child abuse assessment and treatment." (App. p. 162). Accordingly, Kromah did not bar her qualification as an expert in child abuse assessment and treatment. Based on her education, expertise, and training she was clearly qualified to offer the expert testimony

she offered regarding delayed and partial disclosure, coaching, and this victim's specific disclosure.

B. The PCR Judge erred in finding Counsel was ineffective for not objecting to alleged bolstering testimony.

Counsel was not deficient for failing to object to alleged bolstering.

Petitioner submits the PCR judge erred in finding Counsel's performance in not objecting to alleged bolstering was deficient. 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)).

Though decided after Respondent's trial, Chavis and Jennings, in which the Court found bolstering, are nevertheless distinguishable from this case. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). 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, Arroyo-Staggs merely stated that she could assess whether the child was being truthful despite Victim's seemingly inconsistent statements as to when and how often the abuse occurs. She never stated she actually believed her or that she was being truthful. Furthermore, her testimony

was all within the context of whether indicia of coaching were shown. 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, Arroyo-Staggs never characterized the disclosure in those terms. She only stated that Victim's statements and language were appropriate for her age. Therefore, Jennings is also distinguishable from this case.

In addition, in State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011), which was also decided after Respondent's trial, the Court of Appeals 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 no 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.

Similarly, the Courts of this state have examined behavioral testimony in several cases. Initially in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), this Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. This Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. Id. at 100-01, 359 S.E.2d at 61. This Court changed direction in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), this Court considered expert testimony regarding rape trauma syndrome. The expert testified to characteristics commonly found in sexual assault victims. Id. at 505, 435 S.E.2d at 861. This Court overturned its holding in Hudnall, and specifically found: "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."

The South Carolina Court of Appeals has also had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexually abused victim. The Court of Appeals stated: "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." Id. at 474-475, 523 S.E.2d at 794 (citing Frenzel v. State, 849 P.2d 741

(Wyo.1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). The Court of Appeals explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, supra. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. Id. See also Lujan, supra (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794. Further, the Court in Brown very concisely and correctly explained:

> We believe the unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror with no prior experience—either directly or indirectly—with sexual abuse. The general behavioral characteristics of child sex abuse victims are, therefore, more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony.

Brown, No. 2012-213548, 2015 WL 80630, at *3 (S.C. Ct. App. Jan. 7, 2015); see also, State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) ("Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior.).

Arroyo-Staggs' testimony did not include any references to the victim's testimony being compelling, consistent, credible, or truthful. Instead, her testimony focused on issues with delayed disclosure and whether or not there was evidence of coaching. Although the order granting relief states that Arroyo-Staggs "unequivocally testified that it was her opinion that the

victim told her the truth," the PCR court's interpretation of the testimony is inaccurate, and in fact, lacks any evidentiary support in the record. (App. p. 600). The question asked of Arroyo-Staggs during trial was how could she assess or determine if the child was telling the truth and her response was simply, "I can definitely assess it, which I have I believe accurately and appropriately, again, basing on age appropriateness, information she's provided." (App. p. 198). Further, she testified, "well, as I said before, based on her age and based on the information that she was able to give me, what I deducted was a disclosure based on the appropriateness of the—what I saw, what I heard, her statements, behavior and affect—were all appropriate for her age." (App. p. 198). Arroyo-Staggs never states that she believes the victim or that the victim was telling the truth, but she instead focuses on whether or not she can assess if the child is telling the truth based upon whether or not the words and statements used by the victim were appropriate for her age. (App. p. 600).

"[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). The Court recently stated:

> "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." 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."

State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), rev'd in part on other grounds,

380 S.C. 499, 671 S.E.2d 606 (2009); State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citations omitted).

Contrary to the inference to be drawn from the PCR court's ruling, simply because an expert's testimony supports the underlying allegations levied by a victim, such testimony does not result in improper bolstering. It is only when the testimony invades the province of the jury and makes a comment on the credibility or veracity of the victim. Here, Arroyo-Staggs never made an explicit statement that she believed Victim. Rather, in response to questioning on re-cross examination, she stated that even though Victim did not give a specific date and said that the abuse occurred a thousand times, she could still assess whether the child was being truthful. At no time did she actually say she believed the child. Because of Victim's very young age—five at the time of the interview and six at the time of trial—it was appropriate in this case for Arroyo-Staggs, as an expert in child abuse assessment and treatment, to testify regarding her interactions with the child and her expert opinion as to the child's behavior and reactions.

