STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County
Court of Common Pleas
The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2016-000242
Lower Court Case No. 2014-CP-32-4072

MICHAEL RAY ELDERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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COUNTER ISSUES PRESENTED

I. Ample evidence supports the PCR Court's finding that counsel was not ineffective for failing to object to Forensic Interviewer's qualification as an expert and her purportedly inadmissible testimony where there was nothing objectionable about the forensic interviewer's, Lysa Miller-Dupre, testimony; counsel was under no duty to be clairvoyant with regard to her qualification as an expert and her testimony; and Petitioner failed to meet his burden to show prejudice, especially in light of his withdrawal of his direct appeal.

II. Ample evidence supports the PCR Court's finding that counsel was not ineffective in failing to object to the introduction of evidence that Petitioner sexually assaulted the victim where the inconsistencies of victim's allegations were favorable to the defense strategy and Petitioner failed to meet his burden to show prejudice, especially where the jury found Petitioner not guilty on the indictment affected specifically by that testimony.

III. Any allegations related to the qualification of the SANE Nurse as an expert or the Nurse's testimony as to the physical exam and the victim's history serving as improper hearsay were not preserved for appellate review.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Petitioner was indicted at the October 2009 term of the Court of General Sessions for Lexington County for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677). (App. p. 540.) Petitioner was then indicted at the February 2011 for lewd act upon a minor (2011-GS-32-0364). (App. p. 543.) Petitioner was also indicted for committing a lewd act upon a child (2011-GS-32-00365). (App. p. 418, ll. 5-8.) He was represented by William Rast, Esq. On March 2, 2011, Petitioner proceeded to trial where he was found guilty as indicted on criminal sexual conduct with a minor in the first degree and on one count of lewd act upon a minor. (App. pp. 542, 545.) Petitioner was found not guilty of incitement 2011-GS-32-00365, "committing a lewd act upon a child involving the defendant putting the child's hand upon the penis." (App. pp. 418, ll. 5-9.) He was sentenced by the Honorable William P. Keesley to a thirty year term of imprisonment for criminal sexual conduct with a minor, first-degree, and to a fifteen year term of imprisonment for lewd act upon a minor. (Id.) The sentences were to be served concurrently. (Id.)

A timely Notice of Appeal was filed on Petitioner's behalf. Petitioner was represented by Elizabeth Franklin-Best, Esq., of the Office of Appellate Defense. The appeal was subsequently withdrawn. (App. pp. 548-49.)

Petitioner filed his first post-conviction relief application on August 2, 2012, and the State filed its Return on March 15, 2013. (App. pp. 427-38.) An evidentiary hearing was held on August 14, 2013, before Judge Dickson. Petitioner was represented by Tristan Shaffer, Esquire. (App. p. 439.) Judge Dickson denied the application through an order filed May 2, 2014. (App. pp. 503-515.) Petitioner did not appeal that order.

On November 7, 2014, Petitioner filed a second PCR application, alleging he had been denied his statutory right to appeal his first PCR. (App. p. 516.) On March 17, 2015, Respondent filed its Return, and an evidentiary hearing was held on April 23, 2015. (App. pp. 524, 529.) Petitioner was represented by Anna Good, Esquire. PCR Counsel explained that Tristan Shaffer, Petitioner's first PCR counsel, had written a letter that explained he had failed to timely file an appeal due to switching offices. (App. pp. 531-32.) Respondent, through Assistant Attorney General Walt Whitmire, consented to relief pursuant to Austin v. State, 305 S.C. 453, 545, 409 S.E.2d 395, 396 (1991). (App. p. 532.)

STATEMENT OF THE FACTS

Summary of the Testimony in the 2013 PCR Hearing

At the 2013 PCR Hearing, Trial Counsel was the only witness who testified at the hearing.

Counsel testified he was retained soon after Petitioner's arrest. (App. p. 457, ll. 2-6.) He had known Petitioner and his family for some time and successfully represented Petitioner in prior cases where Petitioner was either acquitted or had his charges dismissed. (App. p. 457, ll. 2-21.) He noted that three of these six cases were brought by Petitioner's wife. (App. p. 457, ll. 23-25.) Counsel testified Petitioner's case was going to trial from the beginning because the State made no viable plea offer and Petitioner protested his innocence. (App. p. 458, ll. 2-10.) Counsel also explained he independently investigated the State's evidence and formulated a defense theory of the case.

