

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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.

APPENDIX

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1 That's ridiculous. She wears Tampons during sex or
2 after sex. And we hadn't had sex for a while. But she's
3 having an affair.

4 I blamed it on Rashan.

5 Said Rashan, what, did you get a tennis shoe stuck in
6 there again?

7 Sorry. Sorry, buddy.

8 He's done this a lot. If you believe VICTIM, Mrs. Crick
9 said right here, if you believe her he's guilty. And His
10 Honor will tell you you don't need corroboration. If you
11 believe her it's over.

12 But there's more. I didn't have to bring any more, but
13 I brought you a lot more.

14 How about Rashan?

15 What did Kevin Riddle say?

16 He's a good boy. He's a good boy.

17 And what did he say?

18 My daddy changed that lock. My daddy had a key for
19 that lock. And you couldn't get in there and I know cause I
20 tried to get in there. And it was locked. My sister was in
21 there.

22 And she came out crying and went where?

23 To the bathroom. Straight to the bathroom.

24 Did he call names?

25 Did he say whore and slut and fat ass?

1 And yeah, that's what Rashan said. Nobody attacked
2 Rashan.

3 How about they put Rashan in that conspiracy?

4 Doesn't he have to be part of it?

5 Certainly he does.

6 Right here.

7 Is that boy an academy winning actress or actor?

8 I'm sorry, Rashan.

9 Is he an academy award winning actor?

10 No, he spoke to you from his heart, and he was full of
11 sorry. And no human being should have to live like that.

12 He's guilty. He is guilty.

13 VICTIM, Rashan, Diane. And she took the good with the
14 bad. I have to admit to you my God, I missed it. My God, I
15 missed it. I have to live with it that I didn't see it. It
16 was always when she was at work. I have to live with that.

17 And yes, my daughter made bad choices afterwards. She
18 got on here and she told you straight up.

19 You think I wanted to believe?

20 You better believe it. I believe my first born baby
21 and my husband putting his penis in her vagina and he's
22 putting his penis in her anus and he's rubbing beside her
23 genitals. You better believe I want him out of my house.

24 How could you do that?

25 And the defendant brought work people in here, nice

1 people, wonderful people. But they didn't even know the
2 family. Had never been to the home.

3 We're not talking about whether he's a good carpenter,
4 whether he's a master craftsman, whether he can build a
5 kitchen.

6 What did he do behind closed doors when his wife wasn't
7 home?

8 He took his daughter into his bedroom that he had a
9 lock on, that he admits he put the lock on because his kids,
10 of course, broke the other lock, but that's the only lock in
11 the house with a key. Only one. That's the lock. The only
12 indoor door, the only indoor door with an outdoor lock.

13 But his friends, yeah, he's a nice guy. I have a hard
14 time believing it.

15 Well, unfortunately, ladies and gentlemen, as we all
16 know, a lot of people are different in private than they are
17 in public. See, that's the great part about your job is you
18 bring your common sense in here. People are different when
19 they're getting paid to repair a kitchen then they do in
20 their home.

21 And yes, it's horrible that he said fat ass, and
22 bastard, a whore, and slut, and the N word. And she, she's
23 dying because she put up with that. That lady's in hell.

24 But let's go over the evidence. I'm just giving you a
25 preview right now. VICTIM, Rashan, Diane. Now we've got two

1 experts.

2 What did Wiley Garrett say?

3 And then what did Doctor Henderson say?

4 This is a slam dunk beyond any reasonable doubt he is
5 guilty.

6 But let's review real quickly. I have to prove that he
7 committed a sexual battery. His Honor will give you that
8 definition again. But the key words there are any
9 intrusion, however slight, any intrusion, however slight.

10 First degree is when she's less than eleven. Second
11 indictment is from her eleventh birthday till the day before
12 she's fifteen. The third indictment is from the day she
13 turned fifteen until the day she turned sixteen. And then
14 the last indictment is incest from the day she turned
15 sixteen until two weeks before he was gone because he did
16 it, and he did it, and he did it, and he did it, and he did
17 it.

18 And to soil that young lady's reputation they brought
19 something in from nineteen months earlier. Said we'll show
20 her. You were suspended in November of 2002, and she didn't
21 say anything in December 2002, or January '03, or February,
22 March, April, May '03, or June, July, August, September,
23 October, November, December '03, or January, February,
24 March, April '04, or May '04.

25 She waited until June of '04, and said I'll get him.

1 I'll get him. Nineteen months later. That's her motive.

2 Well, then if that's not motive cause, you know, the
3 Tampon in the toilet and daddy knows if his daughter uses
4 Tampons.

5 What does your common sense say about that?

6 Daddy regulated her period because that's the only time
7 he left her alone cause he was sticking his penis inside her
8 body. It started when she was ten.

9 Then I have to prove, for lewd act, that she was less
10 than sixteen and that he committed or attempted to commit a
11 lewd or lascivious act upon her with her body. Rubbing his
12 penis on her vaginal area and in her anal area is lewd and
13 lascivious, ladies and gentlemen. Grabbing her breast as
14 she walks by and then her buttock is lewd and lascivious
15 from age ten to thirteen.

16 Did he put it all the way in?

17 I don't know, maybe.

18 Is that a lie?

19 He put it all the way in, he put it in some of the way,
20 any intrusion however slight.

21 That makes her a liar?

22 No.

23 Rubbing on the outside is lewd and lascivious and
24 intrusion inside is a sexual battery. And His Honor will
25 give you all this. And then incest is having carnal

1 intercourse, a man with his daughter is one thing, and that
2 was it.

3 Let's look at what Wiley Garrett said. He's a licensed
4 independent social worker with a clinical practice.
5 Performed over 400 forensic assessments or forensic
6 interviews. He met with her on two occasions, and this was
7 his testimony.

8 Did she make a disclosure to you?

9 Yes, she did. She said it was when she was about ten
10 years old, of age. You see Wiley says also that, you know,
11 we don't keep a calendar. See my dad molested me at ten, I
12 was ten years three weeks and one day old and okay. But you
13 don't do that. And the more it happens the harder it is to
14 be precise.

15 Guess what else doesn't make it be precise?

16 The Honorable J. Mark Hayes will tell you that I don't
17 have to be precise on dates. I've got to show that it was
18 between ten and the day before eleven, but I don't have to
19 show you which date because that would be impossible. And
20 like Wiley said, that would be like asking you what did you
21 have for lunch everyday for the last year, every day for the
22 last year starting one year ago. You don't get to start
23 with yesterday. Start with a year ago.

24 You can't do it. But you remember traumatic and tragic
25 things like your daddy sticking his penis in your anus while

1 you're leaning over a bed.

2 She said it happened three or four times a week after
3 she was ten. When she was thirteen it was once or twice.
4 At fourteen it stopped. Started again when she turned
5 fifteen. Happened once a week since then, since then until
6 he's gone June 15th, 2004. Said it happened in her
7 parent's bedroom.

8 I asked him what is the concept of delayed reporting?

9 He says it's extremely common. Worked with people in
10 their 20's, and 30's, and 40's, and 50's who disclose for
11 the first time. Not unusual for children to be molested and
12 then wait until they're adults to tell.

13 Would you, doctor, or Mr. Garrett, have any concerns
14 about somebody who doesn't report immediately?

15 No, I would not especially if it's a child in a family
16 system.

17 You want to upset your mother?

18 Could you imagine the horror of that?

19 Mom, I got to tell you something that's gonna change
20 our life. Your husband has been sticking his penis -- she
21 couldn't say it. Has been touching me for years.

22 Can you imagine the horror of that?

23 But they want to criticize VICTIM with, you know, did
24 they go in, did they go out.

25 Can you imagine the horror of that?

1 Sobbing.

2 Do you still love me?

3 Do you still love me?

4 We're gonna -- I'm gonna change your life, mama.

5 Please tell me you still love me.

6 Children are often afraid in situations they've been
7 threatened Wiley Garrett said. There you go. It fits, as
8 Mr. Garrett said.

9 In your experience as a professional in this field,
10 what's the significance do you place on whether a child can
11 be precise in detail?

12 I do not expect precise times in traumatic events
13 especially where it happens over a long period of time.
14 Particularly if it starts at ten years old.

15 Would it be unlikely that a person would remember all
16 those details of all those times like me asking anybody what
17 did you have for lunch everyday for last year, or, in her
18 case, for the last six years?

19 It all fits.

20 Why didn't she tell?

21 That fits the family dynamic of setting the family to
22 be afraid. She can't get all -- she can't get it precise.
23 She shouldn't be able to. That fits what the researchers
24 say, what the experts say. You wouldn't be able to. You
25 can't.

1 And then the marks on the penis.

2 Did her and her mom come running in and say, he's got
3 this mark on his penis?

4 No, that's not what happened.

5 Wiley Garrett asked her if there were any marks. She
6 says she remembered one time he had shown her a mark or a
7 freckle or a mole. That wasn't part of the so called
8 conspiracy. They never brought it up.

9 She met with the police June 15th, 2004. Met with
10 Wiley Garrett July 1st, 2004. And on the second meeting
11 with Wiley Garrett on July 20th, 2004, he said any
12 markings on his body. And VICTIM said he showed it to me one
13 time.

14 And Mr. Ennis, wonderful man. But two things. The
15 best I can recall -- he said a lot. Actually there's
16 things. The man was standing up. The defendant was the one
17 that moved around his penis. Had his own fingers on it.
18 But it wasn't erect.

19 THE COURT: Mr. Leibert, I -- I'm sorry. I can't hear
20 you.

21 SOLICITOR LEIBERT: Well, I sure won't ask you to move
22 cause I know what will happen.

23 THE COURT: All right. Go ahead.

24 SOLICITOR LEIBERT: Can't say the same thing to him.

25 All right. He wasn't erect. That's the key. He

1 wasn't erect.

2 Mr. Garrett brought it up.

3 What was your conclusion, Mr. Garrett, as to her
4 disclosure?

5 It was a clear, consistent, compelling disclosure of
6 sexual abuse.

7 Do you have an opinion within a reasonable degree of
8 psychological certainty whether your findings are consistent
9 with a child who's been sexually abused?

10 Yes, I do have conclusion. Her words, disclosures,
11 descriptions, emotions, reactions are all consistent with a
12 child that has been sexually abused. And yes, I've had
13 teenagers who came in lying, and no, she wasn't in my
14 opinion. That's what he said. Yes, children lie. That's
15 part of the forensic interview. And yes, he's had it. Her
16 disclosure was compelling.

17 Well, if you'd of known about the allegations of oral
18 sex 19 months earlier, would that have changed your opinion?

19 No.

20 Let's move on to Doctor Nancy Henderson, board
21 certified pediatrician examined over 3,000 children for
22 sexual abuse.

23 What is the hymen?

24 It is a type of flexible tissue that partially covers
25 over the vaginal opening?

1 And my question to her was as follows, what does
2 narrowing at eight o'clock mean?

3 She talks about how the hymenal tissue is pretty
4 uniform and consistent normally all the way around. But
5 when you see where the hymenal tissue is almost completely
6 diminished at that point, that's a sign of some type of
7 penetration through the hymenal tissue.

8 Do you have an opinion, Doctor Henderson, within a
9 reasonable degree of medical certainty whether your findings
10 are consistent with a child who's been sexually abused?

11 Yes, I do.

12 What is that opinion?

13 I felt that it was consistent with what, that she had
14 been abused, that she had been sexually abused, yes, sir.

15 Guilty as charged.

16 We'll keep going.

17 She said a hymen being in tact isn't even medical
18 terminology and I asked her, does the hymen have to be torn
19 for there to be a penetrating injury and she said no.
20 Talked about puberty and the estrogen affect, and that the
21 hymenal tissue will stretch in a remarkable way.

22 This is the expert. Doctor Nancy Henderson, 3,000
23 exams, testified as an expert over 300 times. Her hymenal
24 tissue, tissue will stretch in a remarkable way so that
25 there can be full penetration without any kind of trauma.

1 Okay. So, in this case then we actually have narrowing
2 consistent with penetration?

3 Yes, sir.

4 Doctor Henderson, has there been research on these
5 types of cases?

6 Yes, there had been studies. Longitudinal studies
7 where they look for people who have been known to be abused
8 and they've gone into Court with a finding, and somewhere
9 between 85 to 93 percent of the exams are normal and there
10 has been penetration.

11 Cause why?

12 Because it stretches in a remarkable way, the hymenal
13 tissue.

14 That's what the expert said.

15 He's guilty.

16 To find him not guilty you have to believe that the
17 wife got caught in an affair because of a Tampon being in
18 the commode and because VICTIM decided to get back at him
19 after 19 months of a problem in school.

20 That's ludicrous. That's the neatest thing about your
21 job. See you get to apply your common sense.

22 Then Rashan, my goodness gracious, what a wonderful
23 young man. Football player, honor roll student. He told
24 you of the horror of that environment.

25 They didn't throw him in the mix, did they?

1 He'd have to be in the mix.

2 She started telling me the night before. Started
3 telling me. Let's say it like it is. She started telling
4 me the night before. If you don't tell mama, I am.

5 Well, I was gonna wait till school started. It's June.
6 It's the middle of June. No, you're gonna tell her or I'm
7 gonna tell her. And they all agree that he got in trouble
8 that night with the ice machine for day camp. And VICTIM
9 thought that the defendant's mad at her cause she didn't
10 want to do anything sexually with her dad.

11 Let's look at his witnesses very quickly. Mrs. Waddell
12 said no contact with five to seven years and she told
13 Mr. Barnette that they had contact for four to five weeks in
14 a business seating over fifteen years. That's what he
15 brought in here. Somebody did a fabulous job in a kitchen
16 that he worked for four or five weeks and in the bathroom.

17 Mr. Brock, only knowing him through work. Not been
18 around his family.

19 Kevin Riddle who lived there for less than a month.
20 Less than a month or around a month. He went there in May
21 of '04. So, the most he could of been there is a month and
22 a half cause as everybody knows he was arrested June 15th,
23 2004.

24 That's all that he brought to you. A tenant that had
25 been there a month and a half and people from work that had

1 never been to his house.

2 If you believe VICTIM, he's guilty. Then we corroborated
3 it with Rashan. We corroborated it with her mother. We
4 corroborated it with Wiley Garrett. And we corroborated it
5 with Doctor Nancy Henderson.

6 My job, ladies and gentlemen, is to do justice. And to
7 render a verdict means to speak the truth. The truth is---

8 MR. CRANE: Your Honor, I'm gonna object to the
9 procedure going on here. This solicitor is passing this
10 solicitor notes and I don't think that's quite proper. The
11 note's right here.

12 THE COURT: All right.

13 MR. CRANE: And he just looked at it. And so, I object
14 to that and ask that it be stopped.

15 THE COURT: All right. Your objection is noted on the
16 record, sir.

17 Go ahead, Mr. Leibert.

18 SOLICITOR LEIBERT: Thank you, Your Honor.

19 My job is to seek justice, and your verdict means to
20 speak the truth. And I'm gonna go into one more thing and
21 then I'm gonna sit down.

22 Doctor Medlock came in and spoke for Doctor Nowatka and
23 his findings in September of 2004. VICTIM had nausea. The
24 school counselor felt that her panic attacks got worse at
25 school. Doing well okay as to her grades. The nausea

1 happened when she starts thinking about the situation that,
2 of her father abusing her. She's lost about eight pounds in
3 the last week.

4 And their impression, the physician's impression, and
5 presumptive diagnosis was panic disorder and posttraumatic
6 stress disorder secondary to sexual abuse from her father.
7 They changed her medicine. They gave her medicine for
8 nausea and gave her medicine for her panic disorder, and
9 recommended that she go to home bound just like the guidance
10 counselor did.

11 And Doctor Medlock is an outstanding doctor. He's 50
12 years. But he's a general practitioner. He says the
13 woman's never told him about it, and he had to look up
14 crescentic hymen.

15 Doctor Nancy Henderson.

16 Ladies and gentlemen, I'm asking you to speak the
17 truth. The truth in this case is the defendant is guilty as
18 charged.

19 Thank you.

20 THE COURT: All right. Ladies and gentlemen of the
21 jury, we now come to the part of the case to where I need to
22 charge you on the law. While everyone else escapes the
23 courtroom, I'm gonna ask you, if you would, just please
24 stand up for about ten to fifteen seconds and take a
25 stretch. We only have about fifteen or twenty minutes more

1 on instructions of the jury.

2 (Pause.)

3 THE COURT: All right. Thank you.

4 Ladies and gentlemen, I remind you that during this
5 trial you and I have duties to perform. As the trial judge,
6 it is my responsibility to preside over the -- people are
7 not suppose to be moving around when I'm giving instructions
8 to the jury.

9 Mr. Bailiff, you want to secure the door.

10 Ladies and gentlemen of the jury, I apologize. Counsel
11 should know better than to instruct people to move around
12 while I'm giving instructions to the jury.

13 Someone needs to move the podium please.

14 MR. CRANE: I'll get that, judge.

15 THE COURT: Ladies and gentlemen, I remind you that
16 during this trial you and I have certain duties to perform.
17 As the trial judge, it is my responsibility to preside over
18 the trial of this case, and I also have the duty to rule on
19 the admissibility of evidence offered during this trial.
20 You are to consider only the competent evidence before you.

21 If there was any testimony ordered stricken from the
22 record in this case during this trial, you must disregard
23 that testimony. You are to consider only the testimony
24 which has been presented from the witness stand, any
25 exhibits which have been made part of the record in this

1 case, and any stipulations of counsel.

2 I have the additional duty to charge you the law
3 applicable to this case. As the presiding judge, I am the
4 sole judge of the law of this case. And it is your duty, as
5 jurors, to accept and apply the law as I now state it to
6 you.

7 If you already have any idea as to what the law is or
8 what the law ought to be and it does not agree with what I
9 now tell you the law is, you must abandon this idea because
10 you are sworn to accept the law and, and apply the law
11 exactly as I state it to you.

12 In every case, in every case tried in this Court before
13 a jury, the jury becomes the sole and exclusive judge of the
14 facts in a case. A trial judge can not intimate, state,
15 comment on, or make any statement to a trial jury about the
16 facts in a case since you, the jury, are the sole judge of
17 the facts in this case. You are not to infer from what I
18 have said during the proceeding, I'm sorry, during the
19 progress of this trial, in ruling upon the admissibility of
20 evidence or otherwise or anything that I say now during the
21 course of this instruction to you, that I have any opinion
22 about the facts in this case. The law does not allow me to
23 have an opinion about the facts in this case. This is a
24 matter solely for you, the jury, to determine.

25 As jurors, it is your duty to determine the effect, the

1 value, the weight, and truth of the evidence presented
2 during this trial.

3 The indictments in this case allege several different
4 offenses against the defendant. The indictments charge the
5 defendant with criminal sexual conduct with a minor in the
6 first degree that occurred, that occurred between
7 September 9th, 1997, to September 8th, 1998. There's an
8 indictment for criminal sexual conduct with a minor in the
9 second degree which occurred between September 9th, 1998,
10 to September 8th, 2002. There is an indictment for
11 criminal sexual conduct with a minor in the second degree
12 which occurred between September 9th, 2002, to
13 September 8th, 2003. There's an indictment for lewd act
14 which occurred between September 9th, 1997, and
15 September 8th, 2000, and, and an indictment for incest
16 which occurred between September 9th, 2003, to May 31,
17 2004.

18 Each indictment charges a separate and distinct
19 offense. You must decide each indictment or charge as
20 against the defendant separately on the evidence and the
21 law, and the law applicable to it uninfluenced by your
22 decision as to any other indictment. The defendant may be
23 convicted or acquitted of any or all of the offenses
24 charged. You will be asked to write a separate verdict of
25 guilty or not guilty for each of the charges that are

1 against the defendant.

2 The State is not required to prove an offense occurred
3 on any exact date between the alleged period of time.
4 However, the State is required to prove, beyond a reasonable
5 doubt, that the offense occurred some time during the period
6 alleged.

7 I remind you that the fact that the defendant was
8 arrested, charged, and indicted in this case is not evidence
9 in this case and can not be considered by you as evidence of
10 guilt in this case. Nor does it create any presumption or
11 inference of guilt.

12 The indictments are simply the formal written
13 instruments which contain the charges made against the
14 defendant. It is the formal -- they are the formal
15 documents by which the case is brought into Court.

16 The defendant has pled not guilty to the indictment,
17 and I -- and this plea puts the burden on the State to prove
18 the defendant guilty. A person charged with committing a
19 criminal offense in South Carolina is never required to
20 prove himself innocent. I charge you that it is an
21 important rule of law that the defendant, in a criminal
22 trial, no matter what the seriousness of the charge may be
23 will always be presumed to be innocent of the crime for
24 which the indictment was issued unless guilt has been proven
25 by evidence satisfying you of that guilt beyond a reasonable

1 doubt.

2 The presumption of innocence does not end when you
3 begin your deliberations. But it is, but it accompanies the
4 defendant throughout the trial until you reach a verdict of
5 guilt based on evidence satisfying you of that guilt beyond
6 a reasonable doubt. The presumption of innocence is like a
7 robe of righteousness placed about the shoulders of the
8 defendant which remains with the defendant until it has been
9 striped from the defendant by evidence satisfying you of the
10 defendant's guilt beyond a reasonable doubt.

11 The presumption of innocence is not mere legal theory.
12 It is not just a legal phrase. It is a substantial right to
13 which every defendant is entitled unless you, the jury, are
14 satisfied of his guilt beyond a reasonable doubt.

15 The State has the burden of proving the defendant
16 guilty beyond a reasonable doubt. Some of you may have
17 served as jurors in civil cases where you were told that it
18 is only necessary to prove a fact is more likely true than
19 not true such as by the greater weight or the preponderance
20 of the evidence. In criminal cases, the State's proof must
21 be more powerful than that. It must be beyond a reasonable
22 doubt.

23 Proof beyond a reasonable doubt is proof that leaves
24 you firmly convinced of the defendant's guilt. There are
25 very few things in this world that we know with absolute

1 certainty. And in criminal cases the law does not require
2 proof that overcomes every possible doubt. If, based on
3 your consideration of the evidence, you are firmly convinced
4 that the defendant is guilty of the crimes charged, you must
5 find the defendant guilty. If, on the other hand, you think
6 there is a real possibility that the defendant is not
7 guilty, you must give the defendant the benefit of the doubt
8 and find him not guilty.

9 There are two types of evidence which are generally
10 presented during a trial, direct evidence and circumstantial
11 evidence.

12 Direct evidence is the testimony of a person who claims
13 to have actual knowledge of a fact such as an eye witness.
14 It is evidence which immediately establishes the main fact
15 to be proved.

16 Circumstantial evidence is proof of a chain of facts
17 and circumstances indicating the existence of a fact. It is
18 evidence which immediately establishes collateral facts from
19 which the main fact may be inferred. Circumstantial
20 evidence is based on inference, and not on personal
21 knowledge or observation.

22 The law makes absolutely no distinction between the
23 weight or value to be given to either direct or
24 circumstantial evidence nor is a greater degree of certainty
25 required of circumstantial evidence than of direct evidence.

1 You should weigh all of the evidence in the case. After
2 weighing all of the evidence, if you are not convinced of
3 the guilt of the defendant beyond a reasonable doubt you
4 must find the defendant not guilty.

5 Necessarily you must determine the credibility of
6 witnesses who have testified in this case. Credibility
7 simply means believability. It becomes your duty, as
8 jurors, to analyze and to evaluate the evidence and
9 determine which evidence convinces you of its truth.

10 In determining the believability of witnesses who have
11 testified in this case, you may believe one witness over
12 several witnesses or several witnesses over one witness.
13 You may believe a part of the testimony of a witness and
14 reject the remaining part of the testimony of that same
15 witness.

16 You may believe the testimony of a witness in its
17 entirety or reject the testimony of a witness in its
18 entirety. You may consider whether any witness has
19 exhibited to you any interest, bias, prejudice, or other
20 motive in this case. You may also consider the appearance
21 and the manner of a witness while on the witness stand.

22 You may also believe the testimony of any witness even
23 though that witness' testimony is not corroborated. The
24 defendant has presented evidence of his good reputation and
25 character to show that it would be inconsistent with the

1 defendant committing the crime. The weight you give to that
2 testimony, like all other testimony in the case, is for you
3 to decide in your good judgment. You may consider testimony
4 of the defendant's good character along with all the other
5 evidence in deciding whether or not the defendant committed
6 the crime.

7 There has been evidence presented that witnesses have
8 made prior statements which are not consistent with the
9 witness' present testimony. You may use this evidence to
10 decide whether to believe the witness. You may also use
11 evidence of the earlier contradictory statements to
12 determine the truth of those statements. It is up to you to
13 determine, to decide whether to believe the earlier
14 statement or the testimony given at trial. If the witness
15 is shown to have knowingly testified untruthfully concerning
16 any material matter, you may consider this in determining
17 whether to trust the witness' testimony as to other matters.
18 You may reject all testimony of that witness or give all or
19 part of the testimony the weight you think it deserves, the
20 weight you think it deserves.

21 The defendant is charged with first degree criminal
22 sexual conduct with a minor. The State must prove beyond a
23 reasonable doubt that the defendant engaged in a sexual
24 battery with the victim.

25 A sexual battery is sexual intercourse, cunnilingus,

1 fellatio, anal intercourse, or any intrusion, however
2 slight, of any part of a person's body or of any object into
3 the genitalia or anal opening of another person's body
4 except when the intrusion is accomplished for medically
5 recognized treatment or diagnostic purposes.