Furthermore, the statement was not elicited by the State's questioning, but rather, was given in response to questioning by Counsel. 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)). But even where Counsel does not provide a strategic reason, 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). It is clear from his question Counsel was attempting to discredit Victim's testimony through his cross-examination of Arroyo-Staggs by highlighting the absurdity that a child who laughs and says the abuse occurred a thousand times could possibly be telling the truth. Petitioner submits there is no other way to interpret Counsel's question.

Petitioner submits that the testimony of Arroyo-Staggs did not rise to the level of improper bolstering for Victim, and therefore, Counsel was not deficient in not objecting to the alleged bolstering.

Counsel's lack of objection to alleged bolstering did not prejudice Respondent

Likewise, Respondent has failed to demonstrate he was prejudiced by the alleged deficiency. In addition to Arroyo-Staggs' testimony, the following evidence was presented against Respondent at trial.

Victim's mother, Wendy Richards, testified regarding jails calls between herself and Respondent. (App. p. 357-60). She testified that when she told Respondent she was taking the victim to Dr. Nancy Henderson "to see if she had been touched," Respondent said "You need to tell them that she F's herself." (App. p. 358 lines 19-21). She also testified Respondent told her "No face, no case." (App. p. 358, lines 23-25). Detective Nikki Cantrell testified that she listened to an audio recording of all the jail phone calls Respondent made prior to trial, including those between Respondent and Richards. (App. p. 266, line 16–p. 267, line 8). She testified Respondent made the following comment to Richards on one of the calls: "you can't prove or disprove oral sex, it's my word against [Victim's]." (App. p. 267, lines 13-14). She also testified that Respondent told Richards on numerous occasions "not to take the child for the forensic interview." (App. p. 267, lines 18-20). She also testified that "when he found out that [Victim] was in therapy he told [Richards] not to take her to therapy and would get angry that she was taking [her] to therapy." (App. p. 267, lines 20-22). Detective Cantrell also testified that Respondent said "[n]o face, no case" "numerous times" and that Respondent said that "if [Victim] is not here to testify they have to dismiss the charges on me." (App. p. 268, lines 1-4). Cantrell also testified Respondent told Richards to "drop off the face of the earth and to go where we don't have jurisdiction. . . ." and to "change the children's schools, move and put the bills in somebody else's name so nobody could ever find them." (App. p. 268, lines 5-8). Regarding

Cantrell's testimony about the jail phone calls, Counsel testified at the PCR hearing that "those things were said" on the tapes. (App. p. 581, lines 9-20).

Cantrell also testified that during her interview with him, Respondent started crying and "told [her] he was sick and he needed help." (App. p. 262, lines 17-19), and that when he made that statement, "He was not requesting medical attention. He was referring to the allegations that he was sick and needed help. And he was going to tell me what he did." (App. p. 280, lines 5-7). Further, Cantrell testified that during his interview with Danny Morgan he was "questioning [Morgan] and talking to [Morgan] a lot about what his options would be and what he should do, what he could do, and asking [Morgan] questions about the law and things like that." (App. p. 261, lines 8-11). Counsel challenged the voluntariness of Respondent's oral and written statements to Cantrell in a motion in limine, and the trial judge ruled that the statements were voluntary. (App. p. 65). Cantrell testified that Respondent admitted he lived with Victim at her mother's house, that he slept on the pull-out couch, and that he would be alone with Victim before she went to school in the mornings. (App. p. 258).

Morgan testified Respondent "never did very strongly or vehemently deny the [allegations] even in the beginning, . . . and that as it went along . . . [he] didn't deny anymore. He started actually nodding his head yes in affirmation that he had done certain things . . . he would just . . . listen and respond and nod his head that he had done these things." (App. p. 235, line 7-p. 236, line 9). Morgan admitted on cross-examination that Respondent "did not come out and say [he] did this to [Victim]." (App. p. 240, lines 13-18).

Although Dr. Nancy Henderson, who was qualified as an expert the field of child sexual abuse, pediatrics, (App. p. 210), testified that Victim's anal and vaginal exams were normal (App. p. 220, lines 11-18). On cross-examination Dr. Henderson agreed Victim's exam did not

show acute signs of abuse. (App. p. 227, lines 20-23). She also testified that "it is not uncommon . . . to see a child weeks, months, even years sometimes after there's—they have been abused and it's just coming forward to have normal exams." (App. p. 218, line 24–p. 219, line 4).