Counsel met with Petitioner numerous times and apprised him of Victim's statement and the forensic interview. He advised Petitioner that the tape of the victim's forensic interview constituted admissible evidence. (App. p. 486, l. 24- p. 487, l. 1.) Counsel interviewed the

victim's doctor and called him at trial to testify to the victim's good health and lack of symptoms commonly present in abused children. (App. pp. 342-347.) Counsel was surprised when Petitioner decided not to testify during the course of trial. (App. p. 488, ll. 5-9.) Petitioner's decision surprised and dismayed counsel who reasoned Petitioner was a critical witness for the defense's theory of the case.

Counsel explained that accusations against Petitioner originated when Johnny Hutto witnessed the victim sitting in Petitioner's lap while Petitioner was operating his truck. (App. p. 459, ll. 1-14.) It was an important part of the counsel's presentation of his case to portray the adverse family witnesses as an irrational mob predisposed to falsely accuse Petitioner of inappropriate behavior. (App. p. 458, ll. 11-13; p. 488, ll. 10-18.)

Counsel also testified that part of the defense theory of the case was to impeach the victim's credibility by showing she was employed as a conduit for her mother who had a motive to send Petitioner to prison. (App. p. 462, ll. 15-25.) The victim's mother had a history of abusing narcotics. (App. p. 462, ll. 12-14.) It was counsel's recollection that the victim would look in the direction of her mother when she could not remember details at trial. (App. p. 462, ll. 2-10.) He noted it was the defense's theory that the victim's mother was the underlying catalyst that led to Petitioner's arrest.

Petitioner alleged counsel was ineffective for not sufficiently objecting to the expert qualifications or testimony from the State's two forensic interviewers, Miller-Dupree and Agent Caldwell. (Trial Tr. p. 194) Counsel noted he interviewed Miller-Dupree, who conducted the taped interview with the victim, prior to trial. (App. p. 460, ll. 16-18.) Counsel objected to the State calling Agent Caldwell, a second interviewer, as an expert in forensic interviewing where she never met with the victim. (Trial Tr. pp. 322-23). He reasoned the State called Agent

Caldwell to combat counsel's attack on the victim's credibility, related to victim's leaving something out of the forensic interview. (App. p. 460, l. 16-p. 461, l. 24.) It was counsel's strategy to impeach the victim on the delayed disclosures. (App. p. 461, ll. 11-16.) Counsel noted he elicited inconsistent testimony from Agent Caldwell and Miller-Dupree on the purpose and role of forensic examination. (App. p. 465, l. 4- p. 466, l. 7.) Counsel also pointed out that he was successful in his strategy because the information the victim left out of the forensic interview was the basis of the indictment for which the jury found his client not guilty. (App. p. 461, ll. 1-16.)

Petitioner alleged counsel was ineffective for failing to object to Miller-Dupree's assessment of the interview as "not problematic" and her testimony that it was recommended that the victim receive evidence based therapy. The forensic interviewer was asked by the State, "what, if any, recommendations did you make following her disclosure?" The forensic interviewer replied: "She was recommended for evidence based therapy at the Dickerson Center." (App. p. 203, ll. 7-10.) On cross-examination, Petitioner's counsel returned to the therapy sessions:

> **Petitioner's Counsel:** [Victim] has talked to a lot of people about [these allegations], has she not?
> **A:** I believe she—she was recommended for therapy. I believe she attended therapy after the interview.
> **Q**: She probably talked to the police . . .
> **A**: Probably.
> **Q**: DSS also . . .
> **A:** They were. . . . .
> **Q**: People at the Dickerson Center other than you?
> **A**: Correct.
> **Q**: Nurses at the hospital?
> **A**: Correct.
> **Q**: She has gone over this with a lot of people, hadn't she?
> **A**: It's possible. I don't know that for a fact.
> **Q**: She should know exactly what happened now, shouldn't she?
> **A**: Everybody's different.

> **Q**: And if she's not telling the truth, that makes it a little more difficult, doesn't it?
> **A**: I don't know, sir.

(App. p. 208, ll. 8-25.)

On direct examination, the forensic interview explained that it was "not [her] job to determine whether the child is telling [her] the truth in the interview." (App. p. 195, ll. 11-12.) On cross-examination, Petitioner's counsel asked the forensic interviewer:

> **Petitioner's Counsel**: Right. Now, you said it's not your job to determine whether she's telling the truth or lying; is that correct?
> **A**: Correct.
> **Q**: So you made no determination on that?
> **A**: Correct.