6 The State must then prove beyond a reasonable doubt
7 that the, that the victim was less than eleven years old at
8 the time of the sexual battery. Consent, willingness,
9 indifference, or ignorance on the part of the minor, if any,
10 as to what was taking place does not in any way affect the
11 charge of criminal sexual conduct with a minor because an
12 unmarried woman under the age of 16 can not legally consent
13 to sexual intercourse.

14 The defendant is charged with second degree criminal
15 sexual conduct with a minor. There's actually two charges
16 of criminal, of criminal sexual conduct with a minor in the
17 second degree against the defendant. The State must prove,
18 beyond a reasonable doubt, that the defendant engaged in a
19 sexual battery with the victim. A sexual battery again is
20 sexual intercourse, cunnilingus, fellatio, anal intercourse,
21 or any intrusion, however slight, of any part of a person's
22 body or of any object into the genitalia or anal, or anal
23 openings of any person's body except when the intrusion is
24 accomplished for medically recognized treatment or
25 diagnostic purposes.

1 Under the first charge of criminal sexual conduct of a,
2 of a minor second degree, it alleges the State must prove
3 that between September 9, 1998, to September 8, 2002, at
4 some point during that time the victim was at least eleven
5 years old, but not more than fourteen years old at the time
6 of the sexual, that the sexual battery occurred.

7 Well, the other charge of criminal sexual conduct, of
8 criminal sexual conduct with a minor in the second, in the
9 second degree, the State must prove beyond a reasonable
10 doubt that between September 9, 2002, to September 8th,
11 2003, the victim was less than sixteen years old, but at
12 least fourteen years old, and that the defendant was either
13 in a position of a familiar, of a family, custodial, or
14 official authority to coerce the victim to submit or that
15 the defendant was older than the victim.

16 Again, consent, willingness, indifference, or ignorance
17 on the part of the minor, if any, as to what was taking
18 place does not, in any way, affect the charge of criminal
19 sexual conduct with a minor because an unmarried woman under
20 the age of sixteen can not legally consent to sexual
21 intercourse.

22 The defendant is also charged with committing a lewd
23 act on a minor. A minor is a person under the age of 18.
24 The State must first prove, beyond a reasonable doubt, the
25 defendant was over the age, that the defendant was over the

1 age of fourteen. Next, the State must prove that the
2 defendant willfully and lewdly committed or attempted a lewd
3 or lascivious act on or with the body or its parts of a
4 child under the age of sixteen years with the intent to
5 arouse, appeal to, or gratify the lust, passions, or sexual
6 desires of the defendant or the child.

7 Willfully means voluntarily and intentionally with the
8 specific intent to do something the law forbids.

9 Lewd means obscene, lustful, indecent, indecent, or
10 lecherous.

11 Lascivious means intending to insight lust, lewd,
12 indecent, obscene, or tending to deprave the morals and
13 respect to sexual relations.

14 The defendant is charged with incest. The State must
15 prove, beyond a reasonable doubt, that the defendant had
16 sexual intercourse with certain types of relatives. These
17 relatives include the defendant's mother, grandmother,
18 daughter, stepmother, sister, grandfather's wife, son's
19 wife, grandson's wife, wife's mother, wife's grandmother,
20 wife's daughter, wife's granddaughter, brother's daughter,
21 sister's daughter, father's sisters, or mother's sister.

22 Mr. Foreperson, ladies and gentlemen of the jury, I
23 have compiled a verdict form for your use back in the jury
24 room. I have listed the four, I'm sorry, the five different
25 charges that involve the defendant that you will need to

1 consider. On each one of the charges your decision needs to
2 be unanimous.

3 I have listed these in a, in the order that I have for
4 no particular reason. You may consider number one the
5 first, number two the second, or you may switch them around
6 and consider the others in any order which you would deem
7 appropriate.

8 Once you have reached your decision as to all of the
9 charges, Mr. Foreperson, I will need for you to enter the
10 appropriate mark beside the line for each charge, and also
11 then sign your name down at the bottom, date it, and then
12 knock on the door, and let the bailiff know that you have
13 reached your decision.

14 Again, ladies and gentlemen, Mr. Foreperson, just
15 shortly you're gonna retire to the jury deliberation room.
16 I will instruct you further that once you begin your
17 deliberations you're to conduct those deliberations only
18 when all twelve members are present. So, that if at any
19 time during your deliberations you take a break, someone
20 goes to the restroom, someone leaves the room, then you need
21 to cease your deliberations and only resume those
22 deliberations once all 12 of you have returned.

23 At this time I'm gonna let you go back to the jury
24 deliberation room. But do not begin your deliberations.
25 I've got to gather up the evidence for you and also take up

1 hopefully briefly some matters of law with the attorneys.
2 If you will, go with the bailiffs and, and we'll get with
3 you just shortly.

4 (Whereupon, the following takes place outside the
5 presence of the jury.)

6 THE COURT: Any exceptions to the charge from the
7 State?

8 SOLICITOR BARNETTE: No exceptions, Your Honor.

9 THE COURT: I feel like there's a but coming there.

10 SOLICITOR BARNETTE: Well, I know. I don't know how --
11 I think you addressed it when you were doing the witnesses.
12 It's expert witnesses. I remember you mentioned it to them
13 when they testified, and you did on each one of them.

14 THE COURT: I did and I didn't, and I didn't include an
15 expert witness charge. And, and when I brought you up here,
16 nobody mentioned it to me. So, I thought it must not be, be
17 that big of an issue in the case.

18 SOLICITOR BARNETTE: It's not a big issue to us. I
19 think you told the jury, told the witnesses, as they
20 testified, what an expert witness was and everything.

21 THE COURT: Mr. Crane.

22 MR. CRANE: One moment.

23 (Pause.)

24 MR. CRANE: We're fine, judge.

25 THE COURT: All right. You don't want me to charge

1 then on expert witnesses?

2 SOLICITOR BARNETTE: I know the State's position was
3 you covered that every time an expert witness testified.

4 THE COURT: I did. I mean I covered, I covered it with
5 every expert that was called, and I told them they can
6 believe, not believe, give whatever credit, give whatever
7 weight that they wanted to.

8 MR. CRANE: You gave them that, judge. That's fine.
9 Thank you.

10 THE COURT: All right. All right. If you would, look,
11 take a look at the evidence. Be sure that we have the
12 proper evidence going back to the jury. Again, take a look
13 at the jury, the verdict form. I did -- I caught an
14 incorrect date and I've corrected that date on the verdict
15 form.

16 (Pause.)

17 THE COURT: All right. Mr. Bailiff, I believe Mr.
18 Leibert's got the evidence and here is the verdict form.
19 And if you will, take that back there, tell them they can
20 begin their deliberations. But if you will then, bring out
21 the, Mrs. Woodruff.

22 BAILIFF: Okay.

23 (Whereupon, the alternate was dismissed at this time.)

24 THE COURT: Tell them they can start.

25 (Whereupon, the jury began deliberations at 3:11, and

1 returned with a verdict at 5:17.)

2 THE COURT: All right. I'm informed we have a verdict.

3 I want to tell the attorneys, the defendant, victim,
4 all the people who are here in support of both sides, when
5 the verdict is read, there should be no outburst at all from
6 any members in the courtroom. I'll look very unfavorably
7 upon that.

8 But at this time, unless anybody has anything else to
9 put on the record, we'll go ahead and bring the jury back
10 in.

11 SOLICITOR BARNETTE: Nothing from the State, Your
12 Honor.

13 MR. CRANE: Thank you, judge.

14 THE COURT: All right. Let's bring the jury back in.

15 (Whereupon, the following takes place within the
16 presence of the jury.)

17 THE COURT: Mr. Foreman, I understand that the jury has
18 reached a verdict, is that correct?

19 FOREPERSON: That is correct.

20 THE COURT: All right, sir. If you will, please give
21 it to the bailiff and he will give it to me.

22 (Foreman complies.)

23 THE COURT: All right. Madam Clerk, are you ready to
24 publish the verdict?

25 CLERK: Yes, sir.

1 THE COURT: All right. If the defendant and his
2 attorney please rise. The clerk will publish the verdict.

3 CLERK: In the Court of General Sessions, State of
4 South Carolina, County of Spartanburg, State versus Farid
5 Mangal, we, the jury, unanimously find Farid Mangal guilty
6 of having committed first degree criminal sexual conduct
7 with a minor between September the 9th, 1997, and September
8 the 8th, 1998.

9 We, the jury, unanimously find Farid Mangal guilty of
10 having committed second degree criminal sexual conduct with
11 a minor between September the 9th, 1998, and September the
12 8th, 2002.

13 We, the jury, unanimously find Farid Mangal guilty of
14 having committed second degree criminal sexual conduct with
15 a minor between September the 9th, 2002, to September the
16 8th, 2003.

17 We, the jury, unanimously find Farid Mangal guilty of
18 having committed lewd act upon a minor between September the
19 9th, 1997, and September 8th, 2000.

20 We, the jury, unanimously find Farid Mangal guilty of
21 having committed incest between September the 9th, 2003, and
22 May the 31st, 2004.

23 Signed by the foreman this 15th day of March, 2007.

24 I will ask the jury is this your verdict and still your
25 verdict, please raise your right-hand.

1 (All jurors raise their hand at this time.)
2 CLERK: Thank you.
3 THE COURT: Thank you.
4 Anything from the defense before we dismiss the jury?
5 MR. CRANE: From the jury, judge?
6 THE COURT: Yes, sir.
7 MR. CRANE: No, sir.
8 THE COURT: Anything from the State before we dismiss
9 the jury?
10 SOLICITOR BARNETTE: No, sir.
11 (Pause.)
12 THE COURT: Yes, sir.
13 MR. CRANE: Judge, I'd -- are we gonna sentence in the
14 morning?
15 THE COURT: Yes, sir.
16 MR. CRANE: May I do motions in the morning please?
17 THE COURT: You are -- you're already on the calendar
18 in the morning?
19 MR. CRANE: For bond hearing, yes, sir.
20 THE COURT: All right. Any objection to the State
21 until waiting until in the morning?
22 SOLICITOR BARNETTE: No, we will be glad to wait until
23 the morning.
24 THE COURT: All right. Then we will do any motions and
25 also, if the motions do not reverse the decision, then we

1 will do the sentencing in the morning as well.

2 MR. CRANE: Thank you, judge.

3 THE COURT: All right. Thank you. We can step down.

4 MR. CRANE: Okay. Thank you.

5 THE COURT: Thank you, sir.

6

7 (Whereupon, Court was in recess for the evening.)

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1 Friday, March 16th, 2007

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3 SOLICITOR LEIBERT: May I approach, Your Honor?

4 THE COURT: Mr. Crane.

5 (Whereupon, a bench conference was held at this time.)

6 THE COURT: All right. We'll go back on the record in
7 the matter of the State versus Mangal.

8 We ready for the sentencing phase?

9 MR. CRANE: Yes, sir.

10 SOLICITOR BARNETTE: Yes, sir, Your Honor.

11 THE COURT: All right. Everybody want to approach.

12 MR. CRANE: Your Honor, I have a post-trial motion.

13 THE COURT: Okay. Yes, sir.

14 MR. CRANE: Judge, I appreciate your assistance this
15 week and I believe you have -- there's a note that's gonna
16 be passed up from Mr. Mangal, Mrs. Farid, excuse me,
17 expressing her appreciation for your rulings this week and
18 the fairness and the way you conducted the trial and I agree
19 with that.

20 It's been -- if there can be a pleasurable trial as far
21 as the procedure, I thought this was, went very well and my
22 client and I thank you for that. I don't necessarily agree
23 with all your rulings, but that's to be expected and that's
24 why I need to make these pretrial motions.

25 I've looked at the various rules, and, of course, there

1 use to be a, a motion of judgment not withstanding the
2 verdict. That was thrown out many years ago. You were
3 probably practicing then. I was a solicitor at that time.
4 And I don't know any way that you can disturb the jury's
5 verdict at this point.

6 However, I would like to make a motion under Rule 29,
7 which is a motion for a new trial. And I would make that
8 motion on all five indictments. Do not have the indictment
9 numbers in front of me. I could probably get them for you.
10 But---

11 THE COURT: I have them.

12 MR. CRANE: Certainly you have the five indictments and
13 I would make those, that motion for a new trial based on the
14 objections that I made and the adverse rulings you made to
15 my objections, the motion for directed verdict which you
16 denied, and most specifically for the mention of my client's
17 prior DUI required, which came out, which you then ruled or
18 instructed the jury not to consider. I would submit that at
19 that point I asked for a mistrial, which you denied, and I
20 would submit to the Court that was based on the, on the Rule
21 29, that would be inappropriate and should of granted a
22 mistrial.

23 Furthermore, judge, I would submit to the Court that
24 the new trial should be granted in that the evidence is not
25 sufficient to support the verdict although the jury found

1 him guilty. But the verdict was based on passion,
2 prejudice, and capriciousness as demonstrated by the
3 theatrical closing argument by the assistant solicitor. He
4 didn't talk about the facts. He talked about the, the
5 passion of the case, how affected that VICTIM was, how
6 affected the family was, how affected that the mother was,
7 and rose the passion of the jury to the point where they had
8 no choice but to convict my client.

9 I would submit to the Court that I still believe and
10 will always believe that my client is not guilty and would
11 ask that you grant a new trial.

12 Thank you, judge.

13 THE COURT: State wish to respond?

14 SOLICITOR BARNETTE: Your Honor, we were here four
15 days. You made appropriate rulings in the case. Extremely
16 fair in that situation.

17 Talking specifically about the mistrial motion and so
18 forth, the DUI's is, is, like I said before under Rule 405,
19 basically that's character evidence. He put up character
20 testimony. And obviously he did bring up good and bad. It
21 didn't even have to be a conviction. I entered that in the
22 record to show it was a conviction. Obviously you told the
23 jury to disregard that comment. Our position was that it
24 would still be admissible evidence. I think you properly
25 denied their mistrial motion.

1 Concerning the closing arguments, Your Honor, Tony
2 Leibert talked all about the facts. Did a great job
3 presenting them to the jury. He told the, basically talked
4 about the facts of the case. He went through every witness,
5 every piece of evidence, and the jury deliberated I believe
6 a little bit over two hours. Obviously they looked at the
7 evidence, they considered and talked about it, and made a
8 verdict in that case that all twelve found guilty. And I
9 think the verdict speaks for itself.

10 THE COURT: All right. All right. Well, give me just
11 a moment. Let me step down just a couple seconds. I'll go
12 review a couple matters and I'll be right back.

13 MR. CRANE: Yes, sir, judge. Thank you.

14 (Whereupon, a short recess was taken at this time.)

15 THE COURT: All right. Mr. Crane, I had to go pull a
16 Rule 29 just to be sure that I was familiar with the exact
17 terms and the standards to apply to a Rule 29 motion. I've
18 reviewed Rule 29.

19 I am not inclined to change the verdict of the, of the
20 jury. I believe that there was sufficient evidence
21 presented to the jury upon which they could of found a
22 conviction under all of the indictments that were presented
23 to them against the defendant.

24 Thank you very much.

25 Ready to proceed with sentencing?

1 SOLICITOR BARNETTE: State's ready, Your Honor.

2 MR. CRANE: You want him to come 'around?

3 THE COURT: Yes, sir, if y'all want to approach,
4 please.

5 THE COURT: All right. Mr. Mangal, if you would, if
6 you would, just raise your right hand as best you can. The
7 clerk is gonna swear you in, sir.

8 FARID MANGAL, being first duly
9 sworn, testified as follows:

10 THE COURT: All right. All right, sir. During this
11 process, if ever you want to talk to your lawyer, just let
12 me know and I'll allow you to do so in private. I need to
13 get first some just background information and then I'm
14 gonna hear from the State and hear from anybody on behalf of
15 the victim, and then I will allow you and your lawyer to
16 close out.

17 All right.

18 DEFENDANT: Yes, sir.

19 THE COURT: Thank you.

20 Sir, how old are you?

21 DEFENDANT: I'm 49 years old.

22 THE COURT: And how far did you go in school?

23 DEFENDANT: High school.

24 THE COURT: And you're divorced, is that correct?

25 DEFENDANT: As far as I know.

1 THE COURT: And you have three children?

2 DEFENDANT: Yes, sir.

3 THE COURT: And what are their ages?

4 DEFENDANT: Nineteen, fifteen, and thirteen.

5 THE COURT: And tell me again, the, the employment
6 would be as a construction subcontractor?

7 DEFENDANT: Yes, sir.

8 THE COURT: And how long have you been doing that kind
9 of work?

10 DEFENDANT: About ten years.

11 THE COURT: Ever serve in the military?

12 DEFENDANT: No, sir.

13 THE COURT: And on this particular charge, how long
14 have you been in jail awaiting trial?

15 DEFENDANT: I was waiting for 33 months, sir.

16 THE COURT: Do you remember the date that you went in?

17 MR. CRANE: June 15th.

18 DEFENDANT: June 15th, 2004.

19 THE COURT: All right. All right. Thank you, sir.
20 Yes, sir, Mr. Barnette.

21 SOLICITOR BARNETTE: Okay. Thank you, Your Honor.

22 One thing I do want to hand up to the Court. I shared
23 this with Mr. Crane. Mrs. Diane Farid has wrote a letter to
24 Your Honor. I've shared that with the defense. I'd like to
25 pass that up to the Court, Your Honor, or I can read it to

1 the, either way you'd like it done.

2 THE COURT: Either way.

3 You mind me, you have any objection, Mr. Crane?

4 MR. CRANE: Just whatever way you want him to do it.

5 THE COURT: I can just read it.

6 SOLICITOR BARNETTE: Okay. Pass it up to, Your Honor.

7 Your Honor, I've talked to the victim in this case as
8 well as her family. I've been doing this business off and
9 on for sixteen, seventeen years. This is a horrible case.

10 As you've heard the facts, I'm not gonna go through the
11 facts, since ten years old she had to deal with this. And
12 other members of this family had to deal with this
13 gentleman.

14 They went through hell. You saw the testimony. You
15 saw VICTIM's testimony. You saw Rashan's testimony. The
16 corroboration between it, they -- it happened just like they
17 said.

18 And the fear they have of this man, it's -- I mean the
19 terror, they should never affect their lives again. Should
20 never affect their lives again. And speaking on behalf of
21 the State and them and their family, we'd ask for a sentence
22 that he would never affect their lives again. He's already
23 affected them too much.

24 They need to live their lives in peace without
25 interference from him. And that's all we would ask.

1 I have several members of the community with us here,
2 have Tony Fisher behind me, as well as many people, many
3 parts of his staff.

4 If y'all please stand.

5 (Parties comply.)

6 SOLICITOR BARNETTE: They're here in support of this
7 family.

8 THE COURT: All right.

9 SOLICITOR BARNETTE: Thank y'all.

10 And there's other members of the community. I know
11 Tabitha Webber was coming from the Child Advocacy Center.
12 There's other members of law enforcement here. And we would
13 just ask for a sentence that speaks and protects this family
14 from this gentleman because he is no gentleman the way he
15 treated this family.

16 And I believe you know his prior record.

17 Mrs. Farid has -- Diane's handed up a letter to you.
18 They want that to express to you how they feel, and they
19 wanted me to tell you how they feel.

20 THE COURT: Well, his prior record, is that limited to
21 the DUI's second back in '90?

22 SOLICITOR BARNETTE: Yes, sir, it's two DUI's, yes,
23 sir.

24 And Your Honor, one other thing, I addressed the 33
25 months. I know you been involved with part of this, Your

1 Honor. He's had I believe four different attorneys in the
2 Public Defender's Office and hired Mr. Crane.

3 THE COURT: You wish to make a -- you're gonna state a
4 position publicly trying to defend the fact that it's taken
5 33 months to get him in jail, I mean to get him into trial?

6 SOLICITOR BARNETTE: Yes, I just want to make sure
7 where -- and I don't know what the Court's position is on
8 that. But---

9 THE COURT: I believe by statute he is entitled to
10 receive credit for the 33 months.

11 SOLICITOR BARNETTE: Oh, no, no. I agree with that. I
12 didn't know if that would be part of your -- and obviously
13 he gets credit for that. No, sir, I don't reflect on that
14 one way or the other.

15 THE COURT: All right.

16 SOLICITOR BARNETTE: Just stating the reasons why he
17 was in jail for 33 months. We obviously have tried to move
18 this case in front of Judge Pieper. I think different
19 things that came up. I'm not saying it's all the
20 defendant's fault. I'm not saying it's all the State's
21 fault, Your Honor.

22 But it's a situation where he's tried to come to Court
23 before, things have happened through attorneys and so forth,
24 and things, and even Tony Leibert was getting ready to try
25 this case in February and he had a family member get ill,

1 and the Court graciously gave a continuance.

2 But it's not always the State's fault from the
3 standpoint. We did try to present this case earlier. We're
4 just glad we got it done this week, Your Honor. We
5 appreciate your assistance in that.

6 THE COURT: You welcome. Thank you.

7 (Pause.)

8 THE COURT: All right. Does anyone wish to address the
9 Court on behalf of the victims?

10 SOLICITOR BARNETTE: I don't know if Tabitha -- I
11 didn't know if the director wanted to say anything. She
12 wanted to be here in support of them, Your Honor.

13 THE COURT: All right.

14 SOLICITOR BARNETTE: She is here.

15 THE COURT: All right. Thank you, Your Honor.

16 Yes, sir, Mr. Crane.

17 MR. CRANE: Thank you, judge.

18 I'd like to address first what the solicitor mentioned
19 about the 33 months and, and the problem with the public
20 defender. And as he said, he didn't want to cast blame.
21 Well, it's certainly not my client's fault that he didn't
22 come to Court.

23 And when mentioned about all the different public
24 defenders that he's had, my client and I have talked about
25 that, and early on there appeared, in my client's mind, a

1 problem with one of the members of the Public Defender's
2 Office.

3 THE COURT: Well, Mr. Crane, I'm gonna -- I apologize
4 to the State if I cut him off. But I'm gonna cut you off as
5 well. But 33 months and the fact that it's taken this long
6 to get this case to trial I consider a blemish on our
7 system.

8 MR. CRANE: Yes, sir.

9 THE COURT: I am not proud of the fact that it took 33
10 months to get it here.

11 MR. CRANE: I understand.

12 THE COURT: I do not intend to consider that positively
13 for the State or for the defense nor negatively for the
14 State nor for the defense.

15 MR. CRANE: Right.

16 THE COURT: I believe the statute provides that he will
17 get credit for 33 months regardless of what sentence it is
18 that I impose.

19 MR. CRANE: I understand that. I was -- to, to cut
20 through everything else---

21 THE COURT: Sure.

22 MR. CRANE: ---then I would simply point out that it's
23 my understanding that the first time it was ever scheduled
24 for trial was late last year, which would of already been
25 more than two years that he was in jail.

1 And I was hired in January, and you gave us a
2 continuance, and we came back in February. Not only did you
3 graciously agree to give a continuance for Tony Leibert, but
4 I was involved in that and I told Tony early on why are you
5 even here, why are you going to trial. My client and I
6 agreed to let Tony go and take care of his personal
7 problems, and, you know, we came to trial this week. I
8 think you gave us a fair trial. We are not going to argue
9 with the jury verdict because it was twelve people who found
10 him guilty. They listened to the facts, they listened to
11 the law, and they found him guilty.

12 What I would like to say, judge, the solicitor
13 indicated he'd been doing this for whatever, 17, 18 years.
14 I been doing this for 30 years. I was a solicitor for
15 twelve and a half years. I've defended a lot of people. I
16 have had other child abuse cases and I have seen other child
17 abuse cases where the child was not telling the truth.

18 Now, the jury has believed VICTIM in this particular
19 case. I wish I could stand up here and tell you that my
20 client is now gonna tell you that he is sorry for what he
21 did. But I can't do that.

22 All of his attorneys, including me, and his friends
23 that are still in the courtroom -- he has people in the
24 courtroom too that are here supporting them, and you've been
25 at the bond hearing. You were at the last bond hearing

1 where he had three or four very influential people from the
2 community who were here in support of him, and who testified
3 for him at the trial.

4 And through all of that, through all of the 33 months,
5 he is always said I am not guilty. I can not plead. As
6 recently as last Thursday when I suggested to the solicitor
7 that we come up with a creativity type of guilty plea, we
8 were offered a guilty plea to plead guilty to assault and
9 battery of a high and aggravated nature, and a neglect of a
10 child. That was, that was an offer made to me by the
11 solicitor. I told him I would take it to my client.

12 I took it to my client on Thursday evening. My client
13 was very hesitant, but he agreed that he would take that.
14 When I called back to the Solicitor's Office on Friday, they
15 said no, we're not gonna do that.

16 Now, whether or not that was the family that said not
17 to do it or not, I don't know. But my client, even that
18 plea, judge, which I submitted to my client, if you, if you
19 went along with it and given him the five years on the
20 ABHAN, he would have been out of jail in probably three to
21 six months, and he hesitated on that because he kept saying
22 Mr. Crane, I'm not guilty.

23 As recently as Monday when we started this trial the
24 State made him an offer of lewd act on a minor, which would
25 carry a maximum of fifteen years. And I explained that to

1 my client. And, and, you know, this is not a case where you
2 got a hard headed client who is guilty and says I'm not
3 gonna take that plea. I want to see if you can do better.

