

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

Farid A. Mangal, Respondent

AUG 02 2017

v.

S.C. SUPREME COURT

State of South Carolina , Petitioner

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal from Spartanburg County  
J. Mark Hayes, II, Trial Judge  
J. Derham Cole, Post-Conviction Relief Judge

---

Opinion № 27726  
Heard December 14, 2016 - Filed July 19, 2017

---

**Petition for Rehearing**

---

Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Farid A. Mangal, hereby Petitions this Court to rehear this matter based upon the following:

1. This Court incorrectly stated that “Mangal was subsequently appointed counsel, but no written amendment to Mangal’s original application was filed.” *Mangal, v. State*, Op. №. 27726 Adv.Sh. № 27 at47, 49. While Mr. Mangal was initially appointed counsel, the attorney who represented him at the Post Conviction Relief hearing was retained.

2.. This Court failed to consider, and rule upon, the fact that the allegations in Mr. Mangal’s Post Conviction Relief Petition of “ineffective assistance of counsel” and “failure to preserve direct appeal issues” would in fact describe the failure of trial counsel to object to the numerous examples of improper bolstering and therefore the issue was not preserved for review

on direct appeal.<sup>1</sup> As the bolstering of the witnesses would have been included within these general allegations alleged in the Petition, the issue was before the Post Conviction Relief Court. Improper vouching of the testimony of a witness is part of the basic law of South Carolina and other states. “It is improper to propound a question to one witness which requires the witness to comment upon the testimony of another witness. The credibility of a witness is to be determined by the jury, and the credibility of a victim may not be bolstered by the testimony of another witness; thus, a witness may not give an opinion as to whether the victim is telling the truth.” 281 AM. JUR. 2d *Witnesses* § 655 (2017).

3. This Court further erred in stating “Mangal’s counsel began the PCR hearing by calling witnesses, giving no indication to the PCR court he intended to raise any issues not set forth in the original application.” *Id.* at 49. The error being that as the improper vouching claim, as noted above, would be included within the general allegations set forth in the petition, the PCR court and the State were on notice of this allegation, although vague, and any other claim that would fit under the allegation. As the State never asked for the Petition to be made more definite and certain pursuant to Rule 12(e) of the S. C. Rules of Civil Procedure, the State should not now be permitted to complain on appeal that they had no notice as to the allegations below. In a PCR petition, as in a complaint, if the allegations are vague, that issue should not be permitted to be raised for the first time on appeal. “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

---

<sup>1</sup> Whether the proper word is “bolstering” or “vouching” is not relevant as the South Carolina Courts have used them interchangeably. *Compare, State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) with *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015)

preserved.” *Pye v. Estate of Fox*, 369 S.C. 555, 564,633 S.E.2d 505, 510 (2006). Had the issue of the vague allegations been raised and ruled upon below, the procedural default found by tis Court, would have been avoided. The obligation to have pleadings that adequately inform the trial court of the issues is a dual obligation and the failure of one party to abide by its obligation should not work to the detriment of the other party.

In this case this Court said “We encourage trial court in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways - within the flexibility of our Rules - to reach the merits of substantial issues.” *Id.* at 58 . This Court should use its discretion in the procedural matters in this case to remand this matter to the PCR court for a new hearing as both parties were in fault in bringing on this difficulty. An error on the part of the State in failing to request the allegations be more definite and certain should not be used to the detriment of Mr. Mangal.

In this case there are numerous examples of trial counsel improperly failing to object to improper vouching. In fact, through his cross examination of Dr. Henderson, he even brought out more improper vouching. He even brought improper vouching in his direct testimony of the mother of the complaining witness. App. at 284, ll 5-9. Trial counsel failed to object to a statement on cross-examination of Ms. Farid that she believed her daughter was telling the truth. App. at 314, ll 8-18. Trial counsel failed to object to improper bolstering of Dr. Wiley Garrett. App. at 130, ll 20-21. Now this Court has, in essence, said these errors by trial counsel are not a basis for a new trial because PCR counsel was inept in failing to amend the pleadings and arguing them to the PCR judge. While in South Carolina two wrongs still do not make a right, apparently two incompetent counsel do make for a valid conviction. This Court should not pass