Demetrius Martin, who was confined with Respondent in a pod at the Spartanburg County Detention Center, testified Respondent said he "rubbed his penis between legs butt area and until he ejaculated. (App. p. 294, lines 20-22). Martin testified Respondent said he "had the case beat" because he did not penetrate Victim. (App. p. 295, lines 1-2). Dwight Lamar Spears, another inmate at the detention center, testified Respondent came to see him almost daily to talk about his case, and that he admitted he "used to ride [Victim] on his lap playing horsy with her. And he said that one time he ejaculated. She asked what it was, and he told her it was snot." (App. p. 304, lines 15-19).

Most damaging for Respondent, however, was six-year-old Victim's testimony at trial and the admission of the Child Advocacy interview DVDs between Michele Arroyo-Staggs and Victim. Victim testified that Respondent touched her in her private with his private, (App. p. 133, lines 2-13), that his mouth touched her private, (App. p. 133, line 20–p. 134, line 1), and that this occurred in the living room on the lay-out couch. (App. p. 134, lines 21-25). Judy Petty corroborated Victim's testimony when she testified that Victim indicated she had been sexually assaulted, that she told her it happened "in the living room on like a pull-out couch[,]" (App. p. 149, lines 3-11), and that it had happened when her "bubba was at school and her mommy was at work." (App. p. 149, lines 12-14). Petty also testified that victim was "teary-eyed," "looked a little scared," and told her not to tell anyone when she disclosed the abuse to her. (App. p. 148, line 23-p. 149, line 5). Arroyo-Staggs likewise testified Victim disclosed to her a sexual assault. (App. p. 173, lines 10-12). Wiley Garrett, Victim's therapist, testified—without providing

details—that Victim disclosed a sexual assault to him as well. (App. p. 22-24). Victim's grandmother also testified that Victim disclosed to her that Respondent had assaulted her and that the assault occurred on the pull-out couch. (App p. 331, lines 18-24). Finally, Wendy Richards, Victim's mother, testified Victim told her about the sexual assault. (App. p. 359, lines 7-8).

The jury viewed the interviews with the child and Arroyo-Staggs themselves. They also heard Victim testify. Further yet, given Victim's age at the time of disclosure and at trial, the contents of the forensic interviews themselves, Victim's demeanor both at trial and in the videos, Victim's actual testimony at trial, the corroborating testimony of other witnesses, the statements of Respondent himself in addition to his recorded jailhouse conversations, there is no reasonable probability that, but for Arroyo-Staggs testimony that she can "definitely assess" Victim's truthfulness, the jury would not have convicted Respondent.

There is no support in the record to support the PCR court's finding that Applicant was prejudiced by the alleged deficiency. Rather, given all of the other testimony and evidence against Respondent at trial—specifically the live testimony of Victim and Victim's Child Advocacy interviews—there is no reasonable probability that had Counsel objected to Arroyo-Staggs' testimony, the jury would not have convicted Respondent. Therefore, Petitioner asks this Court to reverse the PCR judge's decision and deny relief.

II. The PCR court erred in granting Respondent's application where no evidence of probative value supports the PCR court's finding that Counsel was ineffective for failing to request a jury charge regarding expert testimony.

Petitioner submits that no probative evidence supports the PCR court's finding that Counsel was ineffective for failing to request a jury charge regarding expert testimony.

When reviewing jury charges for error, the jury charge is considered as a whole and in light of the evidence and issues presented at trial. State v. Logan, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013). Further, if the charge is "substantially correct and covers the law," the charge does not require reversal. Id.

The same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony. Anderson v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104 (1943). "As with any witness, the jury is free to accept or reject the testimony of an expert witness." State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009). When reviewing the instructions as a whole, paying particular attention to the charge related to witness credibility, Petitioner submits that the jury instructions clearly state how the jury can view witnesses and their credibility.

The jury instructions regarding witness credibility were stated as:

> You will decide what weight, value and effect to give to any particular witness' testimony, or even portions of testimony. And there are several factors which you should consider in arriving at your assessment as to a particular witness' credibility . . .
>
> . . . .
>
> You should also consider how the witness came to know the facts to which a particular witness has testified to. In other words, what was that witness' opportunity to perceive the existence of those facts to which that witness has testified by having previously used his or her senses. And then what is that witness' ability to be able to come into court and to accurately recollect to you as to what that witness has previously perceived.
>
> . . . .
>
> Now, because you are the judges of the facts and because you are the judges of the credibility of each witness who has testified you are permitted to believe as much or as little of what a witness has testified to as you deem appropriate.