4 This is a case where my client just flat out says I
5 didn't do it and I'm not pleading to anything that's gonna
6 make me a convicted child molester, which he now is. Maybe
7 he made a mistake. Maybe he should of done like 90 percent
8 of the other defendants I represent and caved in and said
9 okay, I'll take that plea since you're gonna let me out of
10 jail. I probably would have. Most of my clients would
11 have. But this man, with his upbringing and, background,
12 would not do it.

13 I don't -- if, if -- unfortunately, maybe, if you, if
14 you're expecting him to say judge, I'm sorry, I did it, it
15 won't ever happen again, that can't happen. He -- it won't
16 happen because he truly believes in his heart that he didn't
17 do it. I've talked to other people, some of the past
18 attorneys he's had, as recently as this morning in the
19 courtroom when I was told I just don't believe Farid did it,
20 people that have been in the business for a long time.

21 Now, like I said, we're not arguing with the jury
22 verdict and I'm simply telling you where I was coming from,
23 where he's coming from. And if that hurts him for
24 sentencing, that's the way it's got to be.

25 Mr. Mangal said to me I'm not guilty, let's go to

1 trial. I hope he thinks that I gave him a good trial. I've
2 talked to some other people that were here and witnessed the
3 trial. I, I know of one mistake that I made. But other
4 than that -- and there may of been others. But there's one
5 that we talked about and he wants to blame it on someone
6 else. I said it's my mistake, not someone else's mistake.

7 But you know, judge, when you're in a battle like we
8 were the last four days, there's things that you try and do,
9 there's things that you try and remember, and there's things
10 you forget. And I probably forgot some things. There's
11 some things that he wanted me to do that, on strategy, on
12 strategy purposes, I chose not to. And I tried the case
13 like I thought it and he put his fate in my hands, and I, I
14 did the best I could for him and the jury found him guilty.

15 Judge, what I would ask you to consider -- and as
16 Mr. Barnette said, they want you to give a sentence that
17 will give this family peace. I simply remind you, and I'm
18 sure you're aware of this, that at least three of the
19 charges, the criminal sexual conduct charges, all are
20 85 percent sentences. My client is 49 years old. If you
21 were to give him a 20 year sentence, he would do 17 years
22 and would be more than 65 years old when he got out of
23 prison if he ever got out of prison.

24 I would ask the Court to consider some type of sentence
25 that would reflect on what they say he's done, but take into

1 account the fact that, in my mind, this was a very close
2 case, in my mind there was a lot of evidence that could of
3 been raised to a reasonable doubt although the jury found
4 otherwise, and would ask that you give him some type of
5 sentence that has compassion not only for the family, and,
6 and support for the family, and, and protection for the
7 family, but compassion to my client and some type of
8 protection and support that might allow him to some day, if,
9 not real soon, come out of the system and go back to being a
10 productive citizen.

11 He is a very good businessman. He's a carpenter. He's
12 been doing it for a long time. He's got supportive people
13 in the community. All of these people that the solicitor
14 says are here from the community, they're not really from
15 the community. They're from law enforcement and the Child
16 Advocacy Center. There's no one from the neighborhood that
17 I'm aware of.

18 We're talking about people from the neighborhood that
19 know my client that are here in the courtroom. None of whom
20 want to speak. They've spoken to you in the past, and
21 you've heard from them, and you know what, what's on their
22 hearts. You've heard from them at the trial, and you've
23 heard from them at bond hearings.

24 For whatever reason, he's been in jail for 33 months
25 since June 15th, 2004. And I would certainly ask that any

1 sentence you give him, simply write on there that his
2 sentence is to begin then, not write on there credit for
3 time served, but that sentence is to begin June 15th of
4 '04. And I ask that you, I would ask that you consider some
5 type of sentence that, quite honestly, judge, might allow
6 him to do more jail time if you see fit, but then suspend
7 the rest of it and give him some type of probation sentence
8 with some type of conditions on him that would disallow him
9 from being around the family.

10 And I would remind the Court further that there are
11 Family Court orders in place that direct him to have no
12 contact with any member of the family. And they are
13 divorced. Although he wasn't even at the divorce hearing
14 for some reason. They certainly knew where he was. But
15 they were divorced last October 25th when it was made
16 finally on the grounds of one years separation.

17 They have not done any property settlement and that's
18 something that needs to be discussed at a later time. But
19 certainly not today. That's with the Family Court lawyers,
20 and I don't do Family Court. So, I don't know that I'll be
21 involved in that.

22 There are some personal things of his at the house that
23 perhaps we can work out with the solicitor to take
24 possession of. But that's something that you don't need to
25 concern yourself with. However, judge, I would ask that

1 you, like I said, temper your justice because we are here,
2 as Tony Leibert said, for your justice. If it's justice for
3 him to go to jail for 30 years, so be it. I would submit to
4 the Court that it is not.

5 Justice for him would be something along the lines that
6 they've offered all along. It's been told to me that not
7 only, not even VICTIM₁ wanted him to go to jail forever. It's
8 been told to me from witnesses that chose not to testify
9 that when VICTIM moved out of the house and had her own
10 apartment, on her mantle was a picture of her and her daddy.

11 I think there's still love there regardless of what
12 happened between the two of them, regardless of what
13 happened between he and the boys, and I truly believe that
14 this jury was aided in their conviction by the physical
15 abuse that happened and said this guy just beat the hell out
16 of his kids for years and years and years, and we're gonna
17 keep him in jail. I'm not saying that they didn't find it
18 wasn't sexual abuse. But I think a lot of their emotion
19 was, was taken up by the beatings that the kids alleged that
20 they took, which, of course, my client says didn't happen.

21 So, judge, again, I place his future in your hands as
22 he does. I don't know if Mr. Mangal wants to say anything
23 or not.

24 THE COURT: Mr. Mangal, were you able to hear the
25 statements that were just made by your lawyer?

1 DEFENDANT: Yes, sir.

2 THE COURT: Do you agree with the things that he said
3 to me?

4 DEFENDANT: Yes, sir.

5 THE COURT: Mr. Mangal, is there anything that you
6 would like to say or would like for me to know or consider?

7 DEFENDANT: Yes, sir.

8 THE COURT: Be more than happy to hear from you, sir.

9 DEFENDANT: Well, I'd like to say to my family there
10 was no danger to them. Never will be danger to them or to
11 my community, and I will always be good citizen.

12 And I wish them a good life, stick together, make good
13 grades, trust each other, stop lying, make your life better.

14 That's all.

15 Be happy too.

16 THE COURT: Thank you, sir.

17 SOLICITOR BARNETTE: Judge, may I respond to just a
18 couple things Mr. Crane said?

19 THE COURT: I usually don't allow response. But if you
20 feel compelled that there was something I need to know you
21 may.

22 SOLICITOR BARNETTE: Yes, sir. Thank you.

23 Just talking about the plea offer and so forth, me and
24 Mr. Crane did have a discussion. I told him if his client
25 would look at something I'd take it to the family. Took it

1 to the family and they rejected it.

2 We did talk about lewd act, made official plea offer of
3 lewd act on Monday. He rejected that. And that shouldn't
4 really have any part of the sentence because obviously you
5 know the facts of the case.

6 The second thing, talking about the Family Court order,
7 the Family Court order, the judge in that case did find a
8 finding of sexual abuse in that case just to let the Court
9 know that as well as what the jury verdict was.

10 Thank you.

11 THE COURT: Thank you.

12 Do you wish to respond in any way?

13 MR. CRANE: The only thing I know about the -- there's
14 two Family Court orders. There's the DSS case and there's
15 the divorce case. And from, from what I understand about --
16 I don't know Judge Anderson. But I've talked to Pat
17 Anderson that defended the DSS case who indicated to me that
18 Judge Anderson, in the past, has found in favor of a man in
19 a similar case who then went out and killed their child, and
20 since then has not let anybody go when allegations were made
21 of some type of abuse.

22 So that -- I mean that's all I know about what happened
23 at that case. She did take it under consideration and did
24 come back after some deliberation with a verdict of child
25 abuse.

1 THE COURT: Thank you, sir.

2 (Pause.)

3 THE COURT: All right. We'll make the note from the
4 victim's mother a exhibit to the proceeding, a Court's
5 Exhibit to the proceeding.

6 (Whereupon, the note from Mrs. Farid was marked as
7 Court's Exhibit No. 3 and received into evidence at this
8 time.)

9 THE COURT: All right. On Indictment 2004-GS-42-3400,
10 Sentence of the Court is that the defendant will be confined
11 to the State Department of Corrections for a period of 30
12 years. That will run concurrent with the other sentence.
13 He'll be given credit since June 15th, 2004. When he -- in
14 the event that he makes any type of release, there's to be
15 no contact with the victims as well as there's to be
16 mandatory GPA monitoring. That sentence will run concurrent
17 with the sentences under 2006-GS-42-2831, 2006-GS-42-4869,
18 which is, Sentence of the Court will be that the defendant
19 will be confined to the State Department of Corrections for
20 a period of 20 years. He'll get the same credit for the
21 time that he has served.

22 Indictment 2006-GS-42-4217, Sentence of the Court is
23 that the defendant will be confined to the State Department
24 of Corrections for a period of fifteen years. That will run
25 concurrent with the other charges. Get credit for the same

1 time that he's served.

2 On Indictment 06-GS-42-2830, Sentence of the Court is
3 that the defendant will be confined to the State Department
4 of Corrections for a period of one year. That will run
5 concurrent to the other charges and you will be given credit
6 for the time that he has served.

7 And given the fact that the jury has spoken, they have
8 reviewed the evidence, I really have very little option in
9 the case considering the allegation that the jury found that
10 he was guilty of.

11 Good luck to you, sir.

12 Good luck to y'all.

13 VICTIM : Thank you.

14 MR. CRANE: Thank you, Your Honor.

15 SOLICITOR BARNETTE: Thank you, Your Honor.

16

17 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 12th, 13th, 14th, 15th, and 16th day of March, 2007.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

June 10th, 2007



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of SPARTANBURG)**2010-CP-42-0080**FRED A. MANBAL 320609)

Full name and prison number, if any, of applicant.)

v.)

APPLICATION FOR
POST-CONVICTION RELIEFSTATE OF SOUTH CAROLINA)

Name of Respondent)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention PERRY
SPARTANBURG CORRECTIONAL INSTITUTE
430 OAKLAWN ROAD, PELZER, SOUTH CAROLINA 29669
2. Name and location of Court which imposed sentence SPARTANBURG COUNTY
COURT OF GENERAL SESSIONS, Spartanburg County, State of S.C.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 041-GS-42-3400 06-GS-42-4217
 - (b) 06-GS-42-2830 06-GS-42-4869
 - (c) 06-GS-42-2831
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) MARCH 14, 2007, 30 YEARS
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made

(a) after a plea of guilty NIA

(b) after a plea of not guilty ☒ NIA

(c) after a plea of nolo contendere NIA

6. Did you appeal from the judgment of conviction or the imposition of sentence? YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. SOUTH CAROLINA COURT OF APPEAL - DIRECT APPEAL

ii. SOUTH CAROLINA COURT OF APPEAL - DIRECT APPEAL RE HEARING

iii. SOUTH CAROLINA SUPREME COURT - WRIT OF CERTIORARI

(b) the result in each such Court to which you appealed:

i. AFFIRMED

ii. DENIED

iii. DENIED

(c) the date of each such result:

i. MARCH 4, 2009

ii. MAY 4, 2009

iii. DECEMBER 17, 2009

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) NIA

(b) NIA

(c) NIA

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INEFFECTIVE ASSISTANCE OF COUNSEL Trial, ~~and~~

(b) PREJUDICENESS

(c) INEFFECTIVE ASSISTANCE OF Appellate counsel

Will Amend Pursuant to SCRPC, Rule 71.1

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COURT OF COMMON PLEAS
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MARC KITCHENS

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) Failure to preserve direct appeal issues

(b) Trial Counsel failed to investigate domantary evidence and witnesses

Counsel (c) ~~Trial fails to object additional objection~~
Trial Counsel fail to make an additional object to the sufficiency of the curative charge or move for a mistrial

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law?

No

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) No

(d) any other petitions, motions or applications in this or any other Court?

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. NIA

ii. NIA

iii. NIA

iv. NIA

(b) the name and location of the Court in which each was filed:

i. NIA

ii. NIA

iii. NIA

iv. NIA

(c) the disposition thereof:

i. NIA

ii. NIA

iii. NIA

iv. NIA

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 SHERBURN COUNTY
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 MARG KITCHENS

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) Ineffective Trial Counsel cannot be raised on Dir. Appeal
- (b) Ineffective Appellate Counsel; could not raise until PCR
- (c) Will amend new grounds upon appt. of pen counsel

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
yes
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? yes

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17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Lawrence W. Lang, 101 Whitsett Street, Greenville, South Carolina 29601
- ii. Lanelle Cantey Durant, Appellate
- iii. Counsel

(b) the proceedings at which each such attorney represented you:

- i. TRIAL AND SENTENCE
- ii. _____
- iii. _____

18. State clearly the relief you seek in filing this application.

Vacate

19. Are you now under sentence from any other court that you have not challenged?

No

MARC KITCHENS

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STATE OF SOUTH CAROLINA)
) VERIFICATION
 COUNTY OF Spartanburg)

I, FARID A. MANGAL #320609, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Farid A. Mangal

Sworn to and subscribed before me

This 4th day of February, 2009

[Signature] L.S.

Notary Public for South Carolina

My Commission Expires May 12th 2011

APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

 Applicant

Sworn to and subscribed before me

This _____ day of _____, 20____.

 L.S.

Notary Public for South Carolina

My Commission Expires: _____

MARC KITCHENS

2010 JAN -6 AM 11:05

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Farid A. Mangal, #320609,	)	2010-CP-42-0080
)	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

In response to the post-conviction relief application filed on January 6, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the August 2004 term of General Sessions for criminal sexual conduct with a minor -1st degree (04-GS-42-3400). Applicant was also indicted at the August 2006 term for incest (06-GS-42-2830) and criminal sexual conduct with a minor -1st degree (06-GS-42-2831). Applicant was then indicted at the October 2006 term for lewd act or attempt to commit a lewd act upon a child under 16 (06-GS-42-4217) and then subsequently indicted at the January 2007 term for criminal sexual conduct with a minor -2nd degree (06-GS-42-4869)¹. Lawrence W. Crane, Esquire, represented the Applicant.

On March 16, 2007, after a four-day trial, a jury convicted the Applicant of these charges.

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

The Honorable J. Mark Hayes II sentenced the Applicant to confinement for thirty (30) years for criminal sexual conduct with a minor –1st degree, twenty (20) years on each charge of criminal sexual conduct with a minor –2nd degree, fifteen (15) years for lewd act on a minor, and one (1) year for incest, all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Mangal, Unpublished Op. No. 2009-UP-113 (S.C. Ct. App. filed March 4, 2009). A Petition for Rehearing was filed on behalf of Applicant and denied by written Order on May 4, 2009. A Petition for Writ of Certiorari was filed on the Applicant's behalf and subsequently denied by the South Carolina Supreme Court on December 17, 2009. The Remittitur was issued on December 22, 2009.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. "Failure to preserve direct appeal issue,"
 - b. "Trial counsel failed to investigate documentary evidence and witnesses,"
 - c. "Trial counsel fail to make an additional object to the sufficiency of the curative charge or move for a mistrial;" and
2. Ineffective assistance of appellate counsel.

For the purpose of this Return, the Respondent incorporates the Spartanburg County Clerk of Court records, the Applicant's South Carolina Department of Corrections' records, Appellate records, and trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. Respondent asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

Where ineffective assistance of counsel is alleged 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, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland v. Washington. 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. Cherry v. State, Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably

raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the

alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

Respectfully submitted,

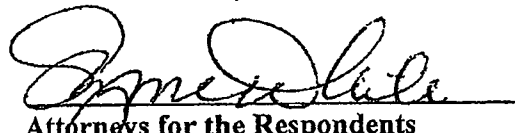
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By:


Attorneys for the Respondents

Office of the Attorney General
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Columbia, S.C. 29211
Telephone: (803) 734-3737

May 12 2010.

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Lawrence W. Crane
Direct examination by Mr. Falkner

1 THE COURT: All right. This is Mangal vs. the State.

2 MS. WHITE: Yes, sir.

3 MR. WILKES: It is, Your Honor.

4 THE COURT: Mr. Wilkes, you represent the applicant?

5 MR. WILKES: Yes, sir.

6 THE COURT: Are you ready to proceed?

7 MR. WILKES: I am. If there's no objection, if

8 Larry's ready I'll just start with Mr. Crane.

9 Is that okay?

10 MS. WHITE: That's fine with me.

11 LAWRENCE W. CRANE, having been
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION BY MR. WILKES

14 MR. WILKES: Your Honor, we would ask to mark as our
15 exhibit a page of transcript from the family court hearing,
16 and I think that's the only thing that we have that's not
17 already in this record.

18 THE COURT: Okay.

19 (Page of transcript marked Applicant's Exhibit No. 1.)

20 Q Mr. Crane --

21 A Mr. Wilkes.

22 Q -- how are you today?

23 A Fine. Thank you.

24 Q Did you represent Mr. Mangal in his trial some years
25 back?

Lawrence W. Crane
Direct examination by Mr. Falkner

1 A I did.

2 Q Do you recall the pretrial hearing that you had as far
3 as discovery issues?

4 A I really do not recall the pretrial hearing. And,
5 quite honestly, in preparation for the hearing today I
6 didn't study my file or the notes extensively.

7 Q Do you recall an issue from his trial being about bank
8 records?

9 A I do, yes.

10 Q Do you recall the bank records being part of
11 Mr. Mangal's concept of the defense as far as how that
12 worked?

13 A Yes.

14 Q Can you explain what you recall about how these bank
15 records were going to help in his case by his theory?

16 A Actually, I don't know that I can give you a real good
17 answer because it's been about four years ago. I know that
18 we wanted the bank records. And I think we actually ended
19 up getting them from Dianne Mangal.

20 They had something to do with, you know, who had been
21 paying the bills. There was some stuff. I'm trying to
22 think back, but I think Mr. Mangal might have even thought
23 that she was having an affair. And I might be incorrect on
24 that. And some of those bank records have something to do
25 with some of that and maybe where some of the money had

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Direct examination by Mr. Falkner

1 been spent and would have been spent on.

2 So I think it all had to do perhaps with her
3 credibility as a witness but that's -- I'm trying to piece
4 it all together. Not knowing what you were going to ask me
5 today, I didn't prepare for that. But I think that's kind
6 of where we're going with that.

7 Q Right.

8 A And I think -- and he could tell you better, but I
9 think we eventually got the bank records. But I don't --
10 if we didn't, then I'm wrong.

11 Q Do you think had you been able to somehow show that
12 the wife was having an affair or if the daughter had been
13 getting money from the grandfather, do you think things
14 like that would have impacted the case substantially?

15 A In this particular case it came down to the
16 credibility of the witnesses, primarily the daughter and
17 his two sons and the wife. And I would think that anything
18 that I could have used to impact their credibility would
19 have been useful.

20 Q Okay. All right. Let me ask you.

21 Do you recall in selecting the jury -- do you recall
22 there being some question as to Mr. Brock who might have
23 been a witness having relation to the foreman of the jury?

24 A Yes.

25 Q And can you tell me what you remember about that?

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Direct examination by Mr. Falkner

1 A I think Mr. Brock knew him very well or was related
2 somehow, and my thoughts were -- I think we thought that
3 that juror would help us, but apparently not.

4 Q But you had conversations.

5 A With Mr. Brock and Mr. Mangal about that particular
6 juror.

7 Q Okay. So you thought that one through when you made a
8 decision on it?

9 A To put him on?

10 Q Right.

11 A I think we wanted him on there. I wanted him on
12 there.

13 Jim Brock -- Jim Brock was a good friend of
14 Mr. Mangal's, and I think they worked together on some
15 stuff. And the Brock family has been in Spartanburg for a
16 long time. And Jim knew that particular juror and
17 indicated to me that he thought he would be good.

18 Q In the rest of the jury selection do you have any
19 recollection about there having been jurors who had family
20 members that might have been deployed to Afghanistan?

21 A No. I don't recall that.

22 Q If there had been would you have given that some
23 thought as to whether or not to put them on the jury?

24 A I might have. I might have given that some thought
25 about putting them on the jury.

Lawrence W. Crane
Direct examination by Mr. Falkner

1 Q And if you did put them to the jury would that have
2 been -- would you have discussed that with Mr. Mangal?

3 A I would have.

4 Q If I can, if you would like to -- do you have a
5 transcript up there --

6 A Let me see what I've got.

7 Q -- convenient? And I have got one if you don't.

8 A I appear to have a transcript, yes.

9 Q Okay. Good. If you would, first just tell the judge
10 briefly. Dr. Medlock testified on behalf of Mr. Mangal?

11 A He did.

12 Q And how so? Dr. Medlock was --

13 A Dr. Medlock was also a longtime friend of Mr. Mangal
14 and treated the family as a general practitioner.

15 And Mr. Mangal had done some construction work on a
16 cottage that Dr. Medlock had at the lake. And so Dr.
17 Medlock knew him very well and spoke very highly of him and
18 was a good character witness but also knew children in his
19 practice, as well as himself personally, had treated the
20 family and the children, in particular VICTIM .

21 Q Who was the alleged victim in the case.

22 A Who was the young girl who alleged that Mr. Mangal had
23 abused her.

24 Q Okay. Now, during -- just as far as the trial overall
25 goes, how critical was Dr. Medlock to the case, to the

Lawrence W. Crane
Direct examination by Mr. Falkner

1 defense? was he a key witness?

2 A I think he -- in my mind he was a key witness because
3 of what he told the jury.

4 Q In the testimony during the cross-examination of Dr.
5 Medlock, do you recall the state having asked a number of
6 character questions?

7 A I do.

8 Q Or what appeared to be attacking character --

9 A I do.

10 Q -- of Mr. Mangal?

11 If you'll turn to page -- I think 325 through 326. I
12 believe you had asked -- I don't see my line reference, but
13 if you'll bear with me I'll find it.

14 On page 325 I believe you had asked -- let's see --
15 325, somewhere close to page or line No. 16. You had
16 asked, "Had you heard from others concerning truth or
17 veracity?" And he indicated he had a good reputation --

18 A That's correct.

19 Q -- for truth. Later on, if you'll turn over to 328
20 and beginning with, "Really early on," from solicitor
21 Barnette's questioning up at line eight, do you recall the
22 state attacking Dr. Medlock with questions, specific
23 questions, of bad character, alleged bad character, of
24 Mr. Mangal?

25 A Yes.

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Direct examination by Mr. Falkner

1 Q That would include that he hit his children, called
2 his daughter a whore, called his son a bastard, called
3 another son a fat ass.

4 And we're moving over from 328 to 329. On 330,
5 whipped his children with an electrical cord. And then
6 down at the middle I think of 330 gotten into -- been
7 convicted of driving under the influence two times. Do you
8 recall that cross-examination?

9 A I do.

10 Q I think he went on further and said more in recross if
11 I'm not mistaken on 336 and 337, that again he said called
12 his daughter a slut.

13 And then he alleged that Mr. Mangal had used a racial
14 slur and didn't even -- and it looks like from the
15 transcript didn't even finish the statement as to who he
16 was referring to, just that he had used a racial slur. Do
17 you recall all of that?

18 A I do because I have read that part of the transcript.

19 Q Now, you interjected an objection at some point in
20 that right about the time that he got to the D.U.I. You
21 had entered -- you raised an objection and argued that
22 improper cross-examination.

23 A That's correct.

24 Q Now, as I understand and I think for the Court's
25 purposes I have in the record the opinion of the Court of

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Direct examination by Mr. Falkner

1 Appeals -- but you would agree that the Court of Appeals
2 found that the -- that that objection was not adequately
3 preserved by further objection after the judge's comments
4 and what the judge believed was curative.

5 A Yes. I agree. And in reading the Court of Appeals'
6 opinion in preparation for the trial -- of course I
7 wouldn't have been involved in the appeal. But it concerns
8 me that the Court of Appeals did not rule on any issues but
9 simply said that it wasn't preserved properly for objection
10 purposes, which leads me to believe if it had been properly
11 preserved, then we got to speculate as to what the Court of
12 Appeals would have done with it, because Judge Hayes prior
13 or during your discussions on 330 and 31 and 32 and
14 whatever those pages are pretty much said that he thought
15 the state had overstepped the bounds and had done wrong.

16 And so, you know, having said that, of course we don't
17 know why Judge Hayes didn't grant the mistrial other than
18 we'd been trying it for two or three days. He didn't. And
19 so, yeah, that -- I know what they said, and that does
20 concern me.

21 Q Now, I will say this also. In raising that objection
22 you specifically argued an improper nature of the
23 cross-examination, but you specifically talked about the
24 D.U.I. conviction at that point when they got to that
25 point.

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Direct examination by Mr. Falkner

1 A That's right.

2 Q You did not raise all of the other highly inflammatory
3 issues that they were confronting Dr. Medlock with.

4 A I did not.

5 Q Now, assuming that those would be in and of themselves
6 objectionable, would there have been any reason not to
7 include those specifically in your argument?

8 A The answer to the question as you put it would be no.

9 Q Okay. That makes me think that I asked the right
10 question.

11 A You asked the right question, but you preface it by
12 saying if, in fact, they were objectionable should you
13 objected, and I would agree that, yes, I should have.

14 Q Okay. Very good. And there's -- but you did raise
15 the improper nature of the cross-examination. But at that
16 time in that flurry of things that was thrown at Dr.
17 Medlock, the one you focused on and argued about was the
18 D.U.I.

