STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

**VOLUME 2 OF 2**

RECEIVED
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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
The Honorable Alex Kinlaw, Jr, Circuit Court Judge
Appellate Case No: 2025-001072

STATE OF SOUTH CAROLINA, Petitioner,

v.

JERALD D. GASKINS, JR., Respondent.

# APPENDIX

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ATTORNEYS FOR PETITIONER

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CHARGE ON THE LAW

THE COURT: Thank you, Ms. Hodge.

Ladies and gentlemen, you've heard all the evidence you're going to hear in the case. And it's now my duty to instruct you on the law that applies to the facts of this case. It's your duty to find the facts from the evidence. To those facts, you must apply the law as I give it to you. And that means you must follow the law as I give it to you.

You should not be concerned with what the law should be, but with what it is. And you must not be concerned or influenced by any personal likes or dislikes, opinions, prejudices, or undue sympathy. And that means you must decide this case solely on the evidence before you and according to the law. And you will recall, you took an oath to do just that when we began this trial.

Now, in following my instructions, you must follow all of them and not single out some and ignore others, because they're all equally important. And you must not read into these instructions or into anything I may have said or done during this trial as any indication as to what I think the facts are or what I think your verdict should be. Because, as I told you at the outset, you are the sole and exclusive judge of the facts.

Now, you decide what the facts are by evaluating and

weighing the evidence you've heard during this trial. It is a mental process. And you weigh and evaluate the evidence simply by using your good common sense, and your sound judgment, and your sense of logic and reason. And you bring those things to bear on the evidence you've heard during this trial.

I told you at the beginning that evidence consists of two sources, sworn witness testimony and exhibits. So nothing else is evidence. What the lawyers say, while they're trying to help you understand the evidence and you should pay keen attention to what they say, their statements are not evidence because they're not witnesses. So if your memory differs from the lawyers memory of the evidence, then your memory controls.

The law, also, recognizes two different types of evidence. And what I'm talking about now is circumstantial and direct evidence. Direct evidence directly proves the existence of a fact. It is evidence that, if believed, immediately establishes a fact. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of another fact.

Crimes may be proven by circumstantial or direct evidence. The law makes no distinction between the weight or value to be given either direct or circumstantial evidence. However, to the extent the State relies upon

circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together point conclusively to the guilt of the accused beyond a reasonable doubt.

If these circumstances merely portray the Defendant's behavior as suspicious, the proof has failed. The State has the burden of proving the Defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination.

I told you, also, that you were, also, the judges of the credibility of the evidence. And I'm not going to repeat that, because I know you heard me the first time.

But I will tell you that in deciding credibility, you may believe everything a witness says, or you may believe nothing a witness says. You may believe parts of their testimony, and disbelieve other parts. You may believe one witness over several, or several over one. But you, certainly, don't decide this matter of credibility by counting up the witnesses for the different sides. Because your objective is to find the true facts from the evidence in this trial, and whether the State has met its burden of proof.

Now, I told you, also, that expert witnesses could give opinions. But I, also, told you that they, like all

other witnesses, must have their credibility judged by you. And so that means you may accept the testimony of an expert, reject it, or give it whatever weight you think it deserves.

Now, I've already told you about the presumption of innocence, but I will tell you again because it is so fundamentally important that any time a person is charged with a crime in this state, they are never required to prove themselves innocent, or prove themselves not guilty. It is a fundamental rule of the law that a defendant, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which the indictment was issued, unless and until guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

The presumption of innocence does not end when you begin your deliberations, but it accompanies the Defendant throughout the trial, unless and until you reach a verdict of guilt based on evidence satisfying you of guilt beyond a reasonable doubt.

Now, the presumption of innocence is not some technicality or mere theory. It is not just a legal phrase. It is a substantial right to which all of us are entitled. And it cannot be removed unless you, the jury, are satisfied from the evidence of guilt beyond a

reasonable doubt.

Now, the mere fact that the Defendant was charged and indicted is not evidence, as I told you before. Mr. Gaskins has pled not guilty to these charges. And that puts the burden of proof entirely on the State. And you may draw no inference or conclusion from the fact that he has been charged. And the indictments do not even raise a suspicion of guilt in and of themselves.

Now, I have talked about this phrase reasonable doubt. So what does that mean? A reasonable doubt is the kind of doubt that would cause a reasonable, sincere, honest, and conscientious person to hesitate to act during an important matter in their own affairs. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt.

Now, of course, there are few things we can know with absolute certainty. And the law does not require proof that overcomes every possible doubt. If, based on your view of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find him guilty. On the other hand, if you think there is a real possibility that the Defendant is not guilty, you must give him the benefit of that doubt and find him not guilty.

And, ladies and gentlemen, a reasonable doubt may

arise from the evidence or from a lack of evidence. And a defendant is entitled to every reasonable doubt that may arise in the case. And what that means is simply this. If as to any issue of fact that is necessary to a finding of guilt you have a reasonable doubt as to how that issue should be resolved, it's your duty to resolve that doubt in favor of Mr. Gaskins.

Now, there are six total indictments that will be listed on the verdict form. And, as I told you before, you must weigh and evaluate the evidence as to each charge separately. So that means as you go through the verdict form, you will consider the evidence as to each listed charge, weigh it, and determine whether the State has met its burden of proof as to each and every element of that charge. And you should not let your decision on one charge influence your decision on the other. They must be weighed and evaluated separately and individually.

Now, in order to convict Mr. Gaskins of the offense of criminal sexual conduct with a minor in the second degree, the State must first prove beyond a reasonable doubt that the Defendant engaged in a sexual battery with the victim. The State must then prove beyond a reasonable doubt that the victim was, at least, 11 years old, but not more than 14 years old at the time of the sexual battery.

A sexual battery is defined as sexual intercourse,

cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or any object -- or of any object into the genital or anal openings of another person's body, except when the intrusion is accomplished for medically recognized treatment for diagnostic purposes.

Consent, willingness, indifference, or ignorance on the part of the minor, if any, as to what was taking place does not in any way affect the charge of criminal sexual conduct with a minor. Because an unmarried woman under the age of 14 cannot legally consent to sexual intercourse.

Now, there are, also, two charges for committing a lewd act on a child. In order to convict the Defendant of this charge, the State must first prove beyond a reasonable doubt that the Defendant, that is Mr. Gaskins, was over the age of 14.

Next, the State must prove that the Defendant willfully and lewdly committed or attempted a lewd or lascivious act on or with the body or its parts of a child under the age of 16 years with the intent to arouse, appeal to, or gratify the lusts, passions, or sexual desires of the Defendant or the child.

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

means obscene, lustful, indecent, or lecherous. Lascivious means tending to incite lust, lewd, indecent, obscene, or tending to deprave the morals and respect to sexual relations.

Now, that covers all the substantive law. And I will just give you a few instructions related to your deliberations.

And, Ms. Marks, I've got the verdict form right here. And it just goes through all six charges and asks whether you find the Defendant guilty or not guilty.

Don't attach any significance to the option I put first. It's simply I have to put one first. It doesn't mean anything, of course.

But, ladies and gentlemen, you were chosen to be jurors in this case, not to be partisans or advocates for either the State or Mr. Gaskins. You were chosen because both sides believe you could be fair and impartial, and you could decide this case without any preconceived ideas, or biases, or prejudices.

So you're judges, judges of the facts. And your sole interest is to determine the facts from the evidence and to do that fairly and impartially, and determine whether the State has met its burden of proof as to every element of each crime that has been alleged.

The record is now closed. There are not going to be

any more witnesses or exhibits. So if something was referred to during this trial that you don't have back in the jury room with you, I can't give it to you. Likewise, if -- as to the testimony, you'll have to rely on your memory of that testimony.

So the genius of our jury system is it allows 12 people from different backgrounds and life experiences to come together, consider the evidence, and share their perspectives and points or view and, ultimately, reach a verdict. So what you will do, of course, is go back in the jury room and calmly and thoroughly discuss the evidence. You will determine what the facts are. And you'll take the law that I just gave you and apply it to those facts. And you'll be able to reach a verdict.

And you can only sign that verdict form when the verdict is unanimous.

And that means that each of you has a vote. And your vote is exactly that, it's your vote and no one else's. So keep that in mind. And keep in mind, also, that you should not care if you have to change your mind if the discussion persuades you that you should, if you're of different minds. But don't give up an honestly and conscientiously held belief simply to get this case over with or to reach a unanimous verdict. Because this is, obviously, an important case for both the State and

Mr. Gaskins.

So thank you for your attention to me.

Just go on back to the jury room at this time, except for you two ladies.

And don't start talking about the case until you get the --

How many -- just one exhibit?

THE COURT REPORTER: Yes.

THE COURT: Until you get the exhibit. That will be your signal you can start deliberating.

(WHEREUPON, the jury was excused from open court at approximately 4:39 p.m.)

THE COURT: All right. Any objection or exception to the charge from the State?

MS. HODGE: None from the State.

THE COURT: From the Defense?

MR. CHAMBERS: No, Your Honor.

THE COURT: The law doesn't allow y'all to go in the jury room at this time as the alternates. But if you'd just stick around for about 10 or 15 minutes, just in case we have a problem.

And if you need anything for your work, Ms. Troop will provide that.

But we, certainly, appreciate your service. You gave us the peace of mind knowing that we could finish the case

if something happened to one of the other jurors, as often does.

So thank you very much.

If you'll just put them in a separate room.

THE BAILIFF: I will put them in one of the other rooms for a few minutes.

THE COURT: Okay. Don't forget about them now.

We'll be at ease until we hear something.

(WHEREUPON, the proceedings were recessed at approximately 4:40 p.m.)

QUESTIONS FROM THE JURY

THE COURT: Okay. We've got a note that says, "Written description of the charges/indictments 2013-GS-23-3233, 31-33, criminal sexual conduct with a minor and lewd act on a child."

I've shared this with both lawyers. And we'll make it part of the record. I think the approach is going to be to send back the jury charges on those two offenses. It may be they're asking for the actual indictments. But we'll find out once we send back the charge. And if they communicate further, we'll know that's what they really wanted.

But does that suit the State and the Defense?

MS. HODGE: Yes, sir.

MR. CHAMBERS: It suits me, Your Honor.

THE COURT: Okay. Do y'all want to come and look at these charges?

(Pause.)

MR. CHAMBERS: Are you good?

MS. HODGE: Uh-huh.

MR. CHAMBERS: They're fine, Your Honor.

THE COURT: All right. Thank y'all.

We'll just make that a Court's Exhibit.

We'll be at ease until we hear something else.

(WHEREUPON, Court's Exhibit Nos. 1 and 2 were marked for identification and admitted into evidence.)

(WHEREUPON, the proceedings were recessed at approximately 5:01 p.m.)

(WHEREUPON, Court's Exhibit No. 3 was marked for identification and admitted into evidence.)

THE COURT: The note we've now received says, "Dates of the indictments. Age of the Plaintiff during the charges." And there's some arrow pointing to charges. It says the word "each" beside it.

Anyway, is there any objection to sending the indictments back?

MR. CHAMBERS: No, not from me, Your Honor.

MS. HODGE: Not from the State, Your Honor.

THE COURT: Okay. We'll just send the six indictments back. And I'll let you know if we hear

**ROA 508**

anything further.

Thank you.

(WHEREUPON, the proceedings were recessed at approximately 5:11 p.m.)

THE COURT: We have everybody present.

The note they've sent out now says, "What is the Plaintiff's birthday?"

MR. CHAMBERS: Who's the "Plaintiff"?

THE COURT: I don't know. I just propose saying you'll have to rely on your memory of the testimony.

Is there any objection to that?

MS. HODGE: Not from the State.

MR. CHAMBERS: I don't object, Your Honor.

THE COURT: I can, also, ask them if they want to continue deliberating or come back in the morning.

MR. CHAMBERS: That would be good.

THE COURT: Do you want me to ask them that?

MR. CHAMBERS: Yes, sir.

(WHEREUPON, Court's Exhibit No. 4 was marked for identification and admitted into evidence.)

(WHEREUPON, the proceedings were recessed at approximately 6:12 p.m.)

THE COURT: The jury has a verdict.

Anything before we bring the jury in?

MS. HODGE: No, sir.

MR. CHAMBERS: Not from the Defense, Your Honor.

THE COURT: Okay. Well, I appreciate everybody's decorum during the trial. And if you don't think you're going to be able to continue to keep decorum or control your emotions when the verdict is read, the time to leave is right now.

Bring the jury in.

(WHEREUPON, the jury came into open court at approximately 6:17 p.m.)

THE COURT: Has the jury reached a unanimous verdict?

JUROR 112, ALICE MARKS: Yes, sir, we have.

THE COURT: If you'll hand it to the Bailiff, we'll receive it and publish it.

(Pause.)

THE COURT: Okay. If you'll fill in the date, ma'am.

JUROR #112, ALICE MARKS: Today is the 5th?

THE BAILIFF: 6th.

JUROR #112, ALICE MARKS: The 6th?

THE CLERK: No. It's the 5th.

THE COURT: No. It's the 5th.

JUROR #112, ALICE MARKS: I thought that was right.

THE COURT: Thank you.

VERDICT

THE CLERK: Your Honor, in the case 2013-GS-23-3231, 3232, 3233, 3234, 3235 and 3236, the State of South

**ROA 510**

Carolina v. Jerald Gaskins, Jr., number one, as to the indictment 2013-GS-23-3231, criminal sexual conduct with a minor in the second degree, we, the jury, unanimously find the Defendant, Jerald Denton Gaskins, Jr., guilty.

As to the indictment 2013-GS-23-3232, criminal sexual conduct with a minor in the second degree, we, the jury, unanimously find the Defendant, Jerald Denton Gaskins, Jr., guilty.

Number three, as to the indictment 2013-GS-23-3234, criminal sexual conduct with a minor in the second degree, we, the jury, unanimously find the Defendant, Jerald Denton Gaskins, Jr., guilty.

Number four, as to the indictment 2013-GS-23-3235, criminal sexual conduct with a minor in the second degree, we, the jury, unanimously find the Defendant, Jerald Denton Gaskins, Jr., guilty.

Number five, as to the indictment 2013-GS-23-3233, lewd act upon a child, we, the jury, unanimously find the Defendant, Jerald Denton Gaskins, Jr., guilty.

Number six, as to the indictment 2013-GS-23-3236, lewd act upon a child, we, the jury, unanimously find the Defendant, Jerald Denton Gaskins, Jr., guilty.

These are all signed by Ms. Marks, our Forelady.

Ladies and gentlemen, if you agree these are the verdicts you reached in your deliberation room, would you,

please, raise your right hand.

(WHEREUPON, all jurors raised their right hand.)

THE CLERK: I thank you.

THE COURT: All right. Any matters or motions before the jury is discharged from the Defense?

MS. HODGE: No, not from the State.

MOTIONS

MR. CHAMBERS: I just make a motion for a judgment notwithstanding the verdict, and a motion for a new trial, Your Honor.

THE COURT: Do you wish to have the jury polled?

MR. CHAMBERS: No, Your Honor.

THE COURT: All right. Ladies and gentlemen, thank you for your service this week.

There are no more cases on the docket. And we're thankful that you could guarantee the parties a right to a jury trial this week. We know it's a sacrifice for you to do so. But you're excused from your jury obligation this week.

If you wish to see the sentencing portion of this, you're welcome to do so. You can just come around. The bailiffs will take you around to the front.

Thank you.

(WHEREUPON, the jury was excused from open court at approximately 6:22 p.m.)

MS. HODGE: Are you ready, Your Honor?

THE COURT: Let's see if any of the jurors would like to come around.

MS. HODGE: Okay.

THE COURT: But I'll be glad to take the sheets.

MS. HODGE: Do you want me to sign these? Some judges say I should, some --

THE COURT: No. That's okay.

Thanks.

MS. HODGE: Yes.

(Pause.)

THE COURT: All right. Yes, ma'am, Ms. Hodge.

MS. HODGE: Do you want us to come around?

THE COURT: Yes.

MS. HODGE: Your Honor, as far as prior record goes, he has a 2000 disorderly conduct, a breech of peace; 2002, fraud check; 2004, a criminal domestic violence charge.

I think you heard during the course of the cross-examination that the Defendant does have some pending charges, criminal domestic violence high and aggravated, and two transporting child. I believe it's out of state charges that, obviously, are not any part of this case, but occurred after this case.

Your Honor, in regard to the facts in this case, as you heard the trial unfold, it's the State's position that

this man is a predator. He is somebody that is targeting, seeking out, and having some success with these young girls. There, obviously, was this victim. At the same time, there was #1 (Minor)

And in his cross-examination, we discussed, which he denied, but there is Redacted -- a girl named Redacted who's 12 years old, Redacted, I believe, was the last name, that law enforcement has received a complaint on that he was doing the same type of things, attempting to engage this child. There is, also, a prior instance with his cousin, who was about the same age.

So we believe that he is a threat, a danger to the community, a predator. That he's not changing his ways. That he's not accepted responsibility for these actions. And that he should get the maximum.

THE COURT: Thank you.

Mr. Chambers.

MR. CHAMBERS: First of all, Your Honor, just to make sure that the record is clean, I want to put my objection on the record to the Solicitor offering up, essentially, uncharged misconduct. You know, she's talking about activity that -- for which my client has not been convicted. But, certainly, I would ask the Court and feel comfortable that the Court is not going to take that into consideration.

Essentially --

THE COURT: I'm not going to take it into consideration.

MR. CHAMBERS: Essentially, he has no significant prior record, Your Honor. This case while, you know, certainly, the jury has found him guilty of having had sex with a 13-year-old girl -- and I'm not going to stand here and try to defend that if that was, in fact, what happened.

But it was clear that there was no force or coercion involved in the case, you know. She continued to go to his house willingly. And, you know, I think that that is a mitigating factor. It's, certainly, not a legal excuse and not offered as one.

I would just ask the Court to be as lenient as possible. He does have family members who are here with him to support him, believe in him.

I don't think Jerald has anything to say. Frankly, I think the only thing he would to say is to profess his innocence again, but. So I don't know what else I can add at this point.

THE COURT: Thank you, sir.

Mr. Gaskins, anything you'd like to say, sir?

DEFENDANT GASKINS: Your Honor, I don't know what to say. I was hoping for the best. It come to the worst. I

do find myself that I'm not a bad person. And I hope that the Court has mercy, takes mercy.

Your Honor, I don't have a bad past record. And I haven't really done anything wrong that I seen. I mean, the Court said different. And I guess I did if the Court say [sic] so, Your Honor. But I just respectfully ask the Court to just, please, cut me a little slack, please.

THE COURT: All right, sir.

I'm unclear. Some of these sentencing sheets are -- are both of them violent and serious?

MS. HODGE: That's -- no. Lewd act is only violent. It is not serious.

THE COURT: Now, one of them is marked most serious.

MS. HODGE: May I see that?

THE COURT: Yes.

(Pause.)

THE COURT: Thank you.

Did he spend any time in jail before?

MS. HODGE: I have two days, Your Honor.

MR. CHAMBERS: That sounds about right, Your Honor.

SENTENCING

THE COURT: Mr. Gaskins, the sentence of the Court is you be committed to the Department of Corrections for a period of 20 years on case number 3231.

On 3232, the sentence is 20 years concurrent.

3233, the sentence is 15 years concurrent.

3234, 20 years concurrent.

3235, 20 years concurrent.

3236, the sentence is five years consecutive, but this sentence is to be served first.

MS. HODGE: Thank you, Your Honor.

THE COURT: You have 10 days to appeal. Your appeal must be in writing.

**********END OF TRANSCRIPT OF RECORD**********

ROA 517

WITNESSES

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

ARREST WARRANT NUMBER
2012A2330203987

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*

*Date:*

DOCKET NO. 2013-GS-23- KBH 003231

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2013

THE STATE

vs.

JERALD DENTON GASKINS JR

Indictment for

0396

CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE (11-14)

VIOLATION § 16-3-655(B)(1)
[formerly § 16-3-655(2)]

ENTERED
ACCT.

ROA 519

APPX522

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | INDICTMENT FOR |
| | ) | CRIMINAL SEXUAL CONDUCT WITH A MINOR |
| COUNTY OF GREENVILLE | ) | SECOND DEGREE (11-14) |

At a Court of General Sessions, convened on APR 23 2013 the Grand Jurors of Greenville County present upon their oath:

That JERALD DENTON GASKINS JR did in Greenville County, between March 2012 and August 2012, commit a sexual battery on Victim who was fourteen years of age or less but who was at least eleven years of age. This is in violation of § 16-3-655(B)(1) [formerly § 16-3-655(2)] of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

W. Hodges
SOLICITOR

**ROA 520**

STATE OF SOUTH CAROLINA )
COUNTY OF Greenville )
STATE VS. )
Jerald Denton Gaskins Jr )
AKA: )
Race: WHITE Sex: M Age: 32 )
DOB: Redacted )
Address )
City,St )
DL#: )
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐ )

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2303231
A/W#: 2012A2330203987
Date of Offense: 3/1/2012
S.C. Code § : 16-03-0655(B)
CDR Code #: 0396

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive - Second deg.

in violation of § 16-03-0655(B) of the S.C. Code of Laws, bearing CDR Code # 0396
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

| Hodge, Kris | 8245 | | | |
|---|---|---|---|---|
| | SC Bar# | Defendant | Attorney for Defendant | SC Bar# |

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____ _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

**Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.**

**SPECIAL CONDITIONS:**

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
_____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

| | | |
|---|---|---|
| *Fine: | | $ |
| § 14-1-206 (Assessments 107.5 %) | | $ |
| § 14-1-211(A)(1) (Conv. Surcharge) | $100 | $ 100.00 |
| § 14-1-211(A)(2) (DUI Surcharge) | $100 | $ |
| § 56-5-2995 (DUI Assessment) | $12 | $ |
| § 56-1-286 (DUI Breath Test) | $25 | $ |
| Proviso 47.9 (Public Def/Prob) | $500 | $ |
| § 14-1-212 (Law Enforce. Funding) | $25 | $ 25.00 |
| § 14-1-213 (Drug Court Surcharge) | $150 | $ |
| § 50-21-114(BUI Breath Test Fee) | $50 | $ |
| § 56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| Proviso 90.5 (SCCJA Surcharge) | $5 | $ 5.00 |
| 3% to County (if paid in installments) | | $ 3.90 |
| TOTAL | | $ 133.90 |

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Paul B. Wickensimer
Court Reporter: Jenkins
SCCA/217 (03/2011)

Presiding Judge Garlington
Judge Code: 2138
Sentence Date: 2.5.15

ROA 521

WITNESSES

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

ARREST WARRANT NUMBER
2012A2330203986

ACTION OF GRAND JURY
TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- 003232
KBH

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2013

THE STATE

vs.

JERALD DENTON GASKINS JR

Indictment for

0396

CRIMINAL SEXUAL CONDUCT WITH A MINOR
SECOND DEGREE (11-14)

VIOLATION § 16-3-655(B)(1)
[formerly § 16-3-655(2)] (2)]

ENTERED
ACCT.

ROA 522

APPX525
121

7

STATE OF SOUTH CAROLINA )
)
COUNTY OF GREENVILLE )

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR
SECOND DEGREE (11-14)

At a Court of General Sessions, convened on APR 23 2013 the Grand Jurors of Greenville County present upon their oath:

That JERALD DENTON GASKINS JR did in Greenville County, between March 2012 and August 2012, commit a sexual battery on Victim who was fourteen years of age or less, but who was at least eleven years of age. This is in violation of § 16-3-655(B)(1) [formerly § 16-3-655(2)] of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

ROA 523

STATE OF SOUTH CAROLINA )
COUNTY OF Greenville )
STATE VS. )
Jerald Denton Gaskins Jr )
AKA: )
Race: WHITE Sex: M Age: 32
DOB: Redacted
Address
City,St
DL#:
*CDL Yes ☐ No ☒ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☒

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2303232
A/W#: 2012A2330203986
Date of Offense: 3/1/2012
S.C. Code § : 16-03-0655(B)
CDR Code #: 0396

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive - Second deg.
in violation of § 16-03-0655(B) of the S.C. Code of Laws, bearing CDR Code # 0396
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is. ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

| Hodge, Kris | 8245 SC Bar# | Defendant | Attorney for Defendant | SC Bar# |
|---|---|---|---|---|

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: #3251
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

**Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence ) to ship,transport,possess,or receive a firearm or ammunition.**

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☒ Ordered PTUP _____
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☒ Set by SCDPPPS _____
Recipient: _____

| *Fine: | | $ |
|---|---|---|
| § 14-1-206 (Assessments 107.5 %) | | $ |
| § 14-1-211(A)(1) (Conv. Surcharge) | $100 | $ 100.00 |
| § 14-1-211(A)(2) (DUI Surcharge) | $100 | $ |
| § 56-5-2995 (DUI Assessment) | $12 | $ |
| § 56-1-286 (DUI Breath Test) | $25 | $ |
| Proviso 47.9 (Public Def/Prob) | $500 | $ |
| § 14-1-212 (Law Enforce. Funding) | $25 | $ 25.00 |
| § 14-1-213 (Drug Court Surcharge) | $150 | $ |
| § 50-21-114(BUI Breath Test Fee) | $50 | $ |
| § 56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| Proviso 90.5 (SCCJA Surcharge) | $5 | $ 5.00 |
| 3% to County (if paid in installments) | | $ 3.90 |
| TOTAL | | $ 133.90 |

_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☒
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Paul A. Wickenmeyer
Court Reporter: Jenkins
Presiding Judge
Judge Code: 2138
Sentence Date: 2.5.13

SCCA/217 (03/2011)

**ROA 524**

WITNESSES

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

ARREST WARRANT NUMBER
2012A2330203985

ACTION OF GRAND JURY
TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- KBH 003233

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2013

THE STATE

vs.

JERALD DENTON GASKINS JR

Indictment for

2468

LEWD ACT UPON A CHILD

VIOLATION § 16-15-140

ENTERED
ACCT.

STATE OF SOUTH CAROLINA )
)
COUNTY OF GREENVILLE )

INDICTMENT FOR
LEWD ACT UPON A CHILD

At a Court of General Sessions, convened on APR 23 2013 the Grand Jurors of Greenville County present upon their oath:

That JERALD DENTON GASKINS JR did in Greenville County, between August 2011 and November 2011, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of Victim a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-15-140 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

ROA 526

STATE OF SOUTH CAROLINA )
COUNTY OF Greenville )
STATE VS. )
Jerald Denton Gaskins Jr )
AKA: )
Race: )
DOB: )
Address: )
City,State )
DL#: )
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2303233
A/W#: 2012A2330203985
Date of Offense: 8/1/2011
S.C. Code § : 16-15-140
CDR Code #: 2468

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

in violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2468
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

| Hodge, Kris | 8245 | Defendant | Attorney for Defendant | SC Bar# |
|---|---|---|---|---|

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: #3231
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

**Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence ) to ship,transport,possess,or receive a firearm or ammunition.**

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

| | | |
|---|---|---|
| *Fine: | | $ |
| § 14-1-206 (Assessments 107.5 %) | | $ |
| § 14-1-211(A)(1) (Conv. Surcharge) | $100 | $ |
| § 14-1-211(A)(2) (DUI Surcharge) | $100 | $ |
| § 56-5-2995 (DUI Assessment) | $12 | $ |
| § 56-1-286 (DUI Breath Test) | $25 | $ |
| Proviso 47.9 (Public Def/Prob) | $500 | $ |
| § 14-1-212 (Law Enforce. Funding) | $25 | $ |
| § 14-1-213 (Drug Court Surcharge) | $150 | $ |
| § 50-21-114(BUI Breath Test Fee) | $50 | $ |
| § 56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| Proviso 90.5 (SCCJA Surcharge) | $5 | $ |
| 3% to County (if paid in installments) | | $ |
| TOTAL | | $ |

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk Paul B Lackenmier
Court Reporter (AT) Jenkins
Presiding Judge
Judge Code: 2138
Sentence Date: 2.5.15

SCCA/217 (03/2011)

**ROA 527**

WITNESSES

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

ARREST WARRANT NUMBER
2012A2330203984

ACTION OF GRAND JURY
TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- 003234
KBH

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2013

THE STATE

vs.

JERALD DENTON GASKINS JR

Indictment for

0396

CRIMINAL SEXUAL CONDUCT WITH A MINOR
2ND DEGREE (11-14)

VIOLATION § 16-3-655(B)(1) [formerly § 16-3-655(2)]

ENTERED
ACCT.

ROA 528

APPX531
527

**WITNESSES**

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

**ARREST WARRANT NUMBER**
2012A2330203987

**ACTION OF GRAND JURY**

TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

**VERDICT**

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- KBH 003231

**The State of South Carolina**

**County of Greenville**

**COURT OF GENERAL SESSIONS**

**April** TERM 2013

**THE STATE**

**vs.**

**JERALD DENTON GASKINS JR**

**Indictment for**

0396

**CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE (11-14)**

VIOLATION § 16-3-655(B)(1)
[formerly § 16-3-655(2)]

ENTERED
ACCT.

ROA 529

APPX532

528

WITNESSES

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

ARREST WARRANT NUMBER
2012A2330203986

ACTION OF GRAND JURY
TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- 003232
KBH

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2013

THE STATE

vs.

JERALD DENTON GASKINS JR

Indictment for

0396

CRIMINAL SEXUAL CONDUCT WITH A MINOR
SECOND DEGREE (11-14)

VIOLATION § 16-3-655(B)(1)
[formerly § 16-3-655(2)] (2)]

ENTERED
ACCT

ROA 530

APPX533
529

WITNESSES

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

ARREST WARRANT NUMBER
2012A2330203985

ACTION OF GRAND JURY
TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- KBH 003233

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2013

THE STATE

vs.

JERALD DENTON GASKINS JR

Indictment for

2468

LEWD ACT UPON A CHILD

VIOLATION § 16-15-140

ENTERED
ACCT.

ROA 531

APPX534
530

STATE OF SOUTH CAROLINA )
) INDICTMENT FOR
COUNTY OF GREENVILLE ) LEWD ACT UPON A CHILD

At a Court of General Sessions, convened on APR 23 2013 the Grand Jurors of Greenville County present upon their oath:

That JERALD DENTON GASKINS JR did in Greenville County, between August 2011 and November 2011, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of Victim a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-15-140 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

ROA 532

STATE OF SOUTH CAROLINA )
COUNTY OF Greenville )
STATE VS. )
Jerald Denton Gaskins Jr )
AKA: )
Race: WHITE Sex: M Age: 32 )
DOB: Redacted )
Address: )
City,Stat )
DL#: )
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐ )

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2303233
A/W#: 2012A2330203985
Date of Offense: 8/1/2011
S.C. Code § : 16-15-140
CDR Code #: 2468

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)
in violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2468
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

| Hodge, Kris | 8245 | Defendant | Attorney for Defendant | SC Bar# |
|---|---|---|---|---|
| | SC Bar# | | | |

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: #3231
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

**Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence ) to ship,transport,possess,or receive a firearm or ammunition.**

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☒ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

| | | |
|---|---|---|
| *Fine: | | $ |
| § 14-1-206 (Assessments 107.5 %) | | $ |
| § 14-1-211(A)(1) (Conv. Surcharge) | $100 | $ |
| §14-1-211(A)(2) (DUI Surcharge) | $100 | $ |
| § 56-5-2995 (DUI Assessment) | $12 | $ |
| § 56-1-286 (DUI Breath Test) | $25 | $ |
| Proviso 47 9 (Public Def/Prob) | $500 | $ |
| § 14-1-212 (Law Enforce. Funding) | $25 | $ |
| § 14-1-213 (Drug Court Surcharge) | $150 | $ |
| § 50-21-114(BUI Breath Test Fee) | $50 | $ |
| § 56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| Proviso 90.5 (SCCJA Surcharge) | $5 | $ |
| 3% to County (if paid in installments) | | $ |
| TOTAL | | $ |

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Paul B. Lickenman
Court Reporter (AT) Jenkins
Presiding Judge
Judge Code: 2138
Sentence Date: 2.5.15

SCCA/217 (03/2011)

**ROA 533**

**WITNESSES**

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

**ARREST WARRANT NUMBER**
2012A2330203984

**ACTION OF GRAND JURY**

TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

**VERDICT**

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- KBH 003234

**The State of South Carolina**

**County of Greenville**

**COURT OF GENERAL SESSIONS**

**April** TERM 2013

**THE STATE**

**vs.**

**JERALD DENTON GASKINS JR**

**Indictment for**

0396

**CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE (11-14)**

VIOLATION § 16-3-655(B)(1) [formerly § 16-3-655(2)]

ENTERED
ACCT.

WITNESSES

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

ARREST WARRANT NUMBER
2012A2330203983

ACTION OF GRAND JURY
TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- KBH 003235

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2013

THE STATE

vs.

JERALD DENTON GASKINS JR

Indictment for

0396

CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE (11-14)

VIOLATION § 16-3-655(B)(1)
[formerly § 16-3-655(2)]

ENTERED
ACCT.

ROA 535

APPX538

534

STATE OF SOUTH CAROLINA )
) INDICTMENT FOR
COUNTY OF GREENVILLE ) CRIMINAL SEXUAL CONDUCT WITH A MINOR
SECOND DEGREE (11-14)

At a Court of General Sessions, convened on APR 23 2013 the Grand Jurors of Greenville County present upon their oath:

That JERALD DENTON GASKINS JR did in Greenville County, between March 2011 and August 2011, commit a sexual battery on Victim who was fourteen years of age or less, but who was at least eleven years of age. This is in violation of § 16-3-655(B)(1) [formerly § 16-3-655(2)] of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

ROA 536

STATE OF SOUTH CAROLINA )
COUNTY OF Greenville )
STATE VS. )
Jerald Denton Gaskins Jr )
AKA: )
Race: WHITE Sex: M Age: 32 )
DOB: Redacted )
Address )
City,Sta )
DL#: SID#: )
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐ )

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2303235
A/W#: 2012A2330203983
Date of Offense: 3/1/2011
S.C. Code § : 16-03-0655(B)
CDR Code #: 0396

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive - Second deg.

in violation of § 16-03-0655(B) of the S.C. Code of Laws, bearing CDR Code # 0396
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.
ATTEST:

| Hodge, Kris | 8245 SC Bar# | Defendant | Attorney for Defendant | SC Bar# |
|---|---|---|---|---|

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: #3231
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence ) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

| | | |
|---|---|---|
| *Fine: | | $ |
| § 14-1-206 (Assessments 107.5 %) | | $ |
| § 14-1-211(A)(1) (Conv. Surcharge) | $100 | $ 100.00 |
| § 14-1-211(A)(2) (DUI Surcharge) | $100 | $ |
| § 56-5-2995 (DUI Assessment) | $12 | $ |
| § 56-1-286 (DUI Breath Test) | $25 | $ |
| Proviso 47.9 (Public Def/Prob) | $500 | $ |
| § 14-1-212 (Law Enforce. Funding) | $25 | $ 25.00 |
| § 14-1-213 (Drug Court Surcharge) | $150 | $ |
| § 50-21-114(BUI Breath Test Fee) | $50 | $ |
| § 56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| Proviso 90.5 (SCCJA Surcharge) | $5 | $ 5.00 |
| 3% to County (if paid in installments) | | $ 3.90 |
| TOTAL | | $ 133.90 |

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Paul B. Wickensimer
Court Reporter: Jenkins
SCCA/217 (03/2011)

Presiding Judge
Judge Code: 2138
Sentence Date: 2.5.15

ROA 537

WITNESSES

Robert Joseph Perry

Greenville County Sheriffs Office

11/14/2012

ARREST WARRANT NUMBER
2012A2330203982

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*
*Date:*

DOCKET NO. 2013-GS-23- KBH 003236

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2013

THE STATE

vs.

JERALD DENTON GASKINS JR

Indictment for

2468

LEWD ACT UPON A CHILD

VIOLATION § 16-15-140

ENTERED
ACCT.

ROA 538

APPX541
537

STATE OF SOUTH CAROLINA )
)
COUNTY OF GREENVILLE )

INDICTMENT FOR
LEWD ACT UPON A CHILD

At a Court of General Sessions, convened on APR 23 2013 the Grand Jurors of Greenville County present upon their oath:

That JERALD DENTON GASKINS JR did in Greenville County, between March 2011 and August 2011, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of Victim a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-15-140 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

WBHodges
SOLICITOR

ROA 539

STATE OF SOUTH CAROLINA )
COUNTY OF Greenville )
STATE VS. )
Jerald Denton Gaskins Jr )
AKA: )
Race: WHITE Sex: M Age: 32 )
DOB: Redacted )
Addres )
City,St )
DL#: )
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐ )

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2303236
A/W#: 2012A2330203982
Date of Offense: 3/1/2011
S.C. Code § : 16-15-140
CDR Code #: 2468

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

in violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2468
☐ NON-VIOLENT ☒ VIOLENT ☑ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

| Hodge, Kris | 8245 | Defendant | Attorney for Defendant | SC Bar# |
|---|---|---|---|---|
| | SC Bar# | | | |

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☑ CONSECUTIVE to sentence on: #3231
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

**Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence ) to ship,transport,possess,or receive a firearm or ammunition.**

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: This sentence to be served first, before #3231. GH

| | | |
|---|---|---|
| *Fine: | | $ |
| § 14-1-206 (Assessments 107.5 %) | | $ |
| § 14-1-211(A)(1) (Conv. Surcharge) | $100 | $ 100.00 |
| § 14-1-211(A)(2) (DUI Surcharge) | $100 | $ |
| § 56-5-2995 (DUI Assessment) | $12 | $ |
| § 56-1-286 (DUI Breath Test) | $25 | $ |
| Proviso 47.9 (Public Def/Prob) | $500 | $ |
| § 14-1-212 (Law Enforce. Funding) | $25 | $ 25.00 |
| § 14-1-213 (Drug Court Surcharge) | $150 | $ |
| § 50-21-114(BUI Breath Test Fee) | $50 | $ |
| § 56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| Proviso 90.5 (SCCJA Surcharge) | $5 | $ 5.00 |
| 3% to County (if paid in installments) | | $ 3.90 |
| TOTAL | | $ 133.90 |

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Paul B. Workman
Court Reporter: Jenkins
Presiding Judge
Judge Code: 2138
Sentence Date: 2.5.15

SCCA/217 (03/2011)

**ROA 540**

THE STATE OF SOUTH CAROLINA
In The Appellate Court

2015-GS-23-00231

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

2013-GS-23-003231-003236

The State,..... Respondent,

v.

Jerald Denton Gaskins, Jr.,..... Appellant.

RECEIVED
FEB 19 2015
SC Court of Appeals

NOTICE OF APPEAL

Jerald Denton Gaskins, Jr. appeals his February 5, 2015 sentence.

This 18th day of FEB, 2015.

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Other Counsel of Record:
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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 09 2016
SC Court of Appeals

Appeal from Greenville County
Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case No. 2015-000312

THE STATE,

Respondent,

vs.

JERALD DENTON GASKINS, JR.,

Appellant.

# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I.

The trial judge did not abuse his broad discretion by admitting the testimony of one of the victim's friends, who was sexually abused by Appellant in a strikingly similar manner to the manner in which Appellant sexually abused the victim, because the victim's friend's testimony constituted evidence of the existence of a common scheme or plan due to its numerous significant similarities to the testimony of the victim, including in regard to the circumstances under which Appellant met his victims, the similar ages of the victims when the abuse occurred, the identical genders of the victims, the similar manners in which the abuse occurred, the similar nature of the abuse, the similar locations at which the abuse occurred, Appellant's special treatment of the victims, and Appellant's provision of gifts to both victims, and because the probative value of the victim's friend's testimony was not substantially outweighed by its potential for undue prejudice.

II.

To the extent Appellant is challenging the solicitor's cross-examination of him about incriminating text messages he purportedly sent to the victim's family members prior to trial, that issue is not properly preserved for appellate review because Appellant conceded to the trial judge it was permissible for the solicitor to ask the questions about the text messages during trial and because defense counsel did not any seek additional relief after the trial judge sustained several of his objections to the questioning. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by permitting the solicitor to question Appellant about the text messages he allegedly sent because the solicitor had a good faith factual basis for asking the questions in light of the testimony presented during trial in regard to the text messages and the fact the solicitor was provided with a physical copy of the purported text messages just before trial.

## STATEMENT OF THE CASE

In November of 2012, Appellant Jerald Denton Gaskins, Jr. was arrested following an investigation into an alleged sexual assault. In April of 2013, the Greenville County Grand Jury indicted Appellant for four counts of second-degree criminal sexual conduct with a minor along with two count of committing or attempting to commit a lewd act upon a child. On February 4, 2015, a jury trial was commenced in the Greenville County Court of General Sessions with the Honorable D. Garrison Hill, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction. Appellant then timely filed a notice of appeal...

## STATEMENT OF FACTS

In the spring of 2011, Appellant Jerald Denton Gaskins, Jr. and his wife at the time, Rachel Gaskins ("Rachel"), attended a horseshoe tournament at a home located in Travelers Rest, South Carolina. (R. p. 54; pp. 62-63; pp. 82-83; pp. 134-135). After the tournament, Appellant began regularly socializing with the family that lived at the home, including with a thirteen-year-old girl ("Victim") who was a part of that family. (R. pp. 64-66; pp. 82-83; pp. 135-136). Over the course of the next few months, Appellant developed a close friendship with Victim, and Victim began to regularly visit with Appellant and his family at different homes he lived in during that time period. (R. pp. 64-65; p. 98; p. 137; pp. 139-140; pp. 145-146; pp. 150-151). However, Victim's mother ("Mother") became uneasy when she found Victim in possession of a phone covertly provided to her by Appellant and when Appellant eventually began to act controlling with Victim, and she ended Victim's contact with Appellant as a result. (R. pp. 73-75; p. 227).

Subsequently, in November of 2012, Appellant's mother-in-law contacted Mother and provided her with information that made her become even more concerned about Victim and Appellant's relationship. (R. p. 75; pp. 87-88; pp. 156-157). In response, Mother and Victim's father confronted Victim about what had been revealed, and Victim initially denied anything inappropriate occurred between her and Appellant. (R. pp. 75-76). However, as the conversation with her parents continued, Victim began to cry before revealing she had been sexually abused by Appellant. (R. pp. 76-77). Thereafter, Mother immediately reported the sexual abuse to the authorities, and Deputy Paul Floyd of the Greenville County Sheriff's Office quickly responded to Victim's home. (R. pp. 53-54; pp. 76-77; p. 89). The deputy then spoke

with Victim alone, and, during their conversation, Victim disclosed she had been sexually abused by Appellant on multiple occasions over the course of more than a year. (R. pp. 56-58).

Following Victim's disclosure, Investigator Robert Perry of the Greenville County Sheriff's Office began an investigation into the reported sexual abuse and spoke with Victim at her school. (R. pp. 345-348; p. 361). During their conversation, Victim disclosed she was sexually abused by Appellant on multiple occasions at different places where he lived from the spring of 2011 until the fall of 2012. (R. pp. 348-349). After speaking with Victim, Investigator Perry attempted to gain access to Victim's phone to examine her communications with Appellant but was unable to do so in light of the fact he was advised Appellant had already taken the phone back from her. (R. p. 353). He then repeatedly attempted to make contact with Appellant, who was thirty years old at the time, but all his attempts to do so were unsuccessful. (R. p. 347; pp. 353-354). Thereafter, Investigator Perry obtained arrest warrants for Appellant based on the reported sexual abuse of Victim. (R. p. 354). Appellant was then arrested and indicted for multiple counts of second-degree criminal sexual conduct with a minor and committing or attempting to commit a lewd act upon a child, and he proceeded to trial. (R. p. 6; pp. 519-540).

During trial, Victim testified about the sexual abuse she suffered at Appellant's hands.[1] (R. p. 192). Regarding that abuse, Victim indicated she met Appellant at a horseshoe tournament in March of 2011 when she was a thirteen-year-old middle school student, and Appellant gave her his phone number at that event. (R. pp. 185-187). Shortly after that, Victim stated she and Appellant began visiting each other's homes and hanging out on a regular basis, and she indicated she spent the night at Appellant's home on some of those occasions. (R. p. 185; pp. 188-189). During one of the visits, Victim testified Appellant asked her if she was a virgin before informing her he would "spoil" her for the remainder of her life if he was the one who

[1] At the time of trial, Victim was seventeen years old and Appellant was thirty-two years old. (R. p. 183; p. 376).

took her virginity. (R. pp. 189-190). A few weeks after that, Victim indicated Appellant brought the subject of her virginity up again, and the two then engaged in sexual intercourse while Appellant's wife took a bath in another room. (R. pp. 190-193). Specifically, during that incident, Victim stated Appellant removed both of their pants, began fondling and kissing her, and then quickly had sexual intercourse with her. (R. pp. 193-194). Afterwards, Victim testified the two pretended like nothing had occurred, and, from that point forward, Appellant began providing her with phones and other gifts, gave her "a lot of attention," and promised to give her whatever she wanted. (R. pp. 194-196; pp. 213-214). As their relationship continued, Victim indicated she and Appellant engaged in sexual intercourse on multiple occasions at different homes Appellant moved to over the course of the next year and a half, and she noted Appellant always wore a condom during the acts of sexual abuse. (R. pp. 197-199). Victim further indicated Appellant performed oral sex on her during some of the incidents, and she recounted Appellant had sexual intercourse with her in a car on one occasion after driving her to an abandoned house while they were out to pick up food for other people in the home. (R. pp. 200-202; pp. 216-217). Additionally, Victim stated she had sexual intercourse with Appellant on one occasion after they dropped his wife off at the hospital, she indicated the two had sexual intercourse on one occasion after Appellant pretended he was going to take her to a country music concert, and she recounted an incident where Appellant's wife found Appellant lying next to her on a couch, which led to a heated argument between Appellant and his wife. (R. pp. 205-210; pp. 224-225). Furthermore, Victim testified Appellant convinced her they were going to get married, tried to talk her into getting legally emancipated from her parents, and tried to alienate her from her family. (R. pp. 222-224). Subsequently, Victim noted her relationship with

Appellant continued until her mother found a phone Appellant had given her, and she eventually revealed the sexual abuse when confronted by her parents about Appellant. (R. pp. 227-229).

As Victim's testimony continued, the solicitor asked Victim about her friend, Hannah Barton, who was present on the day Victim met Appellant.[2] (R. pp. 234-235). The solicitor then asked for permission to address a matter outside of the presence of the jury, and the trial judge excused the jury from the courtroom. (R. pp. 235-236). After that, the solicitor indicated she intended to introduce Barton's testimony as prior bad act evidence while noting Victim and Barton were the same ages, were in the same grades in school, met Appellant in the same manner, engaged in the same types of acts with Appellant, and were told the same things by Appellant during the courses of their relationships with him. (R. pp. 236-241). In response, defense counsel objected, contended the appellate court decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), was "bad law," and asserted the prior bad act evidence involving Barton was not admissible as evidence of a common scheme or plan because there was allegedly no evidence of a modus operandi. (R. pp. 242-243).

Thereafter, the trial judge asked the solicitor to proffer Barton's testimony, and Barton was called to the witness stand. (R. pp. 245-246). During her proffered testimony, Barton stated she met Appellant in the spring of 2011 just after she turned fourteen years old when she was visiting Victim's home for a horseshoe tournament. (R. pp. 246-248). Upon meeting Appellant, Barton indicated Appellant was immediately flirtatious towards her, and the two exchanged telephone numbers. (R. p. 248). After that, Barton testified she began hanging out with Appellant, and Appellant said "very nice things" to her. (R. p. 249). A few weeks later, Barton indicated the two began kissing and eventually began having sexual intercourse when she was alone with Appellant after he made her feel "very special." (R. pp. 249-251). Regarding the

[2] By the time of trial, Barton was eighteen years old and no longer a minor child. (R. p. 246; p. 306).

sexual intercourse, Barton recounted it was quick, it always involved a condom, it always occurred when she was alone with Appellant, and only their pants were removed during it. (R. pp. 251-254). Additionally, Barton stated Appellant made her feel like the "most special person in the world" and got her whatever she wanted. (R. p. 252). As their relationship continued, Barton noted they had sex on a few more occasions, including on one occasion at an abandoned house. (R. pp. 253-254). Eventually, Barton indicated she ended the relationship with Appellant, and, when she did so, he informed her he was going to "make his next move" on Victim. (R. pp. 255-256).