(App. p. 205, ll. 5-10.)

On re-direct, the State asked the following of the forensic interviewer:

> **State**: You testified on cross that it was not your job to determine whether they were telling the truth or telling a lie. Did you find [Victim's] disclosures problematic?
> **A**: No, I did not.

(App. p. 209, ll. 12-16.)

At the PCR hearing, Trial Counsel reasoned the objection was not warranted in light of his opinion that "based on the whole of her testimony and the video of the interview [with the victim], I mean, that's basically up to the jury." (App. p. 466, ll. 4-24.)

Last, Petitioner alleged counsel was ineffective for failing to properly object to Robin Baker, the SANE nurse who treated the victim, to hearsay testimony regarding her pre-screening interview with the victim. Part of that testimony included the nurse reviewing her notes, which indicated Victim said Petitioner put his hands down her pants and touched her "private," and Petitioner made her "touch his private . . . touch[] him under his cloth[e]s . . . . He unzipped his pants. He pulled it out, nothing happened, it stayed the same." (App. pp. 266, l. 13-p. 267, l. 21.)

Petitioner alleged the objection was not properly preserved for appellate review because counsel failed to contemporaneously reference Rule 803, SCRE, or Rule 404(b), SCRE. Counsel explained he did not object "because it was all brought out either before or later on, when she testified and when she was on the video." (App. p. 483, ll. 3-6; see p. 147, p. 487, ll. 24-25, p. 488, ll. 1-4.) Further, the jury found Petitioner not guilty on the indictment related to making the victim touch Petitioner's penis. (App. p. 418, ll. 5-9.)

Summary of 2015 PCR Hearing

A hearing was scheduled for Petitioner's second PCR application, which sought relief pursuant to Austin, 305 S.C. at 454, 409 S.E.2d at 396. At the hearing, Assistant Attorney General Walt Whitmire informed the PCR Court that the original PCR Counsel, Tristan Shaffer, had informed the State he failed to file a timely Notice of Appeal from the 2014 PCR order due to moving offices. (App. p. 531, ll. 8-21.) PCR Attorney Anna Good referenced a letter from original PCR Counsel Tristan Shaffer to Petitioner stating the same. (App. p. 531, l. 22 – p. 532, l. 4.) Respondent consented to a belated appeal of the 2013 PCR Decision pursuant to Austin, 305 S.C. at 454, 409 S.E.2d at 396. (App. p. 532, ll. 5-7.) In an order filed January 6, 2016, the Honorable Brooks P. Goldsmith granted Petitioner's request for a belated appeal pursuant to Austin, 305 S.C. at 454, 409 S.E.2d at 396.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'any evidence' of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner 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. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 668. Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Ample evidence supports the PCR Court's finding that counsel was not ineffective for failing to object to Forensic Interviewer's qualification as an expert and her purportedly inadmissible testimony where there was nothing objectionable about the forensic interviewer's, Lysa Miller-Dupre, testimony; counsel was under no duty to be clairvoyant with regard to her qualification as an expert and her testimony; and Petitioner failed to meet his burden to show prejudice, especially in light of his withdrawal of his direct appeal.

Trial Counsel was not ineffective. The cases relied on by Petitioner to challenge this witness being qualified as an expert and portions of her testimony were not issued until **after this case went to trial**. Further, a review of the testimony at issue and the evidence in this case shows there was no prejudice to Petitioner. Any claim that these issues should have been preserved for appellate review is speculative where Petitioner voluntarily withdrew his direct appeal in this case. (App. pp. 548-49.)

The long standing principle that has governed PCR jurisprudence is that a defense attorney does not hold a duty of clairvoyance to anticipate either changes of law or facts during challenged representation. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Strickland explicitly states "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, **viewed as of the time of counsel's conduct**." Strickland, 466 U.S. at 690 (emphasis added). South Carolina 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, 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).