> And therefore you may believe everything that a witness testified to; you may choose to believe none of it. You may believe one portion of a witness' testimony and reject some other portion of that same witness' testimony.
>
> You may believe one witness as opposed to several, or several as opposed to one. And a witness' testimony does not need to be corroborated by other evidence if you find it to be credible in the case.
>
> Simply put, you have to determine what is the most credible and believable testimony and evidence, and that's the testimony and evidence you should accept. And you should reject any testimony or other evidence that you find not to be credible or believable.

App. Vol. I. p. 440-442.

Petitioner submits that the jury charge correctly states the law and informs the jury that they have the option of believing all, nothing, or some of what any witness testified.

Although there is no South Carolina case directly addressing this issue, Petitioner submits that the decision in the Federal Habeas case, Hernandez v. Florida Dep't of Corr., 470 F. App'x 721 (11th Cir. 2012), reflects an appropriate standard for a finding of ineffective assistance of counsel based upon the failure to request a jury instruction regarding expert testimony. In Hernandez, the court found that the trial court had provided the jury with instructions indicating it was "up to them to decide what evidence was reliable or unreliable," and an instruction similar to the present case regarding the credibility of witness testimony. Id. The court found that, "[i]n light of these instructions, it [was] highly unlikely that the jury believed that it had to accept [the expert's] testimony as true." Hernandez v. Florida Dep't of Corr., 470 F. App'x 721, 724 (11th Cir. 2012).

The record does not support a finding that but for Counsel's failure to request the expert jury instruction, the outcome of Respondent's trial would have been different. See Strickland, 466 U.S. at 694. As Petitioner argues above, many other witnesses testified against Respondent, including Victim. These witnesses corroborated the six-year-old Victim's

disclosures. In addition, Respondent's own statements were admitted against him. Therefore, the record contains no probative evidence to support a finding that Counsel's failure to request an expert jury instruction led the jury to accord Arroyo-Staggs' testimony any greater weight than that given to any other witness. Accordingly, the PCR court erred in finding that Respondent satisfied his burden of proof.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court reverse the PCR Court's decision and deny relief.

Respectfully submitted,

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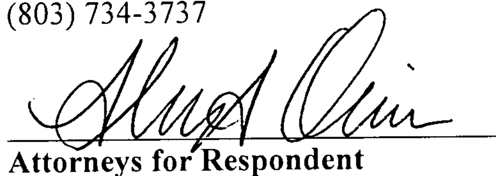
By: 
Attorneys for Respondent

November 16, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2014-000693

Anthony Neil Briggs,..Respondent,

v.

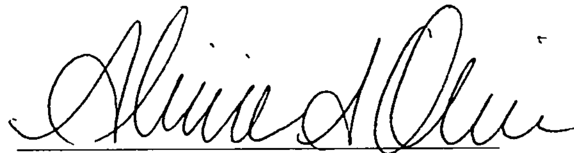
State of South Carolina,...Petitioner.

CERTIFICATE OF SERVICE

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

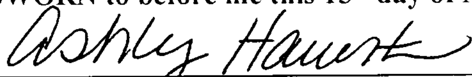
Mr. Jeremy Adam Thompson, Esquire
Law Ofc. of Jeremy A. Thompson, LLC
PO Box 12891
Columbia, SC 29211

This 16h day of November, 2016.



ALICIA A. OLIVE
ATTORNEY FOR RESPONDENT

SWORN to before me this 15th day of November, 2016.



Notary Public for South Carolina.
My Commission Expires: 3-18-23

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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

November 16, 2016

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

Re: **Anthony Neil Briggs v. State of South Carolina**
Appellate Case No. 2014-000693
Lower Court Case No. 2012-CP-42-2674

Dear Mr. Shearouse:

I am enclosing the original and fifteen (15) copies of the **Brief of Petitioner** in the above referenced case for filing in your office. Also, per Rule 243(j) included are thirteen (13) additional copies of the Appendix.

Sincerely,

Alicia A. Olive
Assistant Attorney General
S.C. Bar No. 102089

AAO/ah

cc: Jeremy A. Thompson, Esquire (2 copies)
Trisha Allen, Victim Services (w/o enclosures)