Following Barton's proffered testimony, defense counsel conceded it would "be stupid" to suggest no similarities existed between the acts involving Barton and the acts involving Victim, but he contended the acts did not rise to the level of a common scheme or plan based on the fact the "whole series of events" allegedly occurred much differently for each of Appellant's victims. (R. p. 259). Defense counsel further renewed his assertion the decision in Wallace was "bad law" while contending prior bad act evidence was the most prejudicial type of evidence that could be admitted. (R. p. 260). In response, the solicitor asserted the prior bad act evidence was extremely probative in Appellant's case as evidence of the existence of a common scheme or plan and contended the probative value of that evidence outweighed the potential for undue prejudice in light of the lack of physical evidence in the case. (R. pp. 261-263). After considering the arguments of counsel, the trial judge found the similarities between the acts outweighed the dissimilarities due to the similarities regarding the ages of the victims, the timing of the sexual abuse, the locations where the abuse occurred, the relationship between Appellant and his victims, the manner and type of sexual abuse, and the use of coercion or seduction on the victims. (R. p. 264). Furthermore, the trial judge concluded the prior bad act evidence was not

unfairly prejudicial in Appellant's case while offering to give a limiting instruction if one was desired. (R. pp. 265-267).

Subsequently, Victim resumed her testimony before the jury, and she confirmed she never discussed Appellant or their relationship with Barton. (R. p. 268). Additionally, she indicated Appellant manipulated and coerced her into doing things with him, and she noted the acts of sexual abuse occurred during the few occasions she was alone with Appellant during the course of their relationship. (R. p. 280; p. 286). Furthermore, Victim testified Appellant got her whatever she asked for, singled her out, showed her favoritism, and made her feel special through his attention to her. (R. pp. 293-294).

Following Victim's testimony, Barton took the witness stand and testified about her relationship with Appellant before the jury. (R. p. 306). Specifically, Barton stated she met Appellant in the spring of 2011 at a horseshoe tournament taking place at Victim's house when she was a fourteen-year-old middle school student. (R. pp. 308-309). Upon meeting Appellant, Barton stated he was flirtatious towards her, and the two exchanged phone numbers. (R. p. 310). A few weeks later, Barton indicated Appellant invited her over and gave her special attention, and the two kissed while Appellant's wife and Victim were in another room of the home. (R. pp. 310-312). Shortly after that, Barton stated she visited Appellant's home again and engaged in a brief act of sexual intercourse with Appellant while he was wearing a condom and while her pants were removed. (R. pp. 313-314). Subsequently, Barton testified she engaged in a few more briefs acts of sexual intercourse with Appellant, including at an abandoned house, before ending their relationship. (R. pp. 315-316). At that point, Barton stated Appellant informed her he was going to go after Victim next. (R. p. 317).

In addition to Barton and Victim's testimony, the investigating officers testified about the investigation into the sexual abuse disclosed by Victim, which led to Appellant's arrest. (R. pp. 54-59; pp. 346-355). Additionally, Mother testified about the details of how Appellant and Victim began to regularly spend time together after meeting at the horseshoe tournament, and she noted Victim's behavior began to change after she started associating with Appellant. (R. pp. 62-67; pp. 72-73). Mother further discussed Victim's subsequent disclosure of the sexual abuse and their actions in response to that disclosure. (R. pp. 75-78; p. 89). Likewise, Victim's older sister ("Sister") testified about her interactions with Appellant after he began spending time with Victim, and she indicated she believed something was going on between Appellant and Victim based on the way Appellant treated her. (R. pp. 97-99). Sister further noted she spoke with Appellant on the phone and exchanged text messages with him after they became friendly towards one another, and she stated Appellant informed her he loved Victim most of all while also referring to her as his "beautiful future wife" during their communications.[3] (R. pp. 100-101; pp. 107-108; p. 112). Furthermore, Dr. Mary-Fran Croswell, an expert in pediatric medicine and child abuse pediatrics, testified about her examination of Victim following the disclosure of the sexual abuse, indicated her examination of Victim was normal, and noted a normal examination did not exclude the possibility of sexual abuse. (R. pp. 332-338).

Beyond that testimony, Appellant's former wife, Rachel, also testified for the prosecution.[4] (R. p. 130). During her testimony, Rachel confirmed she and Appellant became friends with Victim's family after meeting them at a horseshoe tournament in March of 2011, and she indicated Victim began regularly visiting their home and sometimes spent the night

[3] During her testimony, Sister also noted she provided the prosecution with a physical copy of Appellant's text messages just before trial. (R. pp. 125-127).

[4] During trial, Rachel noted she obtained a divorce from Appellant at some point after the events involving Victim occurred. (R. p. 154; pp. 172-173).

there.[5] (R. pp. 134-137; p. 139). After that, she stated she became uncomfortable about the relationship and confronted Appellant, who reacted angrily. (R. p. 138). Rachel further testified Appellant and Victim were alone together numerous times during her visits, and she recounted on one occasion she found Appellant and Victim lying on a couch together in the middle of the night with Appellant's leg draped over Victim's legs. (R. p. 148). After finding them in that compromising position, Rachel stated she confronted Appellant and he became very threatening in response. (R. p. 149). At some point after that, Rachel indicated Appellant kicked her out of the home. (R. p. 152). She then testified she eventually revealed her concerns about Appellant and Victim to Victim's mother and Investigator Perry. (R. pp. 157-159).

Subsequently, at the conclusion of the State's case, Appellant elected to testify in his own defense. (R. p. 362; p. 376). During his testimony, Appellant asserted he first met Victim's family at a horseshoe tournament that took place on June 7, 2011, but claimed he did not speak to either Victim or Barton at that time.[6] (R. pp. 394-395). After that, he indicated he and Rachel began regularly visiting with Victim's family while Victim began visiting his home to babysit his daughter. (R. pp. 394-396). After Victim began visiting, Appellant acknowledged she spent the night at his home on some occasions, but he claimed she was never alone with him on any occasions and simply played with his daughter, played video games, and used his "humongous"

[5] At the outset of her testimony, Rachel indicated she met Appellant, who was twenty-six years old at the time, in September of 2008 when she was a seventeen-year-old high school student. (R. p. 131). She further stated he convinced her to move in with him through manipulation within two weeks of initially meeting her, and they got married less than a year later. (R. pp. 132-134; pp. 175-176). After that, Rachel indicated Appellant was abusive and manipulative towards her, and she noted he forced her to make a false allegation of sexual abuse against her father that she subsequently recanted. (R. pp. 143-144; pp. 165-166; p. 175; pp. 178-179). Later during trial, Appellant confirmed he met Rachel when she was seventeen years old and he was twenty-six years old, acknowledged she moved in with him two weeks later, and indicated she married him a few months later before giving birth to their first child together not long after that. (R. pp. 378-380; p. 388). He further asserted Rachel was violent and unfaithful towards him during the course of their relationship and claimed they both decided together for her to file a rape allegation against her stepfather. (R. pp. 382-383).

[6] At the outset of his testimony, Appellant asserted he was disabled due to a diagnosis of attention deficit hyperactivity disorder and had been receiving disability benefits since the age of thirteen as a result. (R. p. 377).

television.[7] (R. pp. 398-399). Eventually, Appellant stated he ceased spending time with Victim's family due to their alleged violent tendencies, and he denied Victim visited him at one of the homes he moved to in Travelers Rest.[8] (R. pp. 408-410). Subsequently, in October on 2012, he claimed he cut off all ties with Victim's family after discovering Victim's father had secretly added multiple vehicles to his insurance policy. (R. pp. 415-418). As his testimony continued, he insisted he only possibly saw Victim in passing after cutting off ties with her family, and he denied Barton had ever been to his home. (R. pp. 418-419). He further denied having an inappropriate relationship with either Victim or Barton, and he insisted he had never heard about an abandoned house and had never discussed going to a country music concert with anyone. (R. pp. 420-421).

Thereafter, on cross-examination, the solicitor began asking Appellant if he sent a text message to Victim's father in regard to his divorce from Rachel, and Appellant insisted he did not send the message while contending someone else had been sending messages pretending to be him. (R. pp. 424-425). Defense counsel then objected to the solicitor's questioning while asserting a foundation had not been established in regard to the text messages he contended the solicitor was attempting to have Appellant read, and the trial judge sustained the objection. (R. pp. 425-426). Thereafter, the solicitor asked Appellant if he sent a text message to Victim's father asking if he was going to drop the charges, and Appellant denied he sent such a message. (R. p. 426). Defense counsel then again objected, and the trial judge sustained the objection before excusing the jury from the courtroom. (R. p. 426).

[7] Appellant further indicated he tried to keep witnesses around him all the time to verify his innocence because he had been accused of many things during his lifetime. (R. pp. 400-401; p. 440).

[8] He further alternately claimed Victim was present and was not present when he separated from Rachel. (R. pp. 411-412).

Once the jury was excused from the courtroom, the solicitor noted it was permissible for her to question Appellant about statements he was alleged to have made, and she further asserted she could call a witness in rebuttal to establish a foundation if she moved to admit the actual text messages themselves into evidence. (R. p. 427). In response, defense counsel asserted a foundation had to be established before the solicitor could ask questions regarding the messages, and the trial judge inquired of defense counsel why the solicitor could not ask Appellant if he made a particular statement. (R. pp. 427-428). Defense counsel then replied: "I think she – well, she can ask if he makes a statement, Your Honor. But she was, actually, reading the text messages verbatim." (R. p. 428). The trial judge and defense counsel then continued to discuss the matter, and defense counsel confirmed his concern was the solicitor's questions allegedly created the appearance she was publishing something that had not been admitted into evidence. (R. pp. 428-429). After that discussion, the following exchange occurred:

> **[Defense Counsel]**: But my issue is not necessarily, Your Honor, that [the solicitor]'s asking [Appellant] that. That's fine. But she's, actually, walking up to him, laying these down in front of him as they were – as though they were a statement that he gave.
>
> **[Trial Judge]**: Yes, I know. That's why I sustained the objection when you objected to that. But, I mean, I think she can ask about alleged previous statements the witness –
>
> **[Defense Counsel]**: Well, I would agree with that.
>
> **[Trial Judge]**: – who was a party, made.
>
> **[Defense Counsel]**: Yeah, I would agree with that, Your Honor. I just – when she – she, at first, seemed as though she was, actually, going to have him read it. Then she's questioning him about it while it's laying up there in front of him. And I, clearly, believe that's improper.
>
> **[Trial Judge]**: Well, I overrule the objection.

(R. p. 429).

Thereafter, the solicitor resumed her cross-examination of Appellant and asked him if he sent a text message to Victim's father about how they could go to Oklahoma and make money if he would drop the bogus charges, and Appellant denied sending such a message. (R. pp. 432-433). The solicitor then asked Appellant if he sent a text message to Sister in regard to not having enough tickets for a country music concert, and Appellant denied doing so while insisting he never sent a text message to Sister on any occasion. (R. pp. 435-437). After that, the solicitor asked Appellant if he sent a text message to Sister indicating Victim was his favorite, and Appellant again insisted he never sent a text message to Sister about anything. (R. pp. 437-438). As her cross-examination of Appellant continued, the solicitor asked Appellant if he knew Barton, and he responded he did not and had only met her on two occasions. (R. p. 455). The solicitor then inquired if Appellant had sent a Facebook message to Barton a few weeks earlier, and Appellant denied doing so while challenging the solicitor to prove it. (R. pp. 454-455).

Subsequently, the defense rested its case, and the solicitor indicated she did not believe it was necessary for her to call any rebuttal witnesses. (R. p. 463). The parties then presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 465-506). During his jury instructions, the trial judge explained to the jury evidence consisted of witness testimony and exhibits while expressly cautioning the jury the statements of counsel were not evidence.[9] (R. p. 498). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. pp. 510-511). Following the verdict, the trial judge sentenced Appellant to an aggregate term of imprisonment of twenty-five years. (R. pp. 516-517).

[9] At the outset of trial, the trial judge had similarly instructed the jury evidence consisted of witness testimony and physical exhibits while also expressly informing the jury evidence could not be considered if an objection to it was sustained. (R. pp. 35-36).

## ARGUMENT

### I.

**The trial judge did not abuse his broad discretion by admitting the testimony of one of the victim's friends, who was sexually abused by Appellant in a strikingly similar manner to the manner in which Appellant sexually abused the victim, because the victim's friend's testimony constituted evidence of the existence of a common scheme or plan due to its numerous significant similarities to the testimony of the victim, including in regard to the circumstances under which Appellant met his victims, the similar ages of the victims when the abuse occurred, the identical genders of the victims, the similar manners in which the abuse occurred, the similar nature of the abuse, the similar locations at which the abuse occurred, Appellant's special treatment of the victims, and Appellant's provision of gifts to both victims, and because the probative value of the victim's friend's testimony was not substantially outweighed by its potential for undue prejudice.**

Appellant contends the trial judge committed reversible error by admitting the testimony of Barton, a friend of Victim who was sexually abused by Appellant just before Appellant began sexually abusing Victim, as evidence of the existence of a common scheme or plan during Appellant's trial for sexually abusing Victim. In support of that contention, Appellant maintains the prior bad act evidence was inadmissible because it was not sufficiently similar to Appellant's more recent acts involving Victim and was overly prejudicial. To the contrary, the trial judge properly admitted Barton's testimony because it was highly similar to the testimony of Victim, including in regard to the circumstances under which Appellant met the victims, the similar ages of the victims when the abuse occurred, the identical genders of the victims, the similar manners in which the abuse occurred, the similar nature of the abuse, the similar locations at which the abuse occurred, Appellant's special treatment of the victims, and Appellant's provision of gifts to both victims, and constituted proof of the existence of Appellant's common scheme or plan to seduce and sexually assault teenaged girls. Moreover, in light of the high degree of similarity between the charged offenses and Appellant's prior bad acts coupled with the lack of physical evidence in Appellant's case, the high probative value of Barton's testimony was not outweighed

by its potential for undue prejudice. As a result, the trial judge did not abuse his broad discretion in admitting Barton's testimony regarding Appellant's prior bad acts. Appellant's convictions should be affirmed.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). An abuse of discretion occurs when the trial judge's conclusions either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). Furthermore, in reviewing such a ruling, the trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594

(Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Generally, evidence of prior bad acts is not admissible to prove a defendant's guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). However, under Rule 404(b), SCRE, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See also State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between

the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, our Supreme Court has instructed:

> Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).
>
> Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charge: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted). Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. "Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis." Id. at 434, n. 5, 683 S.E.2d at 278.

Finally, after determining the prior bad act evidence is relevant and falls within a permissible exception of Rule 404(b), SCRE, the trial judge must weigh the probative value of the evidence against its prejudicial effect. State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). "The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." Wallace, 384 S.C. at 435, 683 S.E.2d at 278. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts

of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible." Mathis, 359 S.C. at 463, 597 S.E.2d at 879. "Stated differently, evidence which is 'logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime.' " State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

In State v. Blanton, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct. App. 1994), Blanton was arrested and charged with first-degree criminal sexual conduct with a minor after Blanton's granddaughter alleged Blanton sexually molested her on several occasions. During trial, two other girls were permitted to testify over Blanton's objection about being sexually abused by Blanton approximately seven or eight years before Blanton sexually abused his granddaughter. Id. Following trial, Blanton appealed his conviction and asserted the prior bad act evidence was not sufficiently similar to the charged offense to constitute evidence of a common scheme or plan. Id. However, this Court disagreed and noted the following similarities existed between the prior bad act evidence and the incident involving Blanton's granddaughter:

> All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All of the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification.

Id. at 33, 446 S.E.2d at 439. Based on those similarities, this Court found the evidence of the prior bad acts was admissible and affirmed Blanton's conviction. Id.

Similarly, in State v. Hubner, 362 S.C. 572, 575, 608 S.E.2d 463, 464 (Ct. App. 2005), Hubner was arrested and charged with six counts of committing a lewd act upon a child after allegations arose he sexually abused a girl who attended his church. During trial, the victim testified she met Hubner through his involvement with the church youth group and their relationship gradually progressed to being sexual in nature. Id. at 575-576, 608 S.E.2d at 464. The victim stated Hubner – over the course of two years – reached into her pants, massaged her, touched her breasts, hugged her, fondled her between her vagina and rectum, told her he loved her, forced her to touch his penis, used religion to gain her acquiescence, gave her gifts, touched her vagina in a swimming pool, kissed her, and fondled her vagina in a garage. Id. at 575-579, 608 S.E.2d at 464-467. In addition to the victim's testimony, the State sought to introduce the testimony of a witness who was molested by Hubner approximately fourteen to fifteen years earlier. Id. at 579, 608 S.E.2d at 466. During an in camera hearing, the witness stated Hubner – over the course of two months – hugged her and fondled her breasts while she was babysitting, massaged her vagina and buttocks through her clothes, masturbated in front of her, engaged in sexual intercourse with her, threatened to kill her if she revealed the abuse to anyone, kissed her, slapped her, involved other people in their sexual encounters, and offered her money to perform sexual acts on him. Id. at 579-581, 608 S.E.2d at 466-467. Following the hearing, the trial judge ruled the witness' testimony regarding the hugging, kissing, and inappropriate touching was admissible as evidence of the existence of a common scheme or plan. Id. at 582, 608 S.E.2d at 467. Following the trial, Hubner appealed his convictions and asserted the prior bad act evidence should not have been admitted. Id. at 575, 608 S.E.2d at 464. On appeal, this Court reversed Hubner's convictions after finding the acts were not sufficiently similar to be admissible under the common scheme or plan exception. Id. at 585, 608 S.E.2d at 469.

However, the Supreme Court subsequently reversed this Court's decision and affirmed Hubner's convictions after finding the trial judge properly admitted the evidence of the prior sexual assaults. State v. Hubner, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

Likewise, in State v. Scott, 405 S.C. 489, 492-493, 748 S.E.2d 236, 238-239 (Ct. App. 2013), cert. dismissed as improvidently granted, 413 S.C. 24, 773 S.E.2d 912 (2015), Scott was arrested and charged with numerous offenses, including one count of second-degree criminal sexual conduct with a minor and and three counts of committing a lewd act upon a child, following an investigation into allegations he sexually abused his four biological daughters when they were minors. During trial, the State sought to admit evidence regarding Scott's prior acts of sexual abuse to establish the existence of a common scheme or plan through the testimony of two unrelated witnesses who alleged Scott sexually abused them when they were minors approximately eleven years before Scott first began sexually absuing the oldest of his four daughters, who had not yet been born at the time Scott engaged in the sexual abuse of his earlier victims. Id. at 492-493, 748 S.E.2d at 238-239. In response, defense counsel objected to the admission of that testimony on the grounds it was too remote and its probative value was substantially outweighed by the danger of unfair prejudice. Id. at 499, 748 S.E.2d at 242. However, the trial judge permitted Scott's prior victims to testify over objection, and Scott was ultimately convicted of numerous offenses. Id. at 496-497, 748 S.E.2d at 240-241. Subsequently, Scott appealed his convictions, arguing the prior bad act evidence was not sufficiently similar to the charged crimes to establish the existence of a common scheme or plan and was so remote its probative value was substantially outweighed by the danger of unfair prejudice. Id. at 492, 748 S.E.2d at 238. On appeal, this Court affirmed. Id. In affirming, this Court first concluded Scott's prior victims' testimony was admissible pursuant to Rule 404(b),

SCRE, because the many similarities existing between the charged crimes and the prior bad acts, including in regard to the ages of the victims at the time of the abuse, the locations and situations where the victims were abused, and the nature of the abuse, outweighed any of the dissimilarities, which included the facts Scott was not biologically related to his prior victims and did not abuse his prior victims in all the same ways he abused his daughters. Id. at 503, 748 S.E.2d at 244. Furthermore, this Court determined the probative value of the prior bad act evidence was not substantially outweighed by a danger of unfair prejudice despite the fact Scott had abused his prior victims eleven years before he began the abuse of his daughters. Id. at 508-509, 748 S.E.2d at 247.

In the case sub judice, the trial judge did not abuse his broad discretion by admitting the testimony of Barton concerning Appellant's prior bad acts because her testimony constituted evidence of the existence of Appellant's common scheme or plan to seduce and sexually assault teenaged girls. Notably, during trial, Victim testified she met Appellant for the first time at a horseshoe tournament when she was a thirteen-year-old middle school student and Appellant provided her with his phone number at that tournament. After that, Victim indicated Appellant began communicating with her and invited her to his home, and she stated he talked with her, made her feel special, and began providing her with whatever she wanted once she began visiting with him. Victim's testimony further established Appellant began sexually abusing her a few weeks after he initiated contact with her, and she noted the abuse always occurred either at one of Appellant's homes or at an abandoned house when no one else was present or in the same room as them. Furthermore, Victim's testimony established Appellant sexually abused her by performing oral sex on her or by engaging in sexual intercourse with her, and she noted the

sexual intercourse was always brief, Appellant always wore a condom during it, and her pants were the only clothing removed.

Similar to Victim's testimony, Barton testified she met Appellant for the first time at a horseshoe tournament, which was the same exact place where Appellant met Victim, just after she turned fourteen years old and while she was a middle school student, and she noted Appellant provided her with his phone number at that tournament. Additionally, like Victim, Barton indicated Appellant began communicating with her and invited her to his home after that, and she stated he talked with her, made her feel like the "most special person in the world," and got her whatever she wanted. Likewise, similar to Victim's testimony, Barton's testimony further established Appellant began sexually abusing her within a few weeks of inviting her to his home, and she recounted the abuse always occurred either at Appellant's home or at an abandoned house when no one else was present or in the same room as them. Furthermore, Barton's testimony established Appellant sexually abused her by engaging in sexual intercourse with her, and, just like Victim, she indicated the sexual intercourse was always brief, Appellant always wore a condom during it, and her pants were the only clothing removed. Finally and critically, Barton testified Appellant established a direct connection between his sexual abuse of her and his sexual abuse of Victim by informing her he was going to move onto Victim when she ended her relationship with him.

Thus, in Appellant's case, each of Appellant's victims was a young girl attending middle school, and both of his victims were approximately the same age. Moreover, Appellant met both of his victims at the same location – a horseshoe tournament – and provided both of the girls with his phone number upon meeting them. Additionally, with each of his victims, Appellant invited the girls to his home a short time after meeting them, and he began sexually abusing the

victims after talking with them, making them feel special, and providing them with whatever they desired. Furthermore, although Victim was subjected to oral sex while Barton was not, Appellant engaged in sexual intercourse with both girls in a highly similar manner, with Appellant always wearing a condom, always engaging in the intercourse while just the girls' pants were removed, and always ending the sexual intercourse quickly. Likewise, both girls testified they were sexually abused by Appellant in his home and at an abandoned house while they were alone with him or while no one else was in the same room. Accordingly, the testimony of Appellant's most recent victim, Victim, was highly similar to the testimony of Appellant's previous victim, Barton, in regard to: (1) the approximate ages of the victims when the abuse occurred; (2) the genders of the victims; (3) the statuses of the victims as middle school students when they first met Appellant; (4) the location where Appellant met the victims; (5) Appellant's acts of providing his phone number to the victims and inviting them to his home within a few weeks of meeting them; (6) the locations where Appellant abused the victims; (7) the nature and type of the sexual abuse Appellant inflicted upon them; (8) the circumstances under which the sexual abuse occurred; and (9) Appellant's acts of making the girls feel special and providing them with gifts. See Wallace, 384 S.C. at 434, n. 5, 683 S.E.2d at 278 ("Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis."); cf. Blanton, 316 S.C. at 33, 446 S.E.2d at 439 (finding the prior bad acts were sufficiently similar to the charged offense to be admissible where the victims in all of the acts were approximately the same age, each of the victims was subjected to the same type of sexual abuse in the same locations, and Blanton took advantage of his relationship with the victims for sexual gratification in each of the acts). Furthermore, those similarities between the acts outweighed any dissimilarities, which

established a clear and logical connection between the earlier acts and more recent crimes. See Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("In sum, there are similarities in the class of the victim, timing, place, and warning that outweigh any dissimilarity."); cf. Scott, 405 S.C. at 501, 748 S.E.2d at 243 (finding prior bad act evidence to be admissible where some distinctions existed between the prior bad act testimony and the testimony of Scott's most recent victims but the distinctions did not outweigh the significant similarities). As a result, Barton's testimony was properly admitted towards establishing the existence of Appellant's common scheme or plan to seduce and sexually assault teenaged girls, which was confirmed by Appellant's own statements to Barton evincing his intention to continue his plan by moving onto Victim after her, and the trial judge's decision to admit that testimony did not constitute an abuse of discretion under those circumstances. See Wallace, 384 S.C. at 433-434, 683 S.E.2d at 278 ("When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). . . . A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility.").

Moreover, the trial judge properly concluded the probative value of Burrow's testimony was not substantially outweighed by a danger of unfair prejudice. Critically, in Appellant's case, the prior bad act evidence was extremely probative and significant due to the lack of physical evidence corroborating Victim's testimony, which could not be obtained based on the fact Appellant always wore a condom during the sexual abuse coupled with the fact both Barton and Victim delayed their disclosures of the abuse. As a result, Barton's testimony was extremely probative and significant because it established the existence of a common scheme or plan on Appellant's part and constituted strong proof of the highly similar incidents involving Victim based on the similarities between the Appellant's prior abuse of Barton and Appellant's

subsequent abuse of Victim. See id. at 433, 683 S.E.2d at 277 ("Such evidence is relevant because proof of one is strong proof of the other."). Accordingly, the probative value of the prior bad act evidence was extremely high. Cf. State v. Clasby, 385 S.C. 148, 158-159, 682 S.E.2d 892, 898 (2009) ("Given there was no physical evidence to corroborate B.C.'s testimony regarding the indicted offense of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charge criminal sexual conduct underlying the offense of lewd act upon a child."). In light of the high probative value of the evidence, the potential for undue prejudice that could have resulted from the admission of the evidence was not sufficient to substantially outweigh the evidence's probative value. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is **substantially outweighed by the danger of unfair prejudice**, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added)); see also State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (" 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.' " (citations omitted)). Therefore, the trial judge did not abuse his broad discretion in weighing the probative value of the prior bad act evidence against its potential for undue prejudice. See Hamilton, 344 S.C. at 358, 543 S.E.2d at 594 ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.").

In conclusion, the prior bad act evidence introduced during Appellant's trial through Barton's testimony was strikingly similar to the testimony of Victim in regard to the similar ages of the victims, the similar circumstances under which Appellant initiated contact with the

victims, the similar timing of the sexual abuse, the manner in which the abuse occurred, the nature of the abuse, the locations where the abuse occurred, and Appellant's special treatment of the victims and provision of gifts to them. See Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("Here, the similarities between the acts include petitioner's relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity."); see also State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008) ("Where there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the Court of Appeals have held prior bad acts are admissible to demonstrate a common scheme or plan."); cf. State v. Hallman, 298 S.C. 172, 175, 379 S.E.2d 115, 117 (1989) ("The prior bad acts here occurred while each of the young women was a foster child to appellant and of similar age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. The extent of abuse against the victim was even more reprehensible than that against the previous foster children. It commenced, however, in exactly the same manner under similar circumstances. We find the evidence of prior bad acts bears such close similarity to the offense charged in this case that its probative value clearly outweighs its prejudicial effect."). Therefore, like in Blanton, Hubner, Scott, and numerous other cases, the prior bad act evidence was relevant and admissible as proof of the existence of a common scheme or plan, and its high probative value substantially outweighed its potential for undue prejudice. Cf. State v. Fonseca, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009) (concluding prior bad act evidence was not admissible under the common scheme or plan exception because "[t]he State provide[d] no compelling argument **of any similarities** between the two occurrences, or any argument to

overcome the fact that the incidents [were] remote in time" (emphasis added)). For those reasons, the trial judge did not abuse his broad discretion in admitting the testimony regarding Appellant's prior bad acts. See Kelley, 319 S.C at 176, 460 S.E.2d at 370 ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also Martucci, 380 S.C. at 253, 669 S.E.2d at 609 ("If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal."). Appellant's convictions should be affirmed.

II.

**To the extent Appellant is challenging the solicitor's cross-examination of him about incriminating text messages he purportedly sent to the victim's family members prior to trial, that issue is not properly preserved for appellate review because Appellant conceded to the trial judge it was permissible for the solicitor to ask the questions about the text messages during trial and because defense counsel did not any seek additional relief after the trial judge sustained several of his objections to the questioning. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by permitting the solicitor to question Appellant about the text messages he allegedly sent because the solicitor had a good faith factual basis for asking the questions in light of the testimony presented during trial in regard to the text messages and the fact the solicitor was provided with a physical copy of the purported text messages just before trial.**

Appellant contends the trial judge erred by allowing the solicitor to question Appellant about text messages he allegedly sent to members of Victim's family that related to his criminal case. In support of that contention, Appellant maintains the solicitor should not have been permitted to ask Appellant about the contents of the text messages he allegedly sent and which he now characterizes on appeal as "inculpatory" without first establishing a foundation for those text messages to be admitted into evidence. Initially, Appellant's appellate challenge to the solicitor's questioning of Appellant about the alleged text messages on cross-examination is wholly unpreserved for appellate review because defense counsel repeatedly conceded to the trial judge it was permissible for the solicitor to question Appellant about the text messages. Based on that trial concession, Appellant is precluded from now raising a challenge to the solicitor's cross-examination questioning on appeal. Likewise, to the extent Appellant is complaining on appeal about the initial questions the solicitor asked Appellant after presenting him with a physical copy of the text messages, that issue is similarly unpreserved for appellate review because defense counsel's trial objections to those questions were sustained by the trial judge, and defense counsel sought no further relief from the trial judge after his objections were sustained. However, regardless of any issue preservation concerns, the trial judge nonetheless

committed no error by permitting the solicitor to question Appellant about the text messages he allegedly sent to Victim's family members because – just as defense counsel conceded during trial – it was permissible for the solicitor to question Appellant about the text messages in light of the fact she had a good faith factual basis for doing so based on the information available to her at that time. Appellant's convictions should be affirmed.

**A. Issue Preservation**

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Imposing issue preservation requirements on a party "is meant to enable the lower court to rule properly after it 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).

However, even if a party properly objects to an issue that arises during trial, no issue is preserved for appellate review if the trial judge sustains the party's objection and the party does subsequently move to strike the allegedly objectionable matter or request some curative measure from the trial judge. State v. Wingo, 304 S.C. 173, 177-178, 403 S.E.2d 322, 325 (Ct. App. 1991); see State v. Saltz, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) ("The requirement that a party move to strike objectionable testimony applies when an objection has been *sustained*."). Critically, if party fails to request additional relief after an objection is sustained, that party has obtained the only relief sought while preserving no issue for appellate review. See State v.

Thompson, 304 S.C. 85, 87, 403 S.E.2d 139, 140 (Ct. App. 1991) ("[T]he trial judge sustained defense counsel's objections to the testimony of which [Thompson] complains. No motion to strike, no request for instruction that the jury disregard the testimony, nor a motion for a new trial based on the admission of the testimony was made at trial. Appellant has failed to preserve this issue. He obtained the only relief he sought and this court, therefore, has no issue to decide.").

Similarly, even if a party properly raises an objection during trial and the objection is overruled, a party may still waive his right to argue error in regard to that objection on appeal under certain circumstances. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Significantly, a party can waive an objection to an issue by indicating to the trial judge the party no longer has an objection to an issue the party previously objected to or by eliciting similar testimony to testimony to which the party previously raised an objection without reserving that earlier objection. See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During the course of the trial certain testimony was admitted over the objection of [McKinney's] counsel. Thereafter, counsel for [McKinney] cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured."); O'Neal, 210 S.C. at 312, 42 S.E.2d at 526 ("An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector."); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no

objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."). Likewise, a party can waive a previously-raised objection to an issue by subsequently conceding that issue to the trial judge. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal).

In the case at bar, the trial judge sustained several objections to questions the solicitor asked of Appellant on cross-examination after presenting him with a physical copy of text messages, and, following the trial judge's rulings sustaining defense counsel's objections, defense counsel did **not** seek any further relief from the trial judge or ask the trial judge to employ any curative measures. Thereafter, the trial judge and the parties discussed the matter outside of the presence of the jury, and, during that discussion, the trial judge afforded defense counsel an opportunity to identify any authority that would prohibit the solicitor from questioning Appellant about statements he was purported to have made against his own interests. In response, defense counsel conceded the solicitor **could**, in fact, ask Appellant if he made a particular statement while specifically asserting his issue was **not** with the solicitor's act of asking the questions. The trial judge then indicated he believed it was permissible for the solicitor to question Appellant about statements he was alleged to have made, and defense counsel responded unequivocally he agreed with the trial judge's position.

Because defense counsel conceded to the trial judge it was permissible for the solicitor to question Appellant about the statements he was alleged to have made, any issue regarding the propriety of the solicitor's questioning of Appellant was waived and cannot now properly be raised or addressed on appeal. See id. at 315-316, 642 S.E.2d at 588 (recognizing an issue conceded during trial cannot properly be argued on appeal); see also Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party cannot acquiesce to a ruling on an issue

during trial and then complain of an error with the issue on appeal); cf. State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding Rios waived his right to allege error with a jury charge on appeal where the trial court specifically asked if there were any objections to the instructions given and Rios responded there were none). Likewise, to the extent Appellant is complaining on appeal about the initial questions the solicitor asked of Appellant after presenting him with a physical copy of the text messages, such an issue is similarly unpreserved for appellate review because defense counsel's objections to those questions were **sustained** during trial and no further relief was sought in regard to those questions. See Thompson, 304 S.C. at 87, 403 S.E.2d at 140 (holding Thompson failed to preserve any issue in regard to an objection that was sustained because he failed to make a motion to strike, request a curative strike, or move for a new trial after the objection was sustained); see also State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) ("Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide."). Accordingly, Appellant failed to preserve any issue for appellate review in regard to the solicitor's questioning of him about the text messages he purportedly sent to Victim's family members. See TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."); McMillan, 319 S.C. at 335, 461 S.E.2d at 45 (finding an issue to be procedurally barred on appeal because it was conceded at trial); see also State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"). Appellant's convictions should be affirmed.

**B. Propriety of the Solicitor's Questioning of Appellant on Cross-Examination**

When a defendant elects to take the witness stand and testify on his own behalf during a criminal trial, the solicitor has a right to conduct cross-examination of that defendant. State v.

Holmes, 171 S.C. 8, __, 171 S.E. 440, 443 (1933). As part of that cross-examination, the solicitor unquestionably is permitted to ask the defendant about any inculpatory or otherwise relevant statements he may have previously made that would be pertinent to the trial **so long as** the solicitor has a good faith factual basis for any questions asked. See Rule 801(d)(2), SCRE (instructing a party-opponent's own statements do **not** constitute inadmissible hearsay); see State v. McEachern, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012) ("[O]ur courts have held that a cross-examiner must have a good faith factual basis before questioning a witness about his or her past conduct."); see also State v. Gilchrist, 342 S.C. 369, 372-373, n. 3, 536 S.E.2d 868, 869-870 (2000) (finding Gilchrist's incriminating statement was admissible as an admission by a party-opponent). Thus, while a solicitor is **not** permitted to merely "go on a fishing expedition" when cross-examining a defendant, the solicitor can question the defendant about matter relevant to the trial when the solicitor has a good faith basis for doing so. See State v. Joseph, 328 S.C. 352, 359, 491 S.E.2d 275, 278 (Ct. App. 1997) ("The cross-examiner must have a good faith factual basis before questioning a witness about his past conduct."); see also State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 105 (1979) ("Counsel should not be permitted to go on a fishing expedition in hopes of finding some misconduct involving moral turpitude by a witness.").

In Appellant's case, Sister testified during trial in regard to text messages she had previously received from Appellant, and she noted she had communicated with him through both text messages and phone calls. See generally State v. Henry, 292 Neb. 834, 868-869, 875 N.W.2d 374, 400 (Neb. 2016) (finding a sufficient foundation had been established for the admission of a **physical copy** of text messages purportedly sent by Henry based on the testimony of witnesses who indicated they spoke with Henry at the phone number used to send the text

messages and knew Henry was the sender based on the context of the messages and further noting a party seeking to admit text messages is **not** required to conclusively prove who authored the messages before they can be admitted into evidence). Sister further indicated she provided the prosecution just before trial with a copy of text messages that were purportedly sent by Appellant. In light of Sister's testimony about the inculpatory text messages she had received from Appellant in regard to Victim and her provision of a copy of the text messages she contended were sent by Appellant to the prosecution, the solicitor had a good faith basis for asking Appellant whether he sent the incriminating text messages attributed to him.[10] See McEachern, 399 S.C. at 147, 731 S.E.2d at 615 (recognizing a good faith factual basis is necessary to ask a particular question on cross-examination); see also State v. Needs, 333 S.C. 134, 160, 508 S.E.2d 857, 865 (1998) (holding testimony in regard to incriminating statements made by Needs was admissible as evidence of an admission by a party-opponent). Thus, just as defense counsel repeatedly conceded during trial, the solicitor was permitted to question Appellant about the text messages, and the trial judge did not abuse his broad discretion by permitting the solicitor to do so.[11] See State v. Sherard, 303 S.C. 172, 174, 399 S.E.2d 595, 596

[10] Notably, depending on Appellant's responses to her questions, the solicitor's questioning of Appellant also could have aided the solicitor in establishing a foundation for the admission of the physical copy of the text messages had she subsequently chosen to seek the admission of that matter into evidence during trial. See Rule 901(b)(1), SCRE (recognizing the requirements for authentication can be satisfied in numerous ways, including through the presentation of the testimony of a witness with knowledge the matter is what it is purported to be); see also Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 576-577, 201 S.E.2d 372, 376 (1973) (instructing direct proof is **not** required in order to authenticate a particular piece of evidence, and, instead, evidence can be authenticated through indirect or circumstantial evidence).

[11] Moreover, as Appellant denied sending any of the text messages the solicitor asked him about, Appellant suffered no actual prejudice as a result of the solicitor's questioning in that regard. Cf. McEachern, 399 S.C. at 148, 731 S.E.2d at 616 ("[W]e note that the mere asking of an improper question is not necessarily prejudicial, where no evidence is introduced as a result. Here, Hollie denied even knowing Warren or Gibbs, and denied 'being involved' with any of the three men. Thus, we find any error in allowing these questions was harmless." (citation omitted)). Likewise, the trial judge's instructions to the jurors cautioning them the statements of counsel were not evidence and instructing them evidence consisted only of witness testimony and exhibits helped to ensure Appellant suffered no prejudice from the solicitor's act of asking the questions regarding the text messages. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the

(1991) ("It is well settled that the scope of cross-examination is within the trial judge's discretion, and this Court will not interfere absent a showing of prejudice by the complaining party."); see also State v. Turner, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007) (recognizing the trial judge retains wide discretion in regard to the scope of cross-examination). Appellant's convictions should be affirmed.[12]

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jurors disregarded those instructions, this Court declines to presume prejudice." (citations omitted)); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("An instruction to disregard incompetent evidence is usually deemed to have cured the error. Moreover, jurors are presumed to follow the law as instructed to them." (citations omitted)); cf. State v. Arther, 290 S.C. 291, 295, 350 S.E.2d 187, 189 (1986) ("The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented.").

[12] In seeking a reversal of his convictions on appeal, Appellant contends this Court should consider a number of unpreserved errors that allegedly occurred during trial when determining whether any preserved error that occurred in his case was harmless. Notably though, Appellant's proposed harmless error analysis is entirely inconsistent with the established law in South Carolina. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 863 (1993) (instructing any error in the admission of evidence that is merely cumulative to other unobjected-to evidence is harmless); State v. Blalock, 357 S.C. 74, 82, 591 S.E.2d 632, 636 (Ct. App. 2003) (finding any error resulting from the publication of a prior statement would have been harmless where its publication was merely cumulative to a previous, unchallenged publication of the relevant portions of the same statement); see also State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error rule does not apply in South Carolina state courts."); State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997) ("South Carolina has no 'plain error' rule."); State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (recognizing unchallenged rulings are the law of the case regardless of whether they are right or wrong).

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 9, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
D. Garrsion Hill, Circuit Court Judge

Case No.: 2013-GS-23-003231; 003232; 003233; 003234; 003235; 003236
Appellate Case No.: 2015-000312

The State, ..... Respondent,

vs.

Jerald Denton Gaskins, Jr., ..... Appellant.

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## STATEMENT OF ISSUES ON APPEAL

I. DOES THE ADMISSION OF PRIOR BAD ACTS UNDER THE FACTS OF THIS CASE CONSTITUTE REVERSIBLE ERROR?

II. DID THE SOLICITOR'S QUESTIONING OF THE DEFENDANT CONCERNING INFLAMMATORY TEXT MESSAGES WITHOUT A PROPER FOUNDATION CONSTITUTE REVERSIBLE ERROR?

III. SHOULD THE COURT'S ANALYSIS OF THE RECORD AS A WHOLE IN A HARMLESS ERROR ANALYSIS INCLUDE PREJUDICE ARISING OUT OF ISSUES APPEARING IN THE RECORD BUT NOT PRESERVED FOR APPELLATE REVIEW?

## STATEMENT OF THE CASE

Appellant was indicted by the grand jury in Greenville County for three counts of criminal sexual conduct with a minor second degree, and three counts of lewd act upon a minor. A jury trial was held on February 4th and 5th, 2015, the Honorable D. Garrison Hill presiding. Kristie B. Hodge, Assistant Solicitor, represented the State at trial. Randall L. Chambers, of Greenville, represented the Appellant at trial. The Appellant was found guilty on all counts and sentenced to four 20 year sentences, one 15 year sentence, all of which were concurrent, and to one 5 year sentence which was consecutive, with the provision that the 5 year sentence was to be served first. Timely notice of appeal was served. J. Falkner Wilkes represents the Appellant on the appeal of this case.

## STATEMENT OF THE FACTS

The defendant was accused of having a sexual relationship over the course of a year and a half with the prosecutrix while she was 13 to 14 years of age. 192-197. The defendant denied the allegations. 421, l. 24-422, l. 1. At the beginning of the trial, outside the presence of the jury, the state declared an intent to offer the testimony of another minor as evidence of other bad acts under Rule 404(b). 240-242. The state argued admissibility under the common plan or scheme exception: "We're saying that he operates in the same manner. Good, bad, or indifferent, we're not saying. But we're saying that he operates consistently the same way, targeting young girls, schmoozing, talking big, talking good, talking them into having sex with them." T. p. 263, l. 9-15. The defendant denied the allegations involving the state's 404(b) witness. 421, l. 19-23.

The state claimed that the events involving the 404(b) witness were factually similar to those involving the prosecutrix: "They were 13, eighth grade, met at horseshoes, had sex at the Defendant's residence, went to the abandoned house and had sex. And the Defendant used a condom. It was vaginal-penile penetration." 242, l. 21-25. The state argued that the 404(b) evidence established a *modus operandi*. 261-262. The defense argued that the similarities were merely generic and that the two were distinctly dissimilar. 242-258. Contrary to the

state's argument, the facts fail to show that the 404(b) evidence established a *modus operandi* or otherwise sufficiently similar to allow its admission.

The 404(b) Evidence:

The 404(b) witness testified that she met the defendant in the spring of 2011 at the prosecutrix's house. 247. That the first time she met the defendant they went outside to the defendant's car and started talking. 248. While sitting in the car talking they exchanged phone numbers. 248. She said that their first conversation in the car "immediately" became flirtatious. 248. About a month later during a cookout at the defendant's house she and the defendant went into a back room and immediately started kissing for twenty or thirty minutes. 249-250; 312. She characterized a relationship of *mutual interest*, stating that the next time they were together "*we* just started flirting again." 250, l. 24-25. She testified that one thing led to another and they had sex again. 250-251. The 404(b) witness testified that she was a "*very*" willing participant, and that she put forth her efforts into making it happen. 252, l. 14-16; 315. She claimed to have had sex with the defendant three times. 254.

The essence of the state's case as to the indicted offenses was that the defendant established a sexual relationship with the prosecutrix through the manipulation of her and her family over an extended period of time. The

evidence showed that the defendant and his family were close friends with the prosecutrix and her family. 64. The defendant's family would often go to the prosecutrix's house. 136. They had contact for over a year and half. 137. They were together as families at times on a daily basis. 83. The mother of the prosecutrix testified that the defendant was generous and gave them money to help out with their bills. 71. The prosecutrix claimed that the defendant helped her parents with their bills, including their car insurance, "to blind them away from what was happening." 288, l. 8-10.

The 404(b) witness lived with her grandparents. 255. Unlike the long established relationship that existed between the prosecutrix's family and the defendant's family, there was no evidence that the grandparents even knew the defendant, much less were friends or ever had any contact with him. 255. Also unlike the claims of almost constant contact between the prosecutrix and defendant, the contact between the defendant and the 404(b) witness was limited to communicating "over Facebook occasionally." 250, l. 16. By her own testimony The 404(b) witness was a very willing participant and that she actually worked at making "it" happen. The 404(b) witness's testimony is distinctly different than the testimony of the prosecutrix and the state's theory that the defendant heavily manipulated the prosecutrix and her family to establish a sexual relationship.

While the 404(b) witness had little contact with the defendant's family, the prosecutrix essentially lived at the defendant's for an extended period of time. The prosecutrix would come over to the defendant's house two or more times a week while the defendant's wife was there. 139. She spent nights at the defendant's house. 138. She was at the defendant's house close to every weekend. 203. This continued into 2011 when the defendant moved to Magnolia Trailer Park where she was given a bedroom. 140. During that time the defendant's wife helped the prosecutrix with her homework and she helped the wife with the defendant's daughter. 140. The prosecutrix also went places with the defendant's family such as bowling and to the movies. 141. She continued to come to the defendant's house even when the defendant and his family moved to Central, and later to Traveler's Rest in 2012. 145; 150-151. There is no evidence that the defendant and the 404(b) witness had similar contact with the defendant and his family.

The alleged sexual contact also differed greatly between the 404(b) witness and the prosecutrix. The defendant's wife testified that one night she found the defendant and the prosecutrix on the couch together. 148. The prosecutrix testified that the defendant had sex with her at his house while his wife was in the shower, and then went back to playing games and watching TV like nothing

had happened and ended up spending the night. 192-196. She also testified that while in Central she had sex with the defendant at his house while his wife was at the hospital. 205. They had sex, including oral sex, again at the house while the wife was asleep. 207. The prosecutrix claimed that she and the defendant had sex at different locations in different rooms. 199-200. She also testified that sometimes it was "full" sex and sometimes oral sex. 200. She testified that they had sex, including oral sex, in the defendant's car. 202. The prosecutrix testified that they continued to have sex everyplace the defendant moved. 198. These events are significantly dissimilar to those alleged by the 404(b) witness.

The prosecutrix also testified that she continued to have sex with the defendant because he had a short temper and in the back of her mind she didn't want to get yelled at. 213. These facts are also dissimilar to the 404(b) testimony.