Petitioner's trial was held on February 28, 2011, State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) was not even argued until April of 2011 and not decided until September 19, 2011, and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) was not decided until almost two years after the trial concluded. Kromah acknowledged that additional guidance on the admissibility of forensic interviews and testimony was required and outlined a set of statements "forensic interviewer[s] should avoid at trial." Kromah, 401 S.C. at 360, 737 S.E.2d at 500. One of those examples was listed as "any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a 'compelling finding' of abuse." Id. In the years since Kromah was decided, several cases have followed, analyzing whether specific testimony falls within that or another Kromah category. See, e.g., State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (holding expert's testimony did not improperly bolster or corroborate child victims' testimony); State v. Smith, 411 S.C. 161, 171, 767 S.E.2d 212, 217 (Ct. App. 2014) (holding there was no improper vouching); Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015) (holding expert's recommendation did improperly bolster Victim's credibility but because "Appellant's crimes were established by evidence independent of [expert] and Victim," that error was harmless).

Strickland requires that Counsel's performance may not fall below an "objective standard of reasonableness." Because Jennings, Kromah, Chavis, and Brown had not yet been decided at the time of Petitioner's trial, trial counsel's failure to object was not ineffective. Even if the testimony was improper, it did not prejudice Petitioner because Petitioner's crimes were established by evidence independent of victim and this witness's testimony, the law at the time would not have resulted in the Trial Court sustaining the objection, and Petitioner voluntarily withdrew his direct appeal.

"This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). At the time of Petitioner's trial, the controlling case law rendered any error qualifying Miller-Dupree as an expert harmless at best. See State v. Baker, 390 S.C. 56, 67, 700 S.E.2d 440, 445 (Ct. App. 2010). Furthermore, Miller-Dupree's testimony that the victim's disclosures were "not problematic" did not equate to prejudice at the time of trial. And, the clinical professional did not bolster the victim's testimony when she testified to her recommendation that the victim obtain therapy, especially in light of how that testimony was used by Petitioner's counsel to support his narrative that many people had the opportunity to assist Victim with her testimony about the allegations. Even if objectionable, her testimony would not have warranted a mistrial at the time of trial. See State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (testimony of psychiatrist who treated child victim of sexual assault was improper where psychiatrist answered "yes" to solicitor's question of whether, based on his examination and observations of the victim, he was "of the impression that [the victim's] symptoms [were] genuine."). Last, any preservation argument here is speculative where Petitioner withdrew his intent to appeal his conviction. See Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) ("PCR is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). Therefore, this petition for writ of certiorari should be denied.

II. Ample evidence supports the PCR Court's finding that counsel was not ineffective in failing to object to the introduction of evidence that Petitioner sexually assaulted the victim where the inconsistencies of victim's allegations were favorable to the defense strategy and Petitioner failed to meet his burden to show prejudice, especially where the jury found Petitioner not guilty on the indictment affected specifically by that testimony.

Trial Counsel was not ineffective for failing to object to the SANE Nurse's testimony because the defense did not include another possible abuser, the victim also testified as to Petitioner's identity as the one who abused her, the victim's forensic interview contained the same information, and the jury rendered a not guilty verdict on one of the indictments related to the portion of this testimony.

"The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. Id.; Rule 801(d)(1)(D), SCRE. The corroborative testimony is restricted to the victim's complaint of the time and place of the sexual assault. Dawkins, 346 S.C. at 156, 551 S.E.2d at 262. Any other details or particulars, including the perpetrator's identity, must be excluded. Id. at 156.

"However, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386

S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "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, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

In Watson, this Court reversed a PCR court's determination that counsel was ineffective for failing to prevent the introduction of hearsay testimony of several witnesses who testified about the abuse allegations against the defendant. Watson, 370 S.C. at 72, 634 S.E.2d at 644. This Court held that "counsel articulated a valid reason for failing to object to the hearsay testimony" where that reason was that counsel "wanted to avoid the possibility that the prosecution would have shown the video of the victim talking about the sexual abuse." Id.

As with Watson, Trial Counsel had a "valid reason for employing a certain strategy [and] such conduct [should] not be deemed ineffective assistance of counsel." Watson, 370 S.C. at 72, 634 S.E.2d at 644 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). Counsel testified he intentionally tried to highlight how the Victim claimed some things to others—such as that Petitioner had made her touch his penis---while not referencing those allegations in her forensic interview. He wanted to highlight that inconsistent testimony. (App. p. 460, l. 16-p. 461, l. 24.) In fact, Counsel intentionally entered a written statement by the Victim's mother as Defense Exhibit 1 for the purpose of challenging the assault claims and calling into question the terminology Victim and her mother had used.

Petitioner's Trial Counsel: Could you read the statement for me, please?
A: Yes, sir. I received a phone call . . . telling me that [Petitioner] has been sexually assaulting our daughter, [Victim]. I told [Victim] I was aware of what was going on and I needed her to tell me.
. . . .
A: She told me **her father had been putting his hands down her pants** and playing with her private area. I asked her hold long this had been going on, she said every time she went over to his house for about a year. The call I received was from my sister . . . . She told me Michael's cousin, Johnny Hutto, saw Michael touching [Victim] inappropriately and I needed to ask [Victim] what was going on.
. . . .
Q: . . . Did you use the words sexually assaulted?
A: Yep, sure did.
Q: And you also used the word that he had been touching her privates?
A; Yes, sir.
Q: That's the exact same words [Victim] uses, isn't it, sexually assaulted and privates?
. . . .
Q: Isn't it true that most kids refer to private parts by different words—
. . . .
Q: --such as tutu, wee-wee?
. . . .
Q: And sexual assault, they use that phrase all the time, too?
. . . .
Q: That is not a child's phrase, is it?
A: No, it's not a child's phrase . . . .
Q: And when [victim] was testifying, she kept looking at you sitting back here behind me, didn't she?
A: Yeah, she kept looking at me. I'm her mother. I'm her support.
Q: And she's going to do what you want her to do?

(App. p. 238, l. 9-p. 242, l. l0.)

This narrative of the Victim using terminology from other adults, like the SANE nurse, was also addressed by Trial Counsel in the cross-examination with the Forensic Interviewer:

Petitioner's Trial Counsel: [Victim] **said she was sexually assaulted by dad. Sexually assaulted is not terms a ten-year-old uses, is it?**
A: Not typically.
Q: [Children] say something else. [Victim] got [the term] sexually assaulted from somebody else then, didn't she?
A: **I think [Victim] said that the nurse said that [term] to her.**

(App. p. 205, ll. 11-18.)

Not only was Trial Counsel's strategy not ineffective assistance, there was no prejudice where the testimony at issue was intentionally elicited through another witness by Petitioner's Trial Counsel for strategic reasons and where the testimony at issue addressed both of Victim's allegations against Petitioner (that he touched her privates and made her touch his). This is especially true where the jury returned **a not guilty verdict on one of those indictments related to him making her touch his penis.** (App. pp. 418, ll. 5-9.) The testimony of the nurse did not serve to improperly bolster the victim's testimony and highlighting the victim's inconsistent statements and clinical terminology was beneficial to Petitioner.

Because counsel was not ineffective for failing to object and because Petitioner's crimes were established by evidence independent of Victim and this witness's testimony, Petitioner failed to show prejudice, and this Petition should be denied.

III. Any allegations related to the qualification of the SANE Nurse as an expert or the Nurse's testimony as to the physical exam and the victim's history serving as improper hearsay were not preserved for appellate review.

Petitioner argues Trial Counsel was ineffective for failing to object to the SANE Nurse's qualification as an expert and "that Robin Baker testified that the history from the child was important to be sure the physical exam and the child's story matched was extremely prejudicial and indicated that she believed the child." (PWC, pp. 19-20.) However, these allegations were not preserved and not addressed by the PCR Court and therefore are not properly before this Court.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" Id. (quoting Wilder Corp. v. Wilke, 330 S.C. at 76, 497 S.E.2d at 733). "Imposing such a requirement on the appellant 'is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" I'On. LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); State v. Sheppard, 391 S.C. 415, 423, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal).

PCR counsel and Petitioner never raised the issue to the Court or gave Trial Counsel an opportunity to respond or address the section of the SANE Nurse's testimony or her qualification as an expert as an allegation of ineffectiveness. The issues presented to the PCR court, offered to Trial Counsel to address, and ruled upon by the PCR court, were limited to the area of the transcript specifically identified by PCR counsel and did not reach the qualification or the testimony given by the SANE Nurse on the physical findings and the victim's history.

Because this issue was not raised or ruled upon, it was not preserved. This Court should find this issue was not preserved and is unreviewable at this stage.

CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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February 8, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Court of Common Pleas
The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2016-000242
Lower Court Case No. 2014-CP-32-4072

MICHAEL ELDERS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari Pursuant to Austin v. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle C. Durant, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 8th day of February, 2017.

Brianna Arnone

BRIANNA ARNONE
LEGAL ASSISTANT