19 A That's correct.

20 Q Now, there would be no reason -- no, no, no trial
21 strategy behind not raising the other ones.

22 A No, no trial strategy to not raise the others.

23 Q Okay. Now, I looked and I did not see, and maybe it's
24 because -- I'm not sure why, but I did not see in the
25 record where there was a notation as to the jurors'

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Direct examination by Mr. Falkner

1 particular race in this case.

2 Do you recall if there were, in fact, black jurors?

3 It may be in there. I don't remember. But do you recall?

4 A No. But I could probably check my notes and
5 determine. I don't recall right offhand.

6 Q If there had been would the racial-slur allegation
7 been inflammatory toward the jury, you think?

8 A Mr. Wilkes, I honestly don't know. I don't know how
9 to answer that. It may have if there were blacks on the
10 jury and the word came out. It may have inflamed them. I
11 don't know.

12 I would -- some -- some blacks, it's just an old
13 Southern word. And some of them just go all bonkers when
14 they hear it.

15 Q But it wouldn't have been a good thing if there were,
16 in fact, black jurors to have Mr. Mangal --

17 A Right. It would not.

18 Q -- needlessly used the -- using racial slurs. Would
19 it have been objectionable?

20 A Yes, sir.

21 Q Now, it's my understanding -- and I have read that
22 record and I have seen numerous things that you
23 cross-examined using the family court transcript -- so it's
24 pretty clear you had the family court transcript from the
25 DSS hearing at the time of trial.

Lawrence W. Crane
Direct examination by Mr. Falkner

1 A I did.

2 Q And you certainly did use portions of it in your
3 cross-examination of the victim.

4 A I did.

5 Q But there is one thing that I noticed you did not use,
6 and that was on page 174 where the victim testified she
7 didn't recall about having an accident.

8 The family court record I think that I marked as an
9 exhibit -- I'll give you a copy -- if you recall where she
10 did testify in family court that she had an accident and
11 that was the whole reason she wasn't able to drive to work,
12 I think, at Plej's. You did not appear to cross-examine
13 her on that one particular point.

14 A I did not.

15 Q And would there have been any reason not to have done
16 that?

17 A No, there would not.

18 Q Now, on the flip side of that, you did cross-examine
19 the victim pretty aggressively.

20 A Really?

21 Q Yeah. Real aggressively, I think.

22 A I tried to, yes.

23 Q Do you believe -- at any time during that
24 cross-examination do you believe -- do you recall the
25 victim to begin crying? Did you upset the victim?

Lawrence W. Crane
Direct examination by Mr. Falkner

1 A I think she did.

2 Q And do you believe that the cross-examination may have
3 been too critical, or do you believe it was appropriate
4 under the circumstances?

5 A Well, you weren't dealing with a baby or a child.

6 This was a -- at that point I think she was 16 or 17 years
7 old, so she was a --

8 Q Maybe 19.

9 A Maybe 19. I don't remember. So, you know, she was an
10 adult. And, quite honestly, I didn't believe a word she
11 was saying.

12 So my thoughts were that if she was crying it was an
13 act anyway. And, you know, I mean, you've tried case and
14 I've tried cases, and you got to treat all of your
15 witnesses, whether they're children or not, in a particular
16 manner. And there's times when you back off and times that
17 you don't.

18 If you read the transcript, I think she lied about a
19 lot of stuff, at least -- let me rephrase that. If you
20 read the transcript, and, like you said, having question
21 from the family court, her testimony was not consistent
22 with the two different courts.

23 Q And you did bring out a lot of that.

24 A I brought out a lot of that, which is another reason
25 why you asked earlier whether Medlock was crucial, and he

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Direct examination by Mr. Falkner

1 was because everything that VICTIM -- basically said
2 that -- excuse me. VICTIM I said was that Mr. Mangal
3 had done things to her prior to I think it was 2002 or
4 something like that.

5 And I got her to say that he had performed full-blown
6 sex on her five or six times in the vaginal area and in the
7 anal area and that it was ongoing.

8 The medical record from 2002 indicated that her hymen
9 was intact. And Dr. Medlock testified that in his 50 years
10 of training if the hymen was intact she couldn't have had
11 sex. So that's why he was critical and that's why I went
12 after many of these questions against her.

13 Q Let me ask you this. You had another doctor that had
14 been subpoenaed and was present in the courtroom.

15 A Well, I don't know if she was present in the
16 courtroom. She was in the courthouse, I think. And she
17 might have been in the courtroom. I don't know.

18 Q Under subpoena though.

19 A She was.

20 Q So she could have testified. And it was your decision
21 as I understand not to call her as a witness.

22 A That's correct.

23 Q And she had at some point in the past been a treating
24 physician for the victim.

25 A That's correct.

Lawrence W. Crane
Direct examination by Mr. Falkner

1 Q Now, what was your thought process in not calling that
2 additional doctor in light of Dr. Medlock's testimony?

3 A Basically, she couldn't add anything to my case. And
4 having spoken with her previous to the trial I was
5 concerned about answers that she might give that would be
6 detrimental to Mr. Mangal, because, again, I know you've
7 read this transcript many more times than I have, but I had
8 VICTIM -- VICTIM -- sorry -- VICTIM

9 medical records from her O.B.G.Y.N. in evidence. And I
10 got those in through the Business Records Act.

11 So I had the records there, and then I had Dr. Medlock
12 who interpreted those records favorable to Mr. Mangal. I
13 didn't need that doctor.

14 Q All right. Now, moving on to the next doctor, Dr.
15 Henderson, if you'll flip over to page 252 --

16 A Okay. And I haven't read anything about him.

17 Q Well, her, I think.

18 A Her, oh.

19 Q Dr. Henderson would have been the state's witness.

20 A I think who she is.

21 Q I thought so. Do you recall her testifying that --
22 well, just as to her forensic evaluation and such?

23 A I do.

24 Q Now, if you will look, I noticed on page 252 Dr.
25 Henderson was asked a question of whether -- and I'm going

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Direct examination by Mr. Falkner

1 to start on line 11.

2 Solicitor Leibert had asked the question, "Do you have
3 an opinion within a reasonable degree of medical certainty
4 based on your education, training and experience and based
5 upon your findings on examination of the victim whether
6 those findings are consistent with a penetrating injury?"

7 A Yes.

8 Q Which was an appropriate question under our law, I
9 would think. But the answer on line 16 was, "She believed
10 she had been abused."

11 A Right.

12 Q Now, that did not raise an objection from you.

13 A It did not.

14 Q Having -- was there any reason not -- or assuming for
15 a moment that that might be outside the scope of what she
16 would be able to testify to or improper bolstering, would
17 there have been any reason not to raise an objection to
18 that testimony?

19 A No, there would not.

20 Q Okay. Can you tell me again -- well, can you tell in
21 context of the trial the testimony of Dr. Henderson as the
22 state's expert -- do you believe that that may have had a
23 significant impact upon the jury?

24 A It may have, yes.

25 MR. WILKES: Now, if I can have just one second, Your

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Direct examination by Mr. Falkner

1 Honor.

2 (Pause.)

3 Q Back to the foreman-of-the-jury thing. would -- how
4 does Ben Waddell fit into it? Was the foreman of the jury
5 somehow relations to Jim Brock or Mr. Waddell?

6 A I recall there being a connection with Jim Brock.

7 Now, if Mr. Waddell somehow knew him, I don't recall
8 that right now. That may be in my trial notes or my notes
9 in preparation for trial.

10 If I recall, Ben Waddell and his wife run an
11 accounting firm out towards the jail whom I visited on
12 several occasions who also knew Mr. Mangal very well. And
13 I think Mrs. Waddell -- I don't remember Ben -- but I think
14 Mrs. testified.

15 Q But if either one -- Mr. Brock and Mr. Waddell -- were
16 friendly to the defense -- were they not?

17 A Both of them were friendly to the defense.

18 Q So if I -- if the foreman of the jury was related or
19 knew them or thought kindly of them, would that have
20 impacted negatively on the selection? I mean, in your mind
21 you wouldn't have struck them for that reason, would you?

22 A No. I would have kept them on there because I thought
23 that the -- the feeling I was getting from Jim Brock was we
24 needed that guy on the jury.

25 Q Okay.

Lawrence W. Crane
Cross-examination by Ms. White

1 A And Jim Brock -- well, Jim -- without going into great
2 detail -- I guess I could because we don't have an
3 attorney-client privilege any more -- but Jim Brock knew
4 him very well.

5 Q So, but you're saying that you were getting a good
6 feedback --

7 A From Jim Brock.

8 Q -- from Jim Brock.

9 MR. WILKES: Okay. If I can have just one second.

10 (Pause.)

11 Q I think that's all I need to ask Mr. Crane. Thank
12 you, sir.

13 CROSS-EXAMINATION

14 BY MS. WHITE

15 Q Mr. Crane, I'm going to ask you just some -- some
16 basic kind of background questions a little bit.

17 If you could, give me an idea of how long you've been
18 practicing law and how long in that practice you've been
19 practicing criminal law.

20 A I think May will complete 34 years having been
21 admitted to the Bar. And I practiced as an assistant
22 solicitor for 12 and a half years when I started my
23 practice. And I've been in defense work, criminal defense
24 work, since then, since 1989.

25 And that's all I do. I don't do family court,

Lawrence W. Crane
Cross-examination by Ms. White

1 lawsuits, anything else. I might do a will or two every
2 now and then, but that's about it.

3 Q And in your practice of criminal defense, what types
4 of cases have you represented?

5 A You name one, and I've probably done it.

6 Q So you've done everything from maybe magistrate level
7 to -- have you done anything that faces life? Have you
8 handled any death penalty cases?

9 A I've been -- well, I'm involved in one right now as
10 second chair. I chose not to be first chair because I've
11 never taken one all the way. I've been on two of those.

12 One of those ended up the judge ruled that they could
13 not seek the death penalty. So it turned out to be a
14 regular murder.

15 And the other one that I'm involved with right now is
16 the one from Greenville where everybody in this courtroom
17 will remember the two people charged with killing a person
18 who cut off their hands and feet. And I'm involved with
19 that one as a second chair.

20 Q Okay. Now, how were you originally, I guess,
21 retained? You were retained in this case? Is that --

22 A I was retained in this case. I think -- I'm trying to
23 think back. I think Mr. Mangal had contacted me, and then
24 I didn't hear from him. And then I either heard again from
25 him or I heard from Jim Brock. And I think Jim Brock

Lawrence W. Crane
Cross-examination by Ms. White

1 actually put the thing together with my communication with
2 Mr. Mangal that I would represent Mr. Mangal.

3 Q Okay. And do you recall how far in advance before
4 this trial, which was I believe March 12th of 2007 maybe,
5 you began representing Mr. Mangal?

6 A March 7 of 2007?

7 Q I think it was March 12th of 2007, was the trial, yes.

8 A I thought I might have a note or a copy of the receipt
9 when I got paid, and I don't see one. But I can tell you
10 that this file has a case number of 07-02. So it would
11 have been one opened in early January.

12 Q Okay. And if you can, just kind of give us a brief
13 overview of your initial thoughts or preparations for the
14 trial. And I guess, first, was this always scheduled to be
15 a trial? Did you ever discuss guilty pleas with
16 Mr. Mangal?

17 A We -- we did discuss guilty pleas because one had been
18 offered by the state. I'm not sure how much he considered
19 that, but it was going to be a trial pretty much. We knew
20 going in it was probably going to be a trial.

21 Q Okay. And in regards to discovery, you filed all
22 discovery motions and received information.

23 A I think I got all the discovery, yeah. We filed the
24 motions, and I think I got all the discovery that they
25 might possibly have.

Lawrence W. Crane
Cross-examination by Ms. White

1 Q And in regards to evidence, you testified essentially
2 it was a credibility case. Was there substantial physical
3 evidence in the case against your client?

4 A No. I don't remember any physical evidence against my
5 client.

6 Q So the main -- the main defense was going to be kind
7 of a person-versus-person testimony, is how are y'all were
8 proceeding?

9 A Well, that and the mole on his penis.

10 Q Okay. And y'all did bring that into -- y'all talked
11 about that in regards to identification. You brought in
12 somebody, in fact, from the jail.

13 A From -- no. Mike Ennis who used to work here and is
14 now deceased, I understand. Isn't he? Mike came in and
15 testified to the jury that -- I think during the family
16 court hearing he was asked to inspect Mr. Mangal's penis,
17 and there was no mole or freckle. And that's what he
18 testified to the jury about.

19 Q And, in fact, that's what -- I believe either the wife
20 and the daughter had both drawn something to indicate that
21 there was a freckle or a mole present.

22 A Right.

23 Q Okay.

24 A And I -- in reading the transcript I know that I asked
25 VICTIM about that.

Lawrence W. Crane
Cross-examination by Ms. White

1 Q Okay. Now, if we can just kind of starting off on a
2 few things, did you feel like y'all had a pretty good
3 chance at the case?

4 A I thought we had a pretty good chance. And, as I said
5 to you before this hearing, some of these people might have
6 been in the courtroom, but/and you never know about a jury.

7 But when we finished the trial more than one person
8 who is regularly in the courtroom said to me he's going to
9 walk, and he didn't -- bailiffs, some of the policeman. I
10 don't remember if she was the reporter or not. I don't
11 think so. But I thought we had a real good chance.

12 Q Okay. Now, specifically, I just want to start off
13 with talking about maybe VICTIM's testimony. Obviously as
14 Mr. Wilkes has pointed out, you had a pretty vigorous
15 cross-examination. And he brought up the point that
16 perhaps at one time during cross she began to cry.

17 Do you recall that she cried during the direct of her
18 testimony as well -- direct?

19 A I really don't recall. I don't know if she did or
20 not.

21 Q Okay. And maybe -- I was referring to -- hold on one
22 second and let me pull my page number back. Perhaps page
23 103 in the testimony indicated that during her direct the
24 attorney -- she began to say -- she hesitated and said;
25 "I'm sorry."

Lawrence W. Crane
Cross-examination by Ms. White

1 The attorney said, "It's okay. Take your time."

2 I believe there were a couple of times during her
3 direct that it appeared that she might have gotten
4 emotional. Is that --

5 A That's fair to say.

6 Q -- fair to say in this case? So the only time she
7 cried was not during your cross. Is that probably correct?

8 A That's probably correct.

9 Q Okay. In regards to bank records you -- the state
10 actually -- you filed a motion for those. The state filed
11 a motion to quash your subpoena, is that right? But your
12 recollection is that y'all were able to obtain those bank
13 records?

14 A I recall getting the bank records. And if we didn't,
15 then I'm just recalling wrong. But I think we got the bank
16 records.

17 Q And, in fact, you were able to bring out on cross I
18 believe or actually it was direct of his exwife at the
19 time, Dianne, that -- that she was still getting the rental
20 money from the rental duplex that they had together, is
21 that right?

22 A That's correct. I do remember that, yes.

23 Q And you also attempted to show that perhaps she had
24 removed money from a safety deposit box before inventorying
25 it with the police. So there were several issues of her --

Lawrence W. Crane
Cross-examination by Ms. White

1 I guess this was a motive you were trying to show or --

2 A To get him out of the house, that's right.

3 Q Right. Okay. So the money did come up on several
4 issues and occasions. In fact, I believe he testified as
5 to the possible affair. Some of that came out as well
6 during testimony, is that right?

7 A That's right.

8 Q And unfortunately Ms. -- his exwife actually denied
9 completely having an affair.

10 A That's right.

11 Q So it was another credibility issue.

12 In regards to the language that was used during the
13 cross-examination of Dr. Medlock, specifically I believe it
14 started off with the words, you know, that he had called
15 his daughter a whore, called his son a fat ass, called his
16 son a bastard -- had those not already been testified to by
17 the state?

18 A I believe they had. You know, the daughter had said
19 that, and the son's testifying and said that they called
20 him that.

21 Q So did you think that was overly inflammatory at the
22 time?

23 A I didn't think it was overly inflammatory, nor did I
24 really think that it was not within the purview of the
25 state's cross-examination to ask those questions, because

Lawrence W. Crane
Cross-examination by Ms. White

1 we were trying to get some of this character out. And I
2 thought it was fair for them to ask it.

3 Q So in your experience -- and would you have objected
4 to something that you thought was improper?

5 A If I thought it was improper I would have objected,
6 yes.

7 Q Okay. Clearly, obviously the very next question had
8 to be with a D.U.I. too, two D.U.I. arrests. And you
9 immediately objected.

10 A That falls into a different category in my mind. And,
11 quite honestly, I think Judge Hayes agreed with me.

12 Q And at the time Dr. Medlock never had a chance to
13 actually answer the question regarding the D.U.I.

14 A No, he didn't.

15 Q You subsequently moved for a mistrial, and that was
16 denied, is that right?

17 A That's right.

18 Q And there was some pretty substantial or lengthy
19 argument, maybe a little bit back and forth, in regards to
20 that.

21 A That's right.

22 Q Okay. And obviously, as you stated and as the record
23 shows, Judge Hayes made a comment that he thought that that
24 was probably improper on the state but was going to cure it
25 by a jury instruction or a curative instruction.

Lawrence W. Crane
Cross-examination by Ms. White

1 Now, at the time did you think that the D.U.I. arrest
2 in light of the charges having to do with the multiple
3 occasions of abuse that VICTIM had already testified to --
4 did you think that was something that was going to really
5 harm the case?

6 A I think any time you bring out a prior conviction for
7 a criminal offense it can harm it, and so, yes, I did.

8 And Mr. Wilkes alluded to something a minute ago when
9 he asked about the people serving in Afghanistan. We knew
10 going in because of his nationality that that was going to
11 be a problem, because if you think back to 2007 and what
12 was going on in the United States and overseas -- and it
13 wasn't too far removed from 2001 -- so I'm sure that
14 nationalities such as Mr. Mangal's had a hard time for many
15 years.

16 Q Okay. And, in fact, you brought out the fact he was
17 an American citizen --

18 A That's right.

19 Q -- when he began testifying, is that right?

20 A That's right.

21 Q Okay.

22 MS. WHITE: Hold on one moment, Your Honor.

23 Q In regards to the testimony of Dr. Henderson, I
24 believe you looked at her testimony on page 252 where the
25 state asked her in regards to whether or not her findings

Lawrence W. Crane
Cross-examination by Ms. White

1 were consistent with a penetrating injury.

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

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

7 Now, is that something that you expected the state to
8 ask her, whether or not her opinion was that VICTIM had been
9 abused?

10 A Not only did I expect it, but if she had answered any
11 other way I would have been shocked, because Dr.
12 Henderson's testimony is canned testimony. And she'll
13 testify the same way in every trial.

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

17 So no. I figured they would ask it and I figured
18 she'd answer that way. That's not the first time I've been
19 with Dr. Henderson.

20 Q Okay. Thank you. I am sorry for interrupting you.

21 A No, no. That's fine. I interrupted you.

22 Q And she actually abused versus the penetrating injury.
23 was that something that you would have normally objected to
24 knowing that that was the ultimate issue that they were
25 asking?

Lawrence W. Crane
Redirect examination by Mr. Wilkes

1 A I probably should have objected.

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

5 A Right.

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

10 A It probably does, yes.

11 Q Okay.

12 MS. WHITE: At this time I think that's all I have,
13 Your Honor, of this witness.

14 MR. WILKES: One or two questions.

15 REDIRECT EXAMINATION

16 BY MR. WILKES

17 Q If it does not fall under that evidentiary rule, if
18 it, in fact -- it did not strike a cord as improper
19 bolstering to you at the time of trial.

20 A It did not.

21 Q The -- you said you had been practicing for 35 years.

22 A Thirty-four.

23 Q Thirty-four, Jeff. Okay. I remember 1989 when we
24 met.

25 Now, of all -- you tried many, many, many of these

Lawrence W. Crane
Redirect examination by Mr. Wilkes

1 cases.

2 A I have.

3 Q Do you believe there's a real possibility that he may
4 not have done what he was accused of?

5 A I do. I really do. I believed it then and I believe
6 it now. And, I mean, if -- and I don't know, you know, if
7 Judge Cole will have time to read the transcript. But if
8 you develop VICTIM's testimony, she went from a very
9 structured, sheltered, father-dominated life to total
10 freedom once he's out of the house, so much freedom that
11 she started drinking and smoking and going out and, you
12 know, grades dropped and just all kinds of stuff.

13 So, I mean, I've tried more than one of these where
14 the sole purpose of a child testifying is to get that man
15 out of the house. That's what happened here.

16 MR. WILKES: Nothing further from Mr. Crane.

17 MS. WHITE: The state has nothing, Your Honor.

18 THE COURT: You may step down.

19 THE WITNESS: May I step down, Judge?

20 THE COURT: Yes.

21 MR. WILKES: May I call the next witness? We call
22 Mr. Mangal.

23 May it please the Court. My client is Muslim if he
24 may affirm rather than swear on the Bible.

25

Farid Mangal
Direct examination by Mr. Wilkes

1 FARID MANGAL, having first
2 duly affirmed, testified as follows:

3 DIRECT EXAMINATION BY MR. WILKES

4 Q Please state your name for the record, please.

5 A Name is Ahmad Farid Mangal.

6 Q Mr. Mangal, Mr. Crane represented you at your trial?

7 A That's correct.

8 Q You have heard Mr. Crane testify about the foreman of
9 the jury.

10 Can you explain what your recollection is about
11 Mr. Brock, the foreman of the jury, the selection of the
12 jury?

13 A Mr. Brock when we picked the jury -- the night I
14 called from county jail, he said everything looked good,
15 all the people know you, we know you. We're going to come
16 and testify and the truth will come out and you're going
17 win the case.

18 But when we came to the trial Judge Hayes picked him
19 as the foreman of the jury. The first thing he say he
20 was -- Mr. Crane asked the jury if anybody was related to
21 the -- to -- to me, you know, or to any, the doctor or the
22 character witness, anybody was on my side.

23 Q Right.

24 A The foreman of the jury, I can't remember his name.
25 He claimed he was brother-in-law to Ben Waddell.

Farid Manga1

Direct examination by Mr. Wilkes

1 Q And Ben Waddell was one of your witnesses.

2 A Ben Waddell is one of my witnesses. His wife was one
3 of my witnesses and --

4 Q And Jim Brock was also one.

5 A Jim Brock too. But Ben Waddell was in family court.
6 He was busy [sic] his wife.

7 Q Okay.

8 A He kind of strike me as, see, this man when I got on
9 the stand looking at him, very harmful look from the
10 beginning to the end.

11 I asked Mr. Crane if he asked this gentleman is he
12 really related to Jim Brock. Mr. Crane said, "No. I'm not
13 going to do that."

14 Q Uh-huh.

15 A So later on when I found guilty I asked Jim Brock. I
16 said what happened, all those good testimony, everything I
17 did. And the man, we really thought he was an honest man,
18 what he did that for.

19 He said he went to Citadel and he prejudiced against
20 Muslim and the blacks. So he said nothing else I can say,
21 that's the only thing. I said why you don't tell me that
22 in the beginning then so we could stop it. He said it's
23 too late now.

24 Q Okay.

25 A Now, that's why it makes me so -- something else going

Farid Mangal
Direct examination by Mr. Wilkes

1 on beside that. why Jim Brock have to do such a thing or
2 the foreman of the jury do such a thing? why don't you
3 just speak the truth? But it was something behind that.

4 Jim Brock's sister was locked down. She was in a
5 prison, federal prison. When she came out, she's released,
6 Jim Brock was with me all along until she come back.

7 When she got arrested everything turned around. So I
8 don't have really investigation and I can't go no more
9 further than that to figure out --

10 Q Do you believe that Mr. Brock intentionally told you
11 something that you relied on that wasn't true?

12 A Something was not true because this man, Jim Brock,
13 was saying he was brother-in-law to him, and the foreman of
14 the jury was saying he was brother-in-law to Ben Waddell.

15 Now, if I just called Ben Waddell, he'll probably just
16 tell me, no, he's not my brother-in-law. So something over
17 here have to be investigated to find really what's behind
18 this, why do they do that.

19 Q Okay. But you decided to put him on there because of
20 something you were told.

21 A Right. Actually, Mr. Crane said that -- that's a good
22 word he said -- is a nice word he said when the judge
23 picked him up. He said very nice word. He said like
24 that's good.

25 Q And at the time y'all thought it was good.

Farid Mangal
Direct examination by Mr. Wilkes

1 A Exactly, yeah, yeah.

2 Q Now, tell me. You had said that there were some bank
3 documents that y'all were able to get before the trial.
4 And I believe -- were there some that you were not able to
5 get?

6 A What it was, my wife and my daughter both, both of
7 them, was not in a good situation. VICTIM was not doing too
8 good at home, bringing the boys to the house, drinking at
9 school. There's two or three things. She was under
10 restriction.

11 And when I was gone to Germany, when I came back
12 Dianne had -- was fixing to have the surgery on her neck.
13 A week before that she come and told me the -- the human
14 resources of her workplace told her she'd be ashamed
15 herself to be eating with -- with this guy named Rake, to
16 be having affair with him, I'm going to call your husband.

17 So she come back home and tells that. So there was
18 things going on back. I was thinking there be a lot of
19 other stuff. And those documents if I get it, I can trace
20 it to find out what's really going on behind -- while I was
21 not around.

22 Q And you believe that proof of her having an affair
23 would have benefited your case --

24 A That's correct.

25 Q -- as a motive to get you out of the house.

Farid Mangal
Direct examination by Mr. Wilkes

- 1 A That's right, sir.
- 2 Q Have you since divorced from Dianne?
- 3 A Yes, sir, I divorced.
- 4 Q Do you remember when that was?
- 5 A That was before the --
- 6 Q About 2006? Does that sound right?
- 7 A Some. I believe so.
- 8 Q You were represented by an attorney at that time?
- 9 A Yes, sir. No. I was not in court when they -- when
- 10 she got a divorce. They went under the rules of 1-year
- 11 separation.
- 12 Q Okay.
- 13 A And that was sufficient for her to get a divorce.
- 14 Q But through the family court and your divorce case you
- 15 had an attorney, right? And --
- 16 A Yes, sir. I had an attorney, but for some reason it
- 17 was just a done deal without me.
- 18 Q Okay. But you didn't approve adultery in that case
- 19 either, did you?
- 20 A No, sir, no, sir.
- 21 Q Okay. Mr. Mangal, you had indicated you believed that
- 22 the doctor that was here from Georgia should have been
- 23 called to testify.
- 24 A I really do.
- 25 Q Okay. Did you talk about that with Mr. Crane at the

Farid Mangal

Direct examination by Mr. Wilkes

1 time of the trial?

2 A In that point I don't, but later on when I look at a
3 transcript the way solicitor attacked Mr. Medlock and they
4 really -- it was better to be expert in that -- in that
5 field to -- to speak for certain things.

6 Dr. Medlock is a doctor, but he's a family doctor.
7 But the doctor came from the lower part of the state. I
8 believe she was expert in her -- in a female practice.

9 Q Okay. Did Larry tell you that his conversations with
10 her made him doubt that she would be helpful? Did he tell
11 you that?

12 A I believe she'd be helpful if she was on the stand.

13 Q But did you talk about that with Mr. Crane trying to
14 make that decision at the time of trial?

15 A At that time I trust Mr. Crane.

16 Q Okay. Mr. Mangal, keeping in mind that it is your
17 P.C.R., have I -- have I overlooked anything that I was
18 supposed to have asked you about?

19 A I don't understand, sir.

20 Q Is there any other issue that I have just forgotten to
21 ask you about as far as your trial and Mr. Crane's
22 performance?

23 A I really don't know.

24 Q Do you think that we have brought to the Court's
25 attention all of the major issues related to the case?

Farid Mangal
Direct examination by Mr. Wilkes

- 1 A A lot of those things sounds good when you hear it,
2 but when it comes to the law you really make a U-turn.
3 They be nice and good and everything, and when it comes to
4 the end you see a stop sign.
- 5 Q Right, right.
- 6 A So.
- 7 Q I understand that. But just tell me. Are there -- is
8 there another issue that you think was grossly unfair about
9 your case?
- 10 A As far as I know I need to investigate it and get the
11 pretrial hearing, the transcript. And I like to attach it
12 with those documents, so.
- 13 Q What do you believe the pretrial hearing -- that's for
14 the motion to quash?
- 15 A The motion for the documents I asked for. And if she
16 give me the documents, start from 2004 -- 2004 to 2006 --
17 when I got arrested. She give me from that date, but I
18 request from 2004 from the beginning of the year until the
19 end of the year.
- 20 Q Okay.
- 21 A See, I wanted the time I was on the street while I was
22 in Germany.
- 23 Q Okay. Because that -- that would be the time that
24 would have established her affair --
- 25 A Exactly.

Farid Mangal
Direct examination by Mr. Wilkes

1 Q -- which would be the motive to get you out of the
2 house?

3 A That's right.

4 Q Okay. And did you receive those documents?

5 A No, sir. I don't.

6 Q Had you had those documents you believe that you would
7 have been able to establish the affair through the
8 financial documents, right?

9 A Correct.

10 Q How would the checkbook and the check register and the
11 checks have done that?

12 A The check, the checkbook and the check register -- I
13 hope we don't have another trial or anything in the future,
14 because I don't want to give too much information now for
15 then. But it was using it for the -- for the defense.

16 Q Okay. Did you talk about getting those particular
17 documents with Mr. Crane?

18 A No. I feel that I got that later on when -- when I
19 asked for my document from Mr. Crane.

20 Q After the trial you're saying it became apparent that
21 that would have been good to have.

22 A Correct.

23 Q That there were more things that you -- okay.
24 Understand.

25 Now, Mr. Mangal, is there any other major thing that

Farid Mangal
Direct examination by Mr. Wilkes

1 was grossly unfair about the way you were treated by the
2 police or by the prosecution or anything else that did not
3 get done properly in your defense?

4 A The only thing, most places if you do something even
5 lottery, you know, when you pick up a ticket, you turn the
6 drum --

7 Q Right.

8 A -- to make sure everything mixed up --

9 Q Right.

10 A -- and then open the door and pick one.

11 Q Right.

12 A But in this case I really don't like the way they
13 picked those tickets for the jury.

14 Q Why is that?

15 A Because actually I asked Mr. Crane to go over there
16 and somehow to turn that thing around and look inside and
17 see if there's anything that's stuck, because it's a very
18 nasty game they played with me. And I saw it. They're
19 trite. They're not playing fair. And Mr. Crane said, no,
20 he can't do that. But could be -- I don't know. I can't
21 say how those ticket was laying in there. It should have
22 been turned.

23 Q Okay. But you brought that to Mr. Crane's attention.

24 A Yes, sir, I did.

25 Q And Mr. Crane did not, you say, turn the jury drum.

Farid Mangal
Cross-examination by Ms. White

1 A Exactly. He said -- they said -- I don't think he
2 thought it was proper.

3 Q Okay. That's all the questions I have. The attorney
4 general is going to ask you some questions.

5 MS. WHITE: Thank you.

6 CROSS-EXAMINATION

7 BY MS. WHITE

8 Q Mr. Mangal, I just have a few questions for you.

9 In regards to the foreman, you testified that you
10 talked some about this with Mr. Crane, is that right?

11 A I did.

12 Q And at the time y'all thought that that was going to
13 be a beneficial person to have on the jury.

14 A In that moment, yeah.

15 Q And you said that the information you received later
16 with regards to possible prejudice, that was after trial,
17 is that right?

18 A That was after the trial.

19 Q But you have no -- no proof of the bias or prejudice.
20 That is something that just someone told you?

21 A I got -- should be a record of it in the county jail,
22 the conversation I had with Jim Brock.

23 Q Do you mean over the telephone or something?

24 A Over the telephone.

25 Q Okay. All right. But we don't have that here today

Farid Mangal
Cross-examination by Ms. White

- 1 to present anything.
- 2 A Okay.
- 3 Q Okay. And in regards to the bank records, you
- 4 testified that you got some of them but not for the full
- 5 year that you were gone.
- 6 A That's correct. But I wanted VICTIM's too, because VICTIM
- 7 said in the family court she had -- that money was hers.
- 8 And later on in the trial, in the criminal trial, she said
- 9 the money her -- her grandfather give it to her. And I
- 10 don't believe he gave her no money. So something was going
- 11 on and she -- she covered it up when she don't want -- she
- 12 didn't give me those -- the documents I asked for.
- 13 Q Okay. And in regards to your wife's documents and
- 14 documents of her bank records, that was solely to prove
- 15 that perhaps she was having an affair?
- 16 A Yes. That's on her and Amina too.
- 17 Q Okay.
- 18 A On both of them.
- 19 Q And isn't it true that your wife testified that she
- 20 had no knowledge if there had been any abuse? She was
- 21 simply told by VICTIM when VICTIM was 16 that this had been
- 22 occurring, is that correct?
- 23 A She testified I was beating the kids and I was mean to
- 24 the kids, I was calling the kids some places. I don't
- 25 know. They were not saying things one way.

Farid Mangal
Cross-examination by Ms. White

1 Q Okay. But in regards to the sexual abuse that you
2 were on trial for --

3 A Right.

4 Q -- your exwife testified that she didn't know anything
5 about that during that 6-year period, only when VICTIM was 16
6 and finally told her, is that correct?

7 A That's right.

8 Q Okay. So she actually testified that she had no
9 knowledge of the abuse or could not confirm it. She just
10 took what VICTIM said and then went on with it.

11 A That's right.

12 Q Okay. And in regards to additional documents, you did
13 testify that you talked with your -- didn't talk with your
14 attorney about that before trial. That's just something
15 you realize that you think you would need after trial.

16 A I don't understand.

17 Q I think you mentioned that there were additional
18 documents, maybe financial documents, that some are
19 missing. And you said you didn't discuss that with your
20 attorney before trial, you just realized after trial that
21 you need that.

22 A No. Before the trial. Excuse me. Before the trial I
23 request for those documents --

24 Q Right.

25 A -- for pretrial hearing. And that's what I request

Farid Mangal
Cross-examination by Ms. White

1 for. For Judge Hayes was the lawyer, I mean, the judge.

2 And the Court agreed with it.

3 Q And you got some, is that correct?

4 A I got Dianne's but not VICTIM'S.

5 Q Okay.

6 A Dianne give me a half a year. I had requested for the
7 whole year.

8 Q Right. And did you ask your attorney at the time, say
9 why didn't get we get all of these documents, you need to
10 go back and try to get all of these?

11 A No, ma'am. I don't see that until later on after
12 the -- when I received all of my documents from Mr. Crane.

13 Q Okay. And that was after your trial.

14 A After the trial.

15 Q Okay. And, in fact, Mr. Crane called at least eight
16 witnesses on your behalf, is that right? Or I know you
17 probably can't recall exactly.

18 A Right.

19 Q But he called -- he called a Leslie Mastil, a Dr.
20 Medlock, your exwife. He called you, Mr. Riddle, Mr.
21 Ennis, Mr. Brock and Elizabeth Waddell. Does that sound
22 about right?

23 A That's correct.

24 Q So he called about eight witnesses in support of your
25 defense.

1 A That's right.

2 MS. WHITE: That's all I have at this time, Your

3 Honor.

4 MR. WILKES: Nothing further.

5 THE COURT: All right. Step down.

6 MR. WILKES: That would be the applicant's case, Your

7 Honor.

8 THE COURT: Okay.

9 MS. WHITE: The state has nothing to present at this

10 point, Your Honor.

11 THE COURT: All right. I will review the record and

12 issue an order.

13 MR. WILKES: Your Honor, can I have 93 seconds to just

14 articulate my issues for the record so they don't get lost?

15 THE COURT: How many?

16 MR. WILKES: 93. I did 60 seconds last time.

17 THE COURT: All right. I'll give you 93.

18 MR. WILKES: Thank you, Your Honor. That's all I

19 need.

20 Your Honor, we've raised several issues, the trial

21 attorney's failure to object and preserve the issue of

22 improper cross-examination of Dr. Medlock.

23 He did raise the D.U.I. issue but failed to follow up

24 and preserve it. The Court of Appeals ruled. So we

25 believe that he should have expanded that and made it

1 include all of the inflammatory remarks made.

2 The whole line of trying to break up character
3 evidence was wrong. Character evidence can only be brought
4 up to the specific trait. And the state just went wild and
5 brought up stuff that was just inflammatory, that was not
6 specifically on the trait that he offered character
7 evidence on, which was his reputation for truthfulness.

8 And therefore we believe that it was just grossly
9 improper but that trial counsel should have included that
10 as well. And we would incorporate the court of opinion's
11 [sic] order in our case. I believe it's in the record, but
12 they did hold that the issue was not preserved.

13 We also raised specifically the failure to address
14 that inflammatory remark alone should have been something
15 that would have received an immediate objection.

16 We had also included appellate counsel had failed to
17 include an argument on her brief because of Toyota vs.
18 Florence Toyota case -- Nigle.

19 She possibly could have raised a super inflammatory
20 remark by the other side even though it had not been
21 preserved, but I think it's probably not an issue since
22 we're addressing the failure to raise it by the trial
23 lawyer which covers -- covers that anyway. But she
24 possibly could have raised that on appeal anyway.

25 The trial counsel's failure to impeach the victim with

1 other inconsistencies from the family court. He certainly
2 did a good job overall, but there were some very key things
3 that -- especially the car wreck -- that he did not do.

4 We also brought up the issue of Dr. Henderson. I
5 believe in this case we have no case law specifically on
6 allowing an expert to say in her opinion abuse occurred.
7 She wasn't asked that question. She gave that answer.

8 It did not receive an objection which we believe it
9 should have. It was improper vouching. And I've cited to
10 Morgan -- I think Baker, Johnson and some other cases --
11 Douglas -- on that issue and put some of that in my little
12 outline for the Court as to why we believe that.

13 And just for the record, that would be our legal
14 position. Thank you, Judge.

15 MS. WHITE: Your Honor, I will briefly respond if
16 you'll allow.

17 The state would submit that it's clear that Mr. Crane
18 was very aggressive in pursuing a defense for Mr. Mangal.
19 He investigated the case thoroughly, met with numerous
20 witnesses, followed through on all lines of possible
21 defense, as well as attacking credibility of all of the
22 state's witnesses.

23 In regards to the issue of the failure to
24 contemporaneously object to the curative instruction as the
25 applicant has presented it, even if counsel is deficient in

1 that regard the state would submit that he has failed to
2 meet his burden of proof in demonstrating that there was
3 any prejudice suffered from that.

4 Clearly, the testimony from the state's witnesses in
5 regard to the actual alleged sexual abuse was pretty
6 serious -- the allegations of how he disciplined his
7 children, how he was in the family home, the things he said
8 had been testified to by those witnesses. And we would
9 submit that that is -- no prejudice has been demonstrated
10 on that regard.

11 In regards to Dr. Henderson's testimony, we believe
12 that the ultimate issue was whether or not there was any
13 sexual abuse. That was what she was there for, her
14 examination was there for. And that's what she did, was
15 produce an expert testimony that she believed there had
16 been abuse.

17 So I do -- the state does not believe that there's
18 any -- anything that was objectionable to that statement or
19 anything that was prejudicial to the client other than the
20 fact that she did say there was abuse, which is what she
21 was there for. So we would ask that you would dismiss this
22 application with prejudice.

23 THE COURT: All right. I'll review the record and
24 issue an order.

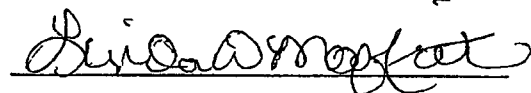
25 END OF REQUESTED TRANSCRIPT OF RECORD

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 7th day of April 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 1, 2012

A handwritten signature in cursive script, appearing to read "Linda D. Moffitt", is written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Farid A. Mangal, #285333,	)	2010-CP-42-0080
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 6, 2010. The Respondent made its Return on or about May 13, 2010. An evidentiary hearing into the matter was convened on April 4, 2011, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Also testifying was Lawrence W. Crane, Esquire. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript, and exhibits placed into the record by the Applicant.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the August 2004 term of General Sessions for criminal sexual conduct with a minor - 1st degree (04-GS-42-3400). Applicant was also indicted

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CLERK OF COURT
SPARTANBURG COUNTY
2012 JAN 18 AM 10:00
H. K. PETERSON, JR.

at the August 2006 term for incest (06-GS-42-2830) and criminal sexual conduct with a minor - 1st degree (06-GS-42-2831). Applicant was then indicted at the October 2006 term for lewd act or attempt to commit a lewd act upon a child under 16 (06-GS-42-4217) and then subsequently indicted at the January 2007 term for criminal sexual conduct with a minor - 2nd degree (06-GS-42-4869)¹. Lawrence W. Crane, Esquire, represented the Applicant.

On March 16, 2007, after a four-day trial, a jury convicted the Applicant of these charges. The Honorable J. Mark Hayes II sentenced the Applicant to confinement for thirty (30) years for criminal sexual conduct with a minor - 1st degree, twenty (20) years on each charge of criminal sexual conduct with a minor - 2nd degree, fifteen (15) years for lewd act on a minor, and one (1) year for incest, all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Mangal, Unpublished Op. No. 2009-UP-113 (S.C. Ct. App. filed March 4, 2009). A Petition for Rehearing was filed on behalf of Applicant and denied by written Order on May 4, 2009. A Petition for Writ of Certiorari was filed on the Applicant's behalf and subsequently denied by the South Carolina Supreme Court on December 17, 2009. The Remittitur was issued on December 22, 2009.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. "Failure to preserve direct appeal issue,"
 - b. "Trial counsel failed to investigate documentary evidence and witnesses,"
 - c. "Trial counsel fail to make an additional object to the sufficiency of

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

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- the curative charge or move for a mistrial;" and
 2. Ineffective assistance of appellate counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms."

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Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

The Applicant alleged that Counsel was ineffective in failing to investigate additional evidence and witnesses for his trial. This Court finds the Applicant's testimony to lack credibility on this issue, while finding Counsel's testimony credible. In regards to witnesses, the Applicant testified that he thought Counsel should have called another doctor as a witness to contradict Dr. Henderson's opinion that the victim had been abused; however, he acknowledged that he did not say anything to Counsel at the time of trial. Counsel testified that he did have another doctor subpoenaed, but he made the strategic decision not to call her as a witness because he did not think that she could help or add anything and was worried that she may harm their case more at that point. Additionally, Counsel testified that he believed that Dr. Henderson would testify that the victim had been abused, so he felt that he was prepared in that he had Dr. Medlock ready to testify, along with the victim's medical records which indicated that she had an intact hymen. Counsel testified that he was able to get the victim's OB/GYN records into evidence. The Applicant did not indicate that Counsel failed to call any other witnesses. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 820 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 909 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been

cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant failed to present the testimony of a witness to support his claims and demonstrate the requisite prejudice.

In regards to evidence that the Applicant alleged Counsel failed to thoroughly investigate, the Applicant testified that Counsel should have more thoroughly investigated bank records. The Applicant testified that he wanted the bank records because he believed his wife and daughter were not doing well at the house on their own and there were some rumors that his wife was having an affair with someone at work. The Applicant also alleged that the victim claimed that she had money. Counsel testified that the issue regarding the bank records was part of the defense in regards to who was paying the bills and taking care of the home at the time of the allegations. Counsel testified that the information regarding the wife's affair was intended to attack her credibility, particularly in that the case rested on the credibility of the wife, the two sons, and the daughter versus the Applicant. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The Applicant failed to produce any evidence to support his claims that had Counsel obtained these bank records and introduced them at trial, the outcome of Applicant's trial would have been any different. Therefore, this Court finds that the Applicant failed to meet his burden of proof as to these claims and they are denied and dismissed.

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The Applicant also alleged that Counsel was ineffective for failing to preserve an issue for appeal regarding the improper introduction of character evidence during Dr. Medlock's testimony when he failed to also object to the judge's curative instructions. Counsel testified that he did object when the State asked Dr. Medlock about the Applicant's two prior DUI arrests and also asked for a mistrial; however, he acknowledged that the Court of Appeals ruled he had not properly preserved the issue for appeal since he did not object to the judge's curative instructions. This Court finds that although the Court of Appeals ruled that Counsel had failed to preserve the issue for appeal, the Applicant has failed to meet his burden of proof as to this matter. Even if Counsel was deficient for failing to preserve the issue, the Applicant failed to demonstrate that he suffered any prejudice from Counsel's deficient performance. Taking the record as a whole and in light of all of the testimony presented, this Court does not believe that the fact that the Applicant had been twice previously convicted of DUI was prejudicial enough to have affected the outcome of Applicant's trial on these charges. Therefore, this claim is denied and dismissed.

The Applicant alleged that Counsel was ineffective for failing to effectively cross-examine witnesses, particularly the victim in this matter. Applicant presented a page from the Family Court Transcript in which the victim testified that she had gotten a new car once her father had been removed from the home because she had a wreck, but alleged that the victim denied on the stand at trial that she had previously had a wreck. Counsel acknowledged that he had the previous Family Court Transcript, but did not cross-examine the victim about her inconsistent testimony regarding the car and wreck. However, he testified that he cross-examined the victim aggressively in an attempt to show the victim's motive for lying about the allegations against Applicant. The nature and scope of cross-examination is inherently a matter

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met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier

supra. Therefore, this allegation is denied.

CONCLUSION

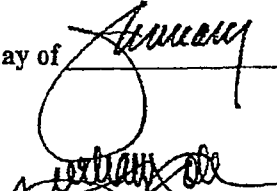
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6 day of January, 2012


J. Derham Cole
Presiding Judge

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2010-CP-42-0080
COUNTY OF SPARTANBURG	)	
	)	
Farid A. Mangal,	)	
320609,	)	
	)	
Applicant,	)	
	)	Motion
v.	)	(Alter or Amend, Rule 59(e))
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Pursuant to Rule 59(e) SCRCPP the Applicant moves this Court to alter or amend its decision as follows:

The Court's Order of Dismissal contains a scrivener's error as to the Applicant's SCDC Inmate number. Applicant's correct SCDC Inmate number is #320609, shown above.

As to the Court's ruling on the issues addressed by the Order of Dismissal, the Applicant submits that the Court misperceived applicable law and overlooked pertinent facts which, if fully considered would entitle the Applicant to relief on those issues as well. In addition to those issues which the Court addressed in its order there were two or more issues for which the Court failed to make specific findings of fact or specific rulings or otherwise include in its order.

As to the issues that were ruled on, no further argument is required.

Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it. Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939). As to those issues or sub-issues not ruled on, a Rule 59(e) motion is appropriate and necessary to obtain a ruling and/or preserve those issues for appellate review. As to any issues raised at the hearing which are not addressed herein, the Applicant believes those issues adequately raised and ruled on for appellate purposes and the failure to include those issues herein are not intended as a waiver or abandonment of those issues.

The Applicant submits that the evidence presented at the hearing, including those matters in record, establish that the Applicant is entitled to post conviction relief based on the following:

Applicant raised the following issues in his application for relief.

Ineffective assistance of counsel:

- Issue I.** The trial attorney failed to object and preserve the issue of improper cross examination of Dr. Medlock.
- Issue II.** The appellate attorney failed to properly include the entire record to allow the appellate court to make a determination as to prejudice of the improper use of Applicant's prior DUI convictions.

The record in this case contains the Opinion of the Court of Appeals

which indicates that trial and appellate counsel failed to ensure that the trial record contain sufficient matter to allow the court of appeals to make a determination of prejudice. The Designation of Matter from the appeal shows a sparsity of record designated. The record therefore shows that the trial counsel failed to create and preserve the record and, that the Appellate counsel failed to adequately designate sufficient matter for the appeal.

The record from the criminal trial shows testimony of Dr. Medlock who testified that the Applicant had a good reputation for truth and veracity. Dr. Medlock also testified that it was not in the Applicant's character to do "something like that" (referring to the present charges). T. 325-326. The State then asked Dr. Medlock whether it would change his opinion if he knew that the Applicant: hit his children 328; called his daughter a whore 328; called his son a bastard 328; called another son a fat ass 328-329; whipped his children with an electrical cord 330; and had been convicted of driving under the influence two times 330.

The only objection trial counsel made was to the DUI conviction and moved for mistrial. The court advised that it would simply tell the jury to disregard the question. 334. The trial attorney failed to object further. 336, l. 14-17.

The State then went on further to ask Medlock about the Applicant calling his daughter a slut, p. 336, l. 22-24; and the Applicant's alleged use of the word ni*** p. 337, l. 2-3. To all of this the trial attorney failed to make proper objections

or otherwise preserve the issue for appellate purposes.

Trial counsel clearly failed to properly object and preserve the issues for appeal. Appellate counsel failed to properly pursue the arguments to the extent they may have been appealable despite the lack of objection.

Evidence of a defendant's character is generally not admissible to show a propensity to act accordingly. Rule 404(a)(1), SCRE. However, when the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct. State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990). The State is restricted to showing bad character only for the traits initially focused on by the accused, and impeachment may be done by introducing prior convictions with extrinsic evidence. *Id.* at 185, 391 S.E.2d at 238.

Since the adoption of Rule 609, the moral turpitude standard is no longer the proper test for determining the admission of remote prior convictions. Therefore, the trial court erred in using the moral turpitude standard to determine the admissibility of Petitioner's prior convictions. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).¹

¹RULE 102

EFFECTIVE DATE AND REPEALER

(a) Effective Date. These Rules take effect on September 1, 1990.

Today, the South Carolina Rules of Evidence provide that if the witness has been convicted of a crime that is punishable by death or imprisonment of more than one year, and the probative value of the conviction outweighs its prejudicial effect, the conviction is admissible to attack the witness's credibility. Rule 609(a)(1), SCRE. In addition, if the crime involved dishonesty or a false statement the conviction is admissible to attack the witness's credibility. Rule 609(a)(2), SCRE. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).

RULE 609 IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Pursuant to §56-5-2930(A)(2), the maximum possible penalty a second offense DUI is a fine of not less than two thousand one hundred dollars nor more than five thousand one hundred dollars, and imprisonment for not less than five days nor more than one year. DUI 1st or 2nd do not carry more than one year imprisonment

and therefore do not qualify under Rule 609 for impeachment of a witness.

Issue III: Trial counsel failed to object to the use of racially inflammatory questioning by the Solicitor in the guise of character evidence.

Issue IV: Appellate counsel failed to brief the issue of the Solicitor's use of racially inflammatory questioning by the Solicitor in the guise of character evidence in light of Toyota v. Lynch.

Applicant submits that the Court's order of dismissal fails to make specific findings or ruling on the issues raised above as to the racially inflammatory nature of some of the Solicitor's comments. To the extent that the Court's order was intended to rule on those issues in its general denial clause, the Applicant submits that the Court has misperceived facts and overlooked relevant law as to these issues.

The record from the trial shows the testimony of Dr. Medlock where the State questioned him about the Applicant's alleged use of the word ni***r p. 327, l. 2-3. This had no bearing on the direct testimony of the Applicant and was improper cross-examination of the Applicant's witness. It was intended solely to inflame the jury.

Despite the egregious nature of the examination the trial attorney failed to raise the issue despite it being flagrant use of racially inflammatory term. Appellate counsel failed to raise the issue even though there is a basis for doing so despite the

lack of contemporaneous objection.

The lack of a contemporaneous objection to an improper argument acts as a waiver, except where a "vicious, inflammatory argument results in clear prejudice." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994). While the Toyota court did not condone a failure to make a contemporaneous objection, it found it "wholly unreasonable for any attorney to anticipate" flagrant, abhorrent conduct towards a party or witness. *Id.* However, the issue must be raised to the trial court by way of a post-trial motion. Dial v. Niggel Assoc., Inc., 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998). Because the trial attorney failed to make a contemporaneous objection and did not present the issue during a post-trial motion, this issue is not preserved.

Issue V. Trial counsel failed to impeach the victim with testimony from the family court trial.

The Applicant further submits that the Court's order of dismissal further misperceives the facts relating to the importance of the impeachment of the victim by prior recorded statements.

The transcript from the criminal and family court trials show significant contradictions in the alleged victim's testimony which the trial attorney failed to raise. *Crim. trans.* p. 174. In the criminal trial the alleged victim testified that she didn't recall having an accident yet in the family court trial she testified that she

had car wreck which was the reason that she left her job at PLEJ's. Fam. Ct. Trans. 79. The victim appeared untruthful about her having had a car wreck/accident in the criminal case and the Appellant believes that trial counsel failed to impeach her with her prior testimony from family court. Because this case rested so heavily on the testimony of the alleged victim, the Applicant submits that the failure to effectively cross-examine her on these obvious inconsistencies was prejudicial to his case.

Issue VI. Trial counsel failed to object to the testimony of Dr. Henderson that, in her opinion the victim had been sexually abused.

The Applicant submits that the Court's order of dismissal fails to make sufficient specific findings of fact or rulings of lack on the issue of the testimony of Dr. Hernderson. To the extent that the Court's order of dismissal did intend to be a complete ruling on these issues the Applicant submits that the Court misperceived relevant facts and overlooked applicable law in its ruling.

At the criminal trial Dr. Henderson was asked if the findings were consistent with a "penetrating injury" and answered that in her opinion, based on what the victim told her, that the victim had been abused. Trial counsel failed to object. P. 252 trial trans.

Henderson's testimony could reasonably have been construed by the jury as

Dr. Henderson vouching for Victim's veracity, such that it should have been excluded under Rule 403, SCRE, because its prejudicial impact outweighed its probative value and further that it constituted improper bolstering of the witness.

The overall evidence made the case turn on the testimony of the witness versus the Applicant. The improper bolstering therefore can not be said to have had no impact on the outcome of the case. The admission of that testimony was therefore unduly prejudicial to the Applicant.

In similar cases the courts make the distinction that the expert witness, or lay witness, has not opined that they believed the victim, or vouched for the victim. *See State v. Baker*, 390 S.C. 56 (Ct.App. 2010); *State v. Douglas*, 380 S.C. 499 (2009).

There is prejudice as the qualification as an expert clothes the witness with an air of authority that does not attach to "ordinary" witnesses. *State v. Baker, Justice Pleconies Dissenting*.

The court of appeals has indicated that there may be limitations to expert testimony in abuse cases. The court has recognized that medical evidence may be sufficiently reliable scientific evidence such that it may be used to "support an inference that a child's injuries were not sustained by accidental means." *Id.* Such testimony is typically based on a physician's clinical diagnostic examination and the child's medical history. The medical witness is often called to describe the

results of the examination, offer an opinion as to the cause of any injuries, establish whether penetration occurred, and answer questions as to whether the injuries could have been inflicted in a particular way or whether the caretaker's explanation is reasonable. State v. J.Q., 617 A.2d 1196, 1201 (N.J. 1993) (*citing Myers, supra* at 48-49). State v. Morgan, 326 S.C. 503 (Ct.App. 1997). Although for differing reasons, some courts limit the form of this type of testimony and prefer "consistent with" or "not inconsistent with" language rather than an outright conclusion of sexual abuse. *E.g.*, Whitted, 11 F.3d at 785; *cf.* State v. Moran, 728 P.2d 248 (Ariz. 1986); People v. Bowker, 249 Cal.Rptr. 886 (Cal.Ct.App. 1988); State v. Cressey, 628 A.2d 696, 699-700 (N.H. 1993). State v. Mogan, at [fn6].

In this case the State's expert simply opined that she believed the abuse occurred. This exceeds the testimony allowed in abuse cases as it constitutes improper vouching and bolstering of the witness. *See also* the Myers article on various aspects of expert testimony in abuse cases:

Expert testimony concerning child abuse typically comes from two sources: medical evidence provided by physicians and behavioral science evidence provided by psychiatrists, psychologists, and social workers. John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 19-25 (1989).[fn1] Where a physician's diagnostic impression is based on the medical as

well as the behavioral aspects of child abuse, the resulting opinion is scrutinized from both perspectives. Myers, supra at 24-25, 51. State v. Morgan, 326 S.C. 503 (Ct.App. 1997) (Also states that the admissibility of expert child abuse testimony is subject to attack on several fronts.)

Accordingly, this Applicant moves this Court to enter a ruling on the issues presented in the Applicant's Application for Post Conviction Relief and those tried at the hearing in this case. That the Applicant be granted relief pursuant to Strickland based on a finding that trial counsel failed to render reasonably effective assistance under prevailing professional norms and, that the Applicant was prejudiced by that failure.

CONCLUSION

Based on the foregoing, the Applicant moves to have his convictions and sentences reversed, and a new trial granted.

Respectfully submitted,


J. Balkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
Counsel for Applicant

January 20, 2011.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Farid A. Mangal, #320609,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-0080

RETURN TO APPLICANT'S
MOTION TO ALTER OR AMEND
ORDER DENYING PCR

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRCPP, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR). The Respondent (the State) would submit the following:

I.

Respondent acknowledges the scrivener's error in the Order of Dismissal and concurs with Applicant that the SCDC number should be listed as #320609.

II.

The Respondent submits that the Order of Dismissal of the Honorable J. Derham Cole, dated January 6, 2012, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003) and Rule 52(a) SCRCPP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). As to the Applicant's claims that there were six issues adequately raised at the hearing, but not ruled upon in the Order of Dismissal, Respondent would note that Applicant is addressing issues that were raised predominantly in written argument form provided

by Counsel at the hearing¹ and not by testimonial evidence or in an amendment to the application:

1. Counsel failed to object to and preserve the issue of the State's improper cross-examination of Dr. Medlock.
 - a. *Respondent submits that the Order of Dismissal does find that the Applicant failed to meet his burden of proof that Counsel was ineffective for properly preserve for appellate review his objection to the State's cross-examination of Dr. Medlock as it relates specifically to the DUI arrests when he failed to object to the court's curative instruction. Respondent submits that although asked if he objected to all questions by the Solicitor, Applicant focused on the issue of failure to preserve the objection to the DUI conviction.*
2. Appellate Counsel failed to properly include the entire record to allow the appellate court to make a determination as to prejudice of the improper use of the Applicant's prior DUI convictions.
 - a. *Respondent submits that the Order of Dismissal does address this issue and finds that the Applicant failed to meet his burden of proof in showing that had Appellate Counsel included additional matter in the record on appeal, that the Court of Appeals would have ruled in Applicant's favor.*
3. Counsel failed to object to the use of racially inflammatory questions by the Solicitor in the guise of character evidence.

¹ Counsel for the Applicant provided the Court and Respondent a bound document that was entered as a Court's Exhibit at the beginning of the hearing and included additional allegations, arguments, case law and supporting documentation.

- a. *Respondent submits that although Counsel for Applicant included the argument for this issue in his written document presented at the hearing, the testimony at the hearing focused on Counsel's failure to preserve for review the Solicitor's question regarding Applicant's prior DUI conviction. However, Respondent does acknowledge that Counsel testified that he did not object to the State's questioning of Dr. Medlock regarding Applicant's previous use of the "n*****" word and that was not based on any strategic decision.*
4. Appellate Counsel failed to brief the issue of the Solicitor's use of racially inflammatory question by the Solicitor in the guise of character evidence in light of Toyota v. Lynch.
 - a. *Respondent submits that there was no testimony presented at the hearing in support of this argument (other than Counsel's written argument) and as such, it is not necessary to address in the Order of Dismissal. Furthermore, an issue must be raised to the lower court and ruled upon before it can be addressed on appellate review, so since this issue was not raised at trial, there would be no preserved issue for Appellate Counsel to raise.*
5. Counsel failed to impeach the victim with testimony from the family court trial
 - a. *Respondent submits that the Order of Dismissal fully addresses Counsel's cross-examination of the victim as it relates to her testimony from the previous family court transcript. This Court found that other than questions addressing inconsistent answers regarding a wrecked car,*

Applicant failed to offer any questions that Counsel should have asked the victim or showed that any other method of cross-examination would have been more effective.

6. Counsel failed to object to the testimony of Dr. Henderson that, in her opinion the victim had been sexually abused.

a. *Respondent submits that the Order of Dismissal addresses Dr. Henderson's testimony in the fact that the Applicant argued at the hearing that he wanted Counsel to obtain an expert to contradict Dr. Henderson. Counsel testified that he was aware that Dr. Henderson would probably say the victim had been abused and thought that he had Dr. Medlock and the victim's OB/GYN records into evidence to contradict that evidence. This Court ruled that the Applicant failed to meet his burden of proof as to the need for any other expert witness and any prejudice suffered as a result from the lack of any witness.*

III.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be granted as to the scrivener's error in the case caption, but denied as to all other issues.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT

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(803) 734-3737

February 10, 2012.

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Farid A. Mangal, #320609,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT.

2010-CP-42-0080

ORDER

This matter comes before the Court by way of Applicant's Motion to Alter or Amend. The Respondent made its Return to this response on February 10, 2012.

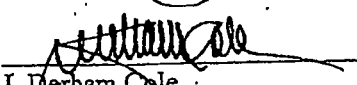
The Order of Dismissal in this matter was signed by me on January 6, 2012. This Court finds that the Order of Dismissal should be amended to correct the scrivener's error in the caption to read that the Applicant's SCDC number is #320609.

Based upon careful reconsideration of all the evidence presented in this case and upon full consideration of Applicant's Motion and Respondent's response, this Court is not persuaded to alter or amend the judgment. Although Applicant alleges that the issues in the Motion were raised at the hearing, but not properly ruled upon by this Court, this Court finds that the issues were not presented to the Court in the application or in an amendment and no testimonial evidence from the Applicant was presented in support of these allegations. This Court further finds that oral argument would not aid in the reconsideration of the original judgment.

IT IS THEREFORE ORDERED:

1. That the Order of Dismissal for 2010-CP-42-0080 be amended to reflect the correct SCDC number of Farid Mangal, #320609.

AND IT IS SO ORDERED this 6 day of July, 2012.


J. Derham Cole
Presiding Judge
Seventh Judicial Circuit

_____, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Hon. J. Derham Cole, Circuit Court Judge
2012-212701

Farid A. Mangal,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF PETITIONER

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QUESTIONS FOR REVIEW

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VI. WAS PCR COUNSEL INEFFECTIVE FOR NOT SUFFICIENTLY RAISING THE BOLSTERING ISSUE?

STATEMENT OF THE CASE

On June 15, 2004 the Appellant was arrested and charged with criminal sexual conduct (1st degree), two counts of criminal sexual conduct (2nd degree), lewd act and incest. Defendant, who never obtained a bond, was convicted of all charges on March 14, 2007.

The alleged victim was Appellant's teenaged daughter, VICTIM, with whom he had a strained relationship because of his strict parenting. She testified that he began committing lewd acts on her when she was 10 years old and raped her multiple times. Though VICTIM testified that her father took her virginity, later examination by a physician established that her hymen was intact.

Wiley Garrett, a forensic interviewer for the Children's Advocacy Center, who was qualified as an expert, testified without objection that when he interviewed the victim he found her account to be a "clear, consistent, and compelling disclosure of sexual abuse." He testified that VICTIM told him that the sexual abuse became once a week when she turned 15. His report stated that VICTIM told him that her father had sex with her three or four times a week after she was 10 years old.

Dr. Nancy Henderson testified for the State that the victim retained her hymen, although there was a thin spot which she could not definitely say resulted from sexual intercourse. Nevertheless she classified it that way based on what the victim told her. Without objection she testified that the information she received from the victim was invaluable, and she made plain she considered that the victim was telling her the truth.

Mr. Mangal denied sexually abusing his daughter. The family doctor testified that VICTIM's hymen was intact during an examination in 2003 and that she denied sexual activity. Dr. Medlock testified that the hymen was a delicate membrane which is easily torn by sexual intercourse and that an intact hymen would indicate that there had not been sexual activity. He concluded that VICTIM was a virgin.

The jury found Mr. Mangal guilty of all charges, and he was sentenced to 30 years imprisonment. Mr. Mangal appealed, alleging that the trial court erred by not granting his motion for a mistrial. By order filed 2 days after the case was submitted to them, the Court of Appeals found that the issues were not preserved for review because trial counsel failed to make an objection to the sufficiency of the curative charge or move for a mistrial. They also found that they had not been provided with a sufficient record to rule on all the issues.

Mr. Mangal timely filed a PCR application asserting that he was entitled to relief because his trial and appellate counsel were deficient. His Application was denied. In a timely Motion to Alter or Amend, Applicant argued that the Court had failed to rule on an issue of improper bolstering. The Court found that no testimonial evidence was presented on this issue and so declined to rule on it.

This appeal was timely commenced thereafter, and John R. Ferguson was substituted as appellate counsel.

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ARGUMENT

PETITIONER'S CONVICTION WAS THE RESULT OF HIS ATTORNEY'S FAILURE TO PROTECT HIM FROM THE STATE'S IMPROPER BOLSTERING OF ITS WITNESSES. (Issues I and II)

At the heart of due process is the promise that a Defendant shall have a fair trial. A key part of that is that determination of the credibility of the witnesses is the sole province of the jury, and an important guarantee of this right is a prohibition against the State's bolstering its witnesses by having other witnesses vouch for their credibility. *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); Rule 608(a), SCRE. In this case defense counsel did not object to multiple incidents of bolstering and therefore could not seek curative instructions or move for a mistrial.

Unobjected to bolstering was pervasive in this case. The first bolstering witness was Wiley Garrett, a forensic interviewer who was wrongfully qualified as an expert without objection (A. 122/18- 123/2). See *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). He testified without objection that "her [the victim's] disclosure was [a] clear, consistent and compelling disclosure of sexual abuse." (A. 131/19-21.) This is indistinguishable from the language found to be reversible error in *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91, 94 (2011) ("[T]he children "provide[d] a compelling disclosure of abuse by [appellant].") and *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139, 141 (Ct. App. 2012). ("[In] both interviews that I conducted with her, I found them to be compelling for sexual abuse.")

The State in this case had a serious problem because the alleged teenage victim of multiple rapes (A. 46/20- 47/7; 136/3-10) had an intact hymen and was a virgin (A. 235/9-17; 235/23- 236/5; 254/23-255/2). To get past this, they put Dr. Nancy Henderson on the stand, who testified to an abnormality of the hymen, but "I cannot say for certain it was caused by the incident." (A. 164/21-22) She said that the ambiguity was resolved in favor of rape "based on the history she [the victim] shared, and she denied any other kind of trauma to that area" (A. 165/23-24). Even though she testified, "I can't say that the actual result I saw was caused by the

penis” (A. 165/19), she concluded “I based it [her conclusion] on the information received by my patient.” (A. 166/15)

As the Court of Appeals said in *State v. McKerley*, 725 S.E.2d at 142,

[The expert] never testified directly that she believed what the victim stated in her interviews or in her testimony...however, there is no way to interpret [her] testimony other than as her opinion that the victim was telling the truth. Citing Justice Pleicones’ opinion in *State v. Jennings*, 716 S.E.2d at 94.

The next instance of improper bolstering was a question by the Solicitor to the victim’s mother about whether she believed her daughter. There was no objection, and she said she did (A. 321A/8-10). In response to the question of why she believed her daughter she replied, “She had no reason, she had no reason to lie about something like that.” (A. 321A/14-15). There was again no objection, even though this was exactly the kind of testimony found to be improper in *South Carolina Department of Social Services v. Lisa C.*, 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2007). See also A. 113/13-15 where the victim’s brother testified that he was only going on what his sister said concerning sex abuse, a further incident of bolstering.

For reasons which are not clear, defense counsel called the victim’s mother, who had divorced Petitioner and was obviously hostile to him, as a witness. He tried unsuccessfully to get her to say that she did not believe her daughter’s accusations, but the result was “I do believe my daughter.” (A. 321C/14). Because this came after the prosecutor had gotten the witness to say she believed her daughter, the answer (and the inadvisability of the question) was not a surprise. Thus defense counsel participated in the bolstering damage to his client.

This pervasive bolstering was clearly prejudicial, because the credibility of the Complainant was a major issue in the case. “Because the children’s credibility was the ultimate determination for the jury to make in deciding appellant’s guilt, the trial court’s error in admitting the [improper bolstering] could not have been harmless.” *State v. Jennings*, 716 S.E.2d at 94. “Improper corroboration testimony that is merely cumulative to the victim’s testimony... cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.” *Id.*

The Complainant admitted she considered her foreign-born father to be very strict (A. 64/11. See also A. 290/10-11, 16-22). He would not let her date (A. 64/12-13) or go out at night (A. 336/24-25), and she hated that (A. 61/11-13; 63/2-10). Not long before her accusation, the Appellant had found a boy in his daughter's bedroom (A. 352/118; 354/15-20). After Petitioner's incarceration, his daughter was in and out of the home at night (A. 416/6-12) and was keeping late hours with boys (A. 409/16-19; 414/12-20; 439/5-14).

There was no question she wanted her father out of the way; and as soon she accomplished that, she started smoking and drinking (A. 66/5-8) and using drugs (A. 298/2-3). She admitted she "kind of went wild" after his arrest (A. 66/17-18. See also A. 296/9-17.) and developed a drinking problem (A. 66/9-14; 89/15-17). She admitted that she had been disciplined at school for giving oral sex to a fellow student (A. 23/25; 67/4-12; 293/3-4), and even the State's witness, Wiley Garrett, testified she was "parent defiant." (A. 144/13-15. See also A. 82/1-5, 20-23; 297/10-16 and 321B/12-17). In the absence of eyewitnesses or unambiguous physical evidence, the case boiled down to he says/she says, so the prosecutrix's credibility was the linchpin of the State's case.

It was therefore crucial that defense counsel impress upon the jury the victim's shaky credibility and not allow that credibility to be bolstered by experts and anyone else. By not objecting to this evidence and by actually encouraging it, defense counsel destroyed the reasonable doubt created by his own expert, who said that the condition of the victim's hymen showed absolutely that no rape had occurred (A. 235/14-17; 235/23- 236/5). The prosecution's expert admitted that the "victim's" hymen was in place even after the charge was made, although she noted one small narrowing of it (A. 164/2-15), which she declined to label as consistent with penetration (A. 163/15- 164/11).

It was the duty of defense counsel to object to the bolstering and to keep the jury's evidence from being polluted by it. He had a duty to seek a curative charge and to move for a mistrial because of the extreme prejudice inflicted on his case, but he did none of these things

and his client suffered accordingly.

TRIAL COUNSEL'S PERFORMANCE TAKEN AS A WHOLE WAS DEFICIENT AND PREJUDICIAL TO PETITIONER. (Issue III)

The argument in the preceding section is incorporated here by reference. The somnolence of defense counsel was not limited to sleeping through bolstering. The prosecution led its witness into a reparative response on an important point without objection. (A. 162/19-20) Defense counsel also gave his case a grievous wound by calling to the stand the prosecutrix's mother, the woman who divorced his client and clearly wanted him convicted. At the end of the trial, defense counsel said, "I know of one mistake I made.... And there may have been others." (A. 557/3-4). This court found that he failed to object to the sufficiency of a curative charge or move for a mistrial, *State v. Mangal*, S.C. Ct. App. Op. No., 2009-UP-113 (2009).

The deficiencies in counsel's representation were material and create a reasonable probability of prejudice sufficient to undermine confidence in the outcome of the trial. See *Smith v. State*, 386 S.C. 562, 689 S.E.2d 562 (2010).

THE POST-CONVICTION RELIEF COURT ERRED IN FINDING THAT THE BOLSTERING ISSUE WAS NOT RAISED. (Issue IV)

In its order denying reconsideration the PCR court found that the bolstering issue was not raised (A. 648). However PCR counsel did interrogate trial counsel on this issue (A. 605/2-20) and was not obligated to ask the same question multiple ways to make a longer record. The essential question is not how extensive the testimony was, but whether there was any testimony at all on the subject. In his Motion to Alter or Amend counsel made a more detailed argument on this issue (A. 639-642), so it was clearly a matter which was argued to the Court below. That Court should therefore have ruled on it. There is a sufficient record and sufficient clarity in the law that this Court can rule on the issue without the necessity of remand.

Although PCR counsel raised the issue of bolstering as to only one witness, Petitioner

would be able to argue that the other instances of bolstering provide a damaging context whereby the impact of the bolstering by Dr. Henderson was intensified and perhaps also argue Dr. Henderson's part in the cumulative effect of the bolstering.

IF THIS COURT SHOULD FIND THAT PCR COUNSEL DID NOT SUFFICIENTLY RAISE THE BOLSTERING ISSUE, HIS PERFORMANCE WAS DEFICIENT AND THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT BUT FOR THAT DEFICIENCY. (Issue V)

The undersigned confesses to the Court that he is unaware of any precedent in this court for handling ineffective assistance of PCR counsel, whether during an appeal or otherwise. Yet "The boast of the law is that there can be no wrong without a remedy." *Messervy v. Messervy*, 82 S.C. 559, 64 SE 753, 753 (1909). See also *Page v. Winter*, 240 S.C. 516, 126 S.E.2d 570, 574 (1962), Justices Bussey and Lewis dissenting. The right to habeas corpus is too important to be partial, U.S. Constitution Art. I, Section 9 and S.C. Constitution Art. V, Section 5; and the overarching concern of the judicial system is to do justice, not protect convictions.

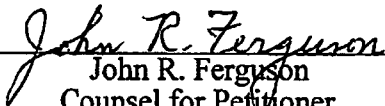
If there is in fact precedent against judging the effectiveness of PCR counsel on appeal, the undersigned gives notice that he will move the Court to allow him to argue against precedent. If there is no law on the subject, the undersigned will invite the Court to chart these uncharted waters. It serves the ends of justice, due process and judicial economy to decide this issue on appeal where appellate counsel is different from PCR hearing counsel and there is no indication of collusion. The record before the Court should be sufficient to rule on the issue, and the procedure could be similar to that in *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), the case which deals with post-conviction relief for failure of trial counsel to appeal.

The crux of the matter is that Petitioner's strongest argument for ineffective assistance of counsel was the pervasive bolstering by the State of the prosecutrix. Counsel raised that argument in so cursory a fashion that the hearing judge missed it and ruled that it had not been raised at all. Precedent says that if the judge had ruled on the issue, he would have been compelled to grant Mr. Mangal a new trial. Surely this Court will not leave Mr. Mangal in prison to serve a 30 year

sentence because his PCR counsel blundered if it agrees with the Court below that the bolstering issue was not raised.

CONCLUSION

There is strong evidence that the Petitioner in this case is actually innocent but was convicted by the State's wrongful bolstering of the "victim's" credibility. Precedent in this state is clear beyond argument that the pervasive bolstering in this case was a material violation of due process and of evidentiary rules, and in this case it was grossly prejudicial. It was only because of the ineffective assistance of trial counsel that the bolstering was allowed to be so rampant as to destroy Mr. Mangal's right to a fair trial. If the Court finds that the bolstering issue was not sufficiently raised to the PCR court, this would constitute a compounding of the damage to Mr. Mangal's rights by his PCR counsel which this Court under its oath is not at liberty to ignore. The Petitioner is entitled to a new trial and to the costs of this appeal, including his attorney fee.


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January 21, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2012-212701

Farid A. Mangal, ...Petitioner,

v.

State of South Carolina, ...Respondent.

**BRIEF OF
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QUESTIONS PRESENTED

Are the allegations that Counsel was ineffective for failing to object to the alleged bolstering of Wiley Garrett, Diane Farid, or Dr. Nancy Henderson properly before this court when the allegations were not raised to or ruled upon by the lower court and Petitioner failed to offer any testimony or argument at the hearing in support of the issues and if this Court finds the issue as to Dr. Henderson preserved, did the lower court properly find that Petitioner failed to meet his burden of proof?

Has the allegation that Counsel was ineffective for failing to move for a mistrial been voluntarily been abandoned by Petitioner and alternatively, is the allegation not properly before this court when the allegation was not raised to or ruled upon by the lower court and Petitioner failed to offer any testimony or argument at the hearing in support of the issue?

Is the issue of cumulative error, in the form of overall deficient performance and prejudice by Counsel not proper for appellate review when the issue was not raised to nor ruled on by the PCR Court and further, has not been recognized as an accepted doctrine in South Carolina's jurisprudence?

Is the issue of ineffective assistance of PCR Counsel inappropriate for appellate review, as it is not a cognizable claim in state collateral review actions?

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Petitioner at the August 2004 term of General Sessions for criminal sexual conduct with a minor -1st degree (04-GS-42-3400). Petitioner was also indicted at the August 2006 term for incest (06-GS-42-2830) and criminal sexual conduct with a minor -1st degree (06-GS-42-2831) and the October 2006 term for lewd act or attempt to commit a lewd act upon a child under 16 (06-GS-42-4217). He was subsequently indicted at the January 2007 term for criminal sexual conduct with a minor -2nd degree (06-GS-42-4869)¹. Lawrence W. Crane, Esquire, represented the Petitioner.

Following lengthy testimony from the victim, Petitioner's daughter, as well as her brother and several other State witnesses, on March 16, 2007, a jury convicted the Petitioner of these charges. The Honorable J. Mark Hayes II sentenced the Petitioner to confinement for thirty (30) years for criminal sexual conduct with a minor -1st degree, twenty (20) years on each charge of criminal sexual conduct with a minor -2nd degree, fifteen (15) years for lewd act on a minor, and one (1) year for incest, all sentences running concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Mangal, Unpublished Op. No. 2009-UP-113 (S.C. Ct. App. filed March 4, 2009). A Petition for Rehearing was filed on behalf of Petitioner and denied by

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

written Order on May 4, 2009. A Petition for Writ of Certiorari was filed on the Petitioner's behalf and subsequently denied by the South Carolina Supreme Court on December 17, 2009. The Remittitur was issued on December 22, 2009.

The Petitioner subsequently filed a PCR application on January 6, 2010. The Respondent made its Return on or about May 13, 2010. An evidentiary hearing into the matter was convened on April 7, 2011, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Following the hearing and testimony from both trial counsel and Petitioner, the Honorable J. Derham Cole denied the PCR application by written Order dated January 6, 2012. A Motion to Alter or Amend was timely filed by Petitioner and denied by Judge Cole on July 6, 2012.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari and Return to the Petition for Writ of Certiorari were submitted. This Court granted certiorari and the Petitioner filed a Brief of Petitioner. This Brief of Respondent follows.

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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **The allegations that Counsel was ineffective for failing to object to the alleged bolstering of Wiley Garrett, Diane Farid, or Dr. Nancy Henderson are not properly before this court when the allegations were not raised to or ruled upon by the lower court and Petitioner failed to offer any testimony or argument at the hearing in support of the issues; however, even if this Court finds the issue as to Dr. Henderson preserved, Petitioner failed to meet his burden of proof.**

Petitioner argues that Counsel was ineffective for failing to object to the bolstering of witnesses by the State and for failing to make a motion for mistrial based upon the alleged bolstering. Respondent addresses each individual witness separately below.

Wiley Garrett

Petitioner raises issues of alleged bolstering by witness Wiley Garrett and the wrongful qualification of Garrett as an expert; however, these issues were never presented to the lower court during the PCR proceedings. During the PCR hearing Petitioner never raised any allegations of ineffectiveness against Counsel as related to Garrett’s testimony or qualifications. In fact, Garrett’s name is not mentioned in the transcript of the PCR hearing once.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 719 S.E.2d 640 (S.C. 2011). It is axiomatic that an issue cannot be raised for the first time on appeal. Id. “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, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The lower court never had the opportunity to hear the issue litigated and subsequently make a ruling.

As to any allegations that Counsel was ineffective for failing to object to Garrett’s testimony or qualification as an expert, Respondent submits that the issues were not presented to the lower court for a ruling and are therefore not properly before this Court for appellate review.

Dr. Nancy Henderson

As the issue relates directly to Dr. Nancy Henderson’s testimony, Respondent submits that the Petitioner failed to meet his burden of proof of establishing that Counsel’s performance was deficient, or that the deficiency led to requisite prejudice in light of the other testimony and facts presented at trial.

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)). However, in this matter, Dr. Henderson never testified to any specific details or facts regarding the incidents, but only that based upon

her physical examination and discussion with the victim, she felt that the damage to the victim's hymen was "consistent with a, that she had been abused." (App. p. 252).

At the time of the trial in March 2007, the Supreme Court had distinguished between what was proper and improper regarding testimony in sexual assault cases.

Ordinarily, when a witness has not been impeached, evidence of prior consistent statements is inadmissible. To this rule is an exception in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible as corroboration of the incident; however, the evidence must be limited to the time and place of the assault, and may not include particulars or details.

State v. Barrett, 299 S.C. 485, 486, 386 S.E.2d 242, 243 (1989).

In Barrett, this Court reversed the conviction because the social worker "testified extensively to details of the sexual abuse reported by Victim." Id. at 487, 386 S.E.2d at 243. The Court of Appeals later distinguished Barrett from the Jolly case, and held that, because the social worker in Jolly did not provide extensive details of the incident, the testimony did not impermissibly bolster the victim's testimony. State v. Jolly, 304 S.C. 34402 S.E.2d 895 (1991). This case did not involve any testimony on behalf of Dr. Henderson regarding details of the alleged assaults or whether or not she believed the victim's allegations, but solely medical testimony regarding the victim's hymen and whether or not the medical findings were consistent with abuse. (App. p. 252).

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured 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. There was no evidence or testimony provided that would support Petitioner's argument that but for Dr. Henderson's testimony, the outcome of his trial would have been different. Petitioner failed to meet his burden of proof of establishing the requisite deficient performance and prejudice.

Diane Farid - Victim's Mother

Petitioner raises issues of alleged bolstering by the victim's mother, Diane Farid; however, again these issues were never presented to the lower court during the PCR proceedings. At a minimum, issue preservation requires that an issue be raised to and

ruled upon by the trial judge. Herron v. Century BMW, 719 S.E.2d 640 (S.C. 2011). It is axiomatic that an issue cannot be raised for the first time on appeal. Id. “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, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The lower court never had the opportunity to hear the issue litigated and subsequently make a ruling.

As to any allegations that Counsel was ineffective for failing to object to Ms. Farid’s testimony, Respondent submits that the issues were not presented to the lower court for a ruling and are therefore not properly before this Court for appellate review.

II. The allegation that Counsel was ineffective for failing to move for a mistrial has voluntarily been abandoned by Petitioner and further is not properly before this court when the allegation was not raised to or ruled upon by the lower court and Petitioner failed to offer any testimony or argument at the hearing in support of the issue.

As to Petitioner’s argument that Counsel was ineffective for failing to move for a mistrial regarding this alleged bolstering, Respondent submits that Petitioner has abandoned the issue on appeal. “An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.” State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (citing State v. Howard 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct.App.2009); see also State v. Jones, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

In the Brief of Petitioner, Petitioner fails to provide any authority to support his position, but simply makes the conclusory statement that Counsel “had a duty to seek a curative charge and to move for a mistrial because of the extreme prejudice inflicted on

his case, but [Counsel] did none of these things and his client suffered accordingly.” (BOP. p. 8-9).

Even if this Court were to find that the issue had not been abandoned on appeal, Respondent submits that issue is not preserved for appeal. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 719 S.E.2d 640 (S.C. 2011). It is axiomatic that an issue cannot be raised for the first time on appeal. Id. “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, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The lower court never had the opportunity to hear the issue litigated and subsequently make a ruling.

Although there was discussion during the PCR hearing regarding Counsel’s motion for mistrial, the discussion was solely in context of the alleged inappropriate question by the State regarding the Petitioner’s prior DUI arrest. (App. p. 239; p. 584-586).

If this Court finds it appropriate to address the merits of the allegation, the Petitioner clearly failed to meet his burden of proof. The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes” stated into the record by the trial judge. State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). Granting of motion for mistrial is an extreme measure that should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). Mistrial should not be granted unless absolutely necessary; to receive mistrial,

defendant must show error and resulting prejudice. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

Respondent submits that even if Counsel had made a motion for mistrial because of the alleged bolstering testimony, the trial court would have denied the motion and that denial would have been affirmed on appeal. Petitioner failed to offer any testimony or evidence that a motion would have been granted or that the failure to make such a motion affected the outcome of his trial.

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

III. The issue of cumulative error, in the form of overall deficient performance and prejudice by Counsel was not raised to nor ruled on by the PCR Court and therefore is not proper for appellate review and further, has not been recognized as an accepted doctrine in South Carolina's jurisprudence.

Petitioner raises the allegation that Counsel's performance should be taken as a whole as deficient and prejudicial to Petitioner. Unfortunately, not only was this issue not raised before the lower court, but it is not the standard for examining Counsel's performance during trial.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 719 S.E.2d 640 (S.C. 2011). It is axiomatic that an issue cannot be raised for the first time on appeal. Id. "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, L.L.C. v. Town of Mt.

Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The lower court never had the opportunity to hear the issue litigated and subsequently make a ruling.

In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the reviewing appellate declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis").

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998) (emphasis added); Wainwright v.

Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

The issue of granting post-conviction relief based upon the cumulative prejudicial effect of two or more instances of deficient performance, is one that South Carolina has not accepted. Therefore, Respondent submits that this should be denied.

IV. The PCR Court properly held that the issue regarding the alleged bolstering was not properly raised or presented to the Court.

Petitioner filed a Motion to Alter or Amend, pursuant to Rule 59(e), SCRPC, following the ruling of the lower court denying his post-conviction relief application. (App. p. 632-42). The Motion argued that the Order failed to rule upon the fact that Counsel failed to object to the testimony of Dr. Henderson regarding the “consistent” injury. (App. p. 639-42). “A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Elam v. S. Carolina Dep’t of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

The extent of Petitioner’s discussion regarding potentially bolstering testimony from Dr. Henderson was when Counsel was asked if there was any reason that, “assuming for a moment that [the answer] might be outside the scope of what [Henderson] would be able to testify to or improper bolstering,” Counsel did not object to her answer and Counsel answered, “No, there would not.” (App. p. 593, lines 14-19). Petitioner then asked Counsel on re-direct if the statement of Dr. Henderson, “did not strike a cord as improper bolstering to you at the time of trial,” to which Counsel testified that “[i]t did not.” (App. p. 605, lines 18-20).

The lower court made findings of fact and ruled upon the fact that Counsel testified that he was aware of the testimony that Dr. Henderson would most likely provide, i.e. that the physical exam would be consistent with abuse, and that he felt prepared to counteract that testimony with the testimony of Dr. Medlock. (App. p. 628). Additionally, the Order addressed the testimony of the Petitioner, who indicated that he wanted another expert to testify on his behalf to counter Dr. Henderson's testimony, but failed to bring that to his attorney's attention at the time of trial and failed to bring an expert to the PCR hearing to meet his burden of proving prejudice. (App. p. 628). The lower court denied the Petitioner's Motion to Alter or Amend and found that the issues raised at the hearing had been fully ruled upon. (App. p. 648). "Arguments of counsel are left largely to the discretion of the trial judge, who is in a much better position to judge their appropriateness." Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Therefore, Respondent argues that the lower court properly held that the issues raised to the court had been ruled upon in the Order and the decision should be affirmed. However, Respondent also notes that the issue may be considered properly preserved and before this Court on appeal because of Petitioner's post-trial Motion.

V. The issue of ineffective assistance of PCR Counsel is inappropriate for appellate review, as it is not a cognizable claim in state collateral review actions.

Petitioner's contention that he received ineffective assistance of counsel on this post-conviction relief application is not a ground for relief. In fact, Petitioner acknowledges that he is unaware of any precedent in this Court or any law supporting a claim of ineffective assistance of post-conviction relief counsel. (BOP, p. 10).

There is no constitutional right to appointed counsel for collateral review of a conviction, including state post-conviction relief proceedings. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Therefore, the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Clearly, the Austin exception does not apply in the case at hand, as the appeal was properly and timely filed.

Further, if Petitioner contends that under the United States Supreme Court's recent decision in Martinez v. Ryan, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), one may file a state PCR action alleging ineffective assistance of previous PCR counsel, Respondent points this Court to the recent South Carolina Supreme Court ruling in Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013,) which specifically held that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.

Therefore, this issue is one that is not proper for post-conviction relief or appeal and should be denied.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's ruling.

Respectfully submitted,

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April 24, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2012-212701

Farid A. Mangal,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

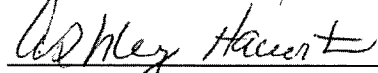
The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

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

This 24th day of April, 2015.


SUZANNE H. WHITE
ATTORNEY FOR RESPONDENT

SWORN to before me, this 24th day of April, 2015.


Notary Public for South Carolina.
My Commission Expires: 3-18-2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Hon. J. Derham Cole, Circuit Court Judge
2012-212701

Farid A. Mangal,

Petitioner,

v.

State of South Carolina,

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT

On p. 14 of its Brief of Respondent, the State concedes that the issue of bolstering was raised to the court below. (Citing A. 593/14-19 and 605/18-20.) The State's solution to this hole in its defense is to argue that this raising of the issue does not count because by their standards it was not extensive enough. The Petitioner's entitlement to justice cannot be defeated by so flimsy an artifice, and the finding of the court below that the issue was not raised at all is unsupported by the record.

Even a cursory examination of the record shows a total denial of the Petitioner's constitutional right to a fair trial because his counsel failed to object to pervasive and extremely damaging bolstering which manifestly affected the result of the trial. PCR counsel did in fact raise this issue during his cross-examination of trial counsel (who even at the PCR hearing was oblivious to it), and he later raised it again in a Motion to Alter or Amend (A. 632). Whether he could have raised it more forcefully is beside the point, because the State's burden is to show that it was not raised at all and it has not carried this burden.

As is shown by pp. 6-7 of the Brief of Petitioner, Dr. Henderson did in fact bolster the testimony of VICTIM, the Complainant. An appellate court is tasked with determining whether such error is significant, and it typically does this by a harmless error analysis. In other words, it considers the error in its factual context: "Whether an error is harmless depends on the circumstances of the particular case. ...[T]he materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Here the factual context is a mass of other bolstering testimony which magnified the impact of the Henderson bolstering.

Dr. Henderson's testimony was the key to the State's getting past the problem of its rape victim being a virgin, and she said she based her conclusions on what the complainant told her (A. 165/23-24, 166/15). Because the victim's credibility was essential to the State's case, this cannot be harmless error. See *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91, 94 (2011). The Henderson testimony, either alone or in context, is not harmless; and it strongly supports the granting of relief. To rule otherwise would be inconsistent with substantial justice.

In *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994), the Court in its harmless error analysis examined whether improper corroboration testimony was harmless because it was cumulative to the victim's testimony and found "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Just as the improper forensic interviewer testimony enhanced the victim testimony there, the cumulative effect of the unobjected to testimony of the State's witnesses in this case enhanced the devastating impact of the Henderson testimony. See also *State v. Brown*, S.C. Ct. App. Op. No. 5288, filed January 7, 2015 for another application of cumulative impact analysis.

Aside from the fact that there is S.C. precedent for cumulative error analysis, there are no South Carolina cases cited by the State in which an appellate court held that a cumulative error analysis is not allowed. As the State concedes on p. 13 of its brief, in *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002) and *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006), the court specifically refrained from declaring a cumulative error analysis to be improper. Because the application of such an analysis would be extremely fact-intensive and would carry a heavy burden for the one asserting it, the State's claim that the sky would fall if this court adopts an overt cumulative error analysis is not rooted in reality.

The State wrongly claims that the undersigned cited no case for the proposition

that trial counsel was ineffective for failing to move for a curative charge or a mistrial. The State apparently failed to read the entire Brief of Petitioner. On p. 9 of that document we find the following: "This court found that he [trial counsel] failed to object to the sufficiency of a curative charge or move for a mistrial, State v. Mangal, S.C. Ct. App. Op. No. 2009-UP-113 (2009)." This holding in Mr. Mangal's direct appeal is sufficient and needs no further supporting citations; but, to gratify the State, see State v. Clute, 324 S.C. 584, 593, 480 S.E.2d 85 (1996).

It is true that the undersigned candidly conceded that there is no precedent concerning ineffective assistance of PCR counsel, but this does not establish the State's position that therefore this court cannot allow it. No precedent simply means the court has not decided the matter. The State, citing federal precedent, says that there is no right to PCR counsel; but counsel is regularly appointed for PCR applicants in this state, which suggests that the right to counsel is recognized. South Carolina is not a state which gives lawyers money when it does not absolutely have to. Further, once counsel has been appointed, the necessity of the appointment becomes moot, and counsel is obligated to act with professional competence. If an applicant does not receive competent representation and is injured, he should not be denied all remedy.

CONCLUSION

The record shows that the Petitioner was likely not guilty of the charges against him and that the State used unconstitutional tactics to win a conviction and a 30 year sentence. This is not a wrong which can be papered over with appeals to procedural technicalities. No nation benefits from rank injustice and the oppression of its citizens, and there will be no benefit to the State of South Carolina if Mr. Mangal's manifestly erroneous and unconstitutional convictions are not voided. For all of the reasons argued in Petitioner's briefs his convictions must be overturned, and he must be granted a new trial with reimbursement for his costs and attorney fees necessitated by the State's

improper conduct.

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May 1, 2015

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Farid A. Mangal, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212701

ON WRIT OF CERTIORARI

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

Opinion No. 5372
Heard November 3, 2015 – Filed December 30, 2015

REVERSED AND REMANDED

John R. Ferguson, of Cox Ferguson & Wham, LLC, of
Laurens, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant
Deputy Attorney General Suzanne Hollifield White, and
Assistant Attorney General Alicia A. Olive, all of
Columbia, for Respondent.

MCDONALD, J.: In 2007, Farid A. Mangal was convicted of first-degree criminal sexual conduct (CSC) with a minor, two counts of second-degree CSC, lewd act upon a minor, and incest. He appeals from the denial and dismissal of his application for post-conviction relief (PCR), arguing (1) trial counsel was ineffective for failing to object to bolstering, (2) trial counsel was ineffective for failing to move for a mistrial in response to bolstering, (3) trial counsel was ineffective for failing to object to the qualification of a forensic interviewer as an expert, (4) trial counsel's performance as a whole was deficient and prejudicial, (5) the PCR court erred in finding the bolstering issue was not raised, and (6) PCR counsel was ineffective for not sufficiently raising the bolstering issue. We reverse and remand.

FACTS

Victim, who was nineteen years old at the time of the 2007 trial, testified that her father (Petitioner) sexually abused her from the time she was ten years old until she was sixteen. The first instance of alleged abuse occurred when Petitioner took her into a bedroom, forced her to remove her pants, and rubbed his penis around her anal area. Victim stated there was "some sort of penetration" on this occasion, but not full penetration. Victim testified that after such abuse began, it occurred nearly every day when she came home from school. According to Victim, she was fourteen or fifteen the first time full penetration occurred, and Petitioner took her virginity. Victim stated Petitioner used condoms occasionally and once pointed out a freckle on the shaft of his penis. According to Victim, the abuse became more painful and aggressive as she aged. Victim stated she initially disclosed the abuse to her brother (Brother) after she refused Petitioner's advances one night, and Petitioner took out his anger on Brother the next day.

On cross-examination, trial counsel questioned Victim extensively concerning inconsistencies in her story and her dislike for Petitioner's strict parenting methods.¹ Victim acknowledged that once Petitioner was out of the house, she began drinking, smoking, and had to seek counseling. Victim was presented with testimony from a 2005 family court hearing where she stated she began cutting herself because she was unhappy about her accusations against Petitioner. In this

¹ Victim testified that Petitioner did not let her date or have friends, and would not allow her to talk on the phone, have pets, or celebrate Christmas. Additionally, family members testified that Petitioner was physically abusive.

prior family court testimony, Victim stated she did not want to get Petitioner in trouble, she just wanted him away from her.

Brother testified there were numerous occasions over the years when Petitioner took Victim into a locked room for twenty or thirty minutes, and Victim would leave the room visibly upset and crying and would go to the bathroom.

Pediatrician Dr. Nancy Henderson testified as an expert "in the examination, diagnosis, and treatment of child sexual abuse." Dr. Henderson testified she examined Victim in July 2004 and discovered a "marked narrowing" on a portion of Victim's hymen, which she believed was "a sign of some type of penetration." During her testimony, the following exchange occurred:

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

[Dr. Henderson:] Based on the history that she shared with me and based on my examination I felt that it was consistent . . . that she had been abused.

[The State:] All right. Also opinion as to whether she was sexually abused, that opinion is?

[Dr. Henderson:] That she had been, yes, sir.

Dr. Henderson further testified that there could be "full penetration without any kind of trauma to the hymenal tissue" due to the effects of estrogen on the tissue during puberty. When asked whether this case involved "narrowing [of the hymen] consistent with penetration," Dr. Henderson stated, "Yes, sir."

When asked whether she could tell the jury that her findings were the "result of penetration by a penis," Dr. Henderson responded, "I can't say that the actual result that I saw was caused by the penis, but based on the history that she shared, and she denies any other kind of trauma to that area . . . my conclusion is . . . as I stated." When asked whether she based her decision on possibly untrue

information she received from Victim, Dr. Henderson stated, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." When asked whether she assumed Victim's information was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes." Dr. Henderson acknowledged that she learned there were allegations that Petitioner engaged in vaginal and anal intercourse with Victim and that the abuse began at age ten. Finally, Dr. Henderson stated that it varied between females as to whether a hymen or remnants of a hymen remained after childbirth or prolonged sexual intercourse, and that she had seen many sexually active teenagers with normal examination results.

The State also presented testimony from forensic interviewer Wiley Garrett, who was qualified as an expert in forensic interviewing without objection. Garrett testified that Victim's disclosure was "clear, consistent, and compelling."

Trial counsel's theory of the case was that Victim and Victim's mother (Mother) fabricated the abuse allegations because Victim wanted freedom from Petitioner's strict parenting and Mother wanted to continue having an extra-marital affair. Petitioner testified in his defense, denied the allegations against him, and stated that Victim and Mother "had a plan . . . going on."

Mother admitted that when Petitioner was arrested, she gave police a statement indicating Victim had disclosed the abuse to her but Victim stated she had not allowed penetration or oral sex. Mother also made a drawing of Petitioner's penis and indicated there was a dark marking like a mole or a freckle on the head of his penis but not on the shaft. During cross-examination, Mother stated that she believed Victim's allegations.

Petitioner's family doctor testified about a January 2002 record created by a former doctor in his practice that stated Victim's hymen was intact. The family doctor explained that based on his nearly fifty years of practice, he expected the hymen of a sexually active person to not remain intact. Dr. Medlock also stated that another record indicated that on September 29, 2003, Victim had a rectal examination that was within normal limits.

Finally, a detention center employee who inspected Petitioner's penis testified that he did not recall seeing a freckle or a mole on Petitioner's penis.

STANDARD OF REVIEW

"In a PCR proceeding, the burden is on the applicant to prove the allegations in his application." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal." *Lee v. State*, 396 S.C. 314, 320, 721 S.E.2d 442, 446 (Ct. App. 2011). Thus, an appellate court "gives great deference to the PCR court's findings of fact and conclusions of law." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). "If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses." *Lee*, 396 S.C. at 319, 721 S.E.2d at 445.

LAW/ANALYSIS

"In order to receive relief for ineffective assistance of counsel, a defendant must make two showings." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "First, he must show that his trial counsel's performance was deficient, meaning that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable." *Id.*

I. Preservation of Bolstering Issue²

Petitioner argues the PCR court erred in finding the bolstering issue was not raised because PCR counsel questioned trial counsel on the subject, and PCR counsel raised the issue again in his Rule 59(e), SCRCP, motion. We agree.

At the PCR hearing, trial counsel admitted that he did not object when Dr. Henderson was asked whether her findings were consistent with a penetrating injury and she responded that she believed Victim was abused. On cross-examination, trial counsel stated he expected Dr. Henderson to opine that Victim was abused because her testimony was "canned testimony." Trial counsel explained that he had been in cases with Dr. Henderson before, and he probably

² We have chosen to analyze Petitioner's Issue 5 first and then address Issues 1 and 2 together.

should have objected when she gave an opinion on the ultimate issue. On redirect, trial counsel was asked if the comment struck "a cord as improper bolstering" during trial, and trial counsel stated it did not. During PCR counsel's summation, he stated that Dr. Henderson's opinion that abuse occurred should have received an objection because it was improper vouching. PCR counsel also cited case law supporting his position.

The PCR court's order did not address the issue concerning Dr. Henderson's testimony; thus, Petitioner filed a Rule 59(e) motion requesting a specific ruling on the bolstering issue. The PCR court then issued an order stating it would not alter or amend its judgment and "[a]lthough [Petitioner] alleges that the issues in the [m]otion were raised at the hearing[,] . . . this [c]ourt finds that the issues were not presented . . . in the application or in an amendment and no testimonial evidence from [Petitioner] was presented in support of these allegations."

The Uniform Post-Conviction Procedure Act provides that "[a]ll grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application." S.C. Code Ann. § 17-27-90 (2014). However, in *Simpson v. Moore*, the supreme court considered an issue that was not raised specifically in a petitioner's application. 367 S.C. 587, 599–600, 627 S.E.2d 701, 707–08 (2006). The supreme court noted that during the PCR hearing, both the petitioner's trial counsel and a witness for the State testified about the issue. *Id.* at 599, 627 S.E.2d at 707–08. The supreme court held that petitioner "should have been permitted to amend his PCR application to conform to the evidence presented." *Id.* at 599, 627 S.E.2d at 708.

Similarly, we hold the issue here concerning Dr. Henderson's testimony is preserved for our consideration. Not only was trial counsel questioned and cross-examined about the issue during the PCR hearing, PCR counsel specifically mentioned it again during his concluding remarks. When the PCR court's order failed to address the issue, PCR counsel took appropriate action to preserve it by requesting a ruling in a Rule 59(e) motion. *See Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (holding when a PCR court fails to rule on an issue, the petitioner must file a Rule 59(e), SCRCP, motion requesting a ruling on the issue to preserve it for review).

Accordingly, we hold the bolstering issue—as it related to Dr. Henderson's testimony—is preserved for review. However, we find any bolstering issues

related to other witnesses are unpreserved because they were not raised in Petitioner's PCR application, the PCR hearing, or in the Rule 59(e) motion. *See id.* at 338, 548 S.E.2d at 866 (holding arguments not raised to and ruled upon by the PCR court are not preserved for review).

II. Bolstering

Because the bolstering issue as it relates to Dr. Henderson's testimony was preserved, we must next determine whether trial counsel was ineffective for failing to object or move for a mistrial in response to Dr. Henderson's comments.

"The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011) (citing *State v. Dawkins*, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989); *State v. Dempsey*, 340 S.C. 565, 568–71, 532 S.E.2d 306, 308–09 (Ct. App. 2000)).

At the PCR hearing, trial counsel admitted he did not object when Dr. Henderson was asked whether her findings were consistent with a penetrating injury and she responded that she believed Victim was abused. Trial counsel testified there was no reason he did not object to Dr. Henderson's answer, and he stated that it may have had a significant impact on the jury. On cross-examination, trial counsel reiterated that the case centered on credibility, and he did not remember any physical evidence against Petitioner.

At trial, Dr. Henderson was qualified as an expert "in the examination, diagnosis, and treatment of child sexual abuse." Thus, it was proper for her to opine that based on her examination, Victim's injuries were consistent with sexual abuse. *See* Rule 702, SCRE ("If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *cf. State v. Douglas*, 380 S.C. 499, 504, 671 S.E.2d 606, 609 (2009) (finding no prejudice from a forensic interviewer's allegedly improper testimony when there was also evidence that a pediatric nurse practitioner examined the victim and determined she had vaginal tearing and scarring consistent with past penetration). However, she stated her opinion was based not only on her examination, but also "on the history that [Victim] shared with [her]." Directly after this comment, Dr. Henderson opined that Victim had been sexually abused. On cross-examination, Dr. Henderson elaborated on these

statements and testified that "based on the history that [Victim] shared, and she denies any other kind of trauma to that area . . . my conclusion is . . . as I stated."

When asked whether she based her decision on possibly untrue information from Victim, Dr. Henderson stated, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." When asked whether she assumed Victim's information was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes."

We believe there is no other way to interpret these comments other than to mean that Dr. Henderson believed Victim was truthful. *See State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (finding a child abuse assessment expert's recommendation that the defendant should not be around the victim for any reason was improper because it could only be interpreted as the expert's believing the victim's sexual abuse claims); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding an expert's reports were erroneously admitted when there 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"); *Dempsey*, 340 S.C. at 568–72, 532 S.E.2d at 308–10 (finding a child sex abuse expert's testimony improperly vouched for a victim's credibility when the expert concluded victim was reliable and the expert testified that a very high rate of children who made sex abuse allegations were truthful); *Dawkins*, 297 S.C. at 393–94, 377 S.E.2d at 302 (holding a psychologist's testimony indicating he believed a victim's allegations were genuine was improper). Accordingly, Dr. Henderson's testimony was improper bolstering, and trial counsel was deficient for failing to object to it or otherwise bring it to the trial court's attention.

Additionally, we find Petitioner is able to demonstrate prejudice. *See Strickland*, 466 U.S. at 694 (defining prejudice as a reasonable probability that but for trial counsel's errors, the result of the proceeding would have been different). As trial counsel admitted, the case lacked physical evidence and hinged on credibility. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94–95 (holding the erroneous admission of reports that contained vouching language was not harmless when the children's credibility was the most critical determination in the case) (citing *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) ("An . . . improper opinion which goes to the heart of the case is not harmless."))). During the trial itself, trial counsel repeatedly sought to attack Victim's credibility through cross-examination, and his

theory of the case was that the abuse allegations were fabricated by Victim and Mother. Given a lack of physical evidence, we believe Dr. Henderson's testimony was critical because she explained how Victim—who claimed full penetration occurred on multiple occasions—had a narrowed but otherwise intact hymen. As a result, Dr. Henderson's improper testimony insinuating that she found Victim credible was particularly prejudicial.

Accordingly, we reverse the PCR court's finding that trial counsel was not ineffective for failing to object or move for a mistrial in response to bolstering testimony given by Dr. Henderson.

In light of our decision regarding the bolstering issue, we decline to address Petitioner's remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when the disposition of prior issues is dispositive).

CONCLUSION

We reverse the PCR court's dismissal of Petitioner's PCR application and remand to the trial court for a new trial.

REVERSED AND REMANDED.

SHORT and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Trial Court Judge
The Honorable J. Derham Cole, Post-Conviction Relief Judge

Appellate Case No. 2012-212701

Farid A. Mangal, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR REHEARING

I.

On December 30, 2015, this Court reversed the post-conviction relief (PCR) judge's denial of Petitioner's application for post-conviction relief. Mangal v. State, Op. No. 5372 (S.C. Ct. App. filed Dec. 30, 2015). This Court misapprehended or overlooked relevant facts of this case and the applicable law. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing and affirm the PCR judge's denial of relief.

II.

At trial, the State's expert witness, Dr. Nancy Henderson, testified as follows:

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

A: Based on the history that she shared with me and based on my examination I felt that it was consistent with a, that she had been abused.

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

A: That she had been, yes, sir.

(App.p.161).

At the PCR hearing, Petitioner questioned Larry Crane ("Counsel") about Dr.

Henderson's testimony:

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

A: Yes.

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

A: Right.

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

A: It did not.

Q: Having – was there any reason not – or assuming for a moment that that might be outside the scope of what she would be able to testify to or improper bolstering, would there have been any reason not to raise an objection to that testimony?

A: No, there would not.

(App.p.593).

Q: So in your experience – and would you have objected to something you thought was improper?

A: If I thought it was improper I would have objected, yes.

(App.p.602).

The PCR judge denied Petitioner's PCR application, finding Petitioner failed to meet his burden of proving Counsel was ineffective. The PCR judge also ruled, in denying Petitioner's Motion to Alter or Amend, that the issue of whether Counsel was ineffective for failing to object to bolstering was not preserved.

II.

The extent of Petitioner's discussion regarding potentially bolstering testimony from Dr. Henderson was when Counsel was asked if there was any reason that, "assuming for a moment that [the answer] might be outside the scope of what [Henderson] would be able to testify to or improper bolstering," Counsel did not object to her answer and Counsel answered, "No, there would not." (App. p. 593). Petitioner then asked Counsel on re-direct if the statement of Dr. Henderson, "did not strike a cord as improper bolstering to you at the time of trial," to which Counsel testified that "[i]t did not." (App. p. 605).

The PCR judge made findings of fact and ruled upon Counsel's testimony that he was aware of the testimony that Dr. Henderson would most likely provide (i.e., that the physical exam would be consistent with sexual abuse), and that he felt prepared to counteract that testimony with the testimony of Dr. Medlock. (App. p. 628). Respondent

submits that the PCR judge properly held that the issue was not preserved.

III.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). The Strickland standard makes it clear that one can only prevail on a claim of ineffective assistance of counsel if one can meet his burden of proving both deficiency of counsel and resulting prejudice.

A.

The Court misapprehended facts and law when it considered the testimony of Dr. Henderson that was elicited on cross examination because any argument that counsel was ineffective for either eliciting such testimony or failing to object to such testimony was not preserved. Therefore, this Court should not have reached the question of whether those particular statements were bolstering. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 329, 739 S.E.2d 282, 285 (2012) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). The Court's consideration of these facts misapprehends the applicable law on issue preservation. Though the court correctly states that an applicant

should be permitted to “amend his PCR application to conform to the evidence presented [at the PCR hearing],” issues that were not covered in either the application or at the hearing cannot be raised for the first time on appeal. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (“Amendments under South Carolina Rule of Civil Procedure 15(b) are allowed *not to assert new claims*, but rather to conform the pleadings to the evidence presented at trial.” (emphasis added)). See also Simpson v. Moore, 367 S.C. 587, 599-600, 627 S.E.2d 701, 707-08 (2006).

The only testimony that was discussed at the PCR hearing and in Petitioner's Motion pursuant to Rule 59(e), SCRCP, was the testimony of Dr. Henderson elicited on page 252 of the trial transcript—her testimony on direct. However, the Court's opinion clearly considers the testimony given by Dr. Henderson on cross examination. Respondent submits it this Court should not have considered such testimony in its determination of whether Counsel was ineffective for failing to object to alleged bolstering. Additionally, Respondent continues to maintain its position that the bolstering issue in general was not preserved for this Court's review. This Court's opinion makes numerous references to Dr. Henderson's testimony without delineating whether that testimony was elicited on direct or cross examination, which Respondent submits, distorts the issue on appeal. Respondent submits that this distinction is necessary to clarify the Court's ruling and that the Court should have confined its ruling solely to the testimony elicited on direct examination. Respondent further submits that the question of whether Henderson's statements on cross examination were bolstering was not before the Court, and that by their very nature—in that they were responses to questions on cross—

they could not have been bolstering as defined by any of the case law that this Court cited to in its opinion. See argument infra.

The Court stated the following in its opinion:

On cross-examination, Dr. Henderson elaborated on these statements and testified that "based on the history that Victim shared, and she denies any other kind of trauma to that area . . . my conclusion is . . . as I stated."

When asked whether she based her decision on possibly untrue information from Victim, Dr. Henderson stated, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient." When asked whether she assumed Victim's information was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes."

Directly thereafter, the Court made its ruling: "We believe there is no other way to interpret these comments other than to mean that Dr. Henderson believed Victim was truthful." (citations omitted). The Court's examination of Dr. Henderson's testimony given on cross examination changes the inquiry on appeal entirely into one that was simply not before this Court. Appellate courts give "great deference to the PCR court's findings of fact and conclusions of law," Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006), but in this instance, the PCR court had no opportunity to consider the question of whether Counsel was ineffective for eliciting the testimony that this Court has found to be bolstering because that issue was never raised. Therefore, the issue was not preserved for its review. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 719 S.E.2d 640 (2011). It is axiomatic that an issue cannot be raised for the first time on appeal. Id. Because it was not raised either at the PCR hearing or in Petitioner's post-trial motion, the Court should

not have considered Dr. Henderson's testimony that was elicited on cross-examination in its finding that counsel was ineffective.

"The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made. Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Strickland v. Washington, 466 U.S. at 689). "Accordingly, [appellate courts] must be wary of second-guessing trial counsel's tactics." Id. (citing; Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. at 689.

Therefore, "[w]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)).

The mere fact the testimony was otherwise inadmissible does not preclude the possibility trial counsel had a strategic reason to elicit the testimony. See Janosky v. St. Amand, 594 F.3d 39, 48 (1st Cir. 2010) (no ineffective assistance of counsel where a decision to elicit otherwise inadmissible hearsay testimony "was part of a calculated trial strategy aimed at poking holes in" the state's case); Figueroa v. Heath, No. 10-CV-0121 JFB, 2011 WL 1838781, at *16 (E.D.N.Y. May 13, 2011) (no ineffective assistance of counsel where "[t]he trial record demonstrates that counsel's decision [...] was part of a

strategy designed not only to show that the prosecution engaged in improper Rosario violations, but also to undermine the police's credibility by highlighting their failure to turn over relevant evidence to the defense.”); Krist v. Foltz, 804 F.2d 944, 947 (6th Cir. 1986) (no ineffective assistance of counsel for eliciting otherwise inadmissible evidence).

In this case, because the issue of whether counsel was deficient in eliciting the testimony found on pages 162-170 of the record was not explored at the PCR stage, Counsel did not even have an opportunity to given a strategic reason for asking such questions. It was therefore not within the authority of the court to make findings related to that testimony. In short, the Court incorrectly considered trial testimony elicited on cross-examination, and, at most, should have confined its analysis to the question of whether counsel was ineffective for failing to object to the testimony that appeared on page 252.¹

B.

This Court misapprehended the applicable law on bolstering in finding that Dr. Henderson gave bolstering testimony on direct examination. 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)). However, in this matter, Dr. Henderson never testified to any specific details or facts

¹ Respondent continues to maintain, however, that the bolstering issue was also not preserved with respect to that testimony on page 151 of the record (page 252 of the trial transcript).

regarding the incidents, but only that based upon her physical examination and discussion with the victim, she felt that the damage to the victim's hymen was "consistent with a, that she had been abused." The Cases that the Court relies do not support its position that Dr. Henderson's testimony was bolstering or that Petitioner showed he was prejudiced by Counsel's failure to object to alleged bolstering. This Court's decision begs the question that the law as it pertained to bolstering at the time of Petitioner's trial was unequivocal. This case did not involve any testimony on behalf of Dr. Henderson regarding details of the alleged assaults or whether or not she believed the victim's allegations, but solely medical testimony regarding the victim's hymen and whether or not the medical findings were consistent with abuse. As the cases the Court relies on show, the law at the time of Petitioner's trial did not support a finding that Dr. Henderson's testimony on direct was bolstering.

Additionally, most were decided years after Petitioner's trial. An attorney's performance must be viewed with regard to the law in existence at the time of the trial or guilty plea. The courts "have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial. State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). See also Strickland v. Washington, 466 U.S. at 690 ("[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.*") (emphasis added). Therefore, the Court should not have considered cases years subsequent to Petitioner's trial.

In Chavis, the Supreme Court found that a forensic interviewer's testimony that

she recommended “that Victim ‘not be around Appellant for any reason’. . . . “was improper bolstering of Victim’s credibility.” State v. Chavis, 412 S.C. 101, 108-09, 771 S.E.2d 336, 340 (2015). Specifically, the Court found that such testimony could “only be interpreted as [the witness] believing Victim’s claim that *Appellant* sexually abused her.” Id. at 109, 340 (emphasis added). The Court erred in relying on Chavis. First, it was decided approximately eight years after Petitioner’s trial. See State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“[the 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.”) Second, in Chavis, the forensic interviewer’s statement was strongly worded and specifically referred to the accused whereas the testimony in this case merely implies that the doctor relied on the victim’s medical history in reaching her conclusion. Chavis, 412 S.C. at 108-09, 771 S.E.2d at 340. The doctor in this case made no statement as to who the alleged abuser was. Third, the court in Chavis affirmed the appellant’s conviction, finding that the Court’s error in admitting the witness’s testimony was harmless. Id. at 109, 771 S.E.2d at 340.

Similarly, the Court’s reliance on State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) was likewise misplaced. First, as with Chavis, Jennings was decided well after Petitioner’s trial. Second, Jennings is plainly distinguishable from this case. The Court found that the trial court erred in admitting a forensic interviewer’s reports because the reports allowed the forensic interviewer to improperly vouch for the children’s credibility. Id. at 480, 716 S.E.2d at 94. The court described the offending information in the reports as follows: “In each report, the forensic interviewer stated that during the

interviews, each child had 'provide[d] a *compelling* disclosure of abuse by [appellant].'
 The forensic interviewer further concluded that each of the children *provided details consistent with* the background information received from their mother, the police report, and the other children." *Id.* (emphasis added). That was the language that the Court considered when it stated: "There is 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 State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct.App.2000))

In Jennings, the language that the court found to be bolstering or vouching was much stronger than the doctor's statement in this case that based on the victim's history she concluded that her findings were consistent with abused. This Court even stated in its opinion that "it was proper for [Dr. Henderson] to opine that based on her examination, Victim's injuries were consistent with sexual abuse." In response to the State's questions, Dr. Henderson gave no opinion as to whether she believed her patient. Accordingly, because Jennings was decided approximately four years after Petitioner's trial and because the offending language is very different from that in this case, the Court erred in relying on that case.

The Court also relies on Dempsey and Dawkins, both of which were decided before Petitioner's trial. In Dempsey, the Court upheld the trial court's ruling that a sexual child abuse counselor's testimony was vouching, but affirmed the trial court's denial of the petitioner's motion for a mistrial, finding the failure to grant a mistrial was harmless error, finding the curative instruction was sufficient. 340 S.C. 565, 532 S.E.2d 306 (Ct.

App. 2000). In Dempsey, the trial judge overruled all of trial counsel's objections during direct examination of the witness. Id. at 569, 532 S.E.2d at 308. The State specifically asked the witness how she determines that the child is telling the truth, and asked whether the child had responded in a way to make her believe he wasn't telling the truth, and the witness also stated: "when a child says that, ninety-five to ninety-nine percent of the time, that's the truth." Id. It was not until the witness stated the following that the trial judge, sua sponte, sustained counsel's objection: very, very rarely does a child say that they've been sexually abused when they haven't been...." Id. The expert in that case gave multiple explicit statements that she believed the child. See Id. Such language is far afield of the language Dr. Henderson used. Furthermore, in Dempsey, there was no physical evidence. Id.

Similarly, in Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) the witness, who was not an expert but only a therapist, gave an explicit statement that he thought the child's claim was genuine. The State asked: "Based on your examination and your observations of [the victim], are you of the impression that her symptoms are genuine?" to which the doctor answered, 'yes.'" State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989). Defense counsel objected and moved for a mistrial. Id. The trial judge sustained the objection, but gave a curative instruction and denied the motion for mistrial. Id. The supreme court affirmed, finding that though the "question was improper," it was "not of such magnitude to [a]ffect the outcome." Id. Not only was the witness in that case a lay witness, but he also specifically opined that it was his "impression that [the victim's] symptoms were genuine." Id. In this case, Dr. Henderson was qualified as an expert and

this Court even stated it was appropriate for her to give an opinion about whether Victim was abused. However, she gave no statement about the victim's credibility.

The Court cites to State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011). However, in that case, this Court actually upheld the trial judge's ruling that the testimony in question was not bolstering. Id. In Hill, this Court upheld the trial judge's ruling that a forensic interviewer's testimony, which was elicited on direct examination, was admissible where the State questioned the witness about what sort of indicia a child might exhibit in an interview that would indicate the child may have been coached. Id. The witness explained that typically he looks to the level and characteristics of details that the child gives in an interview. Id. The State asked him if those details were present and he testified "yes." Id. 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 . . . pursuant to Rule 403, SCRE." Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376. This Court disagreed. Id.

These cases either do not support the Court's decision or should not have been considered because they were years subsequent to Petitioner's trial.

C.

Petitioner failed to demonstrate he was prejudiced by Dr. Henderson's testimony that her "opinion as to whether [the victim] was sexually abused" was "that she had been." In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). Petitioner has failed to prove that had Counsel objected to Dr. Henderson's testimony, the trial judge would have sustained the objection. Furthermore, Counsel testified he did not feel that the testimony was objectionable. Counsel also testified he had been practicing criminal law for decades and that he had heard Dr. Henderson testify before and knew what her testimony would be.

As stated above, the law at the time of Petitioner's trial did not support a finding by the Court that Dr. Henderson's testimony on direct was bolstering. The Court's opinion also overlooks the fact that three witnesses, including Petitioner, testified at trial that he had installed a keyed lock onto his bedroom door. Counsel fully cross-examined all of the witnesses and called witnesses of his own, including the family doctor who refuted Dr. Henderson's testimony that abuse had occurred. Counsel also had the victim's OB-GYN records admitted at trial. Petitioner has therefore failed to satisfy his burden of proving that the outcome of the trial would have been different had Counsel objected to Dr. Henderson's testimony on direct examination.

The Court framed the issue as a question of "whether trial counsel was ineffective for failing to object *or move for a mistrial* in response to Dr. Henderson's comments." However, the issue of whether Counsel's performance was deficient for his failure to move for a mistrial was not preserved for review and was abandoned on appeal by

Petitioner's failure to argue it in his brief. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (citing State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct.App.2009)); see also State v. Jones, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority). In his Brief, Petitioner failed to provide any authority to support his position, but simply makes the conclusory statement that Counsel "had a duty to seek a curative charge and to move for a mistrial because of the extreme prejudice inflicted on his case, but [Counsel] did none of these things and his client suffered accordingly." (BOP. p. 8-9).

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 719 S.E.2d 640 (2011). "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. L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The PCR court never had the opportunity to hear the issue litigated and subsequently make a ruling. The only discussion during the PCR hearing regarding Counsel's motion for mistrial was solely in context of the alleged inappropriate question by the State regarding Petitioner's prior DUI arrest. Petitioner only raised the issue of whether Counsel was deficient for failing to object. Therefore, this Court should have confined its review only to the question of whether counsel was ineffective for failing to object, not for failing to move for a mistrial.

IV.

For the foregoing reasons, Respondent submits both prongs of the Strickland analysis were not satisfied and the opinion in this case was error. Respondent requests the panel grant the petition for rehearing, find the PCR judge properly denied Petitioner's PCR application, and affirm the order of dismissal.

Respectfully submitted,

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By:


Attorneys for Respondent

January 14th, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Trial Court Judge
The Honorable J. Derham Cole, Post-Conviction Relief Judge

Appellate Case No. 2012-212701

Farid A. Mangal, ...Petitioner,

v.

State of South Carolina, ...Respondent.

PROOF OF SERVICE

I, Alicia A. Olive, certify that I have today served the within Petition for Rehearing upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

John R. Ferguson, Esquire
Cox Ferguson & Wham, LLC
107 E. Laurens St.
Laurens, SC 29360

I further certify that all parties required by Rule to be served have been served.
This 11th day of January, 2016.



ALICIA A. OLIVE, S.C. Bar # 102089
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Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Hon. J. Derham Cole, Circuit Court Judge
2012-212701

Farid A. Mangal,

Petitioner,

v.

State of South Carolina,

Respondent.

RESPONSE TO PETITION FOR REHEARING

In its Petition for Rehearing the State simultaneously raises new arguments and complains about Mr. Mangal's allegedly advancing new arguments.

The Court below correctly found that the bolstering issue had been raised. Had it not done so, it would have been compelled to find that PCR counsel was ineffective.

For the first time, the State advances the argument that this Court cannot consider bolstering which occurred during Dr. Henderson's cross-examination. It did not make this argument before and cannot do so now.

The State also claims that the law on bolstering changed after the 2004 trial of this case. Not only did the State fail to argue this in its brief, it is not accurate. State

v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) makes quite plain that it is improper for an expert to bolster a witness's credibility. See also *State v. Supps*, 295 S.C. 484, 369 S.E.2d 145 (1988) and *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 503 (Ct. App. 1997).

This is no more than an affirmation that no one may invade the province of the jury, a proposition firmly established from the earliest days of our state. Under English law, the judge charged on the facts as well as the law. This was a system ripe for abuse, and the newly independent colonists hated it so much that they wrote into our state's constitution a provision banning it. S.C. Constitution Art. V, Section 21. There is nothing new about this principle of law.

Even if the State had been correct that the law had changed, this would avail it not:

[A] new constitutional rule of criminal procedure should not apply to cases that became final before the new rule is announced. However, this general prohibition against the retroactive application of new constitutional rules is subject to two exceptions. First, a new rule may be applied retroactively if the rule is substantive. Second, a new rule may be applied retroactively if it is a 'watershed rule' of criminal procedure. *Aiken v. Byars*, S.C. Sup. Ct. Op. No. 27465, filed November 11, 2014.

The Applicant would have been entitled to the application of the bolstering rule even if it had been a subsequent rule.

The State's attempt to elevate mere procedure over due process runs afoul of this Court's long-standing commitment to

justice. As this Court stated in *Boykin v. Boykin*, 296 S.C. 100, 101, 370 S.E.2d 884 (Ct. App. 1988),

In the last analysis, this Court is concerned with the substance of an appeal, not the technical differences in the issues raised by the exceptions; this [is] despite the general rule that this Court will not reverse the judgment of the circuit court, even if it is erroneous, on a ground not raised by a properly framed exception. [See also Code Section 17-27-90 re a ground not asserted "for a sufficient reason" or "inadequately raised".]

If the Court were to accept the State's belated invitation to divide Dr. Henderson's testimony into direct and cross with cross-examination being ignored, in fairness it would also have to accept the Petitioner's invitation for it to consider Dr. Henderson's testimony in the context of the pervasive bolstering which occurred during the State's case and which magnified the effect of the Henderson bolstering.

As to Mr. Mangal's allegedly having failed to show prejudice, in cases such as this where corroborative evidence is lacking and the "victim's" credibility is the key issue, our Supreme Court has had no hesitation in finding prejudice without further proof. See *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011).

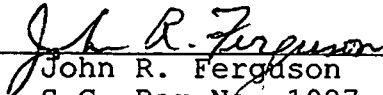
The State asserts that trial counsel's failure to move for a mistrial was not preserved for review and was abandoned on appeal by the failure of the undersigned to argue it. To the contrary, trial counsel's failure to move for a mistrial had already been found by this Court to be deficient, and that finding is the law of the case. See *State v. Mangal*, S.C. Ct.

App. Op. No. 2009-UP-113 (2009) and Petitioner's argument about this issue in his briefs, especially at pp. 4-5 of the Reply Brief of Petitioner.

CONCLUSION

This Court got it right the first time. The State has failed to show a need to rehear the case, so its Petition must be denied.

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January 20, 2016

The South Carolina Court of Appeals

Farid A. Mangal, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212701

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

John R. Ferguson J.

Stephen P. McDonald J.

Columbia, South Carolina

cc:

Suzanne Hollifield White, Esquire
John R. Ferguson, Esquire
Alan McCrory Wilson, Esquire
Alicia A. Olive, Esquire
The Honorable J. Derham Cole

FILED

February 22, 2016