The nature of the defendant's normal daily contact between the prosecutrix and the 404(b) witness is also hugely dissimilar. The prosecutrix testified that the defendant went to her school events, like volleyball tournaments or practices. 138. According to the defendant's wife the defendant had constant contact with the prosecutrix through text messages or calls to the prosecutrix. 137. When the prosecutrix had her phone cut off for going over her minutes on her parent's data plan, the defendant bought her a cell phone on his plan. 73. When that cell phone

was taken away due to poor grades, she testified that the defendant secretly provided another cell phone. 74. In contrast to the constant contact alleged by the prosecutrix, the 404(b) witness testified that she only had occasional contact with the defendant through Facebook. The dissimilarities clearly far outnumber any generic similarities between the testimony of the prosecutrix and the 404(b) witness.

In addition to the stated 404(b) evidence the solicitor repeatedly raised other evidence of bad acts or bad character throughout the trial. The solicitor asked the defendant on cross-examination about Jennifer Anglin's daughter. 444. Despite not being the subject of direct examination the solicitor went into a line of questioning involving Anglin's daughter. The solicitor's questions clearly implied that the Defendant was making some improper contact with Anglin's daughter using an assumed name. 445. The solicitor offered no proof to substantiate the allegations that were the subject of her questions. 446.[1] The solicitor then went on to question the defendant about the existence of a no contact bond with his fiancé Angelina Campbell. 446. The solicitor asked if the no contact provision was a condition of his bond. 446. The solicitor made a point to

[1]The solicitor discussed Anglin's daughter and the defendant's cousin at sentencing claiming "that law enforcement has received a complaint on that he was doing the same type of things, attempting to engage this child." 514, l. 5-11.

inform the jury, under the guise of asking the defendant a question, that the defendant had an active charge against him:

Q: All right. So are you, currently, engaged right now?

A. Yes, I am.

Q: To whom?

A: Angelina Campbell.

Q: Is she in court today.

A: Yes, she is.

Q: Isn't there a no-contact order between you and Angelina?

A. There was.

Q: No. There is, isn't there?

A: I'm not sure. It's - -

Q: As a condition of your bond, you're not supposed to have contact with her; isn't that correct?

A: No, it's not correct. It was supposed to have been dissolved.

Q: Sir, you have an active charge with her; correct?

A: Ma'am, once again, it was supposed to be dissolved.

Q: Sir, you have an active charge with her, do you not?

A: I don't know if I do or not, ma'am. But, once again, it was supposed to

have been dissolved.

Q: Am I your prosecutor on that case?

A: I don't know if you are or not - -

Q: Have you not called me numerous times asking me - -

A: No, ma'am, I have not. No. There was a letter sent to you, an affidavit filled out for you.

Q: And have you been instructed by our office that that case is not dropped and you are not to have contact with her?

A: Ma'am, I was once told it was dismissed. So I don't know what's going on with it - -

Q: Who were you told that by?

A: I guess your office.

Q: No, sir. No one from my office - -

445, l. 22-447, l. 4.

The solicitor went on to make the point again:

Q: But do you have an active charge with her? 447, l. 12.

There was never any evidence offered as to the alleged charge or no contact order to make it admissible or the proper subject of questioning before the jury.

The solicitor again attempted to bring up other bad acts evidence on cross of the defendant asking him about an *incident* with his cousin. 456. The state never offered any evidence to establish the admissibility of the any "incident" involving the defendant's cousin under Lyle and Rule 404(b).

The state elicited testimony from the investigating officer that he left his card for the defendant so the defendant could tell him his side of the story but that "He never contacted me." 354, l. 4-5. The solicitor went on to follow up that giving the defendant an opportunity to talk with the officer was something he normally did. 354, l. 10-11.

The solicitor asked the defendant on cross if he was supplementing his disability income by selling pot or pills. 442. There was no attempt by the state to establish any basis for the question under 404(b) or other any rule. 442.

In closing the state characterized the defendant as a pack of lions preying on a baby. 487-488. The state then repeatedly made personal representations to the jury in closing argument: I think the defendant has personal self-worth issues. 488. Vouching for the 404(b) witness: "I think she was very, very humble when she took the stand." 488, l. Vouching for the prosecutrix: "I think she really like[d] him. And I think that is what's embarrassing right now, too, is that she, actually, fell for that." 490. I think she liked being around him." 491. "Because I

think what he told her and what she thought was that one day, they were going to run off together." 491. "So, yeah, maybe her testimony wasn't exactly as we would have like it to be, quite as humble, and as open, and honest as [The 404(b) witness'], but it wasn't a lie." 490, l. 8-10.

## ARGUMENT

*Standard of Review*

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

### I. THE COURT ERRED IN ALLOWING EVIDENCE OF PRIOR BAD ACTS UNDER STATE V. LYLE, 125 S.C. 406, 118 S.E. 803 (1923), AND RULE 404(b), SCRE.

In this case the Appellant is charged with multiple counts of criminal sexual conduct and lewd act involving a single individual, the prosecutrix in this case. Over the defense's objection the state introduced evidence of other bad acts with a second individual, who was about the same age as the prosecutrix. Over the defense objection, the testimony of the witness was allowed as other bad act evidence under the common plan or scheme exception to Lyle and Rule 404. This was error.

Generally, "evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." Lyle, 125 S.C. at 415, 118 S.E. at 807. However, there are certain well-established exceptions to this general rule:

[E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. Lyle, 125 S.C. at 415, 118 S.E. at 807; Rule 404(b), SCRE ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). State v. Fonseca, 681 S.E.2d 1, 383 S.C. 640 (S.C. App., 2009).

Motive was not made a material issue at trial and the occurrence of physical contact was denied by the defendant. The introduction of the prior bad act is therefore unsupported under the motive and intent exceptions provided in Lyle and Rule 404. State v. Fonseca, 681 S.E.2d 1, 383 S.C. 640 (S.C. App., 2009). Likewise, neither mistake, accident nor identity were at issue in the trial. The introduction of the prior bad act evidence is therefore equally unsupported by related exceptions under Lyle or Rule 404. Common plan or scheme was the only exception argued by the state as its basis for the admission of the Rule 404

evidence.

***Common Plan or Scheme***

[E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Lyle; Rule 404(b). "When determining whether evidence is admissible as [a] common scheme or plan [under Rule 404(b)], the [circuit] court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-78. "A close degree of similarity exists when the similarities outweigh the dissimilarities.'" State v. Scott, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013) (*quoting* Wallace, 384 S.C. at 433, 683 S.E.2d at 278).

"The common scheme or plan exception 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged ... is held admissible as tending to show continued illicit intercourse between the same parties.'" Kirton, 381 S.C. at 10, 671 S.E.2d at 117 *citing* State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955). Here the other bad act evidence is not between the same parties, instead it involves a third party, and is

alleged to have occurred prior to the offenses charged. Other than the occurrence of sex, the alleged offenses and the other bad act evidence bear little material resemblance.

Due to the lack of substantial similarities in this case between the testimony of the prosecutrix and the 404(b) witness, the probative value of the other bad act evidence is slight. *See* State v. Kirton, 381 S.C. 7, 9, 671 S.E.2d 107, 117 (Ct.App.2008) (holding a common scheme or plan requires similarity between the prior act and the charged act that increases the probative value of the evidence); State v. Aiken, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct.App.1996) (noting the more similar the prior act is to the charged act, the more likely the evidence will be admissible); State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (finding prior bad acts are admissible when close similarity between the acts enhances the probative value of the evidence so as to outweigh the prejudice).

In this case there are no more than generic similarities between the offenses for which the defendant was charged and those alleged by the 404(b) witness. The connection between the prior bad act and the crime must be more than just a general similarity. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997); State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct.App.2004); State v. Stokes, 279 S.C. 191,

193, 304 S.E.2d 814, 815 (1983). Generic similarities fail to meet the standard necessary for admissibility. A *close degree of similarity* or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception. State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct.App.1999) *emphasis added.*

The prior bad acts alleged through the testimony of the witness fail to establish any common scheme or plan, much less raise to the level of *modus operandi* as argued by the state. "Clear and convincing evidence of prior crimes or bad acts that is logically relevant is ... admissible to prove ... a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other." State v. Moultrie, 316 S.C. 547, 554, 451 S.E.2d 34, 39 (Ct.App.1994). Here, the prior bad acts fail to do more than establish evidence of propensity and bad character, which is clearly impermissible: "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); *see also* State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity

therewith).

In Fonseca the court rejected the State's argument that two incidents that occurred in Fonseca's marital home while his wife was in the other room, demonstrated that the Fonseca had a common scheme or plan to attack the victim while his wife was not present or was in the other room. Fonseca, which was adopted by the supreme court as well reasoned[2], appeared to be the first sign of a slowing of the Wallace juggernaut. Despite the court's ruling in Fonseca, the rule of Lyle and 404 against the use of propensity evidence has continued to be eroded, virtually to the point of non-existence in criminal sexual abuse cases, especially those involving minors. As pointed out by the dissent in Wallace:

> [O]ur cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a "common scheme or plan" under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence. *Compare, e.g.*, Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct.App.1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) vacated on other grounds 371 S.C. 511, 641 S.E.2d 24 (2007) internal citations omitted, yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions,[7] I believe that thorough scrutiny is warranted.

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[2]State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (S.C. 2011).

State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) *Justice Pleconies, dissenting*.

In this case, the state has offered nothing more than propensity evidence. Any similarities are merely generic and far outweighed by dissimilarities between the facts surrounding the prosecutrix and the 404(b) witness. While the state argued that the 404(b) evidence was offered to show that the defendant had sex with the prosecutrix through a pattern or scheme of manipulation, it failed to show that the 404(b) witness or her family were similarly manipulated. What it did show was that the defendant had sex with a young girl before, therefore allowing the jury to infer that the defendant had the propensity to commit the offenses charged. In any other type of case, evidence of this nature would have immediately been judged too dissimilar under Lyle and Rule 404.

Even if the other bad act evidence were admissible under Rule 404(b), the testimony of the 404(b) witness should have nevertheless been excluded, as its probative value was substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Beck, 342 S.C. at 135-36, 536 S.E.2d at 683; *see also* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence."). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct.App.). State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (S.C. App., 2005) The testimony of The witness was unnecessary to any element in the state's case and overly prejudicial. As a result, the 404(b) evidence in this case should have been excluded under both Rules 404 and 403. Its admission was therefore error.

***Harmless Error Analysis***

To deem an error harmless, this court must determine "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (*citing* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)) (*internal quotations omitted*). Due to the prejudicial tendency of admitting prior bad act testimony it cannot be said that beyond a reasonable doubt the verdict was not affected by the evidence. *See* Fosneca, *supra*. Therefore, the erroneous admission of evidence under 404(b) in the defendant's case constitutes reversible error.

## II. THE COURT ERRED IN ALLOWING QUESTIONS CONCERNING INFLAMMATORY TEXT MESSAGES WITHOUT A PROPER FOUNDATION.

On cross-examination the solicitor questioned the defendant about text messages allegedly sent to the prosecutrix's father some time after the defendant had been arrested on the present charges. 424. The solicitor asked the defendant if 561-7021 was his phone number. 424. The defendant testified that it was not. 424. He testified that he was not texting from that number. 425. The solicitor asked the defendant to read the content of the text messages aloud for the jury. 425. The defense objected to the solicitor asking the defendant to read aloud the contents of the messages. 426. The defense argued that there had been no foundation laid to allow the messages to be read aloud for the jury. 426. The court sustained the objection. 426, l. 9. Then, despite the objection having been sustained, the solicitor continued by reading the content of the text messages aloud to jury herself in the form of a question:

Q: Did you text - - well, here's how I'll do it. Did you text Walt on June 22nd of 2013, and state to him, Will you drop charges, or are we going to court? Either way, I'm still going to hang out with you. Just be honest with me?

A: No, I did not.

426, l. 11-16. Despite the continued denial of having sent any text messages

during that time frame or from that phone the Solicitor continued:

Q: Did you text him, my life is - - excuse me - - fucked up - -

Again defense counsel objected. 426, l. 17-19. The objection was sustained and the jury excused. 426.

After the jury was excused there were arguments as to the propriety of having the contents of the text messages read aloud to the jury before they had been authenticated and offered into evidence. 427. The solicitor maintained that she should be allowed to read the text messages *verbatim* and force the defendant to answer whether he made each statement. The solicitor admitted that she could not introduce the statements through the defendant, but stated that she had a rebuttal witness that she would put on the stand to lay a foundation for the admission of the text messages. 426. In the discussions the court noted that what was "troublesome" was that solicitor was essentially publishing something not yet in evidence. 429. The court overruled the defense objection and allowed the solicitor to continue reading the texts aloud in the form of a question. 430. The court's ruling, however, appears to have been based on the solicitor's representation that the state would call a rebuttal witness to lay a proper foundation and have the text messages entered as evidence. 430.

The solicitor then continuing reading the content of the inflammatory text

messages aloud before for the jury in the form of questions to the defendant:

Q: All right. Mr. Gaskins, did you text Walt Mucienko on June 21st of 2013, and ask him to drop the charges so y'all could bounce and go hang out with Ian, your higher power God?

A: No, I did not.

Despite denying having sent the message the solicitor continued questioning the defendant about the message:

Q: Who is Ian?

A: I have no idea.

Q: What is the higher power God?

A: I have no idea either.

The solicitor continued:

Q: -Did you text him again on June 22nd of 2013, and ask him again, about dropping the charges, saying, If not, that's cool, but don't want to hassle with going to court?

A: No I did not.

431, l. 17- 432, l. 4.

Despite the defendant's consistent and repeated denials of sending the text messages the solicitor continued reading the inflammatory contents of the

alleged text messages in front of the jury in the form of questions:

Q: Okay. So you didn't text him about going to Oklahoma to make some money - -

A: No, ma'am. I did not.

Q: Okay. And you didn't text him then about, Why have you not dropped this shit on me? And why are you letting Sandy drag it –

A: Once again, I never texted him from 2013 forwards at all.

Q: Okay. And so then you didn't text him to say, Sandy must be threatening you, daddy?

A: No, ma'am. I did not.

432, l. 22-433, l. 9.

Despite having indicated that the state would call a witness to lay a foundation and authenticate all of the text messages that were read aloud to the jury, when asked if the state intended to bring any reply the solicitor responded: "I don't think I need to." 463, l. 9.

In this case the jury should not have heard the substance of the texts messages without the state first laying a proper foundation and authenticating the content of messages through a witness with personal knowledge of origin of the messages. "A witness may not testify to a matter unless evidence is

introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE. Here, the defendant denied any knowledge of the messages and the solicitor failed to call a witness as promised that could lay a proper foundation for the messages. Absent a proper foundation the state failed to establish the relevance of the evidence. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

Despite the defendant's denial of any knowledge of the text messages the prejudicial impact of solicitor's lengthy questioning is apparent. They were not only inculpatory, but also cast the defendant as a liar, pitting him against witnesses that were never called. The defense could not cross-examine or challenge the authenticity of the text messages. This left the jury to infer authenticity from the solicitor's insistent use of the them. As the court had earlier indicated, the solicitor was using them as they though they were evidence in the case. The potential for the jury to consider the text messages is obvious. The solicitor's intent that the jury the jury consider the text messages as evidence is clear as she later argued them to the jury in closing argument, claiming that the defendant's denial of the text messages was not believable. 494. This of course

constituted arguing facts outside of the record. "Solicitors must confine their closing arguments to evidence in the record, tailoring comments to the evidence presented and its reasonable inferences. State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)." State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (S.C. App., 2000).

Based on the solicitor's failure to properly lay a foundation and authenticate the inflammatory text messages, the exact problem arose that the court had earlier predicted. The solicitor's reading of numerous text messages before the jury under the guise of questioning could only be perceived as evidence by the jury. Absent a foundation the state failed to establish the relevance of the evidence. Absent any relevance, the evidence fails to withstand a probative value versus prejudice analysis under Rule 403, SCRE. It was therefore error for the circuit court to allow the questioning without having the solicitor first lay a proper foundation.

In light of the inculpatory and inflammatory nature of the text messages, the prejudice resulting from the solicitor's improper questions undermines a finding of harmless error. *See* State v. Padgett, 2010 MO 17 (S.C., 2010).

## III. THIS COURT SHOULD CONSIDER THE OVERALL PREJUDICE IN ANY HARMLESS ERROR ANALYSIS ON ALL ISSUES.

The cumulative prejudicial effect of evidence, questioning, and improper argument throughout the case should be considered in evaluating the prejudice effect of the appealable issues raised herein. The determination of whether an error is harmless depends on the circumstances of the particular case. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). No definite rule of law governs this finding. *Id.* Rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985). "An error is harmless where it could not reasonably have affected the result of the trial. *Id.* In the present case, unappealable due to the lack of an objection or the failure to request curative instructions, the record is replete with instances causing undue prejudice.

Without any foundation to establish admissibility under Rule 404, the solicitor asked the defendant on cross-examination about numerous other bad acts. The solicitor made absolutely no attempt at laying a foundation for questions implying bad acts involving Jennifer Anglin's daughter. 444. The solicitor's questions clearly implied that the Defendant was making improper contact with Anglin's daughter under an assumed name. 445. The solicitor

brought up other bad acts on cross of the defendant alleging an *incident* with the defendant's cousin. 456. The solicitor offered no proof whatsoever to substantiate the questions, or otherwise establish a valid basis under Rule 404 and *Lyle* for the admissibility of any evidence relating to either of the other individuals. 444; 446.

The solicitor then went on to question the defendant about the existence of a no contact order involving his fiancé Angelina Campbell. 446. The solicitor asked if the no contact provision was a condition of a bond, presumably a criminal bond. 446. The solicitor made a point to inform the jury, again under the guise of asking the defendant a question, that the defendant had an unrelated active criminal charge against him. 446. No foundation was laid for this line of questioning. 446. Although most of the inflammatory questioning went without an objection, and are therefore unappealable, the prejudice remains apparent and appropriate for this Court to consider in any harmless error analysis.

The state further caused undue prejudice by eliciting testimony from the investigating officer that he left his card for the defendant so the defendant could tell him his side of the story but the defendant never contacted him. The solicitor went on to follow up that giving the defendant an opportunity to talk with the officer was something he normally did. Although this also went without objection it clearly added to the overall prejudice in the case.

The solicitor went on to further prejudice the defendant in the jury's eyes by asking the defendant on cross if he was supplementing his disability income by selling pot or pills. 442. There was no apparent basis for asking this question, nor any attempt by the solicitor to establish the admissibility of such evidence. It was asked simply to show the jury the defendant's bad character. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity therewith). This went without an objection from defense counsel, but again it clearly added to the overall prejudice in the defendant's case. 442.

The solicitor also pitted the defendant against the state's witnesses: "So you're telling us the state did not present any true evidence. Is that what you said?" 456, l. 15-16. When the solicitor asks an argumentative question requiring the defendant to explain the truthfulness or testimony of an adverse witness, the question is improper. "No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper." Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998). Particularly when credibility is the crucial issue in a case, improper pitting of witnesses is prejudicial and cannot be

deemed harmless. Sapps, 295 S.C. at 486, 369 S.E.2d at 146; Brown, 297 S.C. at 29, 374 S.E.2d at 670.

In closing the state characterized the defendant as a pack of lions preying on a baby argument that went without objection. 487-488. The solicitor then went on to make numerous personal representations in closing argument: "I think Mr. Gaskins has some personal issues, some personal self-worth issues." 488, l. 4-5. The solicitor vouched for the 404(b) witness stating: "I think she was very, very humble when she took the stand." 488, l. 22-23. The solicitor then vouched for the prosecutrix, "I think she really like[d] him. And I think that is what's embarrassing right now, too, is that she, actually, fell for that." 490, l. 5-7. I think she liked being around him." 491, l. 10-11. "Because I think what he told her and what she thought was that one day, they were going to run off together." 491. "So, yeah, maybe her testimony wasn't exactly as we would have like it to be, quite as humble, and as open, and honest as [the 404(b) witness'], but it wasn't a lie." 490, l. 8-10.

Despite the lack of objection by the defense, it is clear that the state repeatedly placed before the jury improper questions that prejudiced the defendant, offered improper and inflammatory evidence, and made improper argument to the jury. "Whether such an error is harmless in a particular case

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Jerald Denton Gaskins, Jr., Appellant.

Appellate Case No. 2015-000312

---

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

---

Unpublished Opinion No. 2017-UP-166
Submitted February 1, 2017 – Filed April 19, 2017

---

**AFFIRMED**

---

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

---

**PER CURIAM:** Jerald Denton Gaskins, Jr. appeals his convictions of criminal sexual conduct with a minor second degree and lewd act upon a minor, arguing (1) the trial court erred in allowing evidence of prior bad acts, (2) the trial court erred in allowing the State to question him about text messages without laying a proper

foundation, and (3) the cumulative prejudicial effect of all errors throughout the trial should be considered in evaluating the prejudicial effect of the preserved issues. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in admitting evidence of prior bad acts: *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) ("The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion."); Rule 404(b), SCRE (providing evidence of other crimes, wrongs, or acts may be admissible to show the existence of a common scheme or plan); *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009) ("When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity."); *State v. Scott*, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013) ("A close degree of similarity exists when the 'similarities outweigh the dissimilarities.'" (quoting *Wallace*, 384 S.C. at 433, 689 S.E.2d at 278)); *id.* at 502, 748 S.E.2d at 243 (noting there was a close degree of similarity between the witness's testimony and the victim's testimony, despite some differences, because "the *vast majority* of [the 404(b) witness's] specific allegations directly align[ed]" with the victims' testimonies).

2. As to whether the trial court erred in allowing the State to question Gaskins about text messages without laying a proper foundation: *State v. Martucci*, 380 S.C. 232, 259, 669 S.E.2d 598, 612-13 (Ct. App. 2008) ("Where a defendant objects and the objection is sustained but he does not move to strike the evidence, the issue is not preserved for appellate review."); *State v. Bryant*, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (providing an issue conceded at trial may not be argued on appeal).

3. As to the cumulative prejudicial effect of all errors: *See State v. Beekman*, 405 S.C. 225, 238, 746 S.E.2d 483, 490 (Ct. App. 2013), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2016) (noting the defendant's argument the court should consider the cumulative effect of unpreserved errors was effectively "asking th[e] court to apply the plain error doctrine by combing the record for unpreserved issues and arguing the cumulative effect of these unpreserved matters deprived him of a fair trial"); *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (providing South Carolina does not recognize the "plain error" rule).

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

**AFFIRMED.**

**LOCKEMY, C.J., and GEATHERS and MCDONALD, JJ., concur.**

# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
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May 05, 2017

The Honorable Paul B. Wickensimer
Courthouse
305 E North St
Greenville SC 29601-2121

**REMITTITUR**

Re: The State v. Jerald D. Gaskins, Jr.
Lower Court Case No. 2013GS2303231, 2013GS2303236
Appellate Case No. 2015-000312

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
J. Falkner Wilkes, Esquire
Mark Reynolds Farthing, Esquire
William Walter Wilkins, III, Esquire

**FORM 5**

STATE OF SOUTH CAROLINA )
)
County of Greenville )
SCDC#360923 )
Jerald Denton Gaskins, Jr )
Full name and prison number (if any) of Applicant )
)
v. )
)
State of South Carolina )
)
)
)

IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
PAUL A. WICKENSIMER
GREENVILLE CO
2017 SEP 11 PM 1:52

**APPLICATION FOR**

**POST-CONVICTION RELIEF**

**2017-CP-23-** 05901

**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 clear to which question any such continued answer refers.

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

If the application 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 the applicant was convicted.

1. Place of detention McCormick Correctional Institution 386 Redemption Way, McCormick S.C 29899

2. Name and location of Court which imposed sentence Greenville County General Session, 305 East North street suite 325, Greenville SC, 29601

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2013GS2303231, 2013GS2303232

(b) 2013GS2303234, 2013GS2303235

(c) 2013GS2303236, 2013GS2303233

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 2013GS2303236-(2-5-2015) 5 years

(b) 2013GS2303236 (2-5-2015) 15 years

(c) 3231, 3232, 3234, 3235 (2-15-2015) 20 years

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) ✓ after a plea of not guilty _____

(c) after a plea of nolo contendere _____

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

yes

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

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

i. Appeal From Greenville County (Direct Appeal)

ii. _____

iii. _____

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

i. Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. April 19th 2017

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

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

(a) prosecutorial misconduct,

(b) Due process violations

(c) ineffective assistance of counsel,

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

(a) _____

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

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

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

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

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

_____

_____

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) 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) I was told these were PCR issues by my last Attorney.

(b) _____

(c) _____

17. 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, Mr J. Falkner Wilkes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

_____

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

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

i. General Sessions - Randy Chambers - Dont know address
Direct Appeal - J. Falkner Wilkes

ii. Attorney AT Law
114 Whitsett Street

iii. Greenville, SC 29601

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

i. General Sessions Greenville county - Randy Chambers
Direct Appeal - Mr. Jeff Wilkes

ii. _____

iii. _____

Revised 3/2003

19. State clearly the relief you seek in filing this application:

For conviction and sentence to be reversed or to be given a new trial.

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

NO

STATE OF SOUTH CAROLINA )
) VERIFICATION
County of Greenville )

I, Jerald Denton Gaskins, 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.

Jerald Denton Gaskins

SWORN to and subscribed before me this 29 day of August, 2017.

J Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

Revised 3/2003

**APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF**

I, Jerald Denton Gaskins Jr., 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 said proceeding or give security thereof.

X _____
*Applicant*

SWORN or affirmed to and subscribed before me this 29 day of August, 2017.

_____
*Notary Public*

My Commission Expires: 12.16.2019

Revised 3/2003

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE THIRTEENTH JUDICIAL CIRCUIT |
| Jerald D. Gaskins Jr., 362923<br><br>Applicant,<br><br>v.,<br><br>State of South Carolina,<br><br>Respondent. | ) | 2017-CP-23-5901<br><br>**RETURN, PARTIAL MOTION TO DISMISS AND MOTION FOR A MORE DEFINITE STATEMENT** |

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on September 14, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In April of 2013, the Greenville County Grand Jury indicted Applicant for four counts of criminal sexual conduct with a minor second degree (2013-GS-23-3231,3232,3234,3235) and two counts of lewd act upon a child (2013-GS-23-3233,3236). Randall L. Chambers, Esquire, represented Applicant. Applicant proceeded to trial on February 4 2015, before the Honorable D. Garrison Hill and a jury. The jury found Applicant guilty as indicted to all charges. Judge Hill sentenced Applicant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction.

evaluating post-trial Brady[1] claims, the applicant must show (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985).

"Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Bagley, 473 U.S. at 678, 105 S.Ct. at 3381. A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. See Clark, 315 S.C. 385.

Applicant has failed to make the requisite *prima facie* showing to warrant an evidentiary hearing that the State withheld any evidence that would have produced a different outcome at his trial. Therefore, Respondent submits this allegation should be summarily dismissed for failing to specifically set forth the facts upon which the application is based.

[1] Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963).

IV.

Applicant also alleges he was denied due process of law. However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must ". . . specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965).

Applicant has failed to state with any specificity the specific facts giving rise to this allegation. Additionally, this allegation is not supported by any other additional information in the application. Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to provide a more definite statement of his allegation of a due process violation. The Uniform Post-Conviction Procedure Act requires applicants to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include "a short and plain statement of the facts showing that the pleader is entitled to relief." Applicant's allegations are so vague and ambiguous that Respondent cannot be reasonably required to frame a responsive return. Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the application.

V.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the proceeding "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests Applicant provide a more definite statement of his claims, and an evidentiary hearing be held on any claims so requiring one.

**[SIGNATURE PAGE FOLLOWS]**

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

January 17, 2018

**FORM 5**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| | ) | |
| Jerald Denton Gaskins, Jr. № 362923 | ) | |
| | ) | |
| v. | ) | **APPLICATION FOR** |
| | ) | |
| State of South Carolina | ) | **POST-CONVICTION RELIEF** |
| | ) | |

**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 clear to which question any such continued answer refers.

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

If the application 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 the applicant was convicted.

1. Place of detention: McCormick Correctional Facility
2. Name and location of Court which imposed sentence: Court of General Sessions, Greenville, SC
3. Name(s) of co-defendant(s) (if any): None

Revised 3/2003

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2013-GS-23-03231

(b) 2013-GS-23-03232

(c) 2013-GS-23-03233

(d) 2013-GS-23-03234

(e) 2013-GS-23-03235

(f) 2013-GS-23-03236

5. The date upon which sentence was imposed and the terms of the sentence:

(a) a, b, d, e above - February 15, 2015 - 20 years

(b) f above February 15, 2015 - 5 years

(c) c above February 15, 2015 - 15 years

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ___

(b) after a plea of not guilty

© after a plea of nolo contendere ___

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

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

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

I. South Carolina Court of Appeals

ii.

iii. -

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

I. Convictions affirmed

ii. ___

iii. ___

© the date of each such result:

I. April 19, 2017

ii. ___

iii. ___

Revised 3/2003

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

I. 2017-UP-166

ii. ___

iii. ___

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) ___

(b) ___

© ___

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

(a) Trial counsel failed to object to improper questions by the prosecutor concerning text messages with Walt Mucienko and a minor and an alleged incident with another minor when there was no factual basis for the questions.

(b) Trial counsel failed to interview and call several witnesses who could have refuted much of the testimony of the witnesses against me.

(c) Trial counsel failed to investigate and obtain records from various sources that could have refuted much of the testimony against me.

(d) Trial counsel failed to introduce family court records that would have established the ground for my divorce and therefore the cross examination by the state would have been proven to be inaccurate.

(e) Trial counsel failed to object to the quesitons by the state as to alleged drug dealing which had no basis in fact.

(f) Trail counsel failed to intorduce the pleadings from the divorce which would impeach the testimony of my ex-wife.

(g) Trial counsel failed to supboena my medical doctor to prove I was alergic to latex.

(h) Trial counsel failed to object to the improper testmony of Dr. Mary Fran Croswell.

(i) Appellate counsel failed to perfect an appeal to the South Carolina Supreme

Court on the issue of the admissibility of other bad act under 404b.

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

(a) At numerous times on cross examination the prosecuting attorney asked questios which had no basis in fact and no objection was raised by trial counsel. This testimony can be found in the transcript of the trial on pages 454 to 455; 424 to 430; 431 to 447.

(b) The names of numerous witnesses we provided to trial counsel who failed to interview or call these witness. These witness would have proven that the alleged incident could not have happened under the cirucmstances described by the complaining witnesses.

(c) Had trial counsel obtained lease agreements and cell phone records much o fthe testimony of the complaining witness could have been refuted. In addition trial counsel failed to obtain record that a jeep vehicle alleged used in this alleged incident had been wrecked before the incident.

(d) The prosecuting attorney cross examined me at lenght about the ground for divorce as being one year separation. The prosecuting attorney cross examine me as if the ground were one year separation. Transcript at 460. Had trial counsel produced the divorce records to which he had access, the jury would have know that I was being truthful.

(e) During her cross examination, the prosecuting attorney asked me "You're not supplementing that by selling pills or pot" Transcript at 442, ll 10-11. This was improper character evidence. My trial counsel failed to object to the question and move for a mistrial as no curative instructino could have erased the prejudice. There was no basis in fact for this question.

(f) At the trial my ex-wife testifed that I had filed for divorce on the ground of one year separation. My trial counsel failed to impeach her with a copy of the divorce pleadings which would have shown the divorce was on the ground of adultry. The trial court ruled that trial counsel could recall my ex-wife and impeach her with the pleadings, but counsel failed to do so. Tr. at 374, ll 15-25. Trial counsel

also could have simply had me identify the pleadings that I filed and then introduce the pleadings but he failed to do this or attempt to do this. Had trial counsel attempted to do this and been denied , then the isue would have been preserved for appeal.

(g) During the trial the complaining witness testifed that I used a condom during the alleged sexual encounters. My lawyer know, because I had provided him with a medical statment, that I was alergic to latex and would break out in a rash if I came in contact with latex. My trial counsel failed to bring my medical doctor to court to terstify as to my allergy.

(h) During the trial, the state called Dr. Mary Fran Croswell to testify. She testiifed that the examination was noral in that "She had normal hymenal tissue." Tr. at 337, ll 11-12. Notwithstanding this normal examination, Dr. Croswell testiifed that the examination was consistent with sexual abuse. This testimony was more prejudicial tha probative and an objection should have been raised. Furthermore, Dr. Cresswell was improperly testified as to what the complaining witness told her. Dr. Cresswell was not a treating physican and as such the medical hisotry form the complaining witness was not relevant.

(i) Appelalte counsel failed to perfect the Petition for Writof Certiorari on the issue of the admisisbility of the other alleged bad act. Appellate counsel should have known that *State v. Perez* had been argued before the South Carolina Surpeme Court on November 30, 2016 and one of the issues argued in that appeal was whether State v. Wallace should be overturned. Had appellate counsel filed the petition my case would have have been on direct appeal at the time of the issuance of the *Perez* opinion and my case would have been bound by it.

12. Prior to this application have you filed with respect to this conviction:

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

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions,

if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

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

(a) the specific nature thereof:

I. ___

ii. ___

iii. ___

iv. ___

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

I. ___

ii. ___

iii. ___

iv. ___

(c) the disposition thereof:

I. ___

ii. ___

iii. ___

iv. ___

(d) the date of each such disposition:

I. ___

ii. ___

iii. ___

iv. ___

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

I. ___

ii. ___

iii. ___

iv. ___

14. Has any ground set forth in (10) been previously presented to this or any other Court,

State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

I. ___

ii. ___

iii. ___

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

I. ___

ii. ___

iii. ___

16. If any ground set forth in (10) 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) Trial Counsel raised no objection

(b) same

(c) same

(d) same

(e) same

(f) same

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

(a) your arraignment and plea? Yes

(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 applications with respect to this conviction, which you filed? Yes

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

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

I. Randall L. Chamber

804 Laurens Road
Greenville, SC 29607
(803) 298-0001

ii. J. Falkner Wilkes
114 Whitsett St.
Greenville, SC 29601
(864) 282-1292

iii. C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010

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

I. initial plea, pretrial motions, trial and sentencing

ii. appeal to the South Carolina Court of Appeals

iii. preparation of this amended application for Post Conviction Relief

19. State clearly the relief you seek in filing this application:

New trial

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

No

STATE OF SOUTH CAROLINA )
) VERIFICATION
County of McCormick )

I, Jerald Denton Gaskins, Jr., 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.

_____

SWORN to and subscribed before me this _____
day of _____, 2____.

_____ (L.S.)
*Notary Public*

My Commission Expires: _____

Revised 3/2003

**APPLICATION TO PROCEED WITHOUT PAYMENT 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 said proceeding or give security thereof.

*Applicant*

SWORN or affirmed to and subscribed before me this 15 day of MAY, 2016.

*Notary Public*

My Commission Expires: 12/7/2019

Revised 3/2003

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE<br><br>JERALD DENTON GASKINS, JR.,<br>APPLICANT,<br><br>vs.<br><br>STATE OF SOUTH CAROLINA,<br>RESPONDENT. | COURT OF COMMON PLEAS<br>2017-CP-23-05901<br><br>TRANSCRIPT OF RECORD |

ORIGINAL

October 24, 2018
Greenville, South Carolina

B E F O R E:

THE HONORABLE ALEX KINLAW, JR., JUDGE.

A P P E A R A N C E S:

C. RAUCH WISE, ESQ.
Attorney for the Applicant

DESHAWN H. MITCHELL, ESQ.
Attorney for the Respondent

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(AW) - Denotes Applicant's Witness
(RW) - Denotes Respondent's Witness

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(AW) JERALD DENTON GASKINS, JR.:
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| | (Applicant's Exhibits) | | |
| A-1 | Text Message Printout | 7 | |
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| A-5 | Letter dated 4/21/17 | 36 | 36 |


All Exhibits were retained by the Clerk of Court for Greenville County.

PROCEEDINGS

MR. MITCHELL: Your Honor, this is 2017-CP-23-5901, Jerald Gaskins v. the State of South Carolina. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court.

In April of 2013, the Greenville County Grand Jury indicted Applicant for four counts of criminal sexual conduct with a minor second degree, and two counts of lewd act upon a child. Mr. Randall L. Chambers represented the Applicant.

The Applicant proceeded to trial on February 4th, 2015, before the Honorable D. Garrison Hill and a jury. The jury found Applicant guilty as indicted to all charges. Judge Hill sentenced Applicant to concurrent 20-year terms of imprisonment for each of the second degree criminal sexual conduct with a minor convictions, a concurrent 15-year term of imprisonment for one of the lewd acts, and a consecutive five-year term of imprisonment for the remaining lewd act conviction.

He appealed his conviction. And the conviction was affirmed by the Court of Appeals. He filed a post-conviction relief application on September 14th, 2017.

He's present in the courtroom today and represented

by Mr. Wise.

THE COURT: All right. Mr. Wise.

MR. WISE: That's a correct recitation.

Let me check with him on one thing.

THE COURT: Okay.

(Pause.)

MR. WISE: Your Honor, I would -- I would like to call Mr. Walt Mucionko [sic].

MR. GASKINS: Mucienko.

MR. WISE: Mucienko as our first witness.

THE COURT: All right. Where's he at?

THE COURTROOM DEPUTY: He's downstairs. I didn't know you wanted to call him --

MR. WISE: Oh, I'm sorry. I apologize.

MR. MITCHELL: Can we approach, Your Honor?

THE COURT: Yes.

(WHEREUPON, a bench conference was held.)

(WHEREUPON, Mr. Walter Mucienko entered the courtroom.)

THE COURT: If you'll come around. And Madam Clerk is going to swear you in.

MR. WALTER MUCIENKO: Sure.

THE CLERK: Please place your left hand on the Bible and raise your right hand.

WHEREUPON,

WALTER MUCIENKO,

after first having been duly sworn, testified as follows:

THE CLERK: Thank you.

You may be seated.

THE COURT: All right. And once you -- once you get there, spell your last name for the court reporter.

THE WITNESS: M-U-C-I-E-N-K-O.

THE CLERK: Thank you.

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. WISE:

Q Mr. Mucienko --

MR. WISE: First of all, I'd like to just mark these for identification right now.

THE COURT: All right. No objection?

MR. MITCHELL: I do have an objection to the authenticity of the -- the text messages. I would -- if he would ask questions about those -- but I'm not sure where they came from, who can verify them --

MR. WISE: I'm not admitting them at this point.

THE COURT: He's just marking them for -- for identification purposes only.

MR. MITCHELL: Okay.

MR. WISE: He cannot authenticate them.

THE COURT: All right. They're for ID only.

(WHEREUPON, Applicant's Exhibit No. 1 was marked for identification only.)

BY MR. WISE:

Q Mr. Mucienko, I'm going to show you some text messages. And I believe you had an opportunity to look at those before?

A Let me get my glasses out here.

Yes, I have.

Q All right. Are those any text messages that you exchanged with Jerald Gaskins?

A No, sir.

Q You didn't do any of those?

A No, sir.

Q And since --

A I have not had access to a cell phone since before I went to prison.

Q All right. And these -- these are back in about 2013?

A 2013. For one, I have never had Verizon. I had Sprint.

Q Okay. And after Mr. Gaskins was arrested in November of 2012, did you have any contact with him?

A After he was arrested, yeah. I was threatened by him and some of his friends at a bar when I was at the VFW,

because of the fact that I did press charges against him for molesting my daughter.

Q All right. But you never had -- you never had any text messages back and forth with him --

A No, sir.

Q -- after November of --

A No. No reason to text message.

Q You had no reason to text message him after November of 2012?

A No.

Q And now that you've got your glasses on, look at --

A Yeah, sure.

Q You've seen those before when the investigator came by to see you?

A Yes, sir, yeah. I -- I wrote a statement on it, too.

Q All right. And none of these -- if you'll look through them a little bit.

A Yeah. Like I said, I have never -- I never had Verizon. I had Sprint the whole -- the whole time I've had Sprint. I've never had Verizon. So, for one, that's -- that's -- that's falsified, made up by somebody else.

Q Do you know whose phone number is (864)561-7021?

A No, sir.

THE COURT: Push that microphone right in front of

you --

THE WITNESS: No, sir.

THE COURT: -- and speak into it.

MR. WISE: Thank you very much.

That's all I have.

THE COURT: All right. Any questions, Mr. Mitchell?

MR. MITCHELL: Judge, I have no questions for this witness.

THE COURT: All right. I have no questions, sir.

You can step down.

Do y'all need him any more?

MR. WISE: I do not.

MR. MITCHELL: No, Your Honor.

THE COURT: All right. Mr. Wise.

MR. WISE: I'd like to call Mr. Gaskins.

THE COURT: Mr. Gaskins, come on up and be sworn.

THE CLERK: Mr. Gaskins, please place your left hand on the Bible and raise your right hand.

WHEREUPON,

JERALD DENTON GASKINS, JR.,

after first having been duly sworn, testified as follows:

THE CLERK: Thank you.

You may be seated.

Please state your full name for the record.

THE WITNESS: Jerald Denton Gaskins, Jr.

DIRECT EXAMINATION

BY MR. WISE:

Q Mr. Gaskins, you were convicted of criminal sexual conduct with a minor back in, I believe, 2015?

A Yes, sir.

Q All right. Who was your lawyer in that case?

A It was Randall Chambers.

Q Randall Chambers. All right. And he represented you during the entire trial?

A Yes, sir.

Q All right. During the course of the trial, were there some questions asked of you by the Solicitor concerning some text messages or e-mails?

A Yes, sir, there was.

Q All right. Did you have a chance to see those during the trial?

A No, sir, I didn't.

Q All right. I want to show you what's been marked first as exhibit -- Applicant's Exhibit No. 1 for identification only. Have you had a chance to review those?

A Yes, sir, I have.

Q All right. And did you have a chance to review those -- approximately how long ago?

A When you brought it to me, sir.

Q About a month, or so?
A About a month ago, yes, sir.
Q Okay. Do you recognize those as being anything that was used in the trial, some of the questions asked of you?
A Yes, sir.
Q All right. In looking at that, did you notice -- first of all, did you have any text messages back and forth with Mr. Mucienko?
A No, sir, I didn't.
Q Were y'all on any real speaking terms?
A No, sir, we weren't.
Q And those were allegedly done when?
A These were allegedly done?
Q Yes.
A 2013.
Q Of what year -- I mean what month? Excuse me.
A June of 2013, sir.
Q All right. Now, so you have never had any contact with Mr. Mucienko through text messages?
A No. My bond consisted of no contact --
Q Are some things in there in your looking at it that, also, created some suspicions as to who -- whether or not -- how they originated?
A Yes, actually, there was.
Q All right. And what did you observe?

A After observing the text messages, there were, actually, several errors. And when I say "errors," there were --

Q Now, you're looking at -- you're looking at Applicant's Exhibit No. 1.

A In this message, you see that -- I'm sorry. It shows that every message is forwarded. Now, anyone that knows anything about cell phones knows that in order to forward a message, you would have to, basically, use another phone. In other words, in -- in this text, it shows that from 561. There's no way I could possess the phone and forward these messages. Because if I did -- if I owned the phone, I would just send a normal text.

Q All right. Now, the phone number that's on there that's texted [phonetic] you, is that your number?

A No, sir.

Q I believe you testified to that at the trial?

A Yes, sir, I did.

Q Has it ever been your number?

A No, sir.

Q All right. So are there anything suspicion about the dates on the --

A Yes, there is. It shows on here that it was sent June 21st at 12:07 a.m. However, if you look at the picture, it shows -- there's several issues here. One, if

you look at the top of the page, it shows a Wi-Fi. The only time you're going to use Wi-fi is if -- one of those is if a phone doesn't work. If you're going to pull something from a phone to another phone, then you would activate Wi-Fi to pull that phone -- you would use the hot spot. And it would connect with that device.

And in this instance, that's kind of what happened here. You see the Wi-Fi is on, but --

MR. MITCHELL: Judge, I'm going to object. This sounds like technical testimony. I don't think he's a -- a cell phone expert, or anything like that.

THE COURT: I -- he's -- he's kind of going down that road, Mr. Wise. I'm going to sustain --

MR. WISE: All right. Let me -- let me -- let's get --

THE COURT: -- the objection.

MR. WISE: -- to the date issue.

THE COURT: All right.

MR. WISE: That's more -- that -- that doesn't require an expert.

THE WITNESS: Well, the dates -- the dates are very -- very suspicious here. Because it shows June 21st at 12:07 and it shows the message. Well, this phone -- Verizon showed at the bottom that it was altered. Because at the bottom here --

BY MR. WISE:

Q Well, not -- go ahead.

A It shows at the top it was sent June 21st. But then if you look at the bottom below the text message, it shows June 24th, 2013, at 4:54 p.m.

Q So there's two different dates?

A Yes.

Q All right. Let me see it a second again.

I want to look at the last one here on the last page of the exhibit, which it -- and the State has this copy. It's a written in number, 16, at the top of the page. And it's the one on June 28th -- June 26th at 8:18 p.m. Look at the message there.

And what does the last message say?

A Are you talking about from this point down?

Q Right.

A Okay. It says, Wondering why you have -- I'm sorry. Wondering why you have not dropped this crap on me, bro. Why are you letting it drag? It is Sandy. I mean, what -- did she threaten you today?

Q All right. And was that your father?

A No.

Q All right. Did you ever call Walt Mucienko when you knew him father?

A No, sir, never.

Q All right. Did your attorney object to any of these -- to this series of text messages at the trial?
A No, sir.
Q All right. I think there was some -- well, we'll get to that in a minute. Do you think that was prejudicial to you?
A Very.
Q All right. Now --
MR. WISE: You need to staple this, too.
BY MR. WISE:
Q Was there, also, an allegation at the trial about alleged messages between you and -- and Jamie, the sister of -- of the girl in this case?
A Yes.
MR. WISE: I'd like to mark this for Applicant's identification No. 2.
THE COURT: Without objection.
(WHEREUPON, Applicant's Exhibit No. 2 was marked for identification and admitted into evidence.)
BY MR. WISE:
Q And I hand you -- or you've got your set there. But let's use --
A Okay.
Q -- the one I've got, unless you've got yours marked.
A Actually, I do have some of mine marked.

Q All right. First of all, I hand you Applicant Exhibit No. 2. And look through that, if you would, please.

A Yeah. I remember reviewing these.

Q All right. Have you seen those before?

A Yes.

Q All right. And in what context did you see some -- or hear some of those messages or even see some of them before?

A The only time I, actually, seen these messages was when you sent them to me.

Q All right --

A Other than that --

Q At the trial in your case, were questions asked --

A Yes.

Q -- about messages contained in there?

A Yes, sir.

Q All right. But you never had a chance to see the messages?

A No, sir.

Q As far as you know, do you know if they were even presented to your lawyer?

A No, sir, I don't.

Q All right. And what were those represented to be at the trial?

A Text messages from Jamie Mucienko and myself.
Q Jamie?
A Yes.
Q Okay. And Jamie was an adult child --
A Yes.
Q -- of Walt Mucienko; correct?
A Yes, sir.
Q All right. Did you ever have any text messages with Jamie Mucienko?
A No.
Q Did the State ever produce any testimony that you -- that Jamie Mucienko, actually, sent -- y'all exchanged those?
A They had -- if I remember correctly, they had entered into -- text messages as -- or entered them in as evidence as they come from Jamie. But...
Q Those -- those were never introduced at trial?
A No. Not these, no.
Q All right. Did you have a chance to look through those?
A The ones --
Q Those messages?
A Yes.
Q All right. Now, you can get your notes out now, the ones you've got notes on. And, if you would, refer to

the -- to the page and so forth -- or the time. All right. What was one of the first things you noticed?
A Actually, by looking at it, one of the first things I noticed is that the phone has no service, none.
Q And is there something that tells anybody it's not active --
A Yes.
Q What is that?
A The top left corner shows that it's 45 degrees outside. Also, in some of the text messages, you will see an icon --
Q Excuse me. Excuse me. It says -- it says 45 degrees; correct?
A Yes.
Q And when were those reportedly sent?
A September 30th.
Q All right. September through what period of time?
A I believe it was September through October 21st.
Q And does the degree ever change?
A No, sir.
Q Okay. So tell us now what -- what you observed in there.
A After looking the messages over -- like I said, the first thing I did observe was the phone being off. The second thing I noticed was the -- and let's see. On Page

2, at the top of the page here, you can see that the triangle -- anyone that has a cell phone knows that -- that a triangle means no service.

So, once again, there's no service on this phone.

Q All right. In looking through these, are the things in here that clearly indicate as to -- not necessarily who they came from, but who they didn't come from, such as yourself?

A Right.

Q All right. Do you remember looking through there and finding some of those things?

A I remember looking through them and then having, you know, stuff like Sissy or Bubba.

Q All right. Let's look -- let's go to the one on October 6th at 10:49.

A Okay.

Q All right. What does that message say?

A Hey. Tell momma that me and Nat are going to the movies. If she needs me, I'll only answer the phone for y'all.

Q Would you have told VICTIM to tell your mother that?

A No, sir.

Q All right. Going back -- going further, rather, go to October the 7th at 6:49.

A Okay.

Q No. Back up, not that one. I should have marked mine.

Does your name appear anywhere in these from what you've looked through?

A No, never.

Q All right. Let's go to 11:30 a.m. at -- 4:13 p.m. All right.

A What page are you on?

Q It's -- I don't -- I don't have mine -- my pages numbered. But it's one at -- October the 8th at 4:13 p.m.

A Sorry.

Q I'll show you mine. Maybe it'll be a little quicker.

A I've got it. I've got it.

Q You've got it. Okay. What does that message say?

A Okay. It's -- the one from October 8th at 4:13 states, Painting and waiting to pick up VICTIM from school. What are you doing?

Q All right. Do you sit in the car and paint?

A No, sir.

Q Are you an artist at all?

A No, sir.

Q Is anybody in the Muchiano -- how do you pronounce their names?

A Mucienko.

Q Mucienko family paint?

A No. That -- I'm thinking about it. The only one that, actually, draws is -- is the brother.
Q [Inaudible]?
A Yes.
Q Okay. The brother is some sort of an artist?
A Yes.
Q Okay. Let's go to October the 12th at 9:52 p.m.
A The one that says --
Q Excuse me.
A Is that what you're talking about?
Q It says -- how --
A You've got October 12th at 9:52 p.m.
Q No. 9:52 on October 12th.
A Mine must be different.
Q Yep.
A Okay.
Q All right.
A Sorry.
Q What does that last comment say?
A I thought we got straight last night about bowling. So why are you telling mom I didn't invite us. This is BS, Jamie, and you know it. Who catches all the hell? Not you.
Q Does that make any sense coming from you?
A None.

Q Then let's go to the very last one -- not the very last one. On October 23rd at 11:03 p.m.
A October 23rd. I don't believe I have that one, sir.
Q Yeah, you do. It's the one about the cell phone payment, to refresh your memory.
A I must have left it over there. I don't have it in my paperwork. I'm sorry. I think it would be much faster to look at your copy, sir.
Q Have you got it?
A I don't have mine.
Q All right. Let me refresh you. Look at mine.
At 10:03 p.m., there's a discussion about a cell phone payment?
A 11:03 p.m., yes.
Q All right. Did you ever have any cell phone obligations with VICTIM?
A Never.
Q You never had her on a phone, or anything?
A No.
Q All right. I'm trying to find the one about New York. Have you got the one about the New York comment? I can't find it --
A Yes, sir. It's right here.
Q All right. What time is that?
A This is at on 10:23 p.m. on October 7th.

Q Let me make sure it's in here. Yes.
What does that say, that text say?
A That's good. Just wanted to say we should have one more cookout before I go to New York.
Q Had you ever had any plans to go to New York?
A Never.
Q Any desire to go to New York?
A Never.
Q Ever been to New York?
A Never.
Q Do you know of your own knowledge whether or not any member of the Mucienko family has moved to New York since this --
A Yes.
Q Who is that?
A Sandy Mucienko, as well as her daughter, Jamie Mucienko.
Q Jamie and the mom?
A Jamie and the mom, yes.
Q All right. So did you ever send any of those?
A No, sir.
Q At the trial, was it ever established that any of those came from your cell phone number?
A No, sir.
Q One other point. Looking at these, what is the time

on the first message on Page -- well, let me give you my put together group.

A Thank you.

Q What is the time on the first message sent and what is the date?

A 2:20 a.m. --

Q Let me back up. What is the time on the -- on the --

A Oh, okay, okay.

Q -- on the --

A 11:18 a.m., sir.

Q Excuse me?

A 11:18 a.m., sir.

Q 11:18 a.m. All right. And that's the time on the -- whatever device is being used?

A Right.

Q All right. What is the time on the last message?

A 11:36 a.m., sir.

Q All right. And do the -- does the time progress in incremental order from 18 to 36?

A Yes.

Q All right. And what are the dates -- what are the dates on that?

A From 11:18 a.m. from -- I'm sorry. From 11:18 a.m. on the first page to 2:20 a.m., September 30th.

Q All right.

A And it ends at 11:13 p.m., October 23rd.
Q All right. So you had over a month of text messages sent in 36 minutes?
A Correct.
Q Was that suspicious to you?
A Very.
Q All right. And were you asked about those messages at trial?
A Sir?
Q Were you asked about --
A Yes, I was.
Q -- those messages at trial?
Did they portray you in a good light?
A They made me look bad.
Q All right. Did you send any of those messages?
A No, sir.
Q Did the State ever produce anybody to identify those messages as, actually, coming from you?
A No, sir.
Q Did they ever introduce any devices they allegedly came from?
A No, sir.
Q Did your lawyer object to those messages?
A No, sir.
MR. WISE: We need to mark this as -- for

identification, Applicant's Exhibit No. 3.

(WHEREUPON, Applicant's Exhibit No. 3 was marked for identification only.)

BY MR. WISE:

Q Have you seen what's been marked as Applicant's Exhibit No. 3 for identification before?

A I had never seen it all until it was produced to me by you.

Q Until we brought it in?

A Yes.

Q All right. Do you recognize that as being used in your trial?

A The name I recognize.

Q All right. What about some of the questions? Have you looked at --

A I've looked at the questions, yes.

Q All right. Were you asked questions about that -- those alleged messages at the trial?

A Yes, I was.

Q Who are those messages from?

A These messages are from someone by the name of Jay Fowler.

Q All right. Who are they to?

A They're to a 12 year old girl.

Q Now, do you know a 12 year old girl?

A Vaguely.
Q All right. And how do you know her?
A Because of my ex-fiancée. She was sister-in-laws with Jennifer Anglin, who is the mother of 12 year old girl?
Q All right. So you knew her through your fiancée -- former fiancée?
A Yes.
Q Okay. Have you ever been on Facebook as Jay Fowler?
A Never.
Q All right. Now, those questions to 12 year old girl how old is 12 year old girl?
A 14 years of age.
Q All right. And did that come out at the trial that she was, like, 14?
A Yes.
Q Did -- was there any objection raised by your lawyer to even asking questions about another incident?
A No, sir.
Q All right. So you were cross-examined about that, also?
A Yes, sir.
Q Do you think that was prejudicial to you?
A Very.
Q All right. Did anyone ever produce any IP addresses or anything like that at trial to show where this Jay

Fowler sent his messages from?
A No, sir.
Q All right. And do you -- did you have an opportunity to even see those before trial?
A No, sir.
Q Okay. Now, do you think those questions were -- were prejudicial to you?
A Yes, sir, I do.
Q All right. Do you remember a question that you were asked about any drug dealing?
A Yes, sir, I do.
Q And I believe that is on Page -- you don't have to look it up.

But for the Court, it's on Page 442 at Lines 10 through 12.

All right. What was that question -- what were you asked?
A I was asked if I supplemented my income by the selling of pot or pills.
Q And you denied it?
A Yes, I did.
Q Do you do that?
A No, sir, I don't.
Q All right. Before you testified -- and, for the Court's edification, you may want to look at this because

I don't think we've went over this.

On Page 364 of the transcript, were you asked by the Court about your testifying?

A Was I asked?

Q Is that where you would discuss with the Court about your testifying in the trial? If you look on Page 365, I think you'll -- that's where you, actually, start talking.

A Okay. What was your question, sir?

Q All right. Do you remember the Court asking you before you testified about do you want to testify, and all that?

A Yes, sir.

Q All right. In that hearing, does the State represent whether or not you had any criminal record?

Look at Lines 13 through 15.

A Not that I see. You said Page 365?

Q 364. Excuse me.

A I'm sorry.

Q I apologize.

A 364. And what line, sir?

Q Line 13 through 15.

A Okay. Yes.

Q All right.

A Yes, I do.

Q And what did the State represent?

A The State said, Nothing that would fit under the rule.
Q All right. But you were impeached with an alleged crime, correct?
A Yes, sir.
Q All right. On Page 454 at Line 21, this is during your testimony. Did the State ask you about texting #1 Minor two weeks ago?
A Yes, it did.
Q All right. Had you texted her two weeks ago?
A No, sir.
Q Have you ever seen any evidence to back that up?
A No, sir.
Q Did -- was an objection made about that?
A No, sir.
Q And was an allegation of your texting #1 Minor two weeks ago prejudicial to your case?
A Yes, sir.
Q And you'll have to probably tell the Court who #1 Minor is.
A #1 Minor -- #1 Minor was the victim's best friend that she had known since the fourth grade.
Q All right. And did #1 Minor testify under the Wallace case?
A Yes.

Q About the fact that you -- she alleged that you had sex with her, too?
A Yes, sir, she did.
Q Is that correct?
A That's correct.
Q So your texting #1 Minor two weeks before trial would be?
A Very prejudicial, sir.
Q Very prejudicial?
A Yes, sir.
Q All right. And then, I think, the sarcastic question was, Well, maybe you did it under Jay Fowler?
A Yes, sir.
Q Was any objection raised to that?
A No, sir.
Q Okay. Now, during your testimony, a big to do was made about your getting a divorce?
A Yes, sir, there was.
Q Correct?
A Yes, sir, there was.
Q All right. And were you impeached on the -- the ground you were trying to seek a divorce on?
A Yes, sir.
Q And did you file a complaint seeking a divorce from your wife, Rachel?

A I did, sir.
Q And was that on the grounds of adultery, as you testified to?
A Yes, sir, it was.
Q Okay. I'll hand you this and ask you if you recognize that?
A Yes, sir. It's the motion and order from the Family Court.
Q Now, look through the whole thing. Keep going. I probably gave you too much.
A I think you did.
Q Do you recognize that portion of it, in particular?
A This -- this portion, yes, I do.
Q And had you read that before your trial in 2015?
A Yes.
Q And what is that?
A It's a divorce pleading.
MR. WISE: All right. Hold on. I'd like to introduce this. This will be an exhibit.
(WHEREUPON, Applicant's Exhibit No. 4 was marked for identification only.)
BY MR. WISE:
Q All right. The grounds for your divorce became a -- did it become a big issue in this trial?
A Yes, sir, it did.

Q All right. And if you would, read from the complaint what the grounds for divorce were.
A See the motion attached --
Q Well, let me -- let me help you out a little bit. Keep going.
A Okay. Now, what do you want me to say, sir?
Q What were the grounds for divorce you sought -- what were the grounds in the complaint you sought a divorce on?
A It was under adultery, sir.
Q All right. And is that what the complaint says?
A Yes.
Q All right. Were you impeached by the Solicitor about the grounds for divorce?
A Yes, I was.
Q And I believe your wife -- or ex-wife testified to the complete contrary; correct?
A Yes, she did.
Q All right. Would that exhibit that we just introduced have been helpful to you at trial?
A Very much so, yes.
Q To prove you were telling the truth?
A Yes, sir.
Q Would it have impeached your ex-wife?
A Yes, sir.
THE COURT: Mr. Wise, let me ask you a question.

Are -- are you moving that exhibit into evidence?

MR. WISE: Yes. Excuse me.

THE COURT: All right. Any -- any objection?

MR. MITCHELL: Without objection, Your Honor.

(WHEREUPON, Applicant's Exhibit No. 4 was admitted into evidence.)

THE COURT: I think the prior two were just for purposes of identification, I believe.

MR. MITCHELL: That's correct, Your Honor.

MR. WISE: This is the first real one.

THE COURT: The first one was admitted without objection.

BY MR. WISE:

Q Now, you hired Mr. Wilkes to handle your case on appeal?

A I did, sir.

Q All right. And he briefed, I believe, two issues?

A Yes, sir.

Q Do you recall what they were without my refreshing your memory?

A I do not.

Q All right. Do you remember one being the -- the -- what we call the other bad acts testimony, or the Wallace --

A Yes, yes, the 404 bad acts --

Q Okay. And he briefed that one?
A Yes.
Q All right. And I believe the other one was about the cross-examination that we've gone over with the text messages?
A Yes.
Q All right. And do you recall what the Court did with the second issue?
A I do not.
MR. WISE: Your Honor, the order's in the file. And the Court held that was not properly preserved for review.
THE COURT: All right.
MR. WISE: If you will take judicial notice of that.
THE COURT: All right.
BY MR. WISE:
Q Now, after your opinion came down, did you get a letter from Mr. Wilkes as to what you should do next?
A Yes, I did.
Q All right. I'll hand you this and ask you if you can identify this letter of April 21st, 2017?
A Yes. I remember the letter very well.
MR WISE: Okay. I'd like to introduce this.
THE COURT: Any objection?
MR. MITCHELL: No objection, Your Honor.
THE COURT: It'll be Applicant's Exhibit No. 2

without objection.

THE COURT REPORTER: It's Applicant's Exhibit No. 5.

MR. WISE: I think she's, actually, numbering it Applicant's Exhibit No. 5 --

THE COURT: Applicant's Exhibit No. 5 --

MR. WISE: -- in anticipation of my getting the other three in.

THE COURT: Very good.

(WHEREUPON, Applicant's Exhibit No. 5 was marked for identification and admitted into evidence.)

BY MR. WISE:

Q And what did Mr. Wilkes suggest that you do?

A Turn -- turn in -- or turn it now to a PCR. Just skip everything and go straight to a PCR.

Q All right. He didn't recommend any further appeal?

A No.

Q All right. Did you know any law at that time?

A No, sir, I did not.

Q All right. Did you know -- do you know now that there were cases pending?

A Yes, sir, I do.

Q All right. You're not a lawyer?

A No, sir, I'm not.

Q You're not trained in the law?

A No, sir, I'm not.

MR. WISE: Your Honor, I would like for the Court to take judicial notice of the docket sheet with the South Carolina appellate case management system and the case of State v. Perez, which --

MR. MITCHELL: I don't have any objection to it. That's fine.

THE COURT: I'll take judicial notice of it.

MR. WISE: And I've got a copy here for you and the dates on that are relevant.

THE COURT: Can I see it?

MR. WISE: I would, also, request that the Court take judicial notice of other documents filed with the South Carolina Supreme Court, including the motion to argue against precedent in Perez, and the order granting the motion to argue against precedent in Perez.

MR. MITCHELL: No objection, Judge.

THE COURT: All right. I'll note it for the record.

MR. WISE: All right. I would, also, request that the Court take judicial notice of the petition for cert in Perez and, in particular, issue four, which states Wallace was wrongly decided and should be overturned, along with reversal of this verdict and remanded for a new trial.

THE COURT: All right.

MR. WISE: And that petition for cert is dated -- was filed the 23rd of July, 2015.

THE COURT: All right. I'll take notice -- judicial notice of that.

MR. WISE: All right. And, for the record, Your Honor, I want you to take judicial notice of this. Because I've done cases with the Attorney General's Office before. And they always say counsel should be clairvoyant -- can't be accused of being clairvoyant. And this is to show what was in the pipeline there.

And, also, unfortunately, you can take judicial notice of the Perez case in which two judges voted to overturn Wallace, two judges voted to reverse the conviction on other grounds, and one judge retired before they issued an opinion.

THE COURT: All right.

MR. WISE: And I would, also, request that the Court take notice of the case of State v. Damyon Cotton.

THE COURT: Do you got the cite on that?

MR. WISE: Excuse me?

THE COURT: Do you got the cite?

MR. WISE: Well, it's -- it's in the appellate process. And the -- the -- actually, this petition is reply brief. And it's appellate case #2017-002402.

And, again, it is the issue in which the Court has granted a petition of writ of certiori on the question of overturning Wallace.

THE COURT: Okay.

BY MR. WISE:

Q If you had known that there was a case in which the South Carolina Supreme Court had granted cert some -- or granted a review some one year before -- over a year before your case was decided, and the South Carolina Supreme Court was looking into overturning Wallace, would you have then recommended to your lawyer that he appeal further?

A Yes, sir.

Q Okay. Also, on Pages 446 through 447 of the transcript, you were asked questions about Angelina Campbell?

A Yes.

Q Well, first of all, who is Angelina Campbell?

A She's the mother of my child -- my third child, at the time, my fiancée.

Q All right. Did Angelina Campbell's case have any relevancy to your trial?

A No.

Q All right. Were you cross-examined about that case?

A Yes, sir, I was.

Q And who were you cross-examined by?

A The Solicitor.

Q All right. And that's on Page 446 and 447 of the

transcript?
A Yes, sir.
Q And I believe that cross-examination got rather heated?
A Yes, sir.
Q To the extent -- do you recall what your lawyer said when he did, finally, interpose an objection?
A I don't remember --
Q I think if you'll look at 447, you'll see it.
A Oh, yes. He objected that it was argument at this point.
Q It was argument at this point?
A Yes.
Q Did he ever object on relevancy?
A No, sir.
Q Did he ever object on the grounds that the question was unduly prejudicial?
A No, sir.
Q All right. Did he ever object on the -- on the grounds that it brought up your character?
A No, sir.
Q All right. If he objected on those grounds, would that -- from what you understand about the law now, would those issues have been preserved --
MR. MITCHELL: Objection, Your Honor --

BY MR. WISE:
Q -- for appeal?
A Yes, sir.
MR. MITCHELL: The question calls for a legal conclusion.
MR. WISE: Excuse me?
MR. MITCHELL: I objected. The question calls for a legal --
MR. WISE: Correct. It would.
THE COURT: Sustained.
BY MR. WISE:
Q Was any objection raised at all?
A No, sir.
Q All right. Now, also, during your trial, there was some testimony from Officer Perry; is that not correct?
A Yes, it is.
Q And Officer Perry pretty much testified about his interview with -- with the complaining witness?
A Yes, he did.
Q And did he go over her testimony?
A Yes.
Q Did he name you as the person she accused?
A Yes.
Q This was not any excited utterance or anything by her?

A No, sir.
Q She was interviewed at the school?
A Right.
Q Did your lawyer object to that hearsay testimony?
A No, sir.
Q Did -- let me get to Officer Perry for a second.
And that's on Page 348 through 349 -- about through 351. No objection was raised to that?
A No, sir.
Q Also, look at Page 357 of the transcript at Line 3 through 10. All right. Do you recall Officer Perry ever being qualified as an expert in child sex abuse?
A No, sir.
Q All right. Was he asked a question there on Line 3 that called for an expert opinion?
A Yes, sir.
Q And what was that basic question?
A Basically, it says, And in your experience investigating those cases, is -- what we call delayed disclosure or the child coming forward much after the events have, actually, occurred, is that common or uncommon?
Q And he gave an opinion about that?
A He gave an opinion, yes, sir.
Q All right. Even though he had not been qualified?

A Right.
Q Was any objection made?
A No, sir.
Q All right. Do you think that was prejudicial to you?
A Yes, sir.
Q Now, let's go back to Dr. Fran Crosswell found on Page 337 of the transcript.
A Uh-huh.
Q And she was allowed to testify on Line -- on Page 338, Line 12?
A Yes, sir.
Q All right. In which she said, Just because she had a normal exam on the day of my evaluation doesn't exclude sexual abuse?
A Correct.
Q All right. Was any objection made to that conclusion?
A No, sir.
Q Then look on Page 339 when she says, We made a referral for her to have appropriate mental health counseling.

All right. Whether or not this child had mental health counseling, was that relevant to your trial?
A No, sir.
Q All right. Was there an objection made to that?

Q All right. Now, let's go back to Officer Floyd on Page 58 of the transcript. All right. Looking at Lines -- well, basically, Lines 7 through 19 -- or 7 through 21. All right. Does Mr. Floyd -- Officer Floyd relate a conversation he had with the complaining witness in this case?

A Yes.

Q And, in that, does he testify as to who she identified as the person who allegedly did it?

A Yes.

Q And who was that person?

A Jerald Gaskins.

Q All right. Was an objection made to that hearsay testimony?

A No, sir.

Q All right. And there was some testimony during your trial about your being allergic to latex?

A Yes, sir, there was.

Q And your lawyer had a statement from your doctor?

A Yes, sir, he did.

Q All right. Attesting to that?

A Yes, sir.

Q And he didn't call the doctor?

A No, sir.

Q All right. And why was that relevant in this case?

A Because the -- it was alleged that there was a condom used. And I was allergic to latex.

MR. WISE: Okay. Thank you.

That's all the questions I have -- well, let me make -- let me sum up with one other question.

THE COURT: All right.

BY MR. WISE:

Q Do you -- do you believe these errors were prejudicial to your case?

A Yes, sir, I do.

Q What light -- particularly the cross-examination questions, what light did they put you in, in your opinion, in front of the jury?

A They put me as just a horrible person that I was not.

Q All right. And there was no proof ever introduced to back up any of the cross-examination about --

A That is correct. None.

Q No records ever introduced?

A None.

Q No cell phone records?

A None.

Q No IP addresses?

A Nothing.

MR. WISE: All right. Thank you.

THE COURT: All right. Is your cross going to be

rather lengthy?

MR. MITCHELL: I don't think so, Judge. I'll save my questions -- the majority of my questions for trial counsel. So I -- I'll be brief.

THE COURT: Okay. I'll let you go ahead and cross him.

CROSS-EXAMINATION

BY MR. MITCHELL:

Q Good afternoon, Mr. Gaskins.

How are you?

A I'm okay, sir.

Q Good.

I just have a few questions for you.

A Yes, sir.

Q I'll be brief. I'll save my questions for trial counsel.

Let me ask you. How many times did you meet with Mr. Chambers?

A Maybe twice.

Q Just twice going to trial?

A Yes.

Q Okay. Did you get a copy of your discovery?

A No, sir.

Q You didn't get -- so you went to trial without having a copy of your discovery?

A He said he had me.
Q Okay. Any plea offers in the case at all?
A There was a plea offer.
Q For how much time?
A Zero to 12, 12 being the cap.
Q Okay. And you rejected the plea offer?
A Yes, sir, I did.
Q Okay. And then in terms of you guys meeting, what type of defenses did you guys talk about?
A He, basically, just said it was a he-said she-said case. And that there was just no evidence showing anything. And this is the day before trial. I met -- the last time I met with him was February 3rd.
Q Okay.
A And he said, also, that he and the Solicitor were old colleagues, for me not to worry.
Q I just wanted to make sure you were done.
A Oh, yes, sir.
Q Okay. And so it was a he-said she-said story. Did you guys talk about calling any potential witnesses on your behalf at all?
A Yes, I did -- we did.
Q Who was that?
A There was one, Jaclyn Parker. There was my father, Jerald Gaskins, Sr. There was Gina Gaskins. There was --

I can't remember. It's been so long ago. Michael Gardner. There was Sabrina Radford. I can't remember the others. But I do remember them off the top.

Q Okay. And what would they have testified to?

A My character and the position I was in as far as the places I would have lived at, stuff like that, just stuff that would have helped me.

Q Okay. So you decided that you wanted to testify after talking to Mr. -- Mr. Chambers?

A I did not want to testify. But Mr. Chambers said it'd be in my best interest to testify.

Q Okay.

A And it was -- merely, the reason why I didn't want to testify was because of -- I have a -- a mental condition I've had since I was 13. And, sometimes, I can get over excited and just talk fast or -- or misunderstand what someone says, which would cause me, you know, to get angry, or something like that.

So I didn't feel like I wanted to go on the stand. But he thought it was best. So that's what I done.

Q Okay. And I heard Mr. Wise ask you about objections to text messages being talked about at trial. Mr. -- Mr. Chambers did object when there were issues about text messages being introduced; correct?

A I -- I do not recall.

MR. MITCHELL: Okay. I would just -- for the Court's notice, Page 101 and then, also, Page 425.

THE COURT: 101 and 125 [sic]?

MR. MITCHELL: Yes, sir.

MR. WISE: Excuse me. What was the page number?

MR. MITCHELL: Pages 101 and then 425. Objections to text messages from -- first objections to text messages from the sister of the victim. And then 425, objections to text messages from the father of the victim.

BY MR. MITCHELL:

Q And so I guess my next question for you is, you got a chance to testify at trial; right?

A I did.

Q Okay. And so you got a chance to refute all the allegations against you; right?

A I wouldn't say refute. I was -- I don't know how to answer that. Because I really didn't get a chance. Because, at the time, like I said, I didn't understand the law. I didn't understand -- because, like I said, he said he had me.

So the questions that he was asking me would have been questions that I would have tried to answer, you know, in a -- as best I could. But during the trial, certain questions was asked -- certain questions was asked and I just didn't understand certain questions. So I

couldn't refute questions I didn't understand.
Q Okay. So your ex-wife testified. Mr. Chambers got a chance to cross-examine her about --
A He did.
Q -- what was the basis for the divorce; correct?
A He did.
Q And he got a chance to ask her questions about whether she cheated on you with your brother and another person; correct?
A Yes.
Q So the jury heard that information?
A They did.
Q Okay. And then you testified to the fact that you had an allergy to latex; correct?
A Yes.
Q So the jury heard that information as well?
A Yes.
Q Okay. Now, in terms of the doctor testifying and giving a medical opinion, do you think it's prejudicial when a doctor says there's no physical evidence?
A I do.
Q Why so?
A Because she's giving her opinion on some of the -- some of the things that were asked, she'd state opinions. But, at the time, if this was -- if the latex thing was

given -- if it was introduced, they could have seen that none of this could have happened.

I mean, it was very prejudicial. Because I didn't have a chance to -- you know, to put that into -- as evidence. Because it would have just rebuttaled [sic] against that. And they would have said, hey, whoa, wait a minute, you know. He's -- he's allergic to latex. And they say that, you know, every allegation stated that there's latex involved.

Q So the allegation -- the comments from the victim and Ms. Barton were that it was a latex condom, or just a condom?

A That it was a latex condom -- well, actually, it says a condom. At the end, I do remember them asking if it was -- something about latex. And then I do remember Ms. Hodge asking what was the difference. I do remember that. I can't remember exactly where. But I do remember her asking was there a difference.

Q Okay. So there's other types of condoms besides latex condoms; right?

A Right.

Q Okay. And then in terms of the testimony regarding Ms. Angelina Campbell, that was -- was it your girlfriend at the time or --

A She was at the time, yes.

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Q Okay.
A She's the mother of my daughter.
Q So were there pending charges between the two of you at the time?
A No.
Q No charges?
A No. They were dismissed. That's what I was getting at. There was an affidavit signed to dismiss all charges.
Q Any type of no contact order, or anything?
A No. There -- at the beginning, yes. But there was nothing after. Like I said, this -- that went on for months. And there was a -- an affidavit signed and Mr. -- what was his name? -- Mr. Chambers office -- that was faxed over to, I believe, the Solicitor. And nothing else was ever said.

So, at that point, I do remember getting a phone call. I think -- it wasn't maybe a month after it was faxed over that -- that everything was dismissed. So that's why Angelina and I lived together. If there was some type of order, Angelina and I would have never lived together. Like I said, we -- we have a child together, so.

Q And let me ask you about that. I think there's another question about Officer Perry testifying about the statements that the minor child may have given to him?

A Yes, sir.
Q And that it was hearsay; correct?
A Yes, sir, it was.
Q By the time Officer Perry testified, the minor victim had already testified to what he testified to; right?
A I don't recall. I really don't recall. It's been too long ago.
Q Fair enough.
A I -- I believe that he had testified at the beginning. The victim hadn't testified yet.

MR. MITCHELL: Judge, that's all the questions I have for this witness.

THE COURT: All right. Anything on redirect?

MR. WISE: Nothing on redirect, Your Honor.

THE COURT: All right. And I have no questions.

You can step down.

THE WITNESS: Thank you.

THE COURT: All right. We're going to take a lunch break and resume at approximately about 2:15 -- about 2:15, give or take.

All right. We'll stand at ease.

(WHEREUPON, a lunch break was taken.)

THE COURT: Are you ready to call your next witness, Mr. Wise?

MR. WISE: The Applicant rests, Your Honor.

THE COURT: Okay. The Applicant rests.

Okay. Mr. Mitchell.

MR. MITCHELL: Thank you, Your Honor.

The State would call Mr. Randall Chambers to the stand.

THE COURT: Mr. Chambers, come on around.

THE CLERK: Mr. Chambers, please place your left hand on the Bible and raise your right hand.

WHEREUPON,

RANDALL LEE CHAMBERS,

after first having been duly sworn, testified as follows:

THE CLERK: Thank you.

You may be seated.

And please state your full name for the record.

THE WITNESS: My full name is Randall Lee Chambers.

DIRECT EXAMINATION

BY MR. MITCHELL:

Q Good afternoon, Mr. Chambers.

How are you?

A I'm doing well.

How are you?

Q Good.

I know this is not your first time me questioning you this week. So I do have some preliminary questions to ask you again.

How long have you practiced law here in South Carolina?

A In South Carolina, since 1992.

Q Okay. And has all that time been devoted to criminal law?

A Yes.

Q And turning our attention to this case. Were you appointed or retained to represent Mr. Gaskins?

A I was retained.

Q Okay. If you could -- I think some of the facts have come out already. But if you could, just give me a brief synopsis of the facts and relation to the charges in this case.

A Well, I mean, this was a CSC case. The -- the alleged victim in the case was a, I guess, family friend of Mr. Gaskins. And he -- I mean, he had gotten to be friends with the family. They -- they socialized together.

And the girl started spending time with Jerald and, also, with Jerald's wife, Rachel. And I think, honestly, primarily with Rachel. But they -- she was with them a lot. She would stay overnight with them.

Sometime after Jerald and Rachel split up -- I think they were involved in divorce proceedings at the time. This allegation comes up that he had been engaging in

sexual activity with her. And then the -- the charges resulted from that. So, I mean, that's, basically, what the facts were in the case.

Q Okay. Very good. Thank you.

Now, during the course of your representation, do you recall offhand how many times you think you met with Mr. Gaskins?

A I don't. And let me just say this up-front. And I -- and I apologize that this is the case. I have, literally, gone through in my file room probably 500 or 600 case files. I cannot find this case file.

My recollection is -- but I don't know. I can't say this with a hundred percent certainty that sometime after the case when the case had gone into the appeals process that -- that someone -- either a member of Jerald's family or maybe somebody -- Jerald wanted this file. And -- and we -- rather than just copy the file because it was a big file, we gave them the file.

But, again, I can't say that with a hundred percent certainty. If that didn't happen, I apologize. But I will say I cannot find the file. And that's where all of my notes would have been.

I know that I met with him on numerous occasions. He -- I remember his father being with him at different times. They would come to the office. We met. I mean,

I -- I felt like going to trial that we were -- that we'd met as much as we needed to, that we were well prepared to go to trial.

Q Okay. That was going to be my next question. Did you feel prepared adequately to go to trial?

A I did.

Q Okay. Now, during the course of these initial meetings, did you go over the -- the charges that he was facing and the possible punishments that he would face if he was convicted?

A I did.

Q Okay. And what about the State's burden and his Constitutional rights?

A Yes.

Q Okay. Now, during the course of this case, you filed the appropriate Rule 5 motion for discovery?

A I did.

Q Did you share that discovery with him?

A I did.

Q Okay. Now, during the -- during the course of your representation, did he ever indicate to you that he didn't understand anything that you were saying to him?

A I mean, if he did, he -- he understood it by the time we got finished, as far as I know. I mean, I made sure that -- to the best of my ability that he understood the

process and -- and what we were doing as far as our case strategy goes.

Q Okay. Now, let me ask you -- turning our attention to the actual trial itself. What was your trial strategy going in?

A Well, you know, my belief was -- you know, because Jerald had -- had from the first day that I talked to him was vehement that nothing had ever happened. And our belief was after talking to Jerald, talking to -- again, I think his father and going through the discovery material we had is that as a result of this divorce proceeding that was ongoing, coupled with the Mucienko -- I can't remember how they pronounce that. I think it was Mucienko family. Jerald had been really close to the Mucienkos. And he had helped them pay bills. He'd done all sorts of things for these folks.

And, at one point, he felt like he was being taken advantage of. And he stopped that. That happened along the same time that Rachel -- they were going through this really nasty divorce.

Now, one of the things that if you -- when you read through the transcript you saw is that the -- the alleged victim -- I think her name was Jamie. Her sister had been a high school classmate of Rachel. So they had an existing relationship.

Our belief was -- and this is -- this was our theory going in and this is what I -- I tried to, you know, illicit for the jury through cross-examination and other means is that Rachel with -- I believe the sister's name was VICTIM, they had sort of concocted this plan to make these allegations against Jerald, and -- and to benefit primarily Rachel in this divorce action that was ongoing.

Q Okay.

A And so that -- that was -- that was our theory going forward. Because, I mean, he -- he -- again, he was adamant that he hadn't done anything. So there was just the general denial.

But, also, any time you can ascribe a motive to somebody making a false allegation, that's what you want to do. And I -- I think that we had a good basis for that in this case.

Q Okay. Now, in terms of investigation, were there any types of witnesses that you thought that needed to be called or Mr. Gaskins wanted you to call?

A Well, we talked about various witnesses. I mean, there were -- there were no real good fact witnesses that I know of. I mean, we had a witness list that we submitted. And my recollection is that all of these people were available for trial. I -- we didn't send subpoenas to any of them, but they were available.

And -- and my recollection is that they were, actually, present during the trial. And my -- I believe there was a woman named Gosnell, somebody named Parker. I'm having trouble reading my own handwriting here -- Jarqodine [phonetic], or something like that. It might be Jaclyn, actually. A Michael Garner. And then Jerald's father, Jerald Gaskins, Sr.

Q Okay. And so I'll get back to some allegations. But, ultimately, Mr. Gaskins is the only one who testified; is that correct?

A That's correct.

Q Okay. And so in terms of him testifying -- prior to him testifying, you guys, obviously, had conversations about him testifying?

A We did.

Q Okay. What was the substance of those conversations? Did you try to dissuade him from testifying or...

A You know, I caught the tail end of his testimony. And -- and, you know, I don't know that I would state it quite the way that he did. But I was of the mind, especially after the Judge allowed in the prior bad act evidence and -- and some other things that came in, that he really needed to testify.

Now, we had talked about him testifying very early in the process, which is something I, typically, do with

clients, you know. I let them know, I don't know whether -- I don't know whether it's going to be a good idea for you to testify or not. But we need to be thinking in those terms. And I want to get somebody prepared if they have to testify.

So, yeah, we talked about it, I'm certain, early in the process and then right up until the time that we, actually, pulled the trigger and decided that he was going to testify. Because, I mean, I heard him. He -- he alluded to the fact -- now, I didn't realize there was any sort of a medical condition, which I heard him say. I knew just from being with him that he was very volatile. And I, also, know the -- the courtroom style of -- of Kris Hodge, who was going to prosecute this case.

So I knew that he was volatile. And I knew that she was going to do her level best to get under his skin in trying to illicit some sort of angry response from him. And so we had a lot of discussion about that.

And my recollection was that he indicated that he could do it, that he could maintain his calm. And -- and those were the discussions we had. And he and I together decided he would testify.

I mean, I'm not going -- I don't have the ability to force somebody to testify. I'm not going to make somebody testify. But I do believe -- and -- and I still believe,

even though I, certainly, second guess a lot of things about -- any -- any time I lose a case, I second guess myself. Okay. But I still believe that that was -- the best strategy was for him to testify. Because I don't think we could have won that case given the posture, at that point, without him testifying.

Q Okay. And I guess let me backtrack just a little bit in terms of the evidence that the State had. Was there any physical evidence at all?

A Not that I recall.

Q Okay. So the evidence, essentially, was the testimony of the victim in this --

A Well, the victim and then -- and then the -- the prior bad act evidence that came in. And then, also, the text messages, those sorts of things. Although the text messages were never technically introduced into evidence, but they were, certainly, discussed.

Q Okay. And so let's -- let's -- probably -- let's talk about the allegations a little bit in terms of the text messages that you heard Mr. Wise ask the Applicant about. Now, I believe the first set of text messages were asked about when the sister of the victim was -- was on the stand. If you could, if you would, turn -- do you have a copy of the transcript?

A I do.

Q If you'd turn to Page 100 for me -- or 101, I should say.
A 101?
Q Yes.
A Okay.
Q So during this time, this Jamie Mucienko, that's the sister of the victim, was testifying. Just a minute. I apologize.
Okay. Page 101, Lines -- Line 6 where you make an objection.
A Yeah.
Q Okay. And then your objection is -- the Judge asks for the jury -- or you ask the Judge for the jury to be excused; right?
A I did.
Q Okay. And then if you'd look down -- down to the rest of that language. What was your basis for that objection at that point?
A Well, first of all, that -- my position was that that was hearsay testimony. But, also, that there was no foundation for it.
Q Okay. And then if you -- it looks like the Judge decides that --
A And the other thing was -- let me say this. Timeliness. We weren't provided those -- anything about

those texts until, literally, the day before trial. I state in here, We received these yesterday at 2:11 p.m. I was not able to discuss them with my client until this morning. I was able to get them to him last night so he could look at them, but they were not timely disclosed. And -- and Ms. Hodge admitted that that was the case.

Q Okay. And it looks as though on Page 104 to 106 that the testimony is proffered then --

A Yeah.

Q -- outside the presence of the jury. And then concluding on Page 106 where the Judge, ultimately, overrules your objection?

A Yes.

Q Three's no question that you objected to the -- to the conversations -- or, at least, questions being asked about those text messages?

A I did object.

Q Okay. Now, if you turn with me to Page 425.

A Okay.

Q Okay. And this is the cross-examination of -- of the Applicant. I apologize. Just a minute.

So it appears that the Solicitor is asking the Applicant questions about text messages between him and the victim's father. And you make an -- make an objection on Page 425, Line 25.

A That's correct, the very last line on the page.
Q Okay. And what was the substance of your objection at that point?
A I said, There's no foundation laid about any texts or anything. Apparently, what she's doing is she has pictures of texts. And she's just showing him and asking him to read those.
Q Okay. And then --
A The Judge sustained the objection.
Q Okay. So no question that during these two times where text messages are trying to be introduced -- or questions are trying to be asked about them, you objected. One time it looks like you were successful, the other time it doesn't look like you were successful?
A That's correct.
Q Okay. So the next thing I want to ask you about is Family Court records and this -- this whole thing about a divorce record being introduced. At the time you went to trial, you knew that Mr. Gaskins was either in the process of getting a divorce or was divorced?
A Yes. I knew that -- I believe I knew that they were in the process of getting divorced.
Q Okay. And so I think there was some contention about what was the -- the grounds for the divorce that was --
A Yeah. That came up during the trial. I mean, I

didn't -- I didn't anticipate beforehand that there was going to be an issue over the grounds for divorce.

Q Okay. Is it fair to say that you were able to cross-examine the Applicant's ex-wife about what those grounds were?

A Yes.

Q Now, whether she agreed with you or not is another question. But you were able to cross-examine her?

A I did cross-examine her about it.

Q Okay. And Mr. Gaskins was asked about the divorce himself during -- during his direct examination by you; correct?

A That is correct.

Q Okay. Now, let's -- let's talk a little bit about --

A And, you know, I'm trying to remember. I've gone through the transcript here. And I thought I had it marked.

But my recollection is that after she had denied that, we tried to offer the pleadings into evidence and the Judge would not allow us to do that. And I had offered to bring over the custodian of records from the clerk's office, if that was something that was needed. And he declined to let us do that.

Q Okay. And I believe that's Page 365 through 376 where you try to introduce a copy of the divorce records

and, also, it looks like a prescription that the doctor had wrote Mr. Gaskins?

A Yeah. Because that's the another thing that came up during the course of the trial that I didn't anticipate was the -- the thing with the condoms, you know. Jerald told me after that testimony came up, as -- as I recollect, that he was allergic to latex. And so assuming that it was a latex condom that was used, he would not have been able to use a latex condom.

Q Okay. Now, you said he told it to you. Did he provide any type of a prescription, or anything like that, or any --

A We -- I -- somebody in his family brought it to me later during the course of the trial.

Q Okay.

A And I -- it might have been the next day.

Q Okay. So this happened while the trial was going on?

A That's correct.

Q Okay. Now, let me ask you about various -- there's some allegations about various times where he's alleging that you should have objected to -- to statements or questions asked by the Solicitor. Before we get into that, what's your general -- I guess your general -- I don't want to say ruling. But do you often object during cross-examination, or do you have a practice, or...

A I mean, every case is different. I mean, I -- I object any time I think that, first of all, something's objectionable, and it is something that's going to really prejudice my client. Now, there are times when something's technically -- technically objectionable that I let it go just because I don't think it's hurting us.

And I don't -- you know, I don't -- as much as possible, I don't want to appear like I'm keeping things from the jury. But, again, I mean, if there's something that's unduly prejudicial and it's objectionable, I'm going to object to it. It's not to say that I don't sometimes mess up. But, you know, that's -- that is, generally, you know, my philosophy on objections at trial. If it's objectionable and it's going to hurt my client, I'm going to do everything I can to keep it out.

Q Okay. And to that point, one of the -- the allegations is failure to object to the improper testimony of the medical expert. Let's see. Just a minute.

So it looks like the allegation is referenced on Page 337 of the transcript where she testifies that the -- the victim had a -- normal hymen tissue, and then that this was consistent with sexual abuse. Do you feel, at that point, that you needed to object to any of her testimony?

A No.

Q Okay. Can you give me a reason why?

A I mean, just -- I don't -- I mean, she's -- she is -- as a medical professional, she's allowed to offer a medical opinion. I -- this particular Dr. Crosswell is -- has testified in several cases I've been involved in. And I think that what she testified to was within the scope of the rules.

And I know from experience that even if I had objected, the Judge was going to let that come in any way. And so I think all I would have accomplished there was making the jury think that I was afraid of what she had to say, you know.

I -- I feel like that on cross-examination I pointed out the fact that, basically, anything that had -- that -- that she had uncovered during the course of her examination, you know -- ostensively a medical examination of the alleged victim in this case, she was going to say was consistent with her having been a victim -- a victim of sexual abuse. Because that's what she always says.

Q Okay. Now, let me ask you about -- it looks like the allegation is failure to object to the questions by the Solicitor concerning a charge pending against the Applicant. So that is referenced -- I apologize -- referenced on Page 447 -- 445 to 447.

The Solicitor asks the Applicant if he has any pending charges against him brought by Ms. Campbell. And

I think you make a -- you make an objection. They're arguing at this point. Did you feel the need to make an objection after the Solicitor asked if he had any pending charges?

A Let's see. What -- you say 445?

Q Yes, sir, 445. That's what the application references.

A What line are you looking at? Because I'm having trouble finding that.

Q Give me just a minute.

So it starts on Page -- Line 22 when she asks him, Are you engaged right now?

A Okay.

Q And then she asks him about Ms. Campbell.

A Yeah.

Q And then she proceeds to ask him about a no-contact order. Now, during any part of this testimony, did you feel the need to object at all?

A Apparently not.

Q Okay. Do you think it's something that was objectionable?

A You know, it might -- it might be.

Q Okay. Now, let me move on to the next allegation. Well, I guess I should back up. You said -- said that it might be?

A Yeah. Just -- I mean, it's not anything -- I mean, given the way that the back and forth went there, it doesn't bother me a whole lot. I don't think it really hurt in the grand scheme of things as far as this trial goes. But it -- it might be an improper question.

Q Got you. But no question that he refuted any of those?

A He did. Yeah, he did.

Q Okay. And let me ask you about the next allegation is failure to object to the hearsay testimony of -- of the -- Officer Robert Perry. And I believe he's the investigator in the case. And that's Page 346 to 347.

A Okay.

Q It appears that Officer Perry is detailing the information that he got from the victim. At any time, did you feel the need to object to any of the information that he was relaying to the jury about his -- I guess his talk or investigation with the victim?

A You know, I mean, obviously, that's, technically, hearsay. I could have objected to it, maybe I should've. But those were facts that were coming out anyway. And I wasn't overly concerned about it.

Q Well, let me ask you this. At the point in time that Officer Perry had testified, had the victim testified already?

A She had.
Q Okay. So her testimony -- and, again, you can answer the question. The facts that he testified to, were they similar to what she testified to?
A I believe so.
Q Okay. And then the next issue was about the officer testifying about delayed disclosure and his experience with it. And I believe that is 348 to -- pardon me. Give me just a minute.
MR. MITCHELL: I beg the Court's indulgence, Your Honor.
THE COURT: Yes.
(Pause.)
BY MR. MITCHELL:
Q So Page 357. I apologize.
A 357?
Q Yes, sir. So starting on Line 3, the Solicitor is asking Officer Perry about his experience investigating sexual assault cases and what they call delayed disclosure. And the answer from the detective is, It's such a rarity for me to see a case that a child has immediately told that it's, like, you know, maybe one out of a hundred, you know.
And then she asks him, Is -- is -- this delay in coming forward, does it somehow hamper the investigation?

Is that something that you felt should have been objected to?

A Obviously not. I mean, I didn't object to it. And -- and even now looking at it, I don't think I would object to it. I mean, he indicated that he had several years of experience, that he'd been involved in probably over 500 investigations. And she was asking, based on his experience. It seems like a proper question to me. It's one that I've seen asked and answered in lots of trials beforehand.

Q Okay. And then it looks like the last allegation I want to cover, if you refer back to the beginning of the transcript on Page 58. It's direct examination of Officer Paul Floyd, who is the initial traffic patrol officer who first comes in contact with the victim.

A Okay.

Q And so the allegation is that the Solicitor elicited a response that the minor child had identified the Applicant as the alleged suspect. Did you see any reason to object at that time to -- to the identification?

A I mean, again, that's, technically, hearsay. I could have objected to it. The Judge likely would have sustained it. But that's information that was, clearly, going to come out.

So I wasn't overly concerned about it. I mean, he

had been identified and was going to be identified by the alleged victim in the case.

MR. MITCHELL: Okay. Judge, I beg the Court's indulgence for just a minute.

THE COURT: Yes, sir.

(Pause.)

MR. MITCHELL: Judge, that's all the questions I have for this witness.

THE COURT: All right. Cross-examination, Mr. Wise.

CROSS-EXAMINATION

BY MR. WISE:

Q Mr. Chambers, I'd -- I'd like to agree with you. Probable the most difficult decision a lawyer ever makes in a case like this is whether or not the Defendant testifies.

All right. Let's go over some things here. On Page 442 of the transcript at Line 10 --

A Okay.

Q -- the question was asked about selling pills or pot; correct?

A That is correct.

Q And there was no objection to it?

A There wasn't. I -- I -- honestly, I had -- I think I was even rising to my feet as she said that.

Q All right. Let me --

A And -- but when he -- he answered, No, ma'am. And then, Actually, I've never done a drug in my life. So it appears that I did not object at that point.
Q That was an attack on his character. No question about it?
A No question about it.
Q All right. Go back to Page 364. And I'm thinking it's Line -- toward the bottom.
A Okay.
Q All right. The Judge was inquiring about any record that Mr. Gaskins may have in order to be impeached with; correct?
A That's correct.
Q And -- and what does the assistant solicitor respond?
A Nothing that would fit under the rule.
Q All right. That would imply there would be no impeachment with other crimes, wouldn't it?
A That is correct.
Q Correct?
A That is correct.
Q And that's what the Judge was told, and what you were told?
A That is correct.
Q All right. But when you get to Page 442, all that changes.

A That is correct.
Q All right.
A And -- and I think she was speaking more -- of course, that just came out of nowhere. I mean, she just came out with that.
Q Did you ever inquire as to whether or not she had a good faith basis for that question?
A Inquire of her or --
Q Yes.
A I did not.
Q Okay. And you understand what I mean by a good faith basis for a question?
A I do.
Q Okay. Now, you've got these exhibits that are marked for identification now, literally, I'm told the day before?
A The day before at about -- I think I read 2:15, or so.
Q All right. Obviously, you hadn't had time to go over them with -- go over them with Jerald?
A I -- as I said, I gave him a copy so that he would look over them at the jail. And we talked about them briefly that morning.
Q And getting something at the last minute is terribly distracting?

A Well, it's unfair.
Q Yeah. Now, did you -- did she ever give you any basis for saying why she thought those were authentic?
A She -- I don't think -- she didn't give me a good basis. I mean, she indicated that she had, literally, just gotten them herself. That she only had those screen shots. And -- and that -- she said that she had gotten them from the sister. And that the sister -- basically, her basis for offering these up, which I think is what she told the Judge when we were arguing back and forth, was that the sister had provided those.
Q Were you in here during part of Jerald's testimony where he talked about those?
A I was not.
Q Okay. Did you look at them even close enough to notice discrepancies or -- or not necessarily discrepancies, but things that just don't look right?
A I looked at them. I don't -- I -- I did not note any discrepancies.
Q All right.
A But again --
Q Well, let me suggest one of them that -- that Mr. Gaskins pointed out. If you look at the one in your hand, which is, I believe, identification number what?
A I've got Applicant's Exhibit No. 2.

Q Applicant's Exhibit No. 2. Okay. It has a temperature on it, doesn't it?
A It does. Actually, 45 degrees.
Q All right. And it has a date on it, too, doesn't it?
A Well, it has a time, 11:18. Okay. September 30th at 2:19 a.m. They all have the -- the time stamped on there.
Q Right.
A And then the date's out there, September 30th. So that's -- that's on all of them.
Q All right. And look at the last one, the last page.
A The last page?
Q Uh-huh. What's the temperature on that one?
A Well, the temperature's the same.
Q Yeah.
A It's 45 degrees.
Q Is that a little unusual?
A Yeah, it is.
Q All right. Look at the time in the top right corner of -- well, let me -- the first page.
A 11:18 a.m.
Q All right. And look at the time on the last page.
A It's -- it's either 11:36 or 11:16. I can't quite tell. It looks like it might be a three, and there's a little splotch over it.
Q So 11:30 something?

A Yeah.
Q There was no explanation given for that?
A No --
Q That's strange?
A No, no explanation given for it. No.
Q You were never given any information as to -- as to whose phone that came off of, were you?
A No.
Q Did you read some of the messages that seemed inconsistent coming from Mr. Gaskins? And I'll give you an example. Look at this one on October 16th. Would that be a strange comment coming from Mr. Gaskins telling -- telling Jamie to tell momma?
A It would.
Q All right. If you had had more time to over -- to look over those, would you have had the ability to pick up on these discrepancies? And I'll concede, I've had a whole lot more time than you did.
A Well, I would, certainly, have had a better opportunity to find the discrepancies. And I would have, certainly, had more time to go over them with Jerald. And -- and he could have, certainly, pointed out those discrepancies.
I mean, he was adamant with me, as I recall, that he didn't send these, they weren't from him. And I believe

he testified to that.
Q Did you -- did you ever ask Ms. Hodge during the cross-examination about those text messages what her good faith basis for believing those, actually, came from Jerald were?
A I -- I didn't ask. But I -- but I don't know -- I mean -- I mean, are you talking about asking her outside of court or --
Q No. Having an objection on the record and dismissing the jury, and say, I need to know the good faith basis for believing these are even from my client.
A Well, no. I -- I didn't do that. But, you know, again, I did object to them coming in. And the Judge overruled that objection.
Q Now, also, there were some text messages from -- let me find it. Yes. Applicant Exhibit No. 1 are alleged text messages between Mr. Mucienko and Jerald; correct?
A That is correct.
Q All right. And I believe it was represented in the trial that Mr. Mucienko's wife would authenticate that?
A I think there was some reference made to that.
Q All right.
A I didn't -- I didn't see these at all until she -- she used these to cross-examine. These were never produced to us beforehand.

Q Until you got -- until -- I guess then that's the first time you've really seen them?
A This is the first time I've ever seen them. She was asking him about them during the trial. She was walking up to the witness stand and laying it down as though it was some sort of an official document and asking him questions about it. I objected to it. And the -- again, the Judge, eventually, overruled and let her continue asking about them.
Q Were you here when Mr. Walt Mucienko testified?
A I wasn't. But you told me out in the hallway that he was going to testify --
Q That he denied --
A -- and that he didn't have anything to do with any --
Q -- sending those?
A -- of those text messages -- yes, exactly.
Q If you'd gotten those a week ahead of time, would you have had a chance to talk to Mr. Mucienko about it?
A I would have, certainly, had a better opportunity. That's for sure.
Q All right. And if you got them two months ahead of time, plenty of opportunity?
A Absolutely.
Q All right. Now, the -- the other cross-examination dealt with a Facebook page on Jay Fowler, which is this

exhibit, which is Applicant's Exhibit No. 3. Have you seen that before?

A I don't believe I've ever seen this, no.

Q Until today?

A I believe this is the first time, yes.

Q There was cross-examination in -- in the trial about Jerald Gaskins impersonating Jay Fowler, if you remember. Do you remember that?

A I do.

Q All right. And Mr. Gaskins denied ever being Jay Fowler, or imitating Jay Fowler, or anything like that; correct?

A I believe that's correct.

Q Did you ever get any representation from the solicitor's office as to a good faith basis for determining whether or not that came from Jerald Gaskins?

A No.

Q And you were not provided that in discovery at all?

A No.

Q Now, and you didn't ask her about a good faith basis for claiming Jay Fowler is Jerald Gaskins?

A No. But, you know, my understanding of the rules -- and this is pretty much what Judge Hill said is that when I was -- when we were going back and forth about the Mucienko text, she could ask and he can answer. She's

stuck with whatever answer that -- that he gives.

But as far as going off the record and questioning her about her good faith basis, no, I did not do that.

Q You would, generally, agree, though, that -- that if you were cross-examining a witness about whether or not they had stolen a thousand dollars from a previous employer that you would have to have a good faith basis to ask that question?

A Well --

Q You can't just come up with it out of the blue?

A Well, no. You -- you can't just make anything up. But that would have ordinarily been just something that my client had told me using the example that you just used.

Q And these documents you've got in front of you would not have been that difficult for the State to authenticate, I assume, in some way?

A You wouldn't think -- you would think not.

Q All right. Now, on Page -- on Page 444 through 445, that's cross-examination about those Facebook messages with Jay Fowler, correct?

A Let me see. You sent 12 year old girl a Facebook request, is that where -- is that what you're --

Q Right. In that area.

A Okay.

Q Correct?

A Yeah.
Q And the clear implication from those questions was that he was trying to strike up an illicit affair with a 12-year-old girl?
A Well, he was, certainly, trying to talk to her, yes.
Q All right. Did you object to that on the grounds that that's improper character evidence?
A I did not.
Q All right. Did they ever give you any notification about any of that even being 404(b) evidence?
A No.
Q And, of course, they didn't have a pre-trial hearing or a pre-testimony hearing about trying to get that in under 404(b) evidence either, did they?
A No.
Q All right. And that's kind of damaging to him?
A I mean, it, certainly, is part of the sort of cumulative effect of all of these things. Yes, it's damaging.
Q All right. Now, on Page 454, I'm looking at Line 21 over to the next page.
A Okay.
Q Jerald was asked about whether or not two weeks before trial he had sent a text to #1 Minor ; correct?
A That is correct.

Q Did you ever see any documents that would lead you to believe that Jerald had sent any text messages to #1 Minor ?

A No.

Q You were supplied no discovery on that?

A No.

Q All right. And that's pretty damaging, too, isn't it?

A Oh, yeah. I mean, again, taken -- when you start adding all these things together, yes.

Q All right. Because there was an allegation in this trial that he'd seduced #1 Minor , correct?

A Well, certainly, that he had tried to talk to her on Facebook.

Q Right. But #1 Minor was the other Lyle evidence.

A Oh, I'm -- I'm sorry.

Q Okay. I'm sorry. I figured when you -- you didn't pick up on that right away.

A Yeah. That's exactly right.

Q So if he's trying to contact this girl two weeks before trial, I mean, that's even more damaging?

A Well, absolutely.

Q All right. Now, go back to the testimony about Officer Perry. Officer Perry testified in some detail

about what the complaining witness told him; correct?
A That's correct.
Q In which he named Jerald; correct?
A That's correct.
Q Named the places?
A That's correct.
Q Now, are you familiar with a line of cases in South Carolina that talk about improper vouching?
A I -- I probably couldn't tell you the specific cases. But I'm -- I'm familiar with improper vouching.
Q Yeah. Kromah and several others cases, like Johnson, and a couple of others?
A Exactly.
Q The concept is that you don't put witnesses up that simply repeat what the person told them is improper vouching; correct?
A Well, at least, vouching for their truthfulness.
Q Right. So Officer Perry -- let me get his testimony. But Officer Perry was allowed to, basically, repeat her testimony?
A Well, yeah. He gave -- he gave the facts that she had given him during the investigation.
Q And then -- and that -- I think you said that was, obviously, hearsay?
A Yeah. I mean, that's, clearly, hearsay. I could

have objected to it, and I didn't.
Q Now, on Page 351 at Line 8, this is during Officer Perry's testimony.
A Okay.
Q Do you perceive where he says all those nice things about the complaining witness that that would be vouching for her testimony?
A It, certainly, is, at least, on the -- the borderline of that, yeah. He -- he's not necessarily talking about her truthfulness. He's talking about her demeanor, which I think is -- is a fair comment for him to talk about her demeanor. But he probably crosses the line a little bit when he talks about her being embarrassed that she kind of got manipulated by Mr. Gaskins.
Q Right. It makes it testifying that her demeanor, as he interpreted it, as -- is being truthful?
A I don't believe I thought that at the time. But I think you could, certainly, make that argument in hindsight.
Q Now, on Page 357, we mentioned it earlier about Officer Perry testifying about delayed disclosure?
A Correct.
Q He was never qualified as an expert in this case, was he?
A No. He wasn't qualified as an expert. But he --

there was some discussion leading up to that as to his years of experience handling cases that he had -- that -- that he had investigated.

Q Right. And his statement that, It's such a rarity for me to see a case where the child has immediately told that it's, like, you know, maybe one out of hundred. If it's -- it's a very common thing, a very -- that's, basically, an opinion, isn't it?

A I took it in that circumstance to be in a -- relating his personal experience as an investigator.

Q I understand that.

A I could, certainly, be -- I could, certainly, be wrong in not objecting to it. But that's how I took it.

Q But it's still an opinion?

A Certainly, his opinion based on -- yeah, based on his experiences.

Q All right. Now, let's go to the closing argument of Ms. Hodge on Page 494 where she's talking about how you determine truth, and lies, and all that. Look at -- beginning particularly at Line 14.

A Okay.

Q Where she says, Let's look at the Defendant's point. What he came to court and presented to you is everything is a lie, everything. And then she says, No, I never texted that, dad. And "dad" is a word used in one of the

text messages, for your information. She says, No, I never texted that sister. And that's a word used in one of the text messages. No, I don't even like country music. No, I never said I had tickets to this concert. No, I never went to the concert where I got into it with my wife. No, I don't have Facebook, no, no, no, no, nothing.

Basically, what she's -- isn't what she's telling the jury there is that he lied in his denials to her?

A That's what she's saying, yes.

Q All right. Did she ever introduce a scintilla of evidence that what he said was, in fact, a lie?

A No.

Q Were you anticipating reply testimony in this case?

A She -- she indicated on the record that there -- that there was the possibility she was going to bring in a rebuttal witness. Because we had some back and forth about that. Because I -- I think it was within the context of the Walt Mucienko text messages.

And I had said that we had not been provided those. We had no notice of them. And that Walt Mucienko had not been provided as a potential witness in the case.

And that's when she -- she said, Well, we don't have to divulge the names of rebuttal witnesses.

But she didn't call any rebuttal. So, I mean,

that -- that was the only reason that I had anticipated that she might put something up in rebuttal is she indicated that she might do that.

Q Because of the cross-examinations, too?

A Exactly, yes, sir.

Q All right. Now, the cross about Angelina Campbell and the pending charges, that wasn't relevant to any issue in this trial, was it?

A No.

Q And alleging there's pending charges by another woman against Mr. Gaskins was, obviously, an attack on his character?

A Yes.

Q Correct?

A Yes.

Q All right. And then didn't she in the course of that argument -- excuse me, cross-examination, you probably accurately called it an argument, but cross-examination. Didn't she, at one point, even pit her testimony against Mr. Gaskins when she talked about, I'm -- if you go look at Page 446.

Do you have that?

A I'm on 446, yes.

Q All right. Where, at one point, she asked a question, Am I the -- your prosecutor on that case?

Correct? At Line 17?

A Yeah. Am I your prosecutor on this case?

Q And he says, I don't know if you are or not.

And then she says, Have you not called me numerous times asking me?

And he said, No, ma'am. I have not.

So isn't she pitting her own credibility against the witness in that case?

A I'll -- I'll answer yes. I'm not -- I'm not sure I'm exactly following you. But I see where you're going with that.

Q Well, she's, basically, saying, you've called me. I know you've called me.

And he's saying, No.

A Yeah. That's true.

Q All right. That's, in essence, what she said?

A That's true.

Q All right. She in essence -- and through that, would she not be conveying to the jury, I know he's a liar?

A Yes.

Q All right. Is that really proper cross-examination?

A In hindsight, I would say probably not.

Q And, in fact, it was shortly after that that you made the astute observation that there's argument at this point?

A Yes.
Q Because it was?
A Yes.
Q All right. Now, for some reason -- and I agree it's probably for some reason unknown to you and I. The issue of the grounds for divorce became a big issue in this case?
A Well, only because I believe, if I remember correctly, that Rachel kept denying the grounds for divorce.
Q And did not -- Ms. Hodge cross-examined Mr. Gaskins at length about the grounds for divorce, too?
A That's correct.
MR. WISE: Where is our exhibit -- the divorce exhibit?
THE COURT REPORTER: It's going to be Applicant Exhibit No. 4.
THE WITNESS: It's not in here.
BY MR. WISE:
Q Have you got Applicant's Exhibit No. 4? I don't see it up here.
A Oh, here we go.
Q There you go. And you had a certified copy of that in the trial?
A I did.

Q All right. And you and the Judge had a discussion about whether or not it was admissible?
A That is correct.
Q All right. Did you ever consider the idea of simply giving that document to your client and saying, do you recognize this?
A I don't recall if I had it.
Q I'm thinking you did. You got it during lunch, or something.
A That's correct. I -- I mean, obviously, I didn't. So no.
Q All right.
A But -- but he did testify to the grounds for divorce.
Q Correct. But -- but other people denied that was the grounds.
A That's -- yeah.
Q He was cross-examined about the fact, You didn't file for divorce; correct?
A That's correct.
Q And if he had identified that document -- which he can do since it's his pleadings, couldn't he?
A He could.
Q All right. And then introduced it, it would have shown all that was wrong?
A That is correct.

Q All right. And this is a close credibility case, isn't it?
A Yeah. I mean, credibility is really important in this case.
Q It's the big issue. Because Dr. Crosswell never testified there was any physical evidence of sex?
A That's correct.
Q And the testimony was from the complaining witness they had had sex, at least, 10 times, if not more?
A I believe that's correct.
Q All right. So the logic would tell you that granted not in every case, but, certainly, with 10 or more times, there probably should have been some physical evidence; correct?
A Correct.
Q All right. I want to ask you about Dr. Crosswell, too. One second. I can find it quicker if you hand me my petition. 337.

All right. And Dr. Crosswell testified it was a normal exam on Page 337; correct?
A That's correct.
Q All right. Then they asked a question of would her findings on this exam be consistent with the allegations of sexual abuse on Page 338; correct?
A Yes.

Q And -- and she, basically, says that's not -- that's not -- that's consistent with sexual abuse?
A That is what she said.
Q Isn't that really a meaningless phrase?
A Absolutely.
Q All right. And even as an expert, I don't think -- you would agree an expert's not allowed to testify to a meaningless phrase?
A Well, I mean, she's -- I think she's allowed to give her opinion. I -- I agree with you that it has -- or should have very little import. Because, basically, what -- essentially, what she's saying is that no matter what I find, it's consistent with sexual abuse.
Q I -- I agree. But doesn't that send the wrong message to the jury that somehow that's a valid test?
A And that's why I cross-examined her on it.
Q We'll get to that in a minute.

Secondly, on Page 339 -- all right. She -- the question was asked, How about mental health counseling? Did you make a recommendation for that?

And she answered, We made a referral for her to have appropriate mental health counseling.

All right. Is that not tantamount to saying I believe the girl?
A I don't know. I can't answer that question.

Q Mental health counseling wasn't relevant in this case, was it?
A I -- it's not relevant to the -- to the issue that was at the heart of the trial, no.
Q Correct.
All right. So when -- it didn't bear on any important issue. And do you believe an average juror would understand that a professional such as Dr. Crosswell would not send a child to mental health counselling unless they needed it for what they're complaining about?
A I don't think I can answer that question.
Q Okay. Now, on cross-examination, you -- the first question you asked was a very simple "yes" or "no" question, I agree. All right. You simply asked, Your testimony is not that there was sexual abuse, just that there could have been?
And the obvious answer to that is "yes"?
A Correct.
Q And that's all that needed to be said --
A That's correct.
Q -- correct?
She went beyond that, didn't she?
A She did.
Q What did she say?
A She said, My testimony is that my patient provided me

a history of sexual abuse. And her exam was consistent with the history provided.

Q All right. With no physical evidence; correct?

A Correct.

Q So, in essence, she's saying that her exam was consistent with sexual abuse only because that's what my client -- what the lady told her?

A That's exactly correct.

Q What the child told her?

A That's exactly right.

Q All right. Is that not vouching for her testimony?

A I don't think so. But I can understand how you could make that argument. I mean --

Q But the point is you didn't make an objection, at that point, to the question not being responsive to your decent question?

A No, I didn't.

Q Okay. And she pretty much said the same thing over on Page 340 where you, again, asked a simple "yes" or "no" question of -- Through this exam that you did, you didn't make any independent finding of your own? To which, the obvious answer is no, based upon all the testimony?

A That's correct.

Q Instead, she says, I made my findings based on the history and the physical exam of what she needed as a

result.

All right. So she's kind of, again, saying she based it upon what the child told her?

A That's correct.

Q All right. At that time, you didn't think it was prudent to make an objection to that?

A I didn't make an objection. But, I mean, I covered all that in the cross-examination with her. I mean, that's why I said to her, So, basically, what you're telling us is you're just an information gatherer? I got into all that with her.

And this is common with these sort of -- with these medical doctors, and with police officers, all these folks. They never want to give you a straight answer to your question. So you have to keep trying to pin them down on cross-examination.

But as far as making an objection, no, I didn't do that.

Q And your question, quite frankly, was a good question that required a simple answer?

A That's correct.

Q Unfortunately, you didn't get it?

A I didn't.

MR. WISE: Excuse me one minute.

(Pause.)

BY MR. WISE:
Q I think -- I do want to say I thought your preservation of the Wallace issue on the record was -- was very good.
A Well, I appreciate --
Q Unfortunately, the Court of Appeals didn't agree with you.
A I appreciate that. I mean, I -- just --
MR. WISE: Thank you.
THE WITNESS: -- just to add a comment. I -- I really think that the -- allowing that evidence in made it almost impossible for Jerald to get a fair trial. I don't think there's any question about that.
THE COURT: Anything on redirect?
Mr. MITCHELL: No, Your Honor.
THE COURT: All right. And I have no questions. Thank you, Mr. Chambers.
THE WITNESS: Thank you, Your Honor.
THE COURT: All right. Any other witnesses for the State?
MR. MITCHELL: The State would call Mr. Jeff Wilkes to the stand.
THE CLERK: Mr. Wilkes --
MR. JEFFREY WILKES: Yes, ma'am.
THE CLERK: -- please place your left hand on the

Bible and raise your right hand.

WHEREUPON,

JEFFREY FALKNER WILKES,

after first having been duly sworn, testified as follows:

THE CLERK: Thank you.

Please be seated.

And state your full name for the record.

THE WITNESS: Jeffrey Falkner Wilkes.

DIRECT EXAMINATION

BY MR. MITCHELL:

Q Good afternoon, Mr. Wilkes.

How are you?

A Good.

Thank you.

Q Good. I appreciate you sticking around.

How long have you practiced law here in South Carolina?

A 30 years.

Q Okay. And how much of that time has been dedicated to criminal law?

A All of it, although I do other things. But for all 30 years, I have been involved in criminal law either prosecution or defense.

Q Okay. Is it fair to say a good part of your practice involves appellate work?

A Yes.
Q Okay. And how do you stay abreast of current issues -- appellate issues?
A Well, research -- I'm constantly researching. But I -- CLE's, and all the other usual stuff of trying to stay current.
Q Okay. And so in this particular case, after Mr. -- after Mr. Gaskins was convicted, he retained you; correct?
A He did.
Q Okay. And so once you got the case, what did you do? What was the first thing you did?
A Well, I guess I met with him. And then I proceeded in ordering -- all the usual steps of the appeal process. I ordered the transcript, reviewed the transcript, briefed -- briefed the case.
Q Okay. So you reviewed the transcript for issues that you thought may be successful on appeal. Is that a --
A I did.
Q -- fair statement?
A And -- and PCR. I make -- when I go through the transcript, I try to make an analysis of PCR issues that are apparent from the record, or from things that my client tells me during the appeal process, even though it's not really part of the appeal. I just -- as long as I'm doing it, I try to put down anything that I see that

might be relevant to the PCR.

Q Okay. So let's -- let's just get to the heart of the allegation that the Applicant has alleged that you did not -- after the Court of Appeals issued their opinion -- petition to the Supreme Court on a particular allegation. Why didn't you?

A Well, the reason -- well, I didn't because my client, Mr. Gaskins, made the decision to proceed with PCR, instead of the petition or -- or the petition for certiori. But he did that on my advice.

So it was my recommendation as far as the better use of -- of time and resources would be spent on the post-conviction relief, rather than another two or so years pursuing a petition for writ of certiori.

Q Was that advice based on you believing he wouldn't be successful?

A Correct.

Q Okay. So the allegation inside of the application is that State v. Perez was argued before the Supreme Court during the time that this appeal potentially was pending. Are you familiar with State v. Perez?

A Yes.

Q Okay. And so Applicant's issue -- or trial, I should say, dealt with the case State v. Wallace?

A Uh-huh.

Q Okay. Now, how did State v. Perez -- or I guess I should back up. You said you reviewed State v. Perez; correct?

A I have reviewed State v. Perez, yes.

Q Okay. And does State v. Perez discuss State v. Wallace?

A Yes.

Q Okay.

A So Perez came out just recently, the decision in Perez. I think the point on PCR is -- is that I did not consider the fact that there had -- the potential that Perez could overturn Wallace in advising on whether or not Mr. Gaskins should follow -- continue with the direct appeal. Perez had not come out and was not law until, I think, April of this year, or close to it.

Q It was March, I think.

A March. But it -- it just came out. So that -- the opinion itself was not a factor. The -- the question on the application was not factoring in the fact that the petition had been granted and a motion to argue against precedent had, also, been granted.

Q Okay. And you do not believe that it was in Mr. -- Mr. Gaskins interest to --

A I did not believe that the Court was -- I did not believe that the probability was high as to the Court

overturning Wallace any time soon -- sufficiently to justify pursuing the petition versus going to PCR. Because PCR -- there's a spoliation issue sometimes with PCR cases. If you go all the way through the petition for writ of certiori, you've added two or more years to -- to the time that you'll start a PCR.

So you -- you have a greater -- and you've already been several years from the trial, which has been several years from the incident, which means you're adding time upon time before you start a PCR.

And I do a lot of PCR's. So I'm pretty sensitive to the balance between continuing on in a petition for certiori if it's not likely and losing evidence, or potentially losing evidence or weakening the -- the PCR case.

Q And so there's no question that this information was relayed to the Applicant?

A Yes, I did relay. And the way I did it was to give him a recommendation that, in my opinion, pursuing the petition for writ of certiori would not be the best use of his time and resources. But I -- it's not that I refused to do it. Certainly, we would have continued, filed the petition, had OID pick it up, if necessary. But I think his decision was based on my recommendation.

Q Very good.

And I guess the last question I'll ask you. The -- the Court issued an opinion in State v. Perez. Did it address State v. Wallace?

A Yes. It -- it was upheld. So it -- ultimately, it -- I guessed right, I guess you could say. Because that's all we do in giving opinions is make an educated guess. And I guessed right.

I will say this. It was a heck of a lot closer than I anticipated. So that -- that doesn't mean that next year it'll happen, or in two years it'll happen. Because the Court [inaudible] changes. But it -- it was far closer than I would have guessed. Because both Beatty -- Judge -- Justice -- Chief Justice Beatty and Justice Hearn believed that Wallace should be overturned. So I -- I expected one, but not both.

Q And as -- but, currently, as of this date, it's still good law?

A Yeah. Wallace is, unfortunately, yeah, still the law.

MR. MITCHELL: Thank you.

Please answer any questions Mr. Wise may have.

THE COURT: Mr. Wise.

CROSS-EXAMINATION

BY MR. WISE:

Q Do you know who wrote the Court of Appeals opinion in

Wallace?
A You -- no, no. I know who dissented. I think -- I believe Justice Pleicones may have dissented.
Q No, not the Supreme Court opinion. The Court of Appeals where --
A Oh, no, no, no, I don't. I don't recall.
Q All right. Justice Hearn, for your information.
A Oh, well, that explains --
Q Okay. And Justice Beatty dissented in Wallace?
A Yes.
Q Okay.
A And in Perez.
Q All right. And are you familiar with opinions in the Court of Appeals written by Justice Kittredge?
A Some, but I can't place any in this line attributed to him. But I know that he -- he did not agree, apparently, with Hearn and -- Justice Hearn and Chief Justice Beatty in Perez.
Q In Perez?
A Right.
Q He went on the Wallace panel [phonetic]. Would it shock you to learn that he's written on the Court of Appeals several opinions that are very favorable for the Defense side of the -- the Lyle issue?
A No, no, it wouldn't.

Q All right. So there are two to three votes up there in play right now?
A That is true. It is --
Q Tell me -- tell me what seminars you've been to on -- on the Lyle-Wallace issue.
A I can't remember a single one that I can identify. I know it's -- it's probably covered in most of the seminars, especially the criminal ones. But not a single dedicated to just the Lyle issue.
Q Were you aware that the Supreme Court had granted cert in the Perez case as far back as, I believe, 2015 -- it's in the exhibit we've got -- in which the cert petition was sought on the grounds that Wallace should be overturned?
A I cannot -- I -- I should have been. It would have been reported in Westlaw. So even though -- even though Perez was an unpublished --
Q Correct.
A -- its cert would have been shown in Westlaw --
Q Correct.
A -- so, yes, I -- I would have -- I would have seen it, yes.
Q And that would -- was done long before -- in fact, Perez was argued on the 30th of November, 2016.
A Correct. And cert was granted in '15, I think.

Q Right.
A So I -- yes, I would have known that.
Q All right. So you're aware of all those dates?
A Absolutely.
Q So you're aware when you wrote the letter to Mr. Gaskins saying don't appeal it any further, that cert had been granted in a case that could overturn Wallace?
A I would have been aware that -- yes.
Q Couldn't you have just simply filed a petition for cert with the South Carolina Court of Appeals -- not a cert -- a rehearing with the South Carolina Court of Appeals and told them to hold it in abeyance until the Supreme Court does something with Wallace?
A I could have, yes, sure.
Q And that would have not been that expensive?
A No, no, no, nor would -- nor would have filing the cert. I mean, he could have just pursued the cert as well. But, again, that gets back to the -- I was just doing a balancing of what I perceived the -- the success would be versus the -- the time involved.
Q Even -- even though you were aware that cert had been granted --
A Yes --
Q -- in an effort to overturn Wallace?
A Oh, yes. Cert -- cert being granted is not

necessarily a -- an absolute predictor of the outcome of the case. You -- you can put a percentage on it. But -- but it's not a predictor. As we see, it was not a predictor at all. So I guessed right --

Q Well --

A -- an educated guess right.

Q Well, two judges said overturn it --

A Yes.

Q -- two ignored it, and one bailed out?

A Yes.

Q Is that a correct analysis?

A That is exactly correct.

Q Okay. And -- and, for your information, do you know that Wallace arose out of this courtroom? It's a Greenville case.

A I -- I -- that I don't recall.

Q Okay. It's a Greenville case.

A I don't recall that.

MR. WISE: Thank you.

MR. MITCHELL: Judge, I have no more questions for this witness.

THE COURT: No more questions?

MR. MITCHELL: No, sir.

THE COURT: All right. Thank you.

Good to see you, Jeff. Take care of yourself.

THE WITNESS: Good to see you.

THE COURT: All right. Any other witnesses?

MR. MITCHELL: I have no additional witnesses, Judge.

MR. WISE: Your Honor, one -- one thing on that. I had anticipated I was going to call Ms. Hodge. And I was going to have her simply identify the documents she gave me from her file. If he'll stipulate that she gave to me those files and introduce them, I have -- I don't have any reason to call her.

THE COURT: Will you stipulate to that?

MR. MITCHELL: Your Honor, that's fine with me.

MR. WISE: Okay.

THE COURT: All right. I'll tell you what we're going to do. I'm going to ask both sides to send me a proposed order within 30 days. And I'll take a look at it. If you need more time, let me know.

MR. MITCHELL: Thank you.

(Pause.)

MR. WISE: Your Honor --

THE COURT: Yes, sir.

MR. WISE: -- I just realized while I was sitting here talking to my client, 30 days from today is Thanksgiving week.

THE COURT: Oh, well, we don't want to do that. What's good for both of you?

MR. WISE: Any time the following -- any time toward the middle of the following week.

MR. MITCHELL: What I will say is, I am leaving the office. So my last day will be the 6th with the Attorney General's Office. But I'm going to work on it diligently.

Sherry's here with me from the AG's Office today, too. So one of us will get it to you in that 45 days.

THE COURT: Say, by December 15th?

MR. WISE: Oh, that's plenty -- that's good. That's good.

MR. MITCHELL: That works for us.

MR. WISE: And I didn't mean to run him off.

THE COURT: No. That's all right.

All right. December 15th.

RM. MITCHELL: Thank you, Judge.

THE COURT: All right.

**********END OF TRANSCRIPT OF RECORD**********

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|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE THIRTEENTH JUDICIAL CIRCUIT |
| Jerald D. Gaskins Jr., 362923<br>Applicant, | ) | 2017-CP-23-5901 |
| v. | ) | **ORDER OF DISMISSAL** |
| State of South Carolina,<br>Respondent. | ) | |

'19 FEB 4 PM 12:00
Paul Wickensimer COC GVL SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed on September 14, 2017 by Applicant. Respondent made its Return on January 17, 2018. An evidentiary hearing into the matter was convened on October 24, 2018, at the Greenville County Courthouse. Applicant was present and represented by C. Rauch Wise. Respondent was represented by DeShawn H. Mitchell and Sherrie Butterbaugh of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Trial counsel Randall L. Chambers and appellate counsel J. Falkner Wilkes also testified. Applicant also called Walter Mucienko to testify on his behalf at the hearing. Following a thorough review of the record in its entirety, and the testimony and evidence presented at the hearing, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In April of 2013, the

Greenville County Grand Jury indicted Applicant for four counts of criminal sexual conduct with a minor second degree (2013-GS-23-3231, 3232, 3234, 3235) and two counts of lewd act upon a child (2013-GS-23-3233,3236). Randall L. Chambers represented Applicant. Applicant proceeded to trial on February 4, 2015, before the Honorable D. Garrison Hill and a jury. The jury found Applicant guilty as indicted to all charges. Judge Hill sentenced Applicant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction.

Applicant filed a timely notice of appeal. J. Falkner Wilkes, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions on February 1, 2017. *State v. Gaskins*, Op. No. 2017-UP-166 (S.C. Ct. App. filed April 19, 2017). The remittitur was returned to the circuit court on May 5, 2017.

**FACTUAL HISTORY**

In the spring of 2011, Applicant and his wife at the time, Rachel Gaskins (Rachel), attended a horseshoe tournament at a home located in Travelers Rest. (Tr.p.54; pp.62-63; pp.82-83; pp.134-135). After the tournament, Applicant began regularly socializing with the family that lived at the home, including a thirteen-year-old girl (victim) who was a part of that family. (Tr.pp.64-66; pp.82-83; pp.135-36). Over the next few months, Applicant developed a close friendship with victim, and victim began to regularly visit with Applicant and his family. (Tr.pp.64-65; p.98; p.137; pp.139-40; pp.145-46; pp.150-51). However, victim's mother (mother) became uneasy when she found victim in possession of a phone covertly provided to her by Applicant and when Applicant eventually began to act controlling with victim, and she

ended victim's contact with Applicant as a result. (Tr.pp.73-75; p.227).

Subsequently, in November of 2012, Applicant's mother-in-law contacted mother and provided her with information that made her become even more concerned. (Tr.p.75; pp.87-88; pp.156-57). In response, mother and victim's father confronted victim, and victim initially denied anything inappropriate occurred between her and Applicant. (Tr.pp.75-76). However, as the conversation with her parents continued, victim began to cry before revealing she had been sexually abused by Applicant. (Tr.pp.76-77). Mother immediately reported the sexual abuse to the authorities, and Deputy Paul Floyd (Floyd) of the Greenville County Sheriff's Office responded to victim's home. (Tr.pp.53-54; pp.76-77; p.89). Floyd spoke with victim alone and victim disclosed she had been sexually abused by Applicant on multiple occasions over the course of more than a year. (Tr.pp.56-58).

Following victim's disclosure, Investigator Robert Perry (Perry) of the Greenville County Sheriff's Office began an investigation into the reported sexual abuse and spoke with victim at school. (Tr.pp.345-48; p.361). During their conversation, victim disclosed she was sexually abused by Applicant on multiple occasions at different places where he lived from the spring of 2011 until the fall of 2012. (Tr.pp.348-49). After speaking with victim, Perry attempted to gain access to victim's phone to examine her communications with Applicant, but could not because Applicant had taken the phone back from victim. (Tr.p.353). Perry repeatedly attempted to make contact with Applicant, who was thirty-years-old, but the attempts were unsuccessful. (Tr.p.347; pp.353-54). Thereafter, Perry obtained arrest warrants for Applicant based on the reported sexual abuse of victim. (Tr.p.354).

During trial, victim testified about the sexual abuse.[1] (Tr.p.192). Regarding the abuse,

[1] At the time of trial, victim was seventeen-years-old and Applicant was thirty-two years old.

victim indicated she met Applicant at a horseshoe tournament in March of 2011 when she was a thirteen-year-old middle school student, and Applicant gave her his phone number. (Tr.pp.185-87). Shortly after that, victim stated she and Applicant began visiting each other's homes and hanging out on a regular basis, and she indicated she spent the night at Applicant's home occasionally. (Tr.p.185; pp.188-89). During one of the visits, Applicant asked victim if she was a virgin before informing her he would "spoil" her for the remainder of her life if he was the one who took her virginity. (Tr.pp.189-90). A few weeks later, victim indicated Applicant brought up the subject of her virginity again, and the two then engaged in sexual intercourse while Applicant's wife took a bath in another room. (Tr. pp. 190-193). Specifically, during that incident, victim testified Applicant removed their pants, began fondling and kissing her, and then quickly had sexual intercourse with her. (Tr.pp.193-94). Afterwards, victim testified the two pretended like nothing happened, and, from that point forward, Applicant provided her with phones and other gifts, gave her "a lot of attention," and promised to give her whatever she wanted. (Tr.pp.194-96; pp.213-14). As their relationship continued, victim indicated she and Applicant engaged in sexual intercourse on multiple occasions at different homes Applicant moved to over the course of the next year and a half, and she noted Applicant always wore a condom during the acts of sexual abuse. (Tr.pp.197-99). Victim further indicated Applicant performed oral sex on her during some of the incidents, and she recounted Applicant had sexual intercourse with her in a car on one occasion after driving her to an abandoned house while they were out to pick up food for other people in the home. (Tr.pp.200-02; pp.216-17). Additionally, victim stated she had sexual intercourse with Applicant on one occasion after they dropped his wife off at the hospital, she indicated the two had sexual intercourse on one occasion after

(Tr.p.183; p.376).

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Applicant pretended he was going to take her to a country music concert, and she recounted an incident where Applicant's wife found him lying next to her on a couch, which led to a heated argument between Applicant and his wife. (Tr.pp.205-10; pp.224-25). Furthermore, victim testified Applicant convinced her they were going to get married, tried to talk her into getting legally emancipated from her parents, and tried to alienate her from her family. (Tr.pp.222-24). Subsequently, victim noted her relationship with Applicant continued until her mother found a phone Applicant had given her, and she eventually revealed the sexual abuse when confronted by her parents. (Tr.pp.227-29).

As victim's testimony continued, the solicitor asked victim about her friend who was present on the day victim met Applicant.[2] (Tr. pp. 234-235). The solicitor asked to address a matter outside of the presence of the jury, and the trial judge excused the jury from the courtroom. (Tr.pp.235-36). The solicitor indicated she intended to introduce the friend's testimony as prior bad act evidence while noting victim and friend were the same ages, were in the same grades in school, met Applicant in the same manner, engaged in the same types of acts with him, and were told the same things by Applicant during the course of their relationships with him. (Tr.pp.236-41). In response, defense counsel objected, contended the Supreme Court's decision in *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), was "bad law," and asserted the prior bad act evidence involving the friend was not admissible as evidence of a common scheme or plan because there was allegedly no evidence of a modus operandi. (Tr.pp.242-43).

The trial judge asked the solicitor to proffer the friend's testimony, and she was called to the witness stand. (Tr.pp.245-46). During her proffered testimony, the friend stated she met

[2] By the time of trial, the friend was eighteen and no longer a minor child. (Tr.p.246; p.306).

Applicant in the spring of 2011 just after she turned fourteen-years-old when she was visiting victim's home for a horseshoe tournament. (Tr.pp.246-48). Upon meeting Applicant, the victim's friend indicated he was immediately flirtatious with her, and the two exchanged telephone numbers. (Tr.p.248). After that, she testified she began hanging out with Applicant, and Applicant said "very nice things" to her. (Tr.p.249). A few weeks later, the victim's friend indicated the two began kissing and eventually began having sexual intercourse when she was alone with Applicant after he made her feel "very special." (Tr.pp.249-251). Regarding the sexual intercourse, the friend recounted it was quick; it always involved a condom, it always occurred when she was alone with Applicant, and only their pants were removed. (Tr.pp.251-54). Additionally, she stated Applicant made her feel like the "most special person in the world" and got her whatever she wanted. (Tr.p.252). As their relationship continued, the friend noted they had sex on a few more occasions, including on one occasion at an abandoned house. (Tr.pp.253-54). Eventually, the victim's friend indicated she ended the relationship with Applicant, and, when she did so, he informed her he was going to "make his next move" on the victim. (Tr.pp.255-56).

Following the friend's proffered testimony, defense counsel conceded it would "be stupid" to suggest no similarities existed between the acts involving the friend and the acts involving victim, but he contended the acts did not rise to the level of a common scheme or plan based on the fact the "whole series of events" allegedly occurred much differently for each of Applicant's victims. (Tr.p.259). Defense counsel further renewed his assertion the decision in *Wallace* was "bad law" while contending prior bad act evidence was the most prejudicial type of evidence that could be admitted. (Tr.p.260). In response, the solicitor asserted the prior bad act evidence was extremely probative in Applicant's case as evidence of the existence of a common

scheme or plan and contended the probative value of that evidence outweighed the potential for undue prejudice in light of the lack of physical evidence in the case. (Tr.pp.261-63). After considering the arguments of counsel, the trial judge found the similarities between the acts outweighed the dissimilarities due to the ages of the victims, the timing of the sexual abuse, the locations where the abuse occurred, the relationship between Applicant and his victims, the manner and type of sexual abuse, and the use of coercion or seduction on the victims. (Tr.p.264). Furthermore, the trial judge concluded the prior bad act evidence was not unfairly prejudicial in Applicant's case while offering to give a limited instruction if one was desired. (Tr.pp.265-67).

Following victim's testimony, her friend took the witness stand and testified about her relationship with Applicant before the jury. (Tr.p.306). It was similar to the in-camera hearing. (Tr.pp.306-17).

Additionally, mother testified about the details of how Applicant and victim began to regularly spend time together after meeting, and she noted victim's behavior began to change after she started associating with Applicant. (Tr.pp.62-67; pp.72-73). Mother further discussed victim's subsequent disclosure of the sexual abuse and their actions in response to that disclosure. (Tr.pp.75-78; p.89). Likewise, victim's older sister (sister) testified about her interactions with Applicant, and she indicated she believed something was going on between Applicant and victim based on the way Applicant treated her. (Tr.pp.97-99). Sister further noted she spoke with Appellant on the phone and exchanged text messages with him after they became friendly toward one another, and she stated Applicant informed her he loved victim most of all, while also referring to her as his "beautiful future wife" during their communications. (Tr.pp.100-01; pp.107-08; p.112). Furthermore, Dr. Mary-Fran Croswell, an expert in pediatric

medicine and child abuse pediatrics, testified about her examination of victim following the disclosure of the sexual abuse, indicated her examination of victim was normal, and noted a normal examination did not exclude the possibility of sexual abuse. (Tr.pp.332-38).

Applicant's former wife, Rachel, also testified for the prosecution.[3] (Tr.p.130). During her testimony, Rachel confirmed she and Applicant became friends with victim's family after meeting them at a horseshoe tournament in March of 2011, and she indicated victim began regularly visiting their home and sometimes spent the night there.[4] (Tr.pp.134-37; p.139). Rachel stated she became uncomfortable about the relationship and confronted Applicant, who reacted angrily. (Tr.p.138). Rachel further testified Applicant and victim were alone together numerous times during her visits, and she recounted on one occasion she found them lying on a couch together in the middle of the night with Applicant's leg draped over victim's legs. (Tr.p.148). After finding them in that position, Rachel confronted Applicant and he became very threatening. (Tr.p.149). Subsequently, Rachel indicated Applicant kicked her out of the home. (Tr.p.152). Rachel eventually revealed her concerns about Applicant and victim to victim's mother and Perry. (Tr.pp.157-59).

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[3] During trial, Rachel noted she obtained a divorce from Applicant at some point after the events involving victim occurred. (Tr.p.154; pp.172-73).

[4] At the outset of her testimony, Rachel indicated she met Applicant, who was twenty-six years old at the time, in September of 2008 when she was a seventeen-year-old high school student. (Tr.p.131). She further stated he convinced her to move in with him within two weeks of initially meeting her, and they got married less than a year later. (Tr.pp.132-34; pp.175-76). Rachel indicated Applicant was abusive and manipulative toward her, and she noted he forced her to make a false allegation of sexual abuse against her father that she subsequently recanted. (Tr.pp.143-44; pp.165-66; p.175; pp.178-79). Later during trial, Applicant confirmed he met Rachel when she was seventeen and he was twenty-six, acknowledged she moved in with him two weeks later, and indicated she married him a few months later before giving birth to their first child together not long after that. (Tr.pp.378-80; p.388). He asserted Rachel was violent and unfaithful towards him during the course of their relationship and claimed they both decided together for her to file a rape allegation against her stepfather. (Tr.pp.382-83).

At the conclusion of the State's case, Applicant elected to testify. (Tr. p. 362; p. 376). During his testimony, Applicant asserted he first met victim's family at a horseshoe tournament in 2011, but claimed he did not speak to either victim or her friend at that time.[5] (Tr.pp.394-95). Applicant testified he and Rachel began regularly visiting with victim's family while victim began visiting his home to babysit his daughter. (Tr.pp.394-96). After victim began visiting, Applicant acknowledged she spent the night at his home on some occasions, but he claimed she was never alone with him and simply played with his daughter, played video games, and used his "humongous" television.[6] (Tr.pp.398-99). Applicant stated he eventually stopped spending time with victim's family due to their alleged violent tendencies, and he denied victim visited him at one of the homes he moved to in Travelers Rest. (Tr.pp.408-10). Subsequently, in October of 2012, Applicant claimed he cut off all ties with victim's family after discovering victim's father had secretly added multiple vehicles to his insurance policy. (Tr. pp. 415-18). As Applicant's testimony continued, he insisted he only possibly saw victim in passing after cutting off ties with her family, and he denied the victim's friend had ever been to his home. (Tr.pp.418-19). Applicant further denied having an inappropriate relationship with either victim or her friend, and he insisted he had never heard about an abandoned house and had never discussed going to a country music concert with anyone. (Tr.pp.420-21).

On cross-examination, the solicitor asked Applicant if he sent a text message to victim's father in regard to his divorce from Rachel, and Applicant insisted he did not send the message

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[5] At the outset of his testimony, Applicant asserted he was disabled due to a diagnosis of attention deficit hyperactivity disorder and had been receiving disability benefits since the age of thirteen as a result. (Tr.p.377).

[6] Applicant further indicated he tried to keep witnesses around him all the time to verify his innocence because he had been accused of many things during his lifetime. (Tr.pp.400-01; p.440).

while contending someone else had been sending messages pretending to be him. (Tr.pp.424-25). Defense counsel objected to the questioning while asserting a foundation had not been established regarding the text messages the solicitor was attempting to have Applicant read, and the trial judge sustained the objection. (Tr.pp.425-26). Following the exchange, the solicitor asked Applicant if he sent a text message to victim's father asking if he was going to drop the charges, and Applicant denied he sent such a message. (Tr.p.426). Defense counsel again objected, and the trial judge sustained the objection before excusing the jury from the courtroom. (Tr.p.426).

Once the jury was excused, the solicitor noted it was permissible for her to question Applicant about statements he was alleged to have made, and she further asserted she could call a witness in rebuttal to establish a foundation if she moved to admit the actual text messages themselves into evidence. (Tr.p.427). In response, defense counsel asserted a foundation had to be established before the solicitor could ask questions regarding the messages, and the trial judge inquired of defense counsel why the solicitor could not ask Applicant if he made a particular statement. (Tr.pp.427-28). Defense counsel then replied: "I think she – well, she can ask if he makes a statement, Your Honor. But she was, actually, reading the text messages verbatim." (Tr.p.428). The trial judge and defense counsel then continued to discuss the matter, and defense counsel confirmed his concern was the solicitor's questions allegedly created the appearance she was publishing something that had not been admitted into evidence. (Tr.pp.428-429). After that discussion, the following exchange occurred:

> **[Defense Counsel]:** But my issue is not necessarily, Your Honor, that [the solicitor]'s asking [Appellant] that. That's fine. But she's, actually, walking up to him, laying these down in front of him as they were – as though they were a statement that he gave.
>
> **[Trial Judge]:** Yes, I know. That's why I sustained the objection

> when you objected to that. But, I mean, I think she can ask about alleged previous statements the witness –
>
> **[Defense Counsel]:** Well, I would agree with that.
>
> **[Trial Judge]:** – who was a party, made.
>
> **[Defense Counsel]:** Yeah, I would agree with that, Your Honor. I just – when she – she, at first, seemed as though she was, actually, going to have him read it. Then she's questioning him about it while it's laying up there in front of him. And I, clearly, believe that's improper.
>
> **[Trial Judge]:** Well, I overrule the objection.

(Tr.p.429).

Thereafter, the solicitor resumed her cross-examination and asked Applicant if he sent a text message to victim's father about how they could go to Oklahoma and make money if he would drop the bogus charges, and Applicant denied sending such a message. (Tr.pp.432-33). The solicitor also asked Applicant if he sent a text message to sister about tickets for a country music concert, and Applicant denied doing so while insisting he never sent a text message to sister on any occasion. (Tr.pp.435-37). After that, the solicitor asked Applicant if he sent a text message to sister indicating victim was his favorite, and Applicant again insisted he never sent a text message to sister about anything. (Tr.pp.437-38). As her cross-examination of Applicant continued, the solicitor asked Applicant if he knew the victim's friend, and he responded he did not and had only met her on two occasions. (Tr.p.455). The solicitor then inquired if Appellant had sent a Facebook message to the victim's friend a few weeks earlier, and Applicant denied doing so while challenging the solicitor to prove it. (Tr.pp.454-55).

Subsequently, the defense rested its case, and the solicitor indicated she did not believe it was necessary for her to call any rebuttal witnesses. (Tr.p.463). The parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law.

(Tr.pp.465-506). At the conclusion of trial, the jury convicted Applicant as indicted. (Tr.pp.510-11). Following the verdict, the trial judge sentenced Applicant to an aggregate term of imprisonment of twenty-five years. (Tr.pp.516-17).

## ALLEGATIONS

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

1. Prosecutorial Misconduct
2. Due Process violations
3. Ineffective assistance of counsel

Applicant amended his application on May 22, 2018, and October 25, 2018, alleging he is being held in custody unlawfully for the following reasons:

1. Trial counsel failed to object to improper questions by the prosecutor concerning text messages with Walt Mucienko and a minor and an alleged incident with another minor when there was no factual basis for the questions.
2. Trial counsel failed to interview and call several witnesses who could have refuted much of the testimony of the witnesses against me.
3. Trial counsel failed to investigate and obtain records from various sources that could have refuted much of the testimony against me.
4. Trial counsel failed to introduce family court records that would have established the ground for my divorce and therefore the cross examination by the state would have been proven to be inaccurate.
5. Trial counsel failed to object to the questions by the state as to alleged drug dealing which had no basis in fact.
6. Trial counsel failed to introduce the pleadings from the divorce which would impeach the testimony of my ex-wife.
7. Trial counsel failed to subpoena my medical doctor to prove I was allergic to latex.
8. Trial counsel failed to object to the improper testimony of Dr. Mary Fran Croswell.
9. Appellate counsel failed to perfect an appeal to the South Carolina Supreme Court on the issue of the admissibility of other bad act under 404b.
10. Trial counsel failed to object to the questions by the solicitor concerning an alleged charge pending against me that was brought by Angelina Campbell.
11. Trial Counsel failed to object to the hearsay testimony of Officer Robert Perry when he testified as the statements the minor child as to the details of the alleged sexual assault. The statements are hearsay and trial counsel should have objected.
12. Trial counsel failed to object to the testimony of Officer Robert Perry when he gave an opinion as an expert to the delayed disclosure of sexual abuse when he had not been qualified as an expert in this field.

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13. During the direct examination of Officer Paul Floyd, the assistant solicitor elicited a response that minor child had identified myself as the alleged suspect. This hearsay testimony was not objected to my trial counsel.

**SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING**

Walter Mucienko's Testimony

At the start of the evidentiary hearing, Applicant called Walter Mucienko (Walter), the victim's father, to ask him about the text messages allegedly exchanged between himself and Applicant. Walter testified he never sent any text messages to Applicant about dropping the charges, further stated he did not use Verizon as his carrier as indicated on the messages and instead previously used Sprint, and stated he was threatened by Applicant and his friends. Walter ended his testimony by reiterating he never sent texts to Applicant and someone had falsified the messages.

Applicant's Testimony

Applicant testified he also never exchanged text messages with Walter, and specifically noted the messages had been forwarded, the phone number was not his, and the texts should not have been used at trial. Applicant stated trial counsel should have objected to the admission of the texts because he did not send them and they were very prejudicial to his defense. Applicant also addressed Facebook messages the solicitor asked him about at trial. The messages were sent by a man named Jay Fowler to a young girl. (Tr.pp.444-45; pp.454-55). Applicant testified counsel should have objected because the solicitor could not prove he sent the messages and he did not see the messages before trial. Further, Applicant stated counsel should have objected more strongly when the solicitor brought up a no contact order and pending charge involving his fiancée. (Tr.pp.445-47).

Applicant also testified there were other instances trial counsel should have objected,

including to hearsay statements by Perry when he testified the victim identified Applicant as her abuser and statements made when he was not qualified as an expert. Applicant testified counsel also should have objected to hearsay statements of Floyd who also testified the victim identified Applicant. Finally, Applicant testified he told counsel he was allergic to latex and could not have worn a condom as the victim stated he did, but counsel did not call his doctor to confirm the allergy. Applicant stated counsel's deficiency prejudiced him because he could have presented evidence to dispute the victim's claim.

Regarding the claim of ineffective assistance of appellate counsel, Applicant testified he was prejudiced because counsel did not continue with the appeal. After failing to prevail at the Court of Appeals, counsel advised Applicant by letter to file for PCR rather than petition for review in the Supreme Court. Applicant testified he was prejudiced by counsel's advice to proceed to PCR rather than continue with his appeal.

On cross-examination, Applicant testified he met with trial counsel twice and admitted he rejected a plea offer with a sentencing range of zero to twelve years. Applicant also stated he testified at trial despite a "mental condition" which caused him to become excited, angry, and speak fast so that he did not always understand the questions being asked of him. When confronted with specific cites to the trial transcript, Applicant acknowledged counsel objected to the text messages but not in the manner he wanted him to, and acknowledged counsel attempted to admit a note from his doctor about his latex allergy. Applicant also agreed he testified at trial about his divorce with Rachel to refute her testimony.

Trial Counsel's Testimony

Trial counsel testified he had been practicing criminal law in South Carolina since 1992. Counsel stated Applicant retained him, they met on numerous occasions, and he was well

prepared to handle the case. Counsel testified he shared discovery with Applicant who understood the process and helped him develop a trial strategy. Counsel indicated there were few fact witnesses to call to testify on Applicant's behalf at trial given it was a "he said/she said" situation. Counsel testified Applicant always maintained nothing happened between himself and the victim and their strategy was to attempt to convince the jury the whole thing was a false allegation concocted by Applicant's ex-wife Rachel and her friend to benefit Rachel during a "nasty divorce." Counsel stated he attempted to introduce documents from the Family Court divorce proceeding to rebut and impeach Rachel's testimony; however, the trial court denied his request. (Tr.pp.365-75). The record reflects Applicant was asked about the divorce and the reason why he filed for divorce which he asserted was adultery, even though Rachel denied it. (Tr.p.172; p.414).

Trial counsel testified he prepared Applicant to testify and discussed with him the pros and cons of doing so, and it was Applicant's decision to testify at trial. Counsel stated Applicant had a "volatile" personality and he knew the solicitor would try to "get under his skin," so he tried his best to prepare him for her questions. Counsel testified there was no physical evidence in the case, so Applicant's credibility was critical.

Turning to the other allegations of ineffective assistance of counsel, trial counsel testified he, in fact, objected to the use of text messages allegedly sent between Applicant and Walter and the trial court initially sustained the objection, before overruling him and allowing the solicitor to ask Applicant about the texts. (Tr.pp.425-30). Regarding the medical opinion offered by the doctor about the victim's normal examination, counsel testified she was qualified as an expert, her testimony was within the scope of her expertise so he did not believe he could object to it, and he felt he could best handle her opinion during cross-examination. Counsel stated the

testimony by Perry and Floyd in which they stated the victim identified Applicant as her abuser was technically hearsay, but he did not object to it. Counsel stated he did not believe it would have been beneficial to object because the information was going to come out anyway during the victim's testimony. Moreover, counsel testified, in his experience as a criminal defense attorney, their testimony was properly admitted based on their prior investigation into the case. As to the solicitor's questions about a pending charge and no contact order involving Applicant's fiancée, counsel testified he agreed it was prejudicial, but he objected to the questions which the trial court sustained, and Applicant refuted the information in front of the jury. On cross-examination, counsel acknowledged he did not object to the solicitor's limited questions about whether Applicant supplemented his income by "selling pills or pot" and acknowledged the solicitor told the trial court Applicant had no criminal history that could be used to impeach him when he testified. Counsel testified it was not his general practice to object during cross-examination of any of his clients unless the questions were unduly prejudicial.

Appellate Counsel's Testimony

Appellate counsel testified he had thirty years' experience as an attorney with focuses on criminal law and appellate practice. Counsel indicated he did research and kept up with case law to help identify issues on appeal. Counsel stated it was his advice not to petition to the Supreme Court following the adverse decision in the Court of Appeals in Applicant's appeal and it was in Applicant's best interests to move on to PCR. Counsel believed, based on his professional opinion, there was not a high probability the Court would overturn *Wallace*,[7] so he did not think the petition had a high chance of success.[8]

[7] *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

[8] One of the issues raised in Applicant's appeal was whether the trial court erred in admitting

## 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 at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony. As a matter of general impression, this Court finds trial counsel's testimony was credible and persuasive on all matters, while also finding applicant's testimony and assertions lack credibility. These credibility findings have been applied to the Court's findings set forth below. Pursuant to S.C. Code Ann. §17-27-80, the Court makes the following findings of facts and conclusions of law based on the probative evidence presented.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, an applicant must prove counsel's performance was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

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evidence of prior bad acts pursuant to *Wallace*. *See State v. Gaskins*, Op. No. 2017-UP-166 (S.C. Ct. App. filed Apr. 19, 2017). At the time Applicant's appeal was pending, a similar case was also awaiting a decision before the Supreme Court, *State v. Perez*, 423 S.C. 491, 816 S.E.2d 550 (2018).

Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds applicant has failed to carry his burden of proof and has not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by applicant:

**Ineffective Assistance of Counsel**

*Failure to Object*
*(Allegations 1, 5, 8, 10, 11, 12, and 13)*

Applicant alleges trial counsel was ineffective in failing to object to the testimony of several witnesses, as well as improper questions about text messages, selling drugs, and a pending charge. This Court finds Applicant has failed to meet his burden on all of these claims as they are matters of trial strategy, and dismisses them with prejudice.

First, the record directly contradicts Applicant's allegation trial counsel did not object to

the questions regarding text messages or Facebook messages. During cross-examination at trial, the solicitor asked Applicant if he and the victim's father sent texts to each other. (Tr.pp.424-25). Counsel immediately objected to the lack of foundation, twice, and the trial court sustained the objection both times. (Tr.pp.425-26). However, following arguments outside the presence of the jury, the trial court overruled a subsequent objection. The solicitor continued her cross-examination which included questions about the texts and later about Facebook messages sent to the victim's friend. This Court finds counsel's performance at trial was reasonable. Counsel objected to questions about the messages twice, the objections were sustained, and counsel further argued against the questions outside of the jury's presence, which was ultimately overruled. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (citing *Strickland*, 466 U.S. at 690) ("Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). It is unclear from the record what more counsel could have reasonably done to prevent further questions about the messages. Additionally, this Court finds it is pure conjecture to claim any further objection would have affected the outcome at trial.

Second, Applicant alleges trial counsel should have objected when the solicitor asked him whether he sold drugs, and about a no-contact order and pending charge involving his fiancée. Again, the record refutes the contention counsel did not object to the questions regarding a pending charge involving Applicant's fiancée. Counsel objected to the question, the trial court sustained the objection, and Applicant contradicted the solicitor about the charge in front of the jury. At the hearing before this Court, counsel acknowledged he did not object to the solicitor's limited questions about whether Applicant sold "pills or pot." However, counsel testified it was not his general practice to object during cross-examination of any of his clients

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unless the questions were unduly prejudicial. While acknowledging the question was prejudicial, it was also limited and counsel did not believe it was so prejudicial to warrant an objection. Accordingly, the record is clear counsel exercised his professional judgment in determining when to object during cross-examination of Applicant and this Court will not second guess counsel's judgment, or his articulated trial strategy. Because counsel had a valid, strategic reason for objecting when he did during Applicant's cross-examination, his performance was reasonable. "When 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, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Applicant cannot meet his burden on this claim.

Next, Applicant asserts trial counsel was ineffective in failing to object to the improper testimony of Dr. Mary-Fran Croswell (Croswell). The doctor testified the victim had a normal examination, but that "doesn't exclude sexual abuse." (Tr.pp.337-38). Counsel testified his strategy in dealing with an expert such as Croswell was to let her give her opinion on direct examination because he felt could best handle it during cross-examination. This Court finds counsel's strategy was reasonable. *See Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)) (holding courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel). The record reflects counsel asked pointed questions of the doctor regarding her physical examination and tried to elicit inconsistencies for the jury. Applicant cannot demonstrate how a different strategy would have been more successful or how an objection would have changed the outcome at trial.

Finally, Applicant alleges trial counsel was ineffective in failing to object to the hearsay testimony of deputy Floyd and investigator Perry at trial who both testified the victim identified Applicant as her abuser. Floyd testified prior to the victim at trial, and Perry testified after she did. Counsel credibly testified that while he believed the testimony was technically hearsay, he did not object to it because the information was going to come out anyway during the victim's testimony, so he did not believe it would have been beneficial to object. Moreover, counsel testified, in his experience as a criminal defense attorney, their testimony was properly admitted based on their prior investigation into the case. This Court finds counsel's strategy was reasonable based on his experience as a criminal defense attorney. *See Edwards*, 392 S.C. at 456, 710 S.E.2d at 64 ("When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel."). While counsel was correct the statement was technically hearsay, counsel was also drawing on his years of experience to know any objection would have been futile. At the time of Applicant's trial in February 2015, any objection would have been overruled because a law enforcement officer could testify for the limited purpose of explaining why an investigation was undertaken. It was not until 2017 when our Supreme Court cautioned against the use and admission of "investigative information" so as not to circumvent the rules against hearsay. *See State v. King*, 422 S.C. 47, 66-67, 810 S.E.2d 18, 28 (2017). Trial counsel cannot be deficient for failing to object to the testimony when no case law existed at the time of Applicant's trial cautioning against the use of similar testimony. Reasonable representation does not require counsel to foresee successful appellate challenges to novel questions of law. *See e.g., Thornes v State*, 426 S.E.2d 764, 765 (S.C. 1993) (holding attorneys are not required to be clairvoyant, or to anticipate changes in the law, or facts which did not exist at the time of the trial). Regardless, the

statements by Floyd and Perry were not prejudicial to Applicant because they were cumulative to the victim's testimony. *See State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) (explaining when "hearsay is merely cumulative to other evidence, its admission is harmless"). Accordingly, Applicant cannot meet his burden on this claim.

Therefore all of these allegations are denied and dismissed with prejudice.

*Failure to Interview/Call Witnesses*
*(Allegations 2 and 7)*

Next, Applicant alleges trial counsel was ineffective in failing to interview and call witnesses who could have refuted "much of the testimony of the witnesses against me" and to call his doctor to testify about a latex allergy which would have refuted the victim's testimony Applicant used a condom during the abuse. However, Applicant failed to present any of these witnesses at his evidentiary hearing or otherwise offer any evidence as to what their testimony would have been. Accordingly, any assertion that they would have provided favorable testimony or changed the outcome at trial is purely speculative.

This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. *See Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (Ct. App. 2012) (finding an applicant failed to meet his burden of proof where he failed to present any testimony from the alleged character witnesses at the PCR hearing in order to establish prejudice from the lack of testimony of these witnesses at trial); *see also Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (noting our courts have "repeatedly held a PCR 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").

This Court notes trial counsel is an experienced criminal defense attorney who testified

he was well prepared to handle the case. This Court finds counsel's testimony more credible than Applicant's that counsel understood the case, reviewed discovery, and worked with Applicant to develop a trial strategy. Counsel also noted there were few fact witnesses to interview or call on Applicant's behalf because it was a "he said/she said" situation. *See Strickland*, 466 U.S. at 691 (stating counsel's actions are often based on information supplied by the defendant). Moreover, regarding testimony from Applicant's the doctor, the record directly refutes Applicant's allegation. The trial transcript demonstrates trial counsel told the trial court he wanted to have the doctor there to testify but it was "not possible" and attempted to submit a note from the doctor regarding a latex allergy. (Tr.p.5; pp.365-75). Applicant also admitted during his testimony before this Court counsel attempted to present evidence of his allergy. Accordingly, this Court finds applicant fails to prove either prong of *Strickland*. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (explaining an applicant bears the burden of proving the allegations in his or her application). Therefore, this allegation is denied and dismissed with prejudice.

*Failure to Investigate*
*(Allegation 3)*

Applicant asserts trial counsel failed to investigate and obtain certain documents, such as lease agreements and cell phone records, which could have been used to refute the victim's testimony. This Court finds Applicant has failed to present any credible evidence to support this allegation.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation," which includes making an independent investigation of the facts of the case. *Edwards v. State*, 392 S.C. at 456, 710 S.E.2d at 64. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere

speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a decision not to investigate must be directly assessed for reasonableness, applying a heavy measure of deference to counsel's judgments. *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

Trial counsel testified he reviewed all discovery, discussed it with Applicant, conducted an independent investigation, and met with Applicant numerous times, and developed a trial strategy. This Court finds counsel's actions were reasonable. *See Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690) (holding under the deficiency prong, an attorney's performance is measured by its "reasonableness under prevailing professional norms"). This Court also finds counsel's testimony more credible than Applicant's on this issue, particularly where Applicant failed to produce to this Court any of the purported leases, cell phone agreements, or other documents he alleges would have refuted the victim's testimony. Consequently, any assertion the documents would have changed the outcome at trial is purely speculative and trial counsel cannot be ineffective. *See Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357 (holding failure to investigate does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result). Accordingly, this Court finds Applicant has failed to meet his requisite burden of proof. This allegation is denied and dismissed with prejudice.

*Failure to Introduce Records*
*(Applicant's Allegations 4 and 6)*

Next, Applicant contends trial counsel was ineffective in failing to introduce Family Court records from his divorce to refute the testimony of his ex-wife, and impeach her testimony about the reason he filed for divorce. This Court finds the record directly refutes this allegation

as counsel attempted to introduce the Family Court pleadings, but the trial court denied the request. Further, Applicant has failed to demonstrate what introducing the documents would have brought out to the jury when he actually testified to the reason for his divorce. Accordingly, this claim is without merit.

Both trial counsel and Applicant testified about this issue at the evidentiary hearing. This Court finds counsel's testimony more credible than Applicant's. At trial, counsel cross-examined Rachel, Applicant's ex-wife, about the divorce. She testified Applicant sought the divorce based on a one-year separation and not adultery. (Tr.pp.172-73). The record demonstrates counsel tried to establish through his questioning of Rachel the stated trial strategy she and Applicant went through a "nasty divorce" and the alleged abuse was a "false allegation" made up by Rachel and her friend to benefit Rachel during the divorce. At the evidentiary hearing, counsel testified, and the trial transcript reflects, he tried to introduce the pleadings from the divorce proceedings to refute and impeach Rachel's testimony, given that she gave an incorrect answer about the reason Applicant filed for divorce. Counsel engaged in a lengthy argument before the trial court in an attempt to gain a favorable ruling, but the court ultimately ruled the Family Court records were not admissible. (Tr.pp.365-75). Applicant later testified at trial about why he sought the divorce and told the jury he filed alleging adultery. (Tr.p.414). Applicant also acknowledged during his testimony to this Court he himself refuted Rachel's testimony by telling the jury about his reasons for filing for divorce. Applicant has failed to demonstrate to this Court how counsel was ineffective. Counsel effectively cross-examined the witness in an attempt to discredit her before the jury and then attempted to introduce the records from the couple's divorce proceeding. The record reflects counsel made reasonable arguments before the trial court, but was ultimately unsuccessful. This Court will not second guess counsel's trial tactics, particularly where this

Court must make "every effort" to "eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689. This Court finds counsel's efforts regarding the Family Court records were not deficient.

Because Applicant cannot demonstrate the first prong of *Strickland*, he also fails to prove he was prejudiced by trial counsel's failure to introduce the Family Court records. Particularly where there is nothing in the record to indicate the trial court would have made a different ruling regarding the admissibility of the documents had counsel used different language during his argument before the court. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

**Ineffective Assistance of Appellate Counsel**
*(Applicant's Allegation 9)*

Applicant alleges appellate counsel was ineffective in failing to file a petition for writ of certiorari to the Supreme Court in his direct appeal. However, Applicant had no right to seek discretionary review, and therefore, no right to effective representation when seeking such review. *See Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 543-44 (2006) ("We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion."); *see also Jones v. Barnes*, 463 U.S. 745 (1983) (explaining appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal). Appellate counsel testified he did not seek certiorari because he did not think it was warranted based on his professional opinion, specifically he believed it was in Applicant's best interests to file for PCR rather than continue pursuing a direct appeal. Therefore, Applicant cannot establish any constitutional ineffectiveness in appellate counsel's decision not to seek certiorari in his case once the Court of Appeals affirmed his convictions, and this Court finds this allegation must be denied.

## CONCLUSION

Based on the foregoing, this Court finds applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief.

The Court notes the applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek review, PCR counsel must file a notice of appeal on the applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for further procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The PCR application is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

**AND IT IS SO ORDERED this** 15th **day of** February **, 2019.**

THE HONORABLE ALEX KINLAW, JR.
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Copy mailed to
Attorney general / Wilkes
on 2 / 4 19.

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| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | ____ JUDICIAL CIRCUIT |
| COUNTY OF GREENVILLE ) | |
| ) | CASE NO.: 2017-CP-23-5901 |
| Jerald D. Gaskins, Jr. No. 362923 ) | **MOTION AND ORDER INFORMATION FORM AND COVERSHEET** |
| Plaintiff, ) | |
| vs. ) | |
| State of South Carolina, ) | |
| Defendant. ) | |

'19 MAR 8 PM 3:27
Paul Wickensimer COC GVL SC

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| C. Rauch Wise, Bar No. 06188 | Sherrie Butterbaugh, Bar No. ____ |
| Address: | Address: |
| 305 Main Street, Greenwood SC 29646 | 1000 Assembly St. |
| Phone: 864-229-5010 Fax 864-229-2665 | Columbia, SC 29201 |
| E-mail: rauchwise@gmail.com Other: ____ | Phone: (803) 734-0128 Fax ____ |
| | E-mail: SButterbaugh@scag.gov Other: ____ |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: ____
Estimated Time Needed: ____ Court Reporter Needed: ☐ YES/☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

C. Rauch Wise 2-19-2019
Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

**SECTION III: Motion Fee**

☐ PAID – AMOUNT: $ ____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: ____
☒ Other: PCR

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE CODE ____
Date: ____

**CLERK'S VERIFICATION**

Collected by: ____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | |
| | | |
| Jerald D. Gaskins, Jr. № 362923 | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | Rule 59 Motion to Alter or Amend Judgment |
| | ) | |
| -vs- | ) | 2017-CP-23-5901 |
| | ) | |
| State of South Carolina | ) | |
| | ) | |
| Respondent. | ) | |

'19 MAR 8 PM3:28
Paul Wickensimer CCC GVL SC

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Jerald D. Gaskins, Jr. hereby Moves the Court to alter or amend the Order dated February 1, 2019 and received by Counsel on February 11, 2019, based upon the following errors in the Order:

1. The Order of this Court on page 18 concludes that the decision of trial counsel in not objecting to the various text message and other electronic communications, the allegation of selling drugs and a pending charge was part of a trial strategy but the Court failed to articulate what trial strategy existed that would permit a trial lawyer from not objecting to the prejudicial testimony and cross-examination.

2, The Order of this Court on page 19 incorrectly states that defense counsel objected to the improper cross examination of the Gerald Jaskins. While counsel did originally object on the vague ground that "[S]he's, actually, walking up to him, laying these down in front of him as they were - - as though they were a statement that he gave." Tr. at 429, ll 10-12. Defense counsel at that point did not object on the ground that the solicitor did not have a good faith basis to ask the question nor did he question the authenticity of the messages. The Court failed to

consider that the testimony at the Post Conviction Relief hearing established that the messages were not from Walter Mucienko, the father of the minor child. The Court failed to consider or rule upon the issues that the jury was lead to believe the messages were in fact between Mr. Gaskins and Mr. Mucienko. To fail to rule upon this issue permits the conviction of Mr Gaskins to stand based upon false testimony implied from the cross-examination of Mr. Gaskins. No reasonable trial strategy can be given for not properly objecting to the improper cross examination of Mr. Gaskins as to the alleged text messages improperly attributed to Mr. Mucienko..

3. The Order of the Court on page 19 states "Counsel objected to questions about the messages twice, the objection was sustained, and counsel further argued against the questions outside the jury's presence, which was ultimately overruled." This finding ignores the ruling of the South Carolina Court of Appeals in the unpublished opinion in this matter that the issue was not preserved for appellate review. As trial counsel apparently attempted to object but did not effectively do so, no trial strategy could be involved in his failure to properly preserve the issue. As trial counsel failed to preserve the issue, he was ineffective.

4. The Order of this Court on page 19 fails to recognize or consider the fact that trial counsel did not object to the improper cross examination of Mr. Gaskins concerning the daughter of Jennifer Anglin. This cross examination of Mr. Gaskins is found at Tr. 444, l 8 to 447, l 16. This cross-examination improperly brought out the allegation Mr. Gaskins was using the name "Jay Fowler." The Court failed to consider that trial counsel was ineffective for not objecting as to both the improper character evidence brought out, but he failed to question as to the factual basis for the cross-examination. At neither the trial nor the Post Conviction relief hearing did the

State ever offer any proof that "Jay Fowler" was in fact Gerald Gaskins. Counsel should have objected to this improper cross-examination.

5. The Order of this Court on page 19 incorrectly contends that there was an objection to the cross examination of Mr. Gaskins that brought out the allegation Mr. Gaskins has a pending charge against him involving Angelina Campbell. The record at the pages cited above shows in fact no objection to this improper cross-examination was ever made. The only objection ever made was "There's arguing at this point." Tr. at 447, ll 8-9. As a matter of law, this objection would not have preserved for appellate review the improper questions asked by the State.

5. The Order of this Court on pages 19-20 states that trial counsel used his professional judgment in not objecting to the improper question of whether Mr. Gaskins sold drugs. The Order fails to set forth any reasonable trial strategy for not objecting to this totally improper question. An alleged judgment call as to the question not being unduly prejudicial is hardly a valid trial strategy. The same would be true for not objecting to the heated discussion between Mr. Gaskins and the assistant solicitor when discussing the alleged pending charges against Mr. Gaskins involving Angelina Campbell.

6. The Order of this Court on page 21 states that counsel was not ineffective for his failure to object to hearsay testimony from the alleged victim from Deputy Floyd, Officer Perry and Dr. Croswell. The Court incorrectly found "[C]ounsel testified, in his experience as a criminal defense attorney, their testimony was properly admitted based on their prior investigation in the case." The Court further concluded "While Counsel was correct the statement was technically hearsay, counsel was also drawing on his years of experience to know any objection would be futile." The statements in question were hearsay and inadmissable. As

the statements went well beyond that which is permitted by the case law and the Rules of Evidence. The Court further erred in finding the law at the time of this trial did permit such statements. This was in error. "A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars." *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001)(internal citation omitted). Thus, since before 2001 a reasonably trained criminal defense lawyer in South Carolina would have known the statement was inadmissible except for the time and place. No novel questions of law were involved in this case. The Court was incorrect in holding "Trial counsel cannot be deficient for failing to object to the testimony when no case law existed at the time of Applicant's trial cautioning against the use of similar testimony." Even as far back as 1994 our Supreme Court has said, "Improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). The law on this issue was re-affirmed when the South Carolina Rules of Evidence were adopted on September 3, 1995. *See*, Rule 801(d)(1)(D). Any reasonable trial lawyer who is familiar with the law and the Rules of Evidence would have known to object to the improper testimony. Mr. Gaskins was prejudiced by the failure of his trial counsel to object to the hearsay testimony.

7. The Order of this Court on page 21 gave an improper interpretation to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). This case did not create any new law in 2017. The opinion

re-affirmed the traditional hearsay rule. The Court said "Further, we do not discern, nor has the State cited, any exception to the hearsay rule that would provide for the admissibility of the testimony. Nonetheless, even with this straightforward analysis, we believe it is necessary to caution prosecutors against using 'investigative information' as it appears this is an attempt to circumvent the rules against hearsay." *Id.* at 66–67, 810 S.E.2d at 28. This portion of the Order should be altered or amended to reflect the proper holding of *King*.

8. The Order of this Court on page 24, incorrectly stated "Trial counsel testified he reviewed all discovery, discussed it with applicant, conducted an independent investigation and met with Applicant several time, and developed a trial strategy." The error in this finding is that trial counsel testified at the Post Conviction Relief hearing that he did not receive two of the electronic messages used by the State in cross-examining Mr. Gaskins. The only group of messages he had received before trial, and it was the night before, were the messages from Walter Mucienko. Trial Counsel testified the first time he had seen two of the sets of electronic messages was at the Post Conviction Relief hearing. This portion of the Order should be altered or amended to reflect the correct facts.

9. The Order of this Court fails to address the improper vouching of the testimony of the minor child. The comments by Officer Perry and Dr. Croswell, cited in the proposed order of Mr. Gaskins, were in fact simply improper bolstering that has been condemned by our courts. *State v. Dawkins*, 297 S.C. 386, 377 S.E.298 (1989). As our Supreme Court has said "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). The Order of the Court does not address the improper vouching issue.

10. The Order of this Court fails to discuss or rule upon the improper expert testimony issue. During the trial Officer Robert Perry was asked for his expert opinion about delayed disclosure of sexual abuse. The question and answer were as follows:

> Q. (By Ms. Hodge) And in your experience investigating those cases is - - what we called delayed disclosure or the child coming forward much after the events have, actually, occurred, is that common or uncommon?
> A. (By Officer Perry) Oh, yeah. It's such a rarity for me to see a case that a child has immediately told that it's like, you know, maybe one out of a hundred, you know. So that is a very common thing, very common.
> Tr. at 357, ll 3-10.[1]

Officer Perry was never qualified as an expert and no objection was taken to his testimony. The Order did not discuss the failure of trial counsel to object to this testimony which was prejudicial against Mr. Gaskins.

11. The Order of this Court on page 26, fails to discuss the appellate issue raised by Applicant at the Post Conviction Relief hearing. Mr. Gaskins raises the point that Appellate counsel failed to fully inform Mr. Gaskins as to his options before Mr. Gaskins made the decision to drop his appeal as recommended by his appellate counsel. Mr. Wilkes testified at the hearing that he was aware of the pending *Perez* case and knew that the South Carolina Supreme Court had agreed to review *State v. Wallace*, 384 S.C. 428, 638 S.E.2d 275 (2009) at the time the South Carolina Court of Appeals made its ruling in this case. A client is entitled to be advised as

[1] Immediately after this statement, the officer then explains at length how the delayed disclosure hampers their investigation. He even went so far as to explain how he could have obtained the text messages from a phone, but this was not an option in this case. Tr. at 357, l 11 to 358, l 9. Again, according to the sister, this information was available on her Ipad in the form of pictures. These pictures for some unexplained reason would not be turned over for more than two years.

to the current state of the law that is within the knowledge of his lawyer. The decision of a client not to appeal any further is no better than the advise given him by his counsel. When counsel fails to advise him of all the relevant facts within the knowledge of the lawyer, then a client is not making an informed decision. In *Padilla v. Kentucky*, 559 U.S. 356 (2010) the United States Supreme Court recognized that the failure of counsel to advise a client of the collateral consequences of a plea is grounds for finding counsel to be ineffective. There should be no different rule here. The issue of the failure of appellate counsel to fully inform Mr. Gaskins of the state of the law is grounds for finding appellate counsel was not effective. The Order of this Court does not discuss this issue.

## CONCLUSION

Fo the foregoing reasons, this Court should withdraw the Order previously issued in this matter, issue an Order in which the Court makes the required findings of facts and law, and grant Jerald D. Gaskins, Jr. a new trial based upon his trial and appellate counsel being ineffective.

February 19, 2019

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rauchwie@gamil.com
S. C. Bar № 06188

Attorney for Jerald D. Gaskins, Jr.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | ) | IN THE COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT |
| Jerald D. Gaskins Jr., 362923 | ) | 2017-CP-23-5901 |
| Applicant, | ) | **RETURN TO APPLICANT'S MOTION TO ALTER OR AMEND JUDGMENT** |
| v. | ) | |
| State of South Carolina,<br>Respondent. | ) | |

Respondent submits this Court's rulings are legally correct and supported by the record, and that the Court should deny Applicant's Motion to Alter or Amend Judgment dated February 19, 2019. In support, Respondent would respectfully show this Court:

## I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. In April of 2013, the Greenville County Grand Jury indicted Applicant for four counts of criminal sexual conduct with a minor second degree (2013-GS-23-3231, 3232, 3234, 3235) and two counts of lewd act upon a child (2013-GS-23-3233, 3236). Randall L. Chambers represented Applicant. Applicant proceeded to trial on February 4, 2015, before the Honorable D. Garrison Hill. The jury found Applicant guilty of all charges. Judge Hill sentenced Applicant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction.

Applicant filed a timely notice of appeal. J. Falkner Wilkes, Esquire perfected the

appeal. The South Carolina Court of Appeals affirmed Applicant's convictions on February 1, 2017. *State v. Gaskins*, Op. No. 2017-UP-166 (S.C. Ct. App. filed April 19, 2017). The remittitur was returned to the circuit court on May 5, 2017.

**II. Current Post-Conviction Relief Action**

On September 14, 2017, Applicant filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on October 24, 2018, at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr. Applicant was present and represented by C. Rauch Wise. Respondent was represented by DeShawn H. Mitchell and Sherrie Butterbaugh of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Trial counsel Randall L. Chambers and appellate counsel J. Falkner Wilkes also testified. Applicant also called Walter Mucienko to testify on his behalf at the hearing.

By written order signed February 1, 2019, and filed February 4, 2019, Judge Kinlaw denied and dismissed the application with prejudice. Applicant subsequently filed a Motion to Alter or Amend the Judgment. This return follows.

**III. Applicant's Motion to Alter or Amend**

In the motion to alter or amend, Applicant disagrees with various findings of fact set forth in the order of dismissal. Applicant also disagrees with certain conclusions of law, including this Court's application of law regarding allegations of failure to object to improper hearsay testimony. Finally, Applicant asserts the Court failed to address allegations raised through testimony at the evidentiary hearing. In sum, Applicant requests the Court submit an amended order of dismissal, or reverse its prior rulings and grant him post-conviction relief based on arguments that were denied by the Court in its order of dismissal.

In response, Respondent submits this Court's Order of Dismissal contains the required findings of fact and conclusions of law necessary to dispense with Applicant's allegations as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRCP; *see also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent asserts the Court fully ruled on all issues properly presented through Applicant's amended post-conviction relief application. Moreover, there was insufficient evidence presented at the evidentiary hearing to address any allegations Applicant asserts were raised at the hearing and not ruled on by the Court in its order of dismissal. *See* Rule 71.1(e), SCRCP (stating the burden of proof is on the applicant to prove the allegations by a preponderance of the evidence). Further, beyond simply asking the Court to alter or amend its order, Applicant is also asking the Court to reverse its decision and grant him relief. Such a request is more properly addressed through the appellate process. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to, but not ruled upon by, the trial court).

As each properly raised allegation was addressed fully in the order, Applicant's assertions are without merit. Indeed, Applicant's motion is replete with arguments previously presented to the Court, which this Court considered when making its ruling. Respondent submits this Court's rulings are legally correct and supported by the record, and this Court should deny Applicant's request to reconsider, alter or amend its ruling.

## IV. Relief Requested

WHEREFORE, having made its return to the motion, Respondent requests the motion to alter or amend be denied and the motion be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

BY: _____

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

March 1, 2019.

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT |
| Jerald D. Gaskins Jr., 362923<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br>Respondent. | 2017-CP-23-5901<br><br>**ORDER DENYING APPLICANT'S 59(e) MOTION TO ALTER OR AMEND JUDGMENT** |

'19 MAR 5 AM 10:12
Paul Wickensimer CDC GVL SC

ENTERED COMPUTER

This matter comes before the Court by way of Applicant's Rule 59(e) Motion to alter or amend its order of dismissal denying the application for post-conviction relief.

**I. Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections. In April of 2013, the Greenville County Grand Jury indicted Applicant for four counts of criminal sexual conduct with a minor second degree (2013-GS-23-3231, 3232, 3234, 3235) and two counts of lewd act upon a child (2013-GS-23-3233, 3236). Randall L. Chambers represented Applicant. Applicant proceeded to trial on February 4, 2015, before the Honorable D. Garrison Hill and a jury. The jury found Applicant guilty of all charges. Judge Hill sentenced Applicant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction.

Applicant filed a timely notice of appeal. J. Falkner Wilkes, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions on February 1,



MA #1

2017. *State v. Gaskins*, Op. No. 2017-UP-166 (S.C. Ct. App. filed April 19, 2017). The remittitur was returned to the circuit court on May 5, 2017.

**II. Current Post-Conviction Relief Action**

On September 14, 2017, Applicant filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on October 24, 2018, at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr. Applicant was present and represented by C. Rauch Wise. Respondent was represented by DeShawn H. Mitchell and Sherrie Butterbaugh of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Trial counsel Randall L. Chambers and appellate counsel J. Falkner Wilkes also testified. Applicant also called Walter Mucienko to testify on his behalf at the hearing.

By written order signed February 1, 2019, and filed February 4, 2019, Judge Kinlaw denied and dismissed the application with prejudice. Applicant subsequently filed a Motion to Alter or Amend the Judgment dated February 19, 2019. Respondent submitted a return on or about March 1, 2019.

**III. Applicant's Motion to Alter or Amend is Denied**

This Court finds its Order of Dismissal contains the required findings of fact and conclusions of law necessary to dispense with Applicant's allegations as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRCP; *see also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). This Court further finds its Order of Dismissal addresses and disposes of all allegations properly raised. This Court finds there was insufficient evidence presented at the evidentiary hearing to raise new allegations not previously raised in the application for relief. *See* Rule 71.1(e), SCRCP (stating the burden of proof is on the applicant to prove the allegations

by a preponderance of the evidence). Having carefully reviewed the record in this matter and arguments presented, this Court finds there is no basis for altering or amending its prior ruling.[1] Therefore, this Court hereby denies Applicant's motion in its entirety, and affirms the previous order of dismissal.

This Court notes if Applicant wishes to seek appellate review of this order and the order of dismissal, a notice of appeal must be filed and served within thirty days of the service of this order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

**AND, IT IS SO ORDERED** this 4th day of March, 2019.

THE HONORABLE ALEX KINLAW, JR.
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Copy mailed to
Attorney General / Rauch Wise
on May / 28 / 2019

[1] The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. *See* Rule 59(f), SCRCP.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

---

Lower Case № 2017-CP-23-5901

---

Jerald D. Gaskins, Jr. #00362923. ..... Petitioner,

vs.

State of South Carolina ..... Respondent.

---

NOTICE OF INTENT TO APPEAL

---

Jerald D. Gaskins, Jr. appeals the Order of Dismissal of the Honorable Alex Kinlaw, Jr. filed February 4, 2019, and the Order Denying Applicant's 59(e) Motion to Alter or Amend Judgment dated March 4, 2019. Petitioner received notice on May 30, 2019.

May 30th, 2019

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Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Appellant

OTHER COUNSEL OF RECORD

Sherri ButterBaugh
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUL 28 2022
SC Court of Appeals

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

Appellate Case No. 2019-000907
Lower Case № 2017-CP-23-5901

Jerald D. Gaskins, Jr. #00362923. ..... Petitioner,

vs.

State of South Carolina ..... Respondent

# SUPPLEMENTAL APPENDIX

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Attorney for Petitioner

SUPPLEMENTAL APPENDIX
INDEX

State's Return to Mr. Gaskins` Application . . . . . 1

Exhibit A-1 (Text message Printout) . . . . . 9

Exhibit A-2 (Text Messages Printout) . . . . . 15

Exhibit A-3 (Facebook Messages Printout) . . . . . 37

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS<br>FOR THE THIRTEENTH JUDICIAL CIRCUIT |
| Jerald D. Gaskins Jr., 362923<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | 2017-CP-23-5901<br><br>**RETURN, PARTIAL MOTION TO DISMISS AND MOTION FOR A MORE DEFINITE STATEMENT** |

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on September 14, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In April of 2013, the Greenville County Grand Jury indicted Applicant for four counts of criminal sexual conduct with a minor second degree (2013-GS-23-3231,3232,3234,3235) and two counts of lewd act upon a child (2013-GS-23-3233,3236). Randall L. Chambers, Esquire, represented Applicant. Applicant proceeded to trial on February 4 2015, before the Honorable D. Garrison Hill and a jury. The jury found Applicant guilty as indicted to all charges. Judge Hill sentenced Applicant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction.

Applicant filed a timely notice of appeal. J. Falkner Wilkes, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions on February 1, 2017. State v. Gaskins, Op. No. 2017-UP-166 (S.C. Ct. App. filed April 19, 2017). The remittitur was returned to the circuit court on May 5, 2017

Attached to this Return are the records of the Greenville County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Prosecutorial Misconduct
2. Due Process violations
3. Ineffective assistance of counsel

III.

Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at the plea hearing or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised the alleged discovery violation on appeal. The failure to do so has waived this allegation as grounds for relief. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

To the extent Applicant is claiming prosecutorial misconduct has been discovered post-trial, and could not have been discovered, in the exercise of due diligence, prior to trial, in

evaluating post-trial Brady[1] claims, the applicant must show (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985).

"Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Bagley, 473 U.S. at 678, 105 S.Ct. at 3381. A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. See Clark, 315 S.C. 385.

Applicant has failed to make the requisite *prima facie* showing to warrant an evidentiary hearing that the State withheld any evidence that would have produced a different outcome at his trial. Therefore, Respondent submits this allegation should be summarily dismissed for failing to specifically set forth the facts upon which the application is based.

[1] Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963).

IV.

Applicant also alleges he was denied due process of law. However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must ". . . specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965).

Applicant has failed to state with any specificity the specific facts giving rise to this allegation. Additionally, this allegation is not supported by any other additional information in the application. Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to provide a more definite statement of his allegation of a due process violation. The Uniform Post-Conviction Procedure Act requires applicants to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include "a short and plain statement of the facts showing that the pleader is entitled to relief." Applicant's allegations are so vague and ambiguous that Respondent cannot be reasonably required to frame a responsive return. Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the application.

V.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the proceeding "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests Applicant provide a more definite statement of his claims, and an evidentiary hearing be held on any claims so requiring one.

**[SIGNATURE PAGE FOLLOWS]**

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

January 17, 2018

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| | ) | 2017-CP-23-5901 |
| | ) | |
| JERALD D. GASKINS, JR., 362923 | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | |
| vs | ) | AFFIDAVIT OF SERVICE BY MAIL |
| | ) | |
| STATE OF SOUTH CAROLINA. | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return, Partial Motion to Dismiss and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Susannah C. Ross, Esquire**
**Ross & Enderlin, PA**
**330 East Coffee Street**
**Greenville SC 29601**

DATED this 17th day of January, 2018.

Judy A. C. Carey, Legal Assistant
For Respondent

8



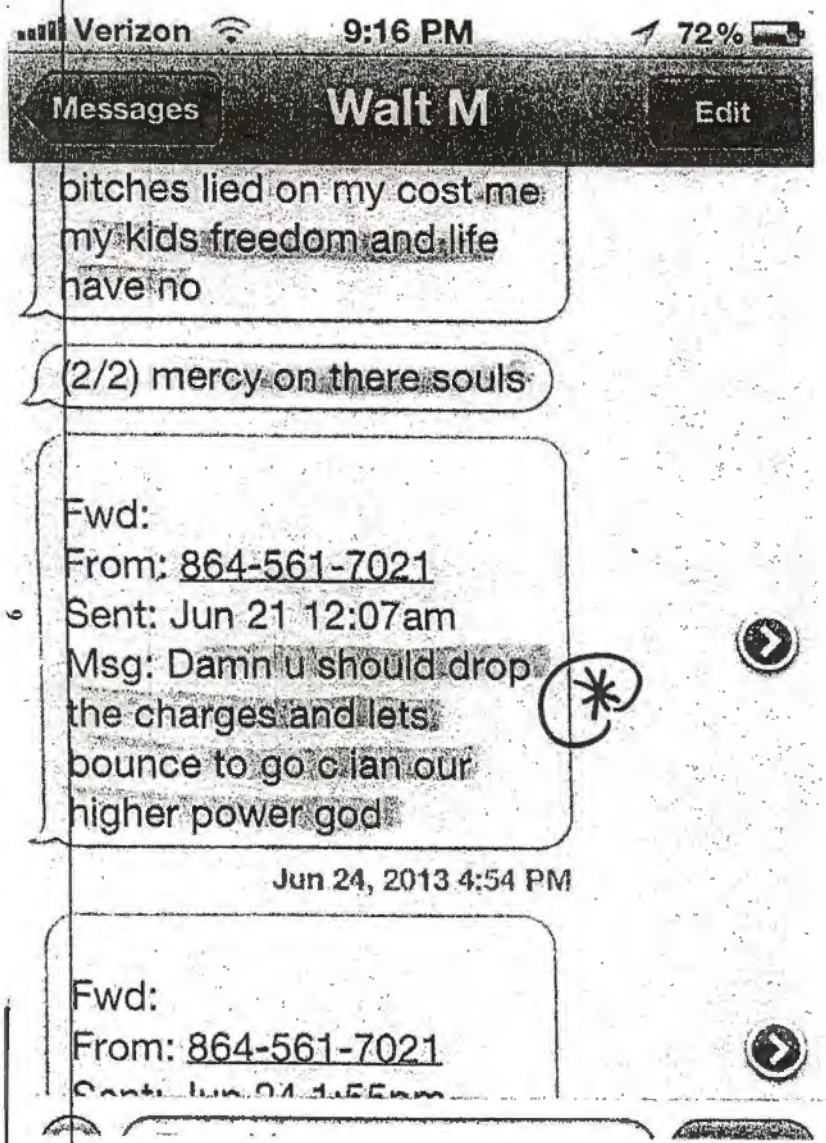


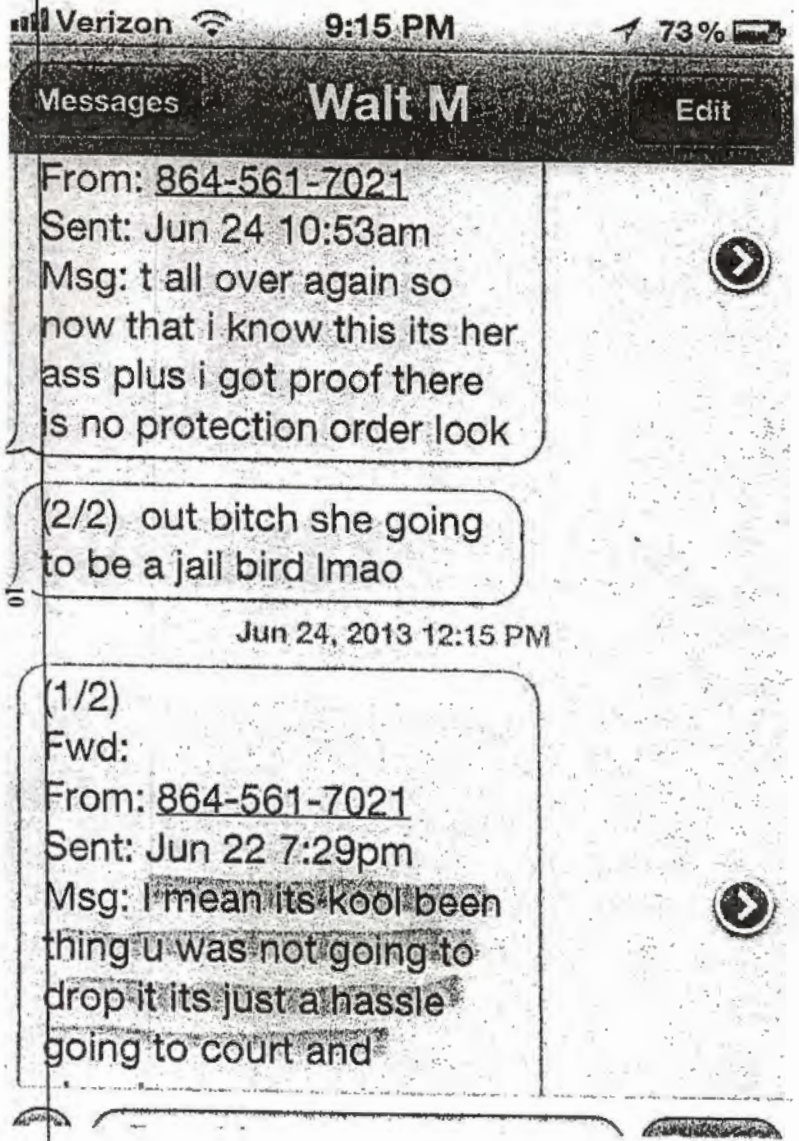



EXHIBIT
Applicant's
1
10/24/18
LH

APPX812

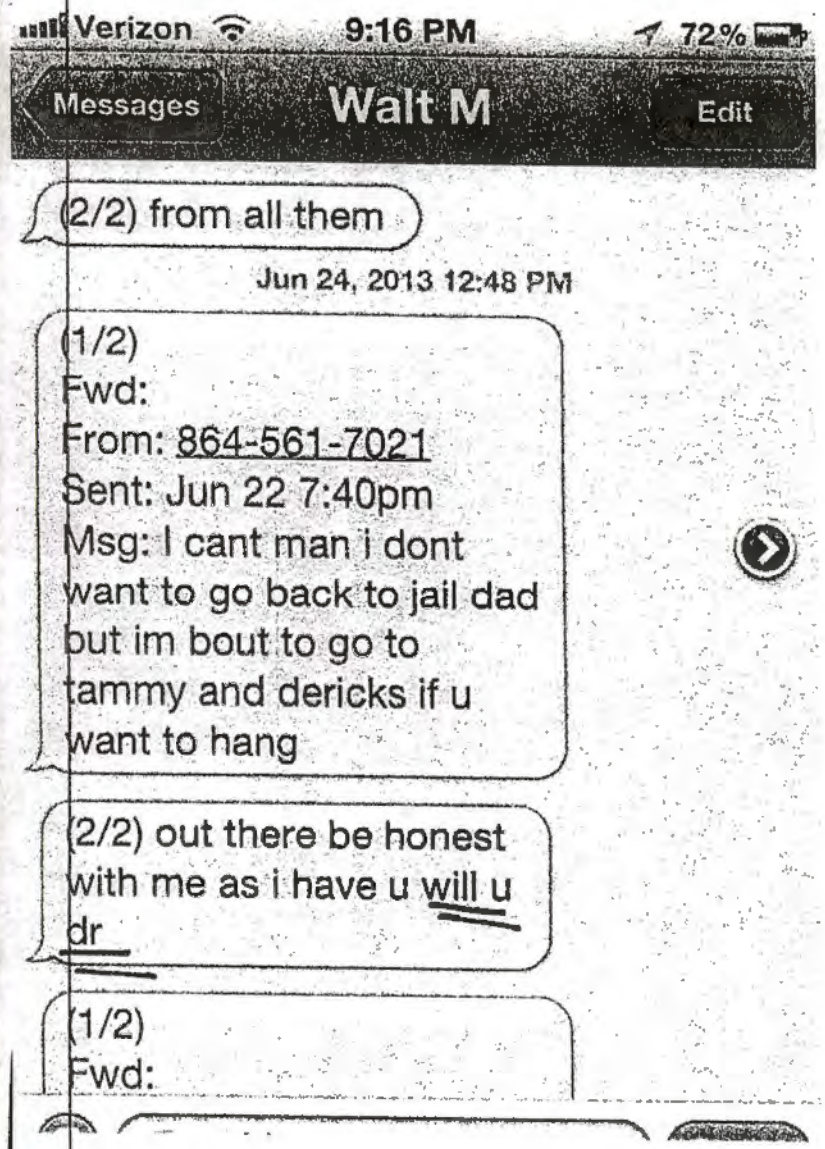
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Verizon
9:15 PM
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Messages
Walt M
Edit
From: 864-561-7021
Sent: Jun 24 10:53am
Msg: t all over again so now that i know this its her ass plus i got proof there is no protection order look
(2/2) out bitch she going to be a jail bird lmao
Jun 24, 2013 12:15 PM
(1/2)
Fwd:
From: 864-561-7021
Sent: Jun 22 7:29pm
Msg: I mean its kool been thing u was not going to drop it its just a hassle going to court and

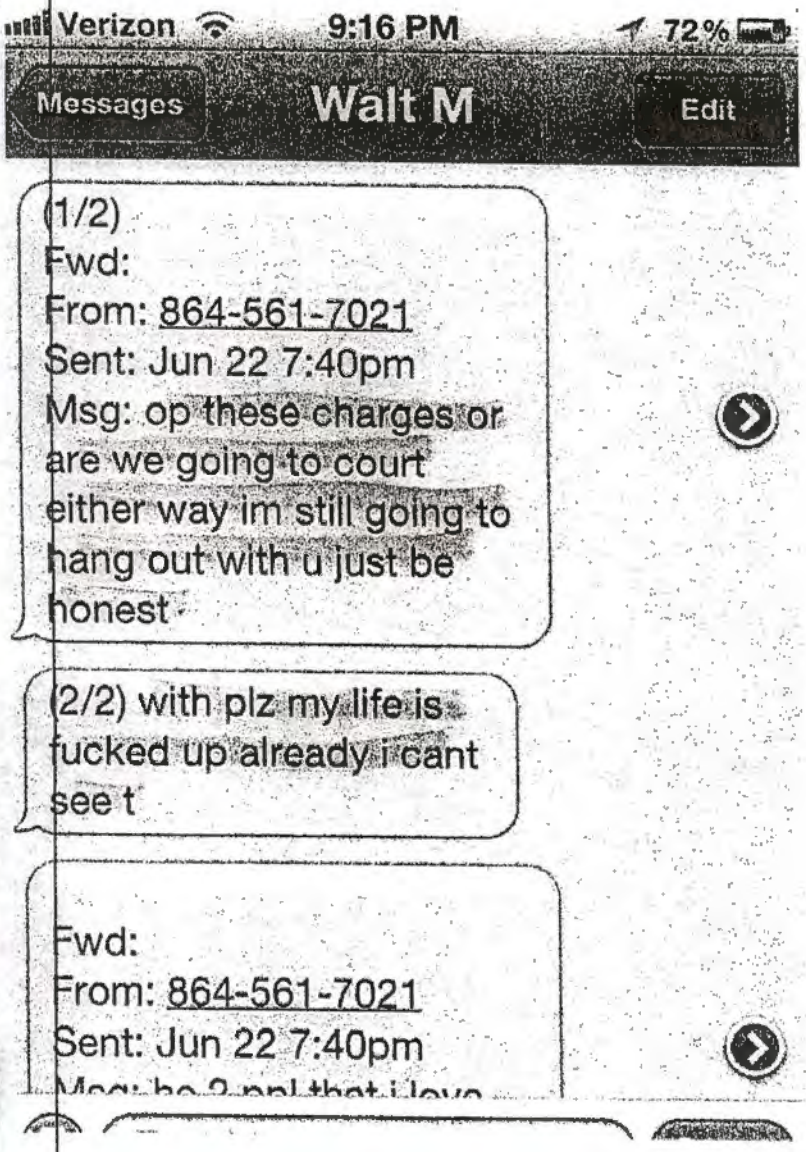
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Verizon
9:16 PM
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Messages
Walt M
Edit
(2/2) from all them
Jun 24, 2013 12:48 PM
(1/2)
Fwd:
From: 864-561-7021
Sent: Jun 22 7:40pm
Msg: I cant man i dont want to go back to jail dad but im bout to go to tammy and dericks if u want to hang
(2/2) out there be honest with me as i have u will u dr
(1/2)
Fwd:

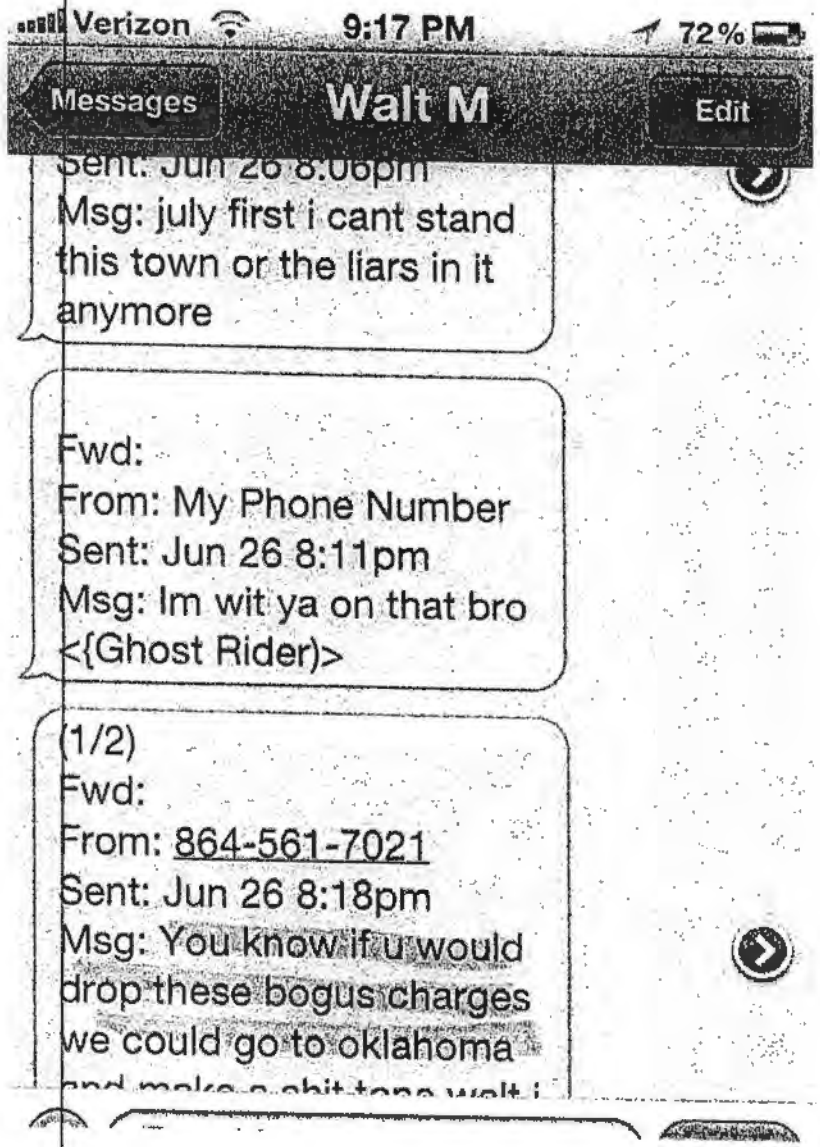
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Verizon
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Messages
Walt M
Edit
(1/2)
Fwd:
From: 864-561-7021
Sent: Jun 22 7:40pm
Msg: op these charges or are we going to court either way im still going to hang out with u just be honest
(2/2) with plz my life is fucked up already i cant see t
Fwd:
From: 864-561-7021
Sent: Jun 22 7:40pm

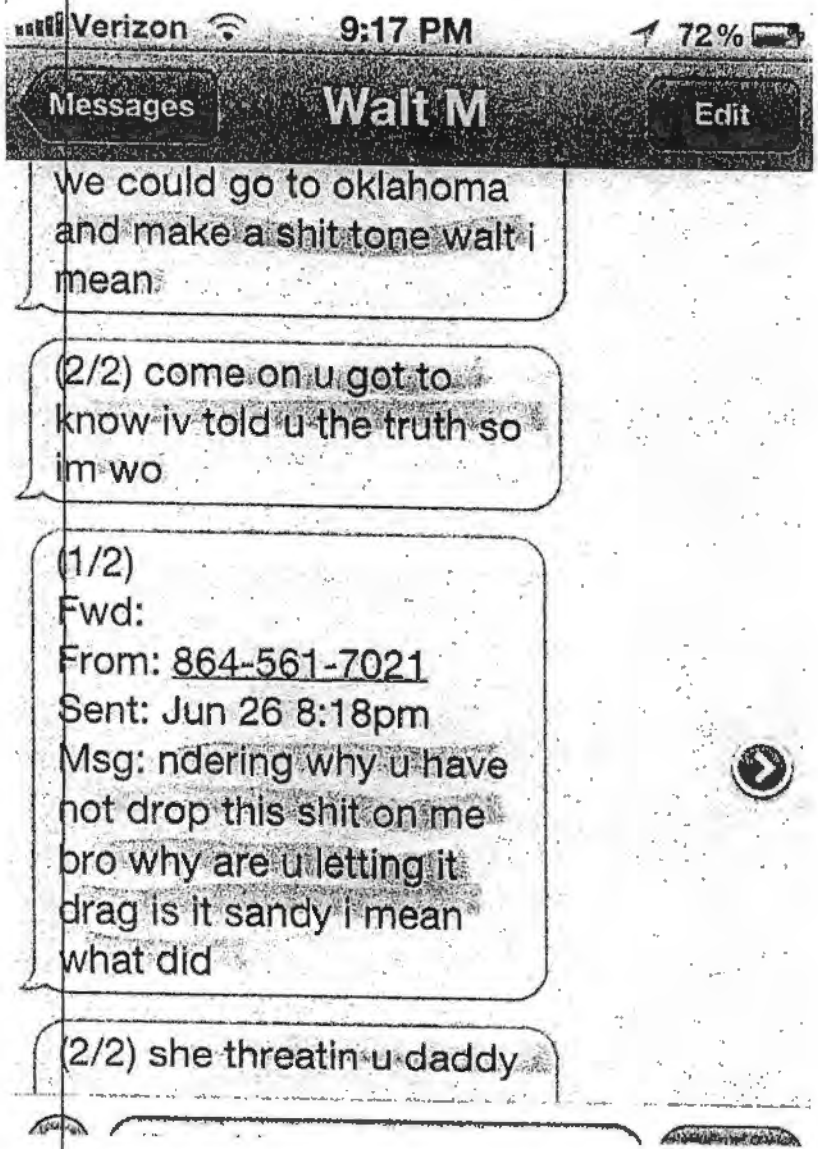
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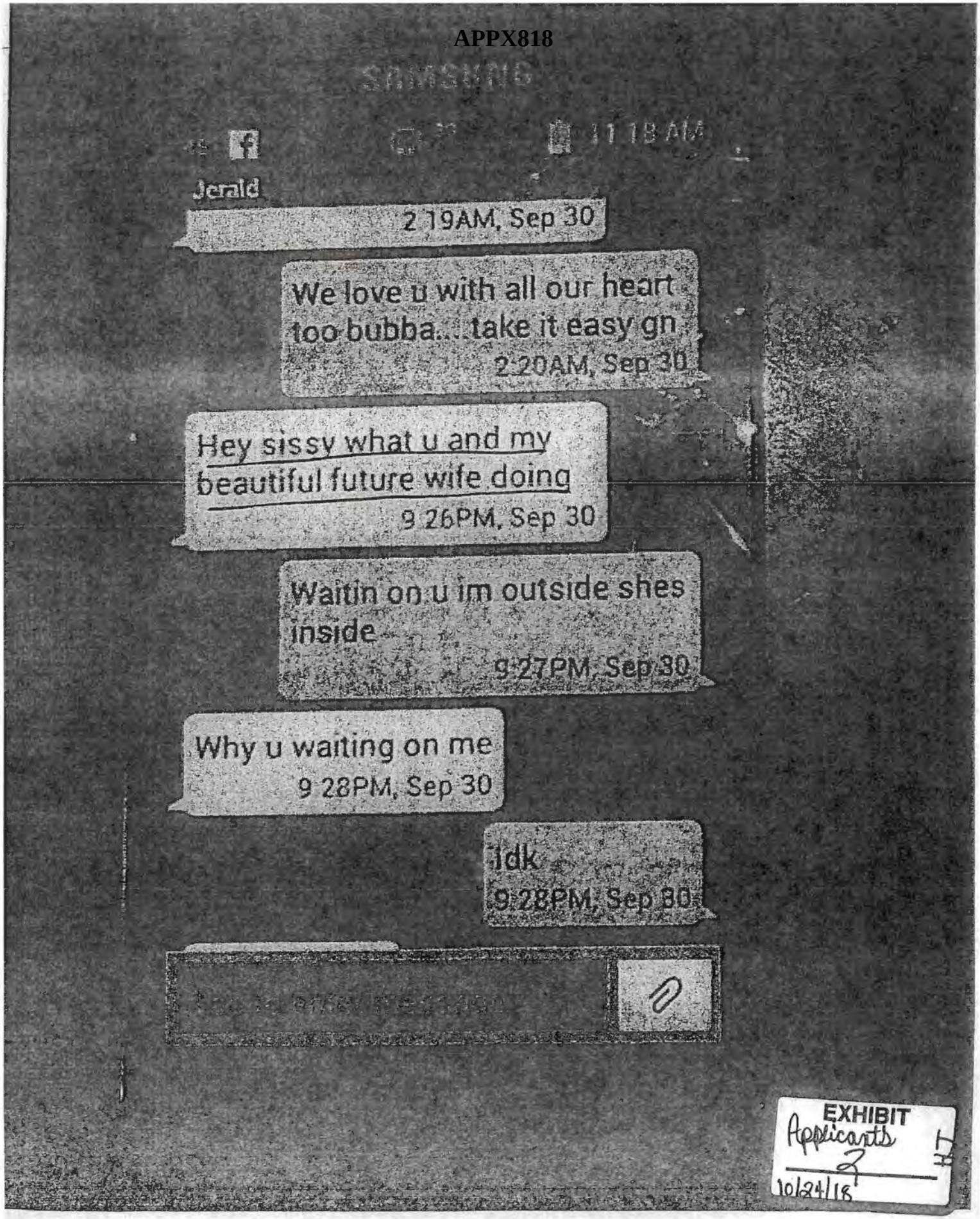


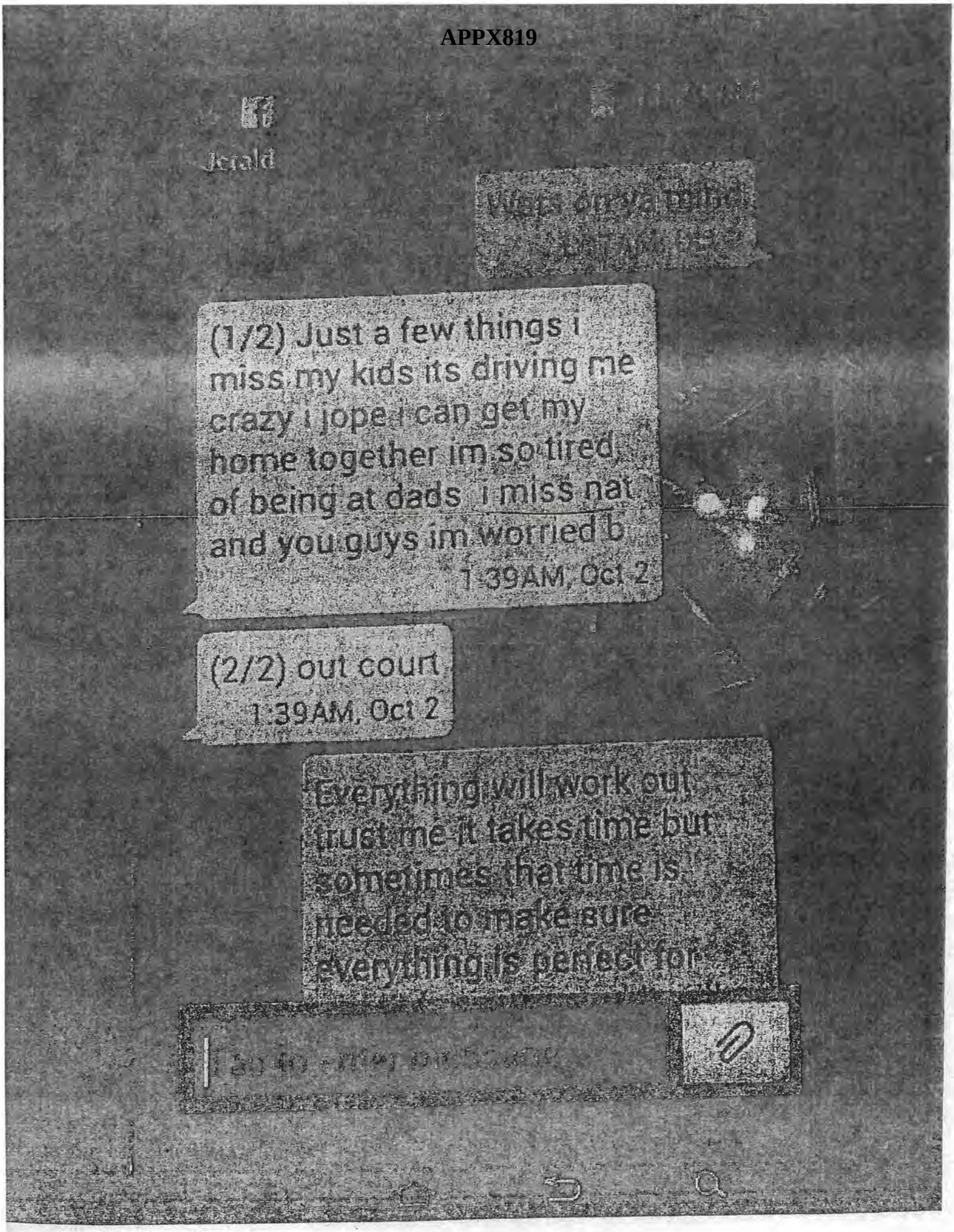

Verizon
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Messages
Walt M
Edit
Sent: Jun 26 8:06pm
Msg: july first i cant stand this town or the liars in it anymore
Fwd:
From: My Phone Number
Sent: Jun 26 8:11pm
Msg: Im wit ya on that bro <{Ghost Rider)>
(1/2)
Fwd:
From: 864-561-7021
Sent: Jun 26 8:18pm
Msg: You know if u would drop these bogus charges we could go to oklahoma

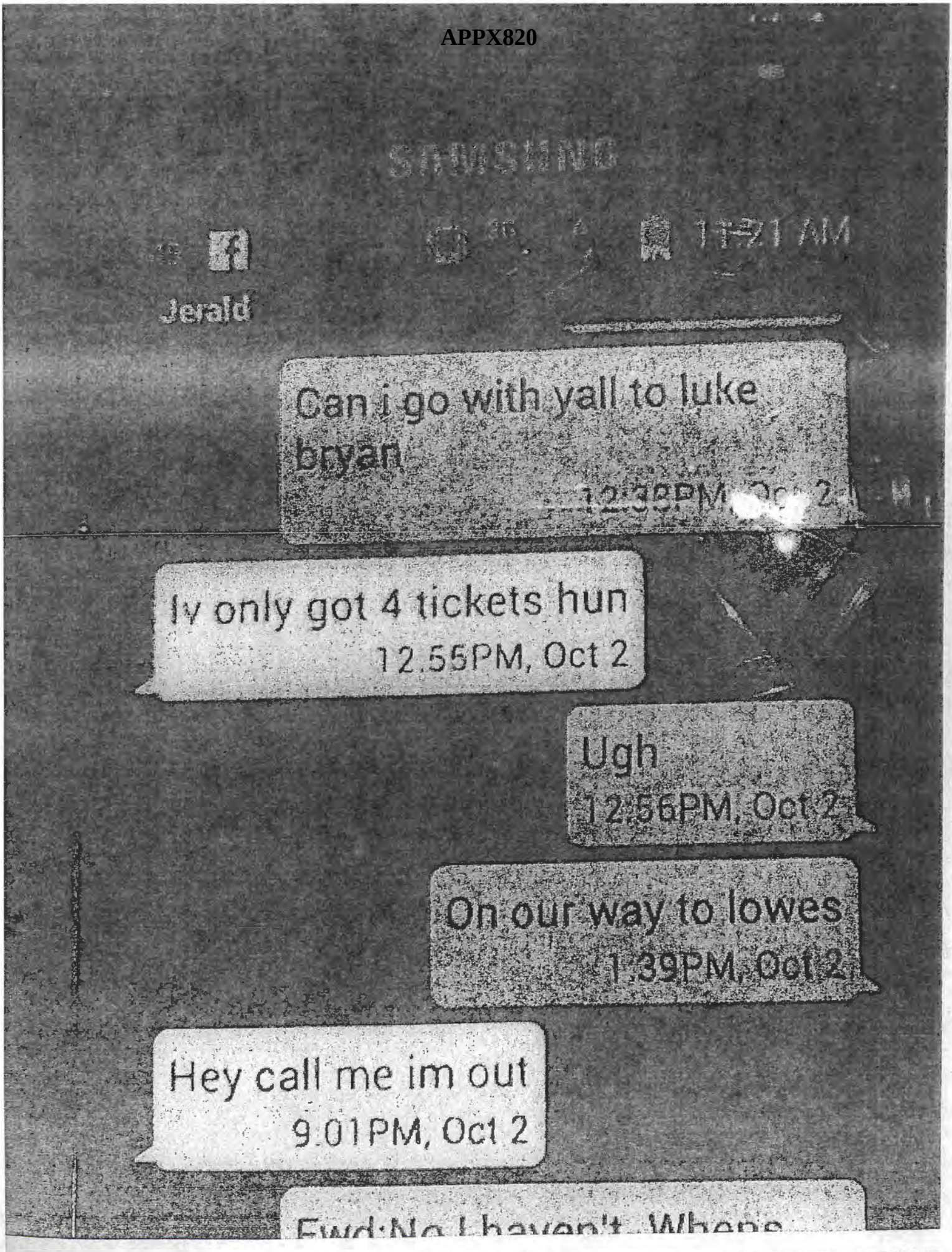
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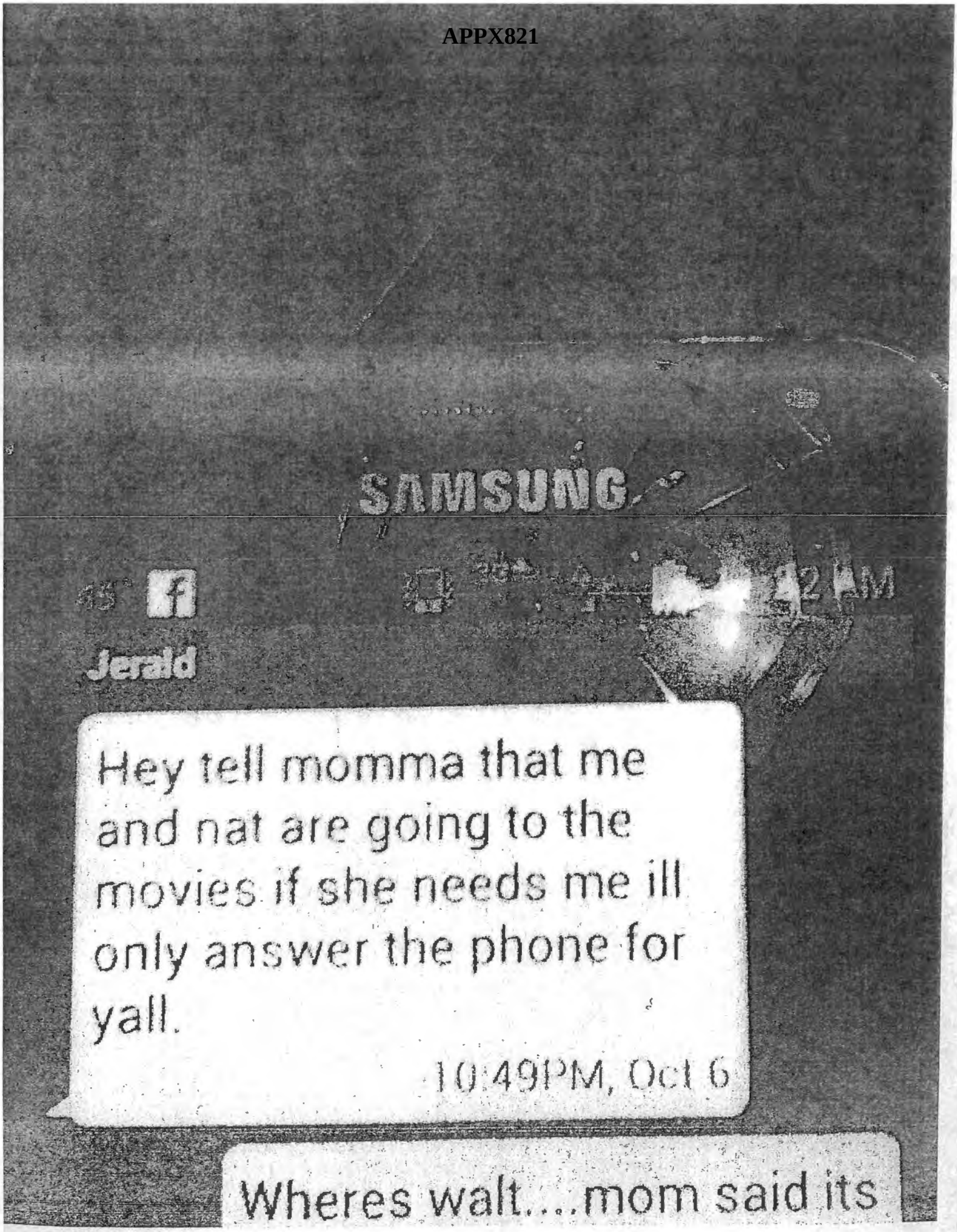


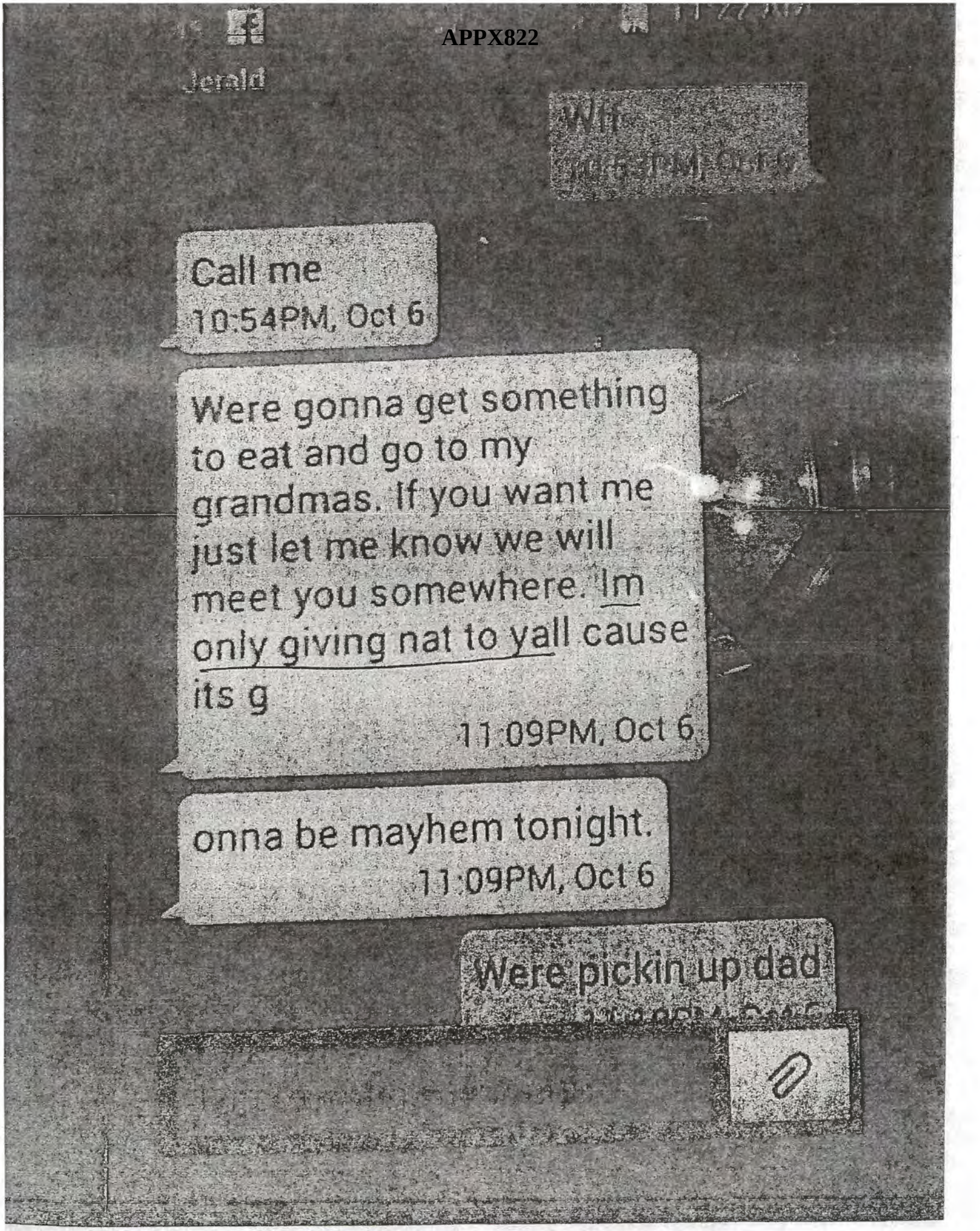

Verizon
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Messages
Walt M
Edit
we could go to oklahoma and make a shit tone walt i mean
(2/2) come on u got to know iv told u the truth so im wo
(1/2)
Fwd:
From: 864-561-7021
Sent: Jun 26 8:18pm
Msg: ndering why u have not drop this shit on me bro why are u letting it drag is it sandy i mean what did
(2/2) she threatin u daddy

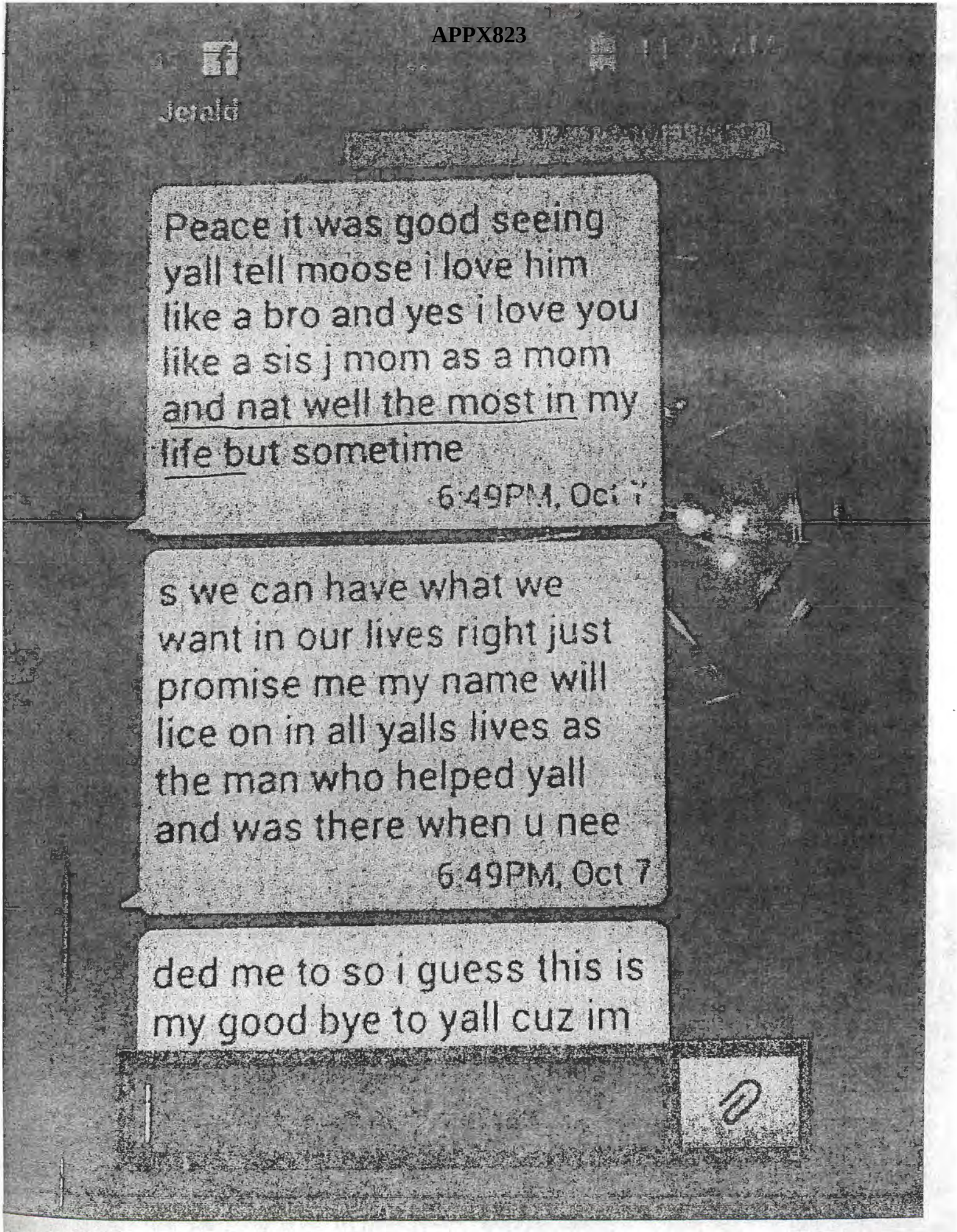

SAMSUNG
11:18 AM
Jerald
2:19AM, Sep 30
We love u with all our heart too bubba... take it easy gn
2:20AM, Sep 30
Hey sissy what u and my beautiful future wife doing
9:26PM, Sep 30
Waitin on u im outside shes inside
9:27PM, Sep 30
Why u waiting on me
9:28PM, Sep 30
Idk
9:28PM, Sep 30
EXHIBIT
Applicants
7
10/24/18

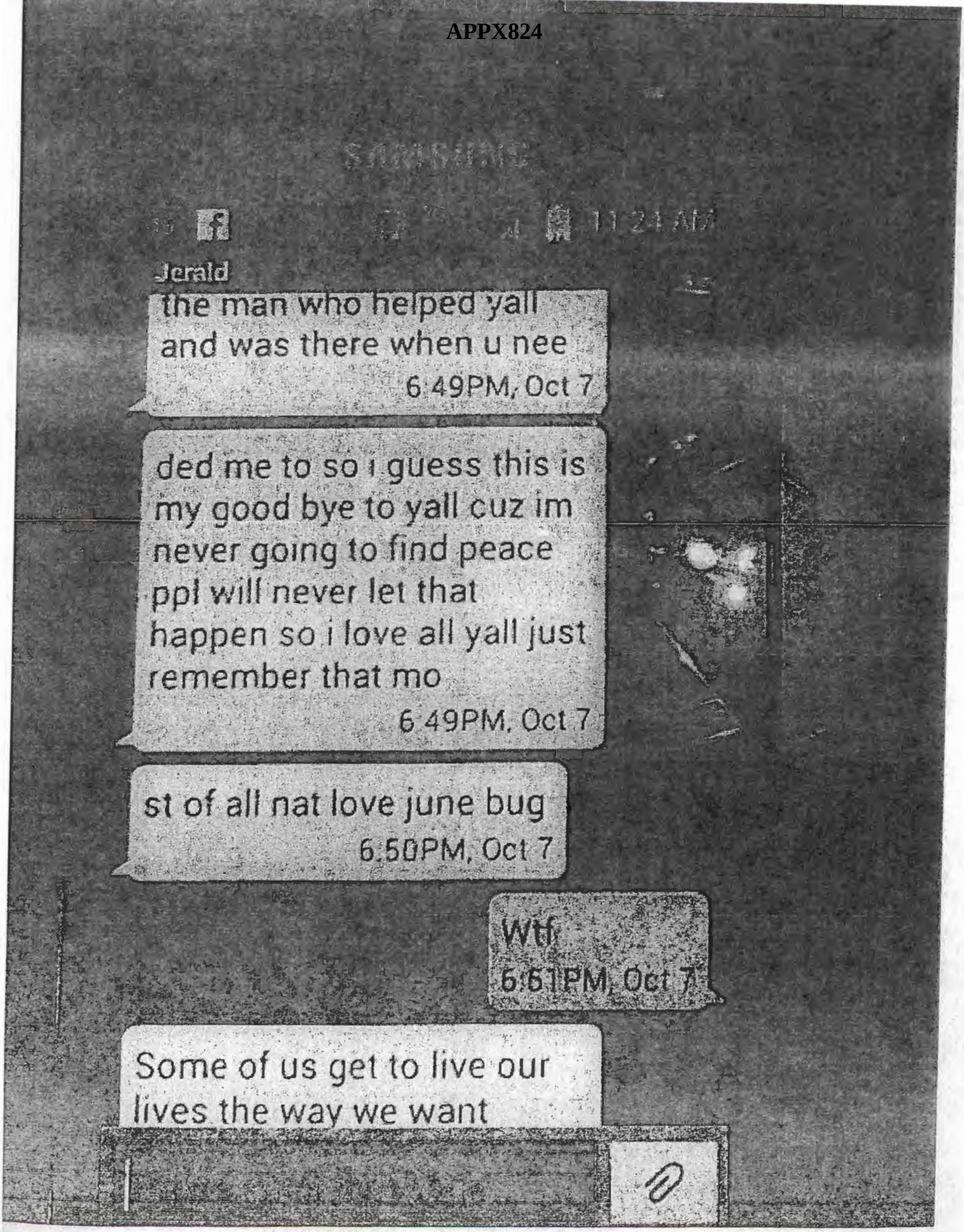

Jerald
(1/2) Just a few things i miss my kids its driving me crazy i jope i can get my home together im so tired of being at dads i miss nat and you guys im worried b
1:39AM, Oct 2
(2/2) out court
1:39AM, Oct 2
Everything will work out trust me it takes time but sometimes that time is needed to make sure everything is perfect for

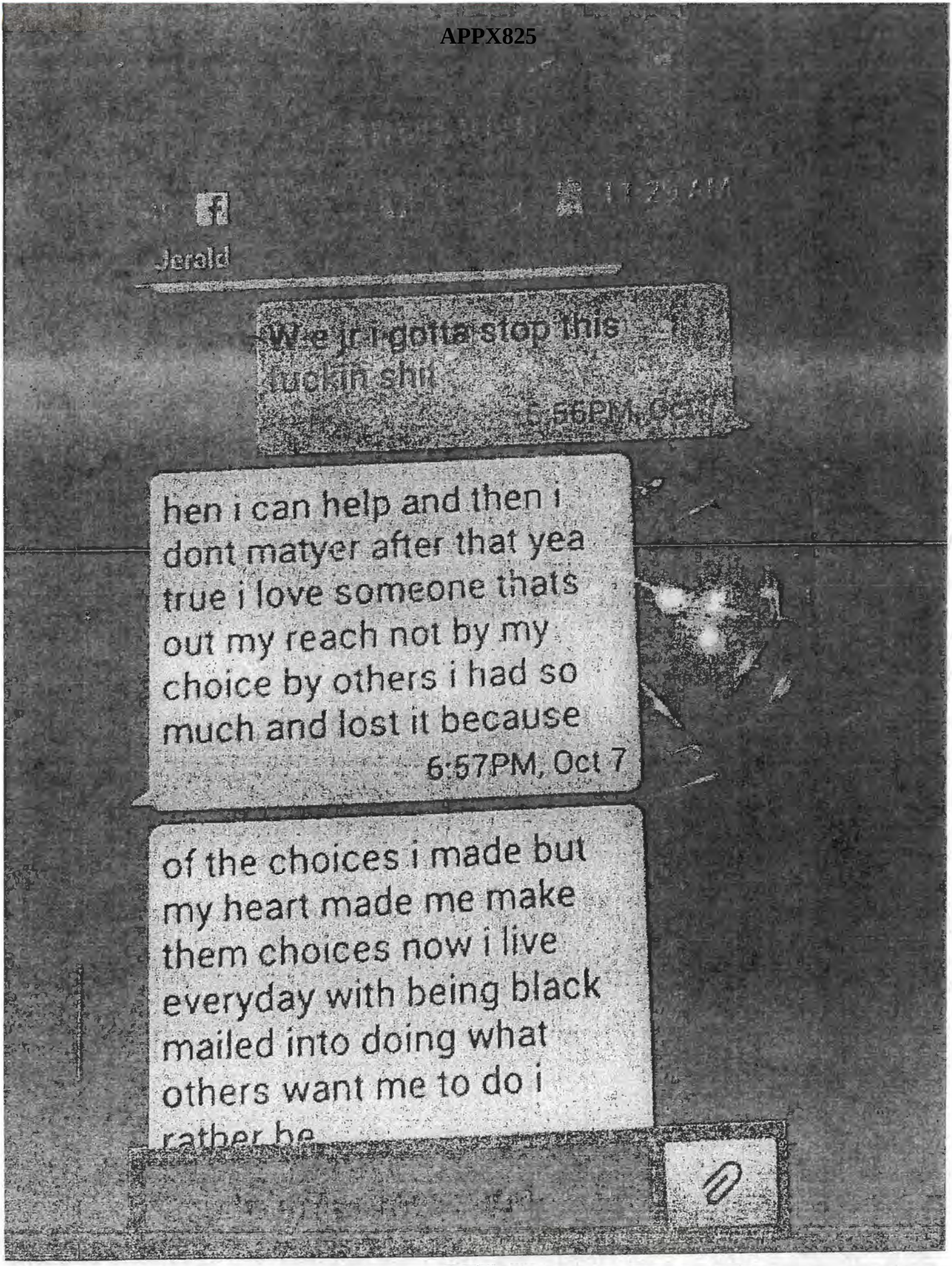

SAMSUNG
11:21 AM
Jerald
Can i go with yall to luke bryan
12:39PM, Oct 2
Iv only got 4 tickets hun
12:55PM, Oct 2
Ugh
12:56PM, Oct 2
On our way to lowes
1:39PM, Oct 2
Hey call me im out
9:01PM, Oct 2

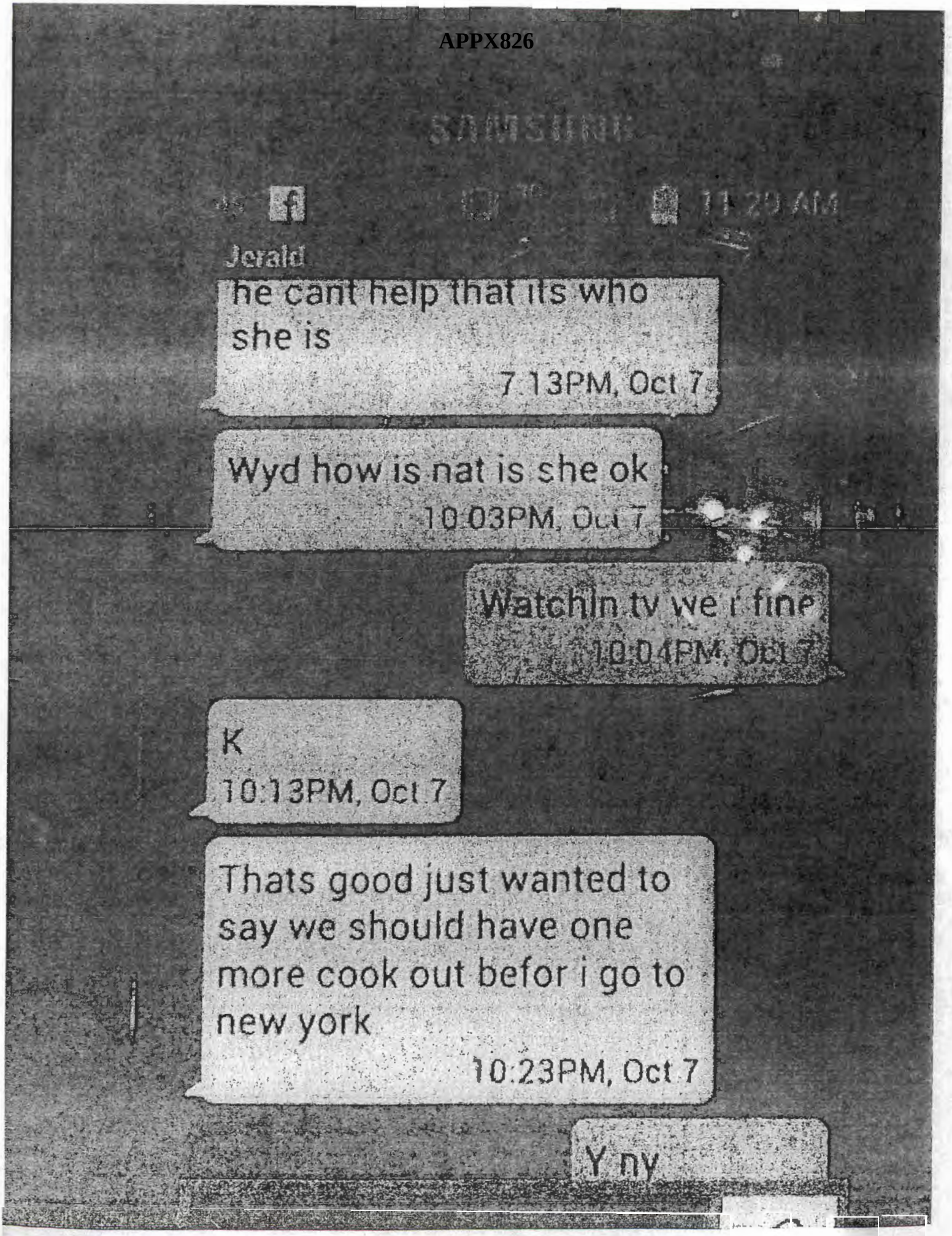

SAMSUNG
12 AM
Jerald
Hey tell momma that me and nat are going to the movies if she needs me ill only answer the phone for yall.
10:49PM, Oct 6
Wheres walt....mom said its

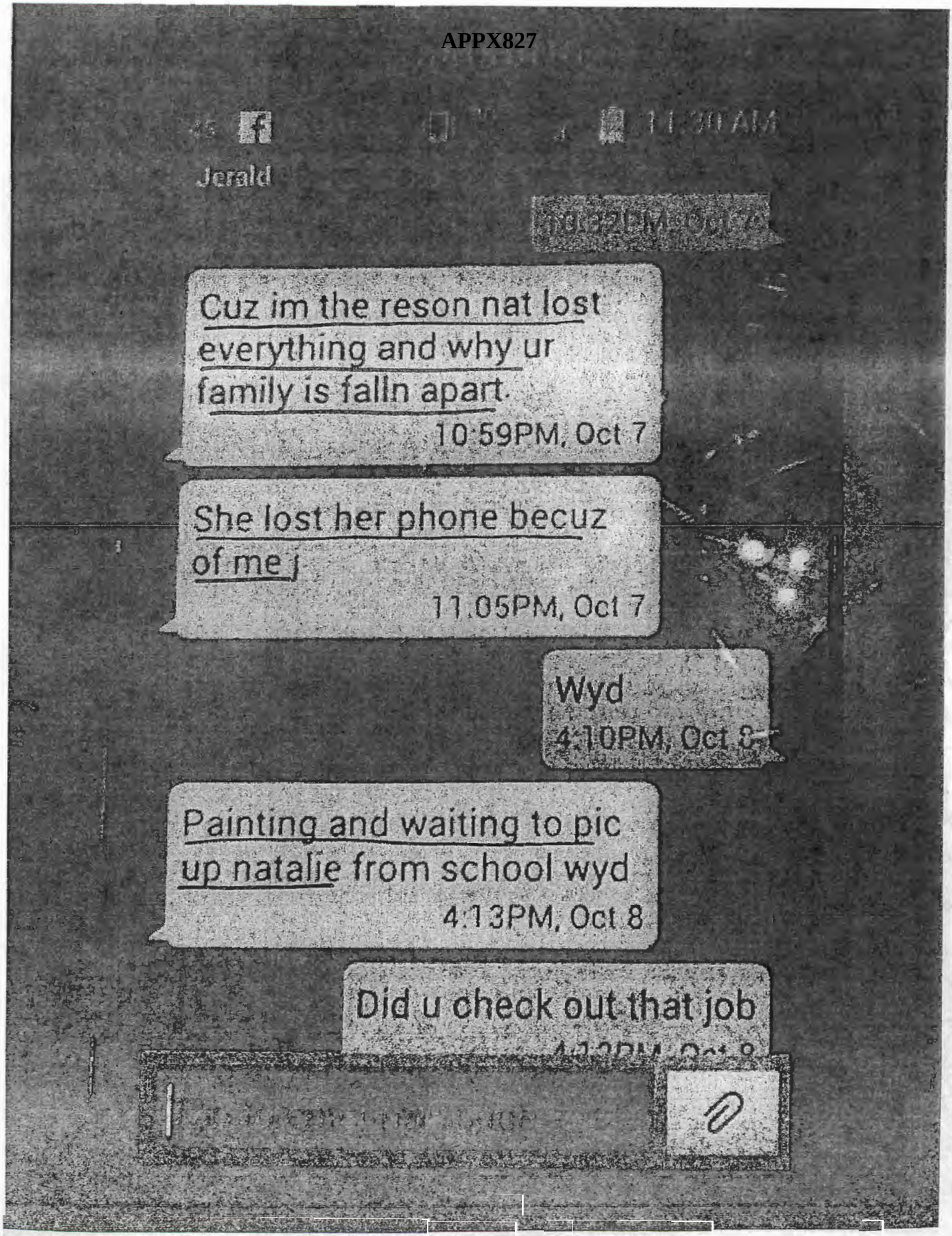

Jerald
Wtf
Call me
10:54PM, Oct 6
Were gonna get something to eat and go to my grandmas. If you want me just let me know we will meet you somewhere. Im only giving nat to yall cause its g
11:09PM, Oct 6
onna be mayhem tonight.
11:09PM, Oct 6
Were pickin up dad

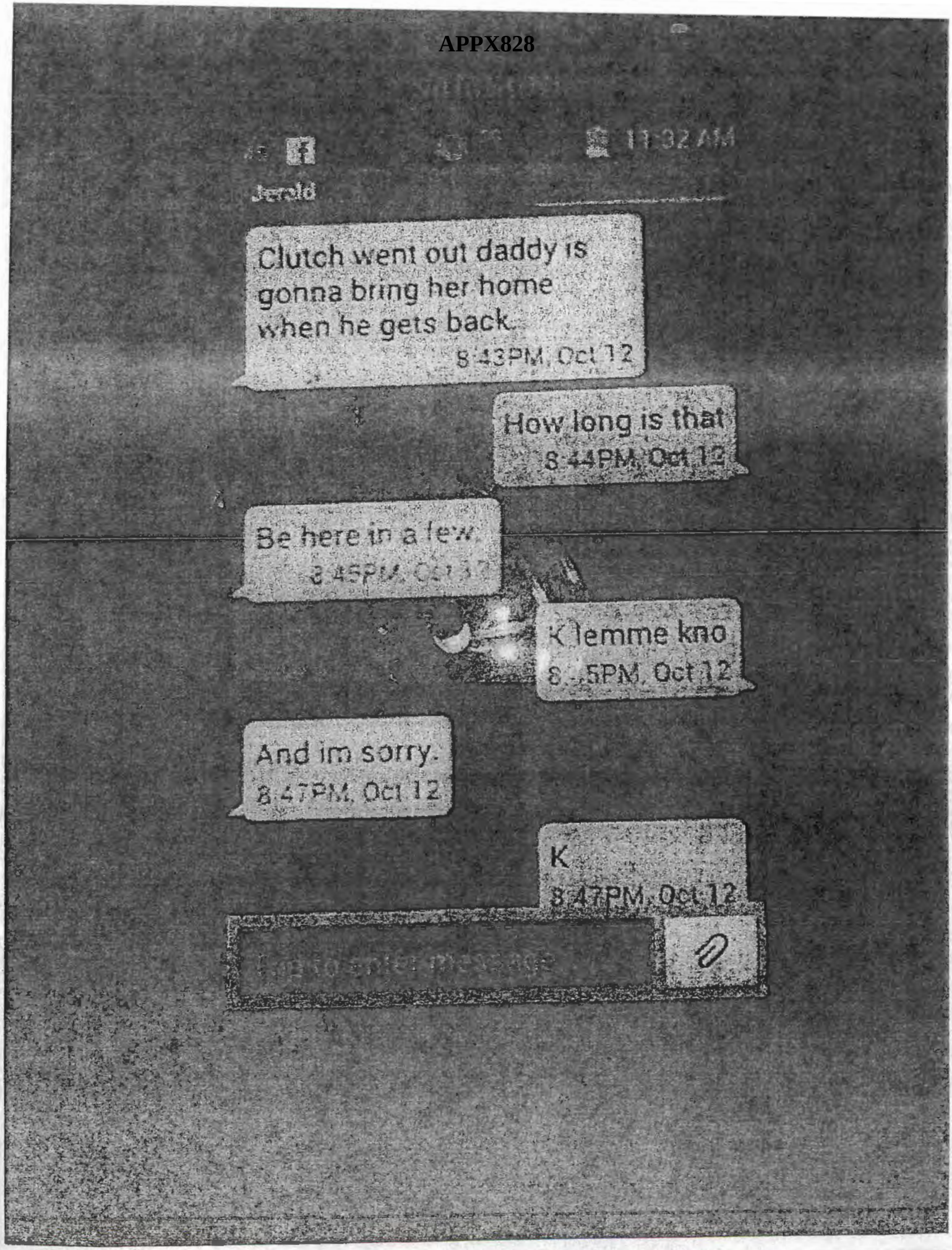

Jerald
Peace it was good seeing yall tell moose i love him like a bro and yes i love you like a sis j mom as a mom and nat well the most in my life but sometime
6:49PM, Oct 7
s we can have what we want in our lives right just promise me my name will lice on in all yalls lives as the man who helped yall and was there when u nee
6:49PM, Oct 7
ded me to so i guess this is my good bye to yall cuz im

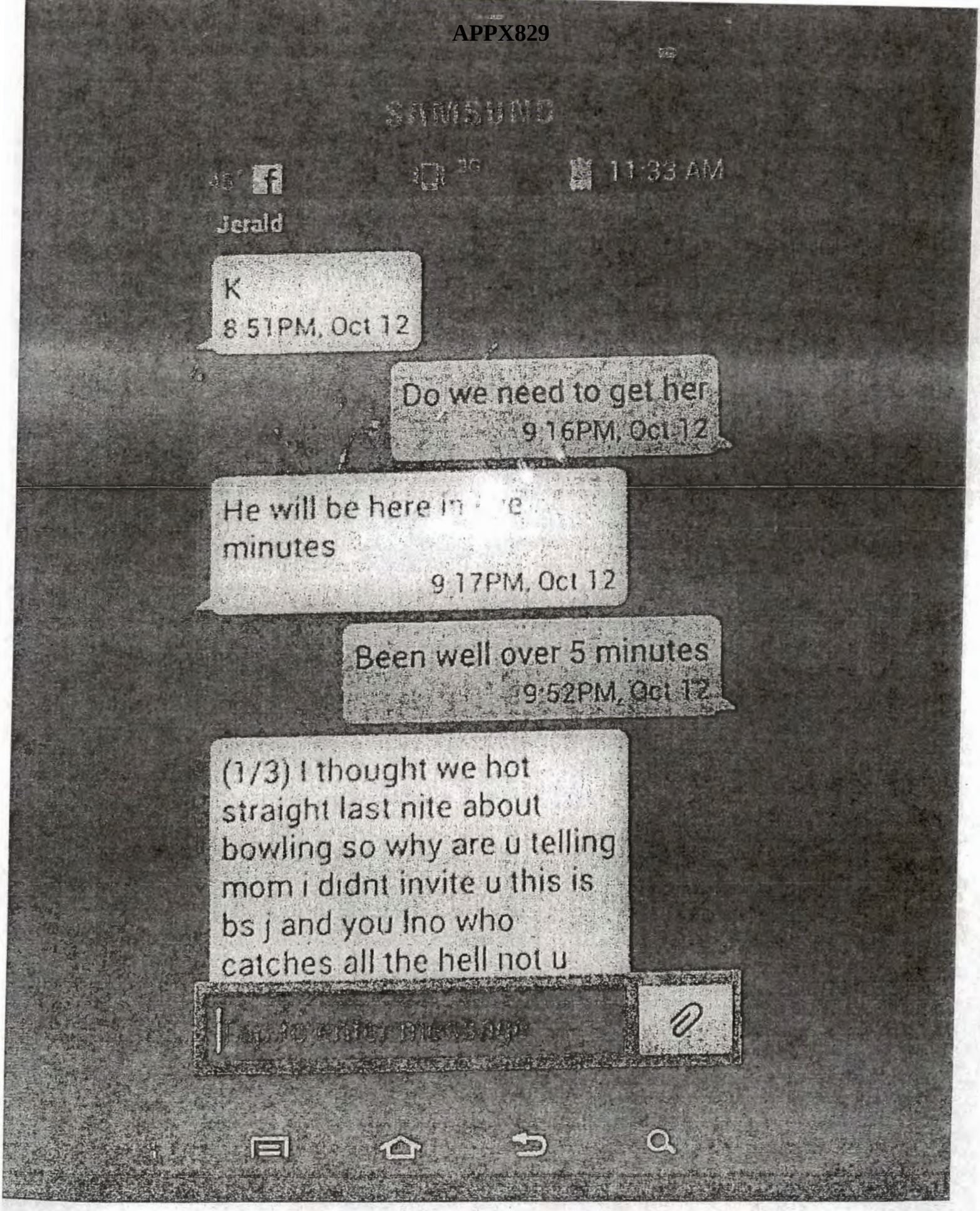

Jerald
the man who helped yall and was there when u nee
6:49PM, Oct 7
ded me to so i guess this is my good bye to yall cuz im never going to find peace ppl will never let that happen so i love all yall just remember that mo
6:49PM, Oct 7
st of all nat love june bug
6:50PM, Oct 7
Wtf
6:51PM, Oct 7
Some of us get to live our lives the way we want

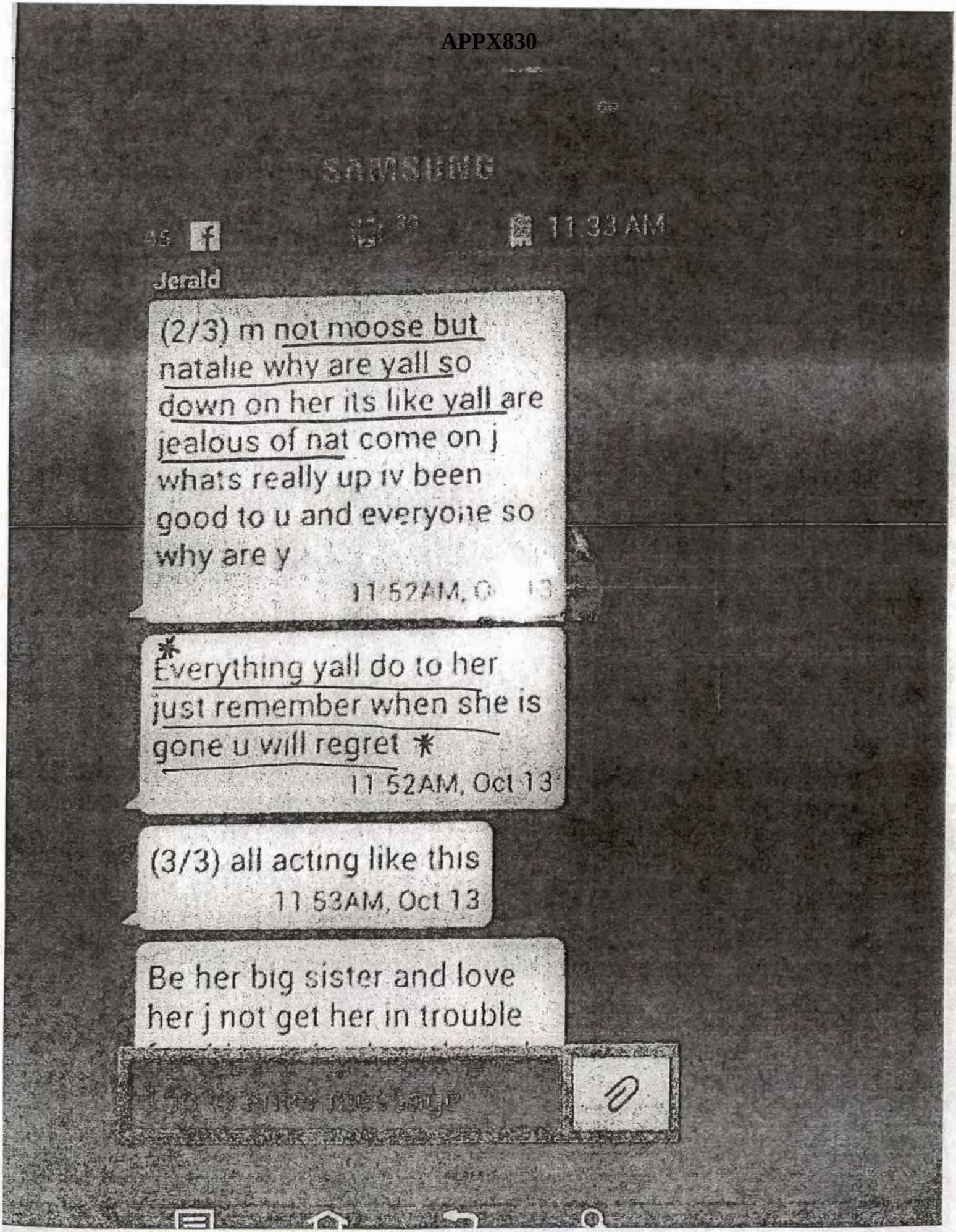

Jerald
We jr i gotta stop this fuckin shit
5:56PM, Oc
hen i can help and then i dont matyer after that yea true i love someone thats out my reach not by my choice by others i had so much and lost it because
6:57PM, Oct 7
of the choices i made but my heart made me make them choices now i live everyday with being black mailed into doing what others want me to do i rather be

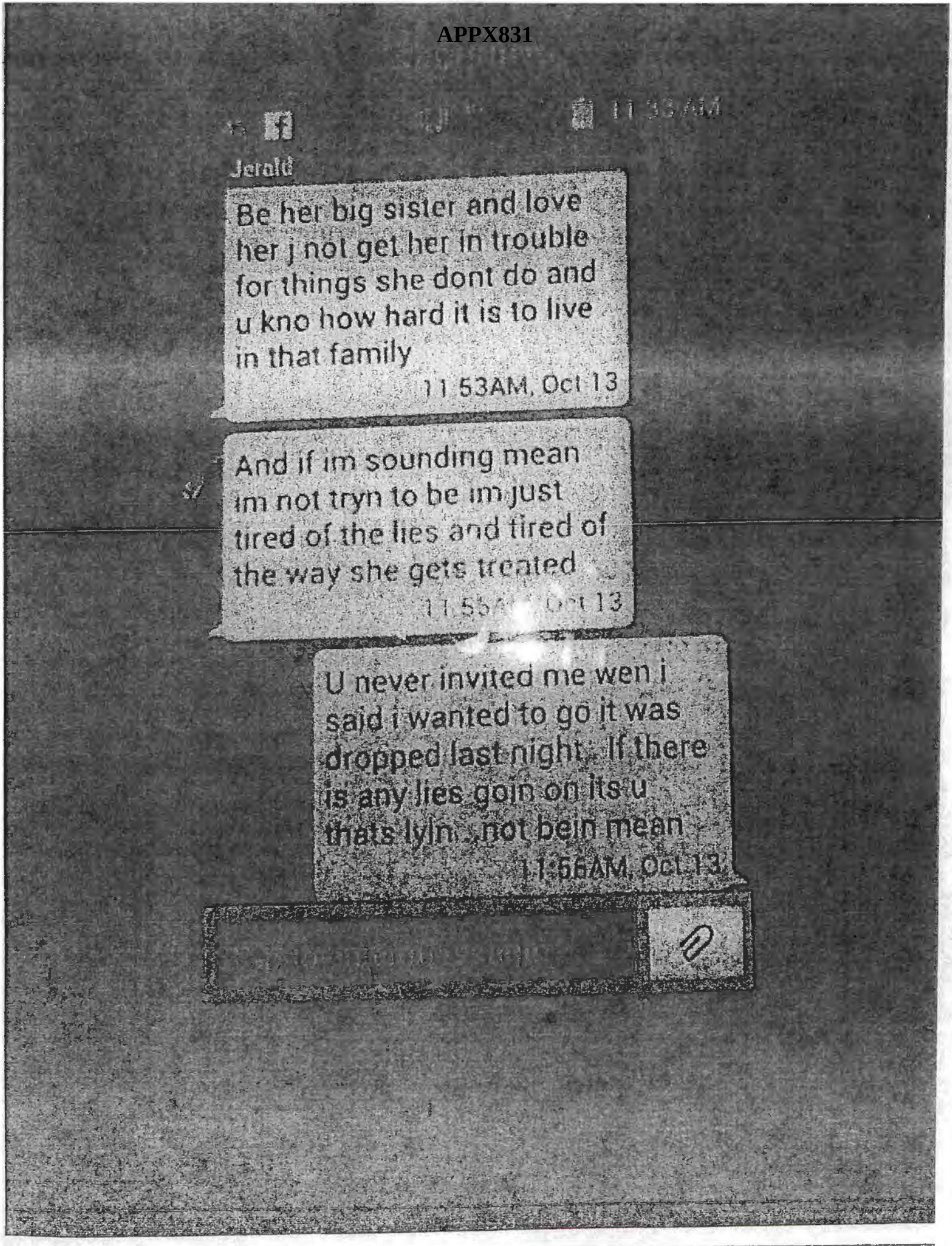

SAMSUNG
11:20 AM
Jerald
he cant help that its who she is
7:13PM, Oct 7
Wyd how is nat is she ok
10:03PM, Oct 7
Watchin tv we r fine
10:04PM, Oct 7
K
10:13PM, Oct 7
Thats good just wanted to say we should have one more cook out befor i go to new york
10:23PM, Oct 7
Y ny

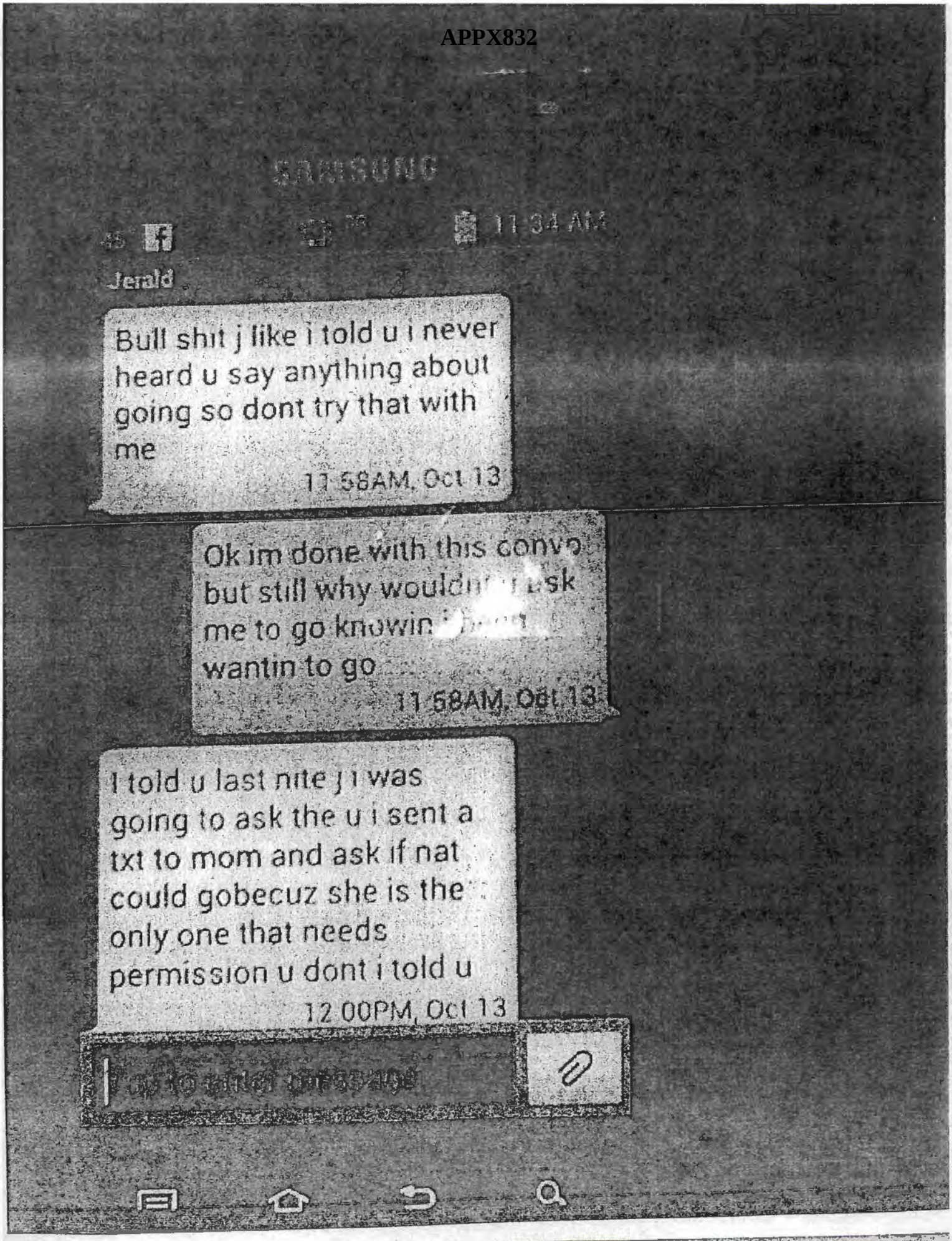

11:30 AM
Jerald
10:32PM, Oct 7
Cuz im the reson nat lost everything and why ur family is falln apart.
10:59PM, Oct 7
She lost her phone becuz of me j
11:05PM, Oct 7
Wyd
4:10PM, Oct 8
Painting and waiting to pic up natalie from school wyd
4:13PM, Oct 8
Did u check out that job

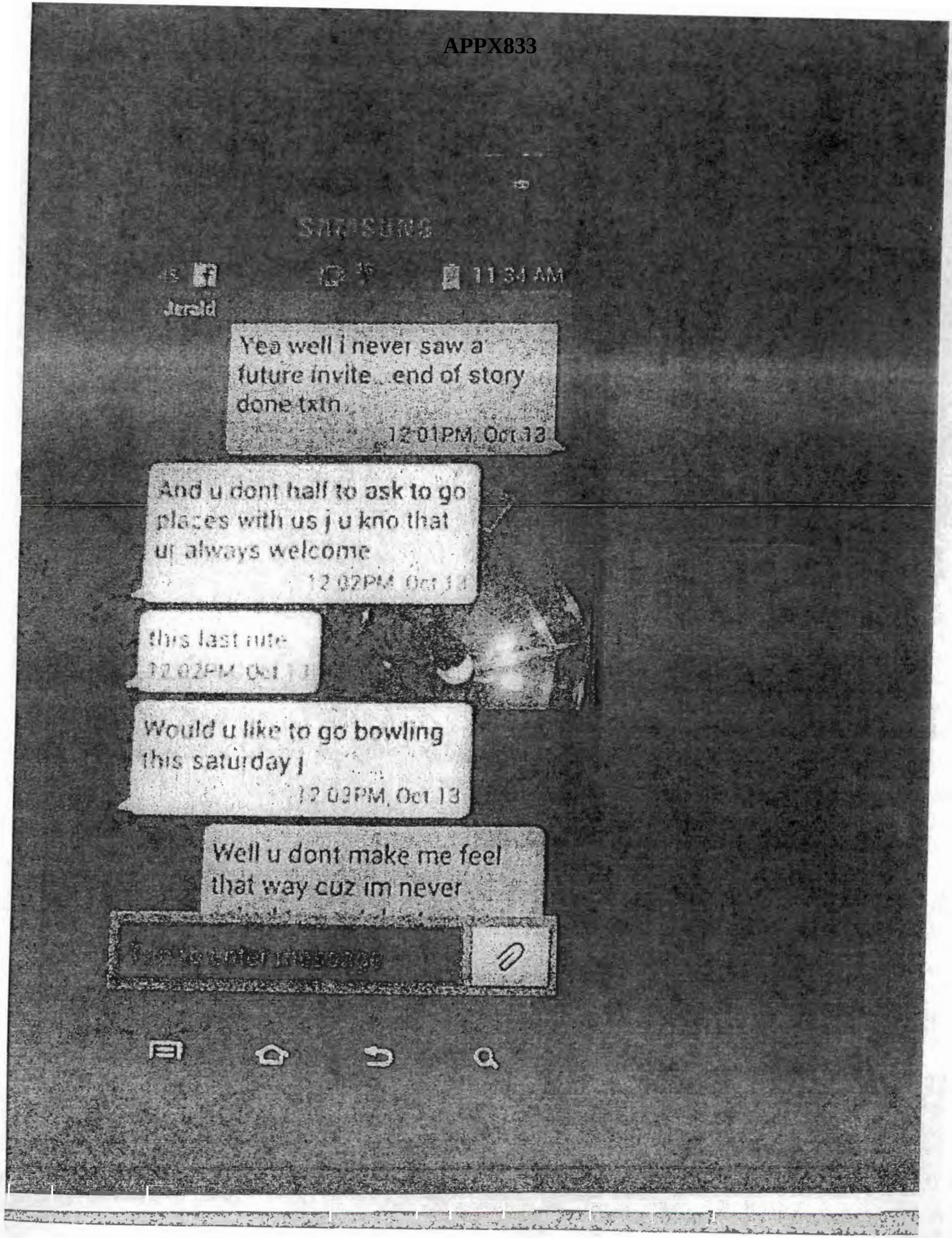

11:32 AM
Jerold
Clutch went out daddy is gonna bring her home when he gets back.
8:43PM, Oct 12
How long is that
8:44PM, Oct 12
Be here in a few.
8:45PM, Oct 12
K lemme kno
8:45PM, Oct 12
And im sorry.
8:47PM, Oct 12
K
8:47PM, Oct 12

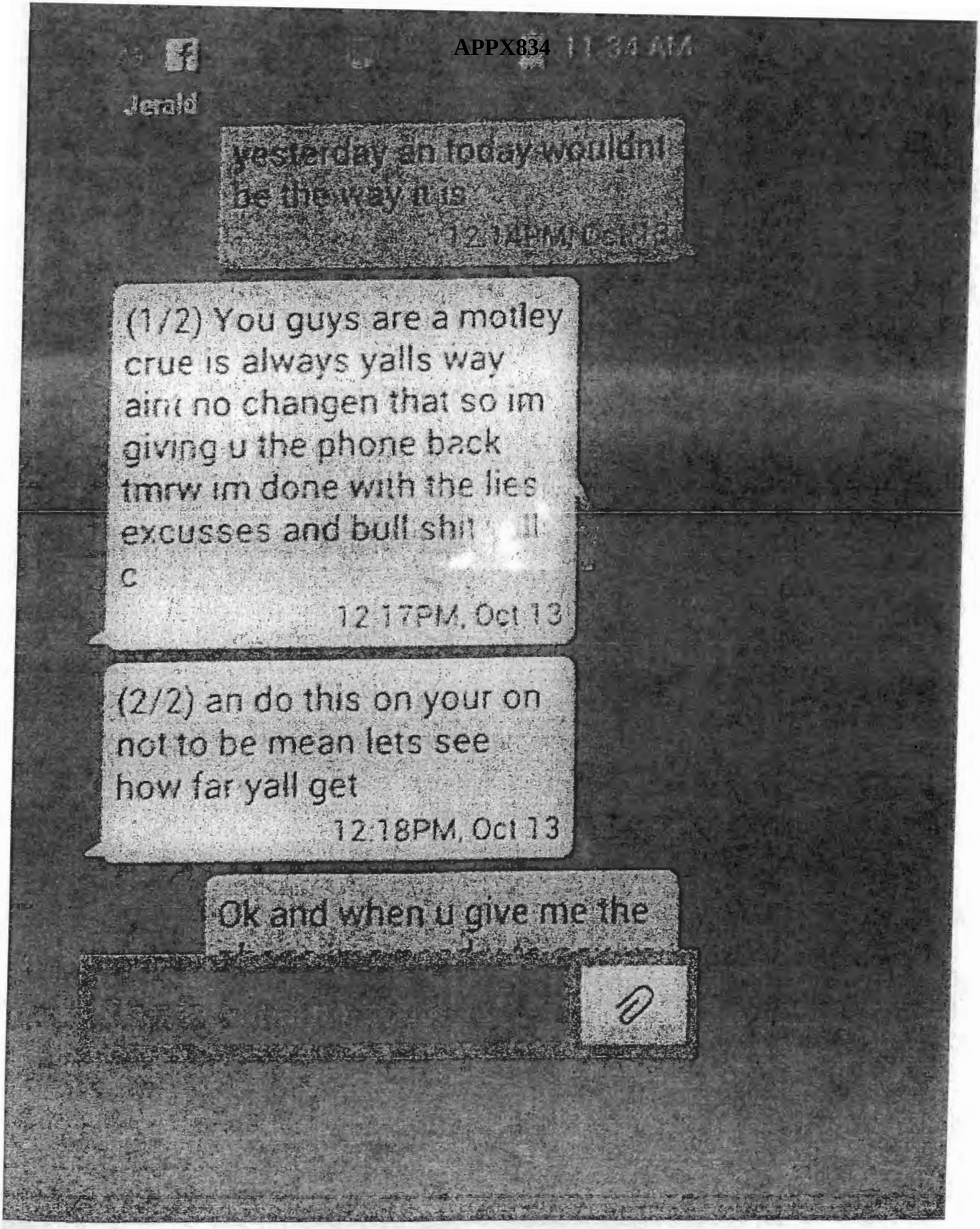

SAMSUNG
11:33 AM
Jerald
K
8:51PM, Oct 12
Do we need to get her
9:16PM, Oct 12
He will be here in e
minutes
9:17PM, Oct 12
Been well over 5 minutes
9:52PM, Oct 12
(1/3) I thought we hot
straight last nite about
bowling so why are u telling
mom i didnt invite u this is
bs j and you lno who
catches all the hell not u

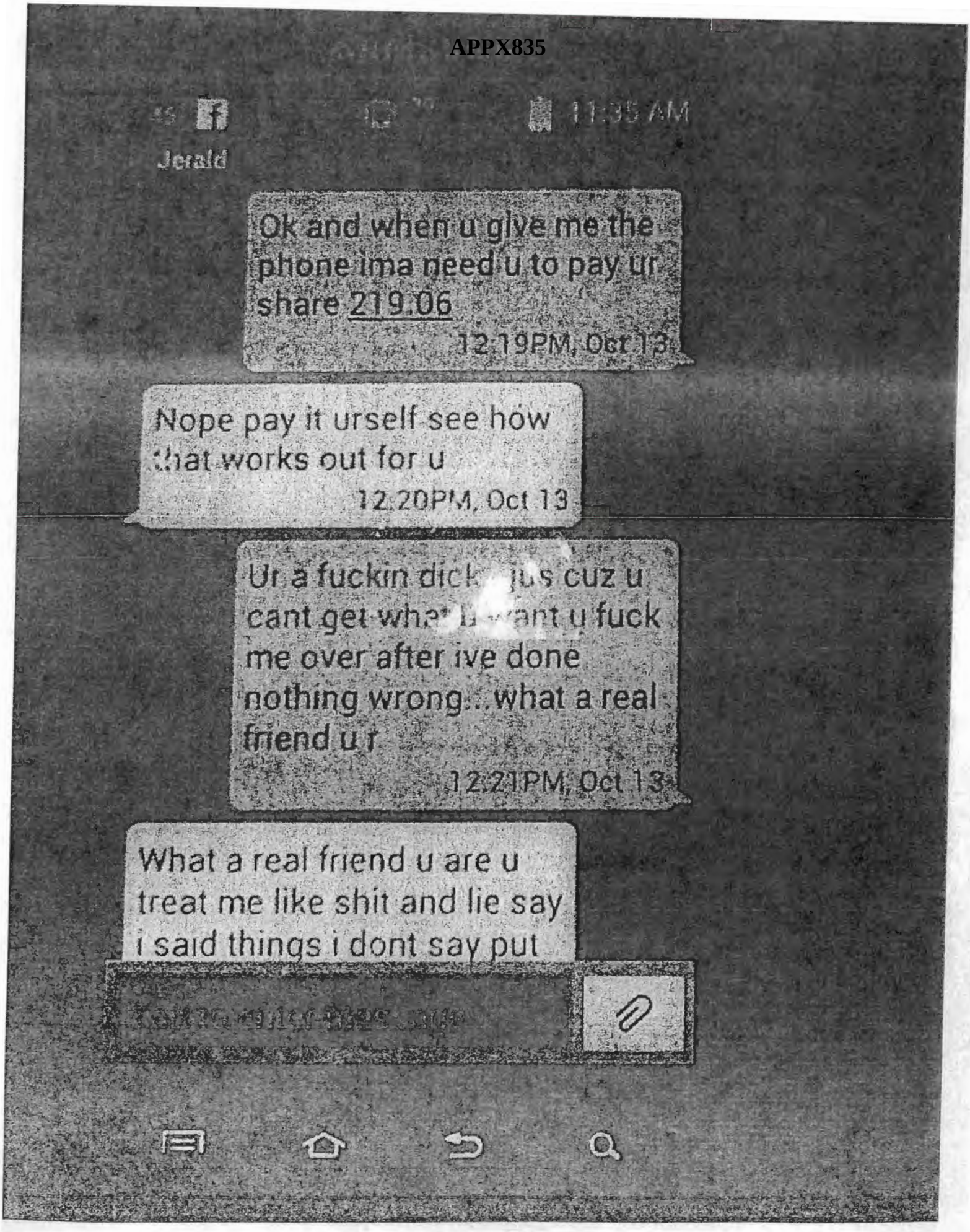

SAMSUNG
11:33 AM
Jerald
(2/3) m not moose but natalie why are yall so down on her its like yall are jealous of nat come on j whats really up iv been good to u and everyone so why are y
11:52AM, Oct 13
*Everything yall do to her just remember when she is gone u will regret *
11:52AM, Oct 13
(3/3) all acting like this
11:53AM, Oct 13
Be her big sister and love her j not get her in trouble

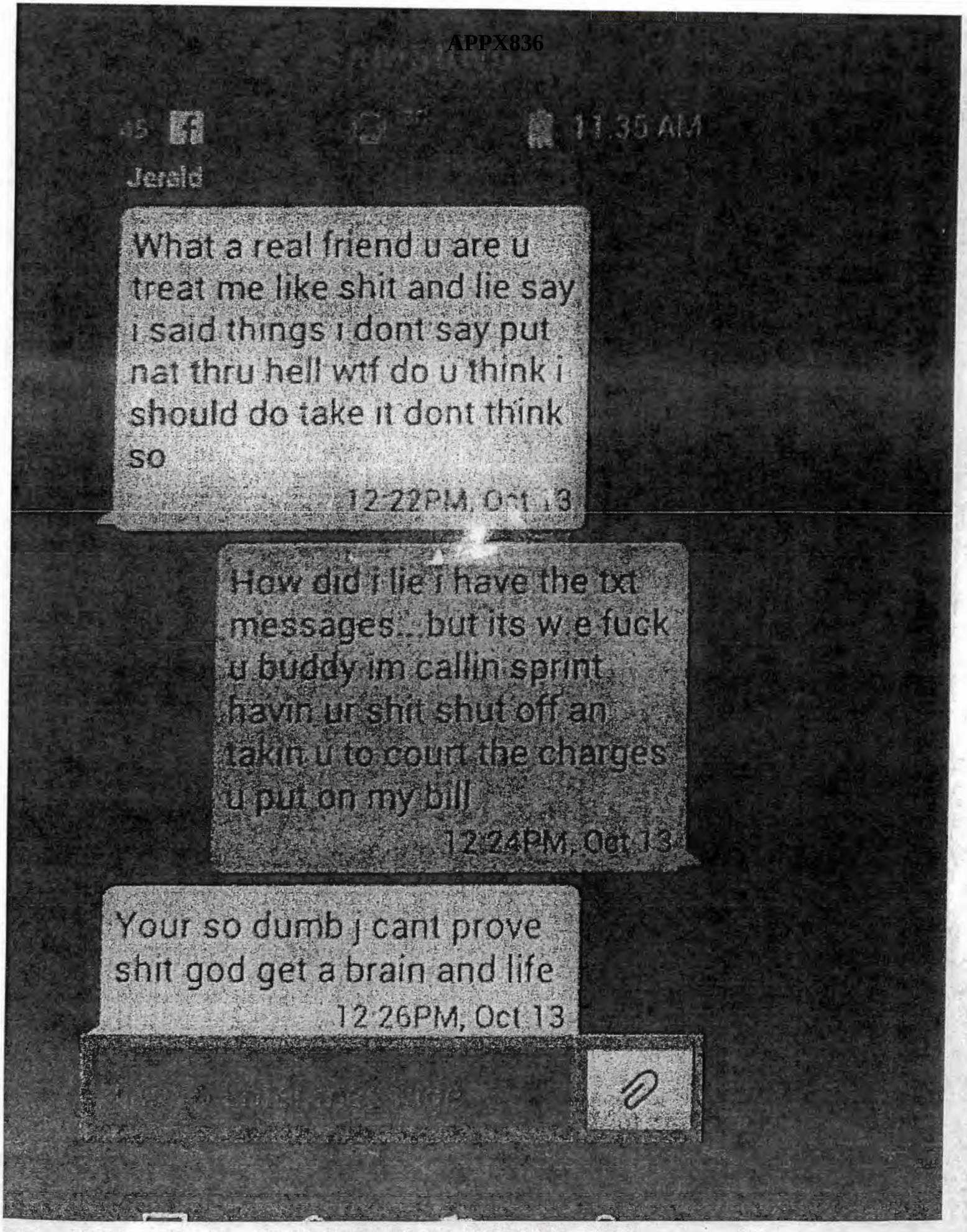

Jerald
Be her big sister and love her j not get her in trouble for things she dont do and u kno how hard it is to live in that family
11:53AM, Oct 13
And if im sounding mean im not tryn to be im just tired of the lies and tired of the way she gets treated
U never invited me wen i said i wanted to go it was dropped last night. If there is any lies goin on its u thats lyin. not bein mean
11:56AM, Oct 13

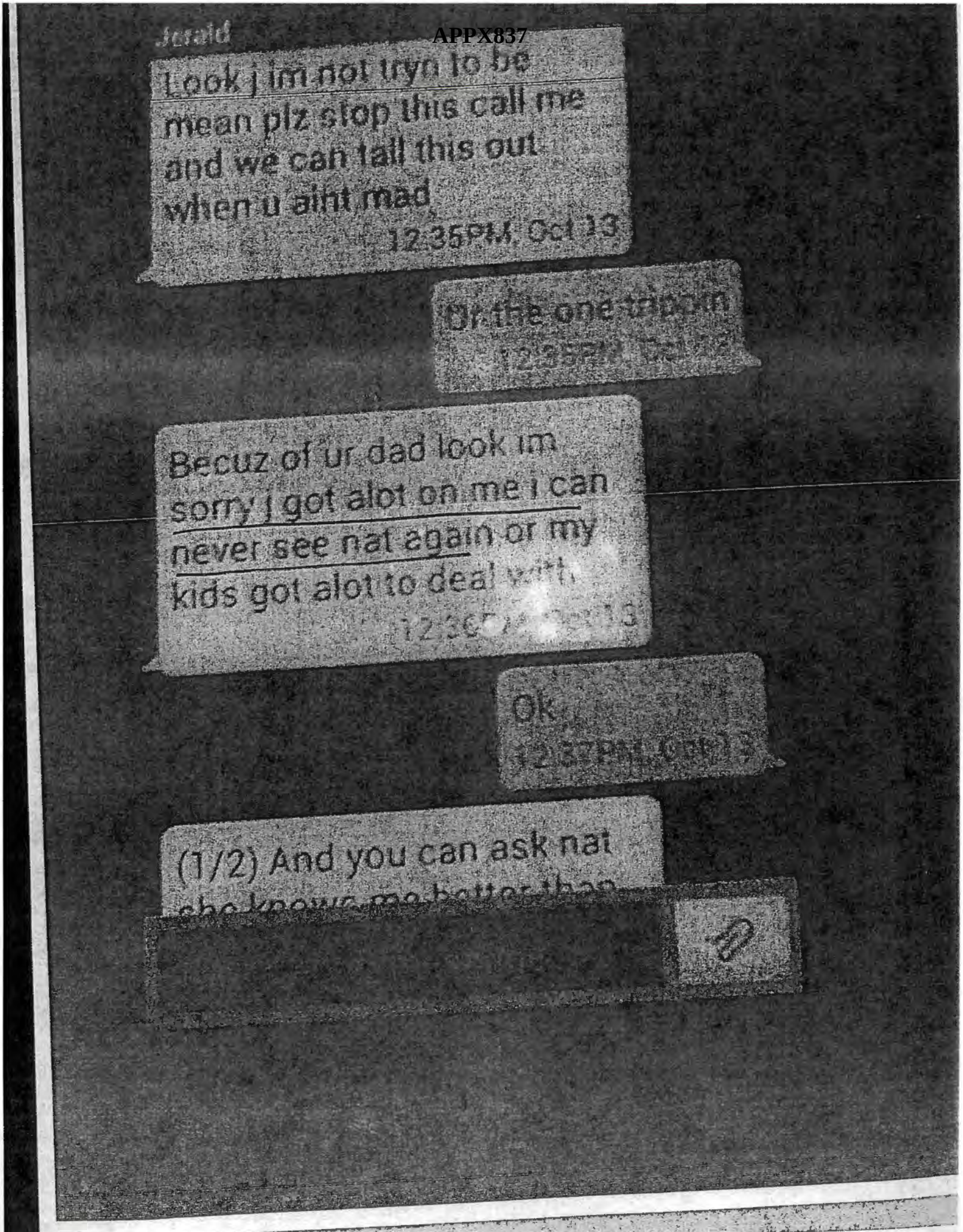

SAMSUNG
11:34 AM
Jerald
Bull shit j like i told u i never heard u say anything about going so dont try that with me
11:58AM, Oct 13
Ok im done with this convo but still why wouldn't ask me to go knowin
wantin to go
11:58AM, Oct 13
I told u last nite j i was going to ask the u i sent a txt to mom and ask if nat could gobecuz she is the only one that needs permission u dont i told u
12:00PM, Oct 13