on to the federal courts by way of *Martinez v. Ryan*, 566 U.S.1 (2012) the errors committed in this case by both trial counsel and PCR counsel. As this Court said in *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999), and repeated in this case, “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” *Id.* at 261, 523 S.E.2d at 755. The citizens of South Carolina are entitled to have the state court protect their rights and not have to depend upon the federal courts. All Mr. Mangal is asking for is one full and fair opportunity to present his claim in one PCR application. But when this Court recognizes that due to the ineptness of his PCR counsel no issues were preserved for review by this Court, he had neither a full nor a fair PCR hearing. This Court should remand this matter to the PCR court for a new hearing so as to afford Mr. Mangal his one full and fair hearing with competent PCR hearing. A hearing where trial counsel is inept is certainly not by any definition a fair hearing. As this Court said in this case “The Supreme Court's decision in *Martinez* reminds us that the Sixth Amendment guarantee of effective assistance of counsel is a ‘bedrock principle in our justice system.’” *Mangal*, at 57. This Court now seems to hold that two inept attorneys satisfy that bedrock. By not correcting the procedural default and remanding for a new hearing, this Court has delegated to another court and another day its obligation to protect the citizens of our state from a fundamentally unfair conviction because of a fundamentally unfair Post Conviction Relief hearing.

3. This Court erred in saying “Even if the PCR court had independently consulted the trial transcript of the direct examination of Dr. Henderson, the court would have discovered no further support for the claim other than Dr. Henderson considered the victim’s history in reaching her opinion.” *Mangal*. at 53. This is not correct. First, the PCR judge in his order stated that he

had independently considered the entire record which includes the entire testimony of Dr. Henderson including the cross-examination of Dr. Henderson. App. at 618. This Court simply cannot assume the Order does not mean what it says. A finding that sex abuse occurred when such finding is based only on the history, and not on physical findings, is improper bolstering. The improper bolstering on cross-examination is also part of the evidence considered by the PCR court in making his ruling. App. at 130, 117 to Supp. App. at 2, 14. Such bolstering has long been improper in South Carolina. This Court can assume the PCR judge knew the law and therefore would recognize this as improper bolstering if he believed it to be.

5. This Court further erred in saying “Notably the PCR court would have discovered Dr. Henderson did not repeat to the jury what the victim told her in that history.” *Mangal*. at 53. This Court has held that to be inadmissible the statement that did not repeat the history the complaining witness told the professional. As this Court has held this question to be inadmissible. “Based on your examination and your observations of Pamela, are you of the impression that her symptoms are genuine?” *State v. Dawkins*, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989). The fact that Dr. Henderson did not repeat word for word what the complaining witness said to her is not a basis for concluding there was no bolstering.

6. This Court further erred in accepting the State’s position that the actions of trial counsel in eliciting improper testimony from Dr. Henderson may be based upon a valid trial strategy. No such position was argued below. The testimony at the PCR hearing hardly elicits a valid trial strategy. How is saying “not the first time I’ve been with Dr. Henderson” or “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.” even

suggestive of a valid trial strategy. (*Id.* at 58-59) If he knew how she was going to testify, trial counsel should have been prepared to object.

This Court notes that the State suggests a trial strategy not mentioned by trial counsel below and then concludes “We need not decide whether this was a valid trial strategy.” *Id.* at 59. If this Court were to remand this matter to the PCR judge for a new hearing, justice would certainly be served and the State would have the opportunity to explore any valid trial strategy it may wish to pursue. Because the blame for the procedural default in this case lies with both parties, remanding this case would serve the ends of justice. The State would know it must file a motion to make the petition more definite and certain and the attorney for the PCR applicant would know he also must amend the pleading in a timely manner.

For the foregoing reasons, this Court should rehear this matter and issue an order remanding this matter for a new Post Conviction Relief hearing.

August 1, 2017



C. RAUCH WISE  
305 Main Street  
Greenwood, SC 29646  
(864) 229-5010  
[rauchwise@gmail.com](mailto:rauchwise@gmail.com)  
S. C. Bar № 06188

JOHN R. FERGUSON  
Cox, Ferguson & Wham  
107 East Laurens St.  
Laurens, SC 29360  
(864) 984-2126

Attorneys for Farid A. Mangal

IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

AUG 02 2017

CERTIORARI TO THE COURT OF APPEALS  
Appeal from Spartanburg  
The Honorable J. Derham Cole, Circuit Court Judge

S.C. SUPREME COURT

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

Appellate Case No. 2016-000610

Farid A. Mangal, #320609 ..... Respondent,

v

State of South Carolina ..... Petitioner.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Respondent in the above entitled case. That on August 1, 2017, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Rehearing in the above case addressed to Alan McCrory, Megan Harrigan Jameson, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211,

Sworn to and Subscribed

Sandy Traynham

before me this 1 day

of August, 2017

Michelle Q Collins  
Notary Public for South Carolina

My Commission Expires: 12/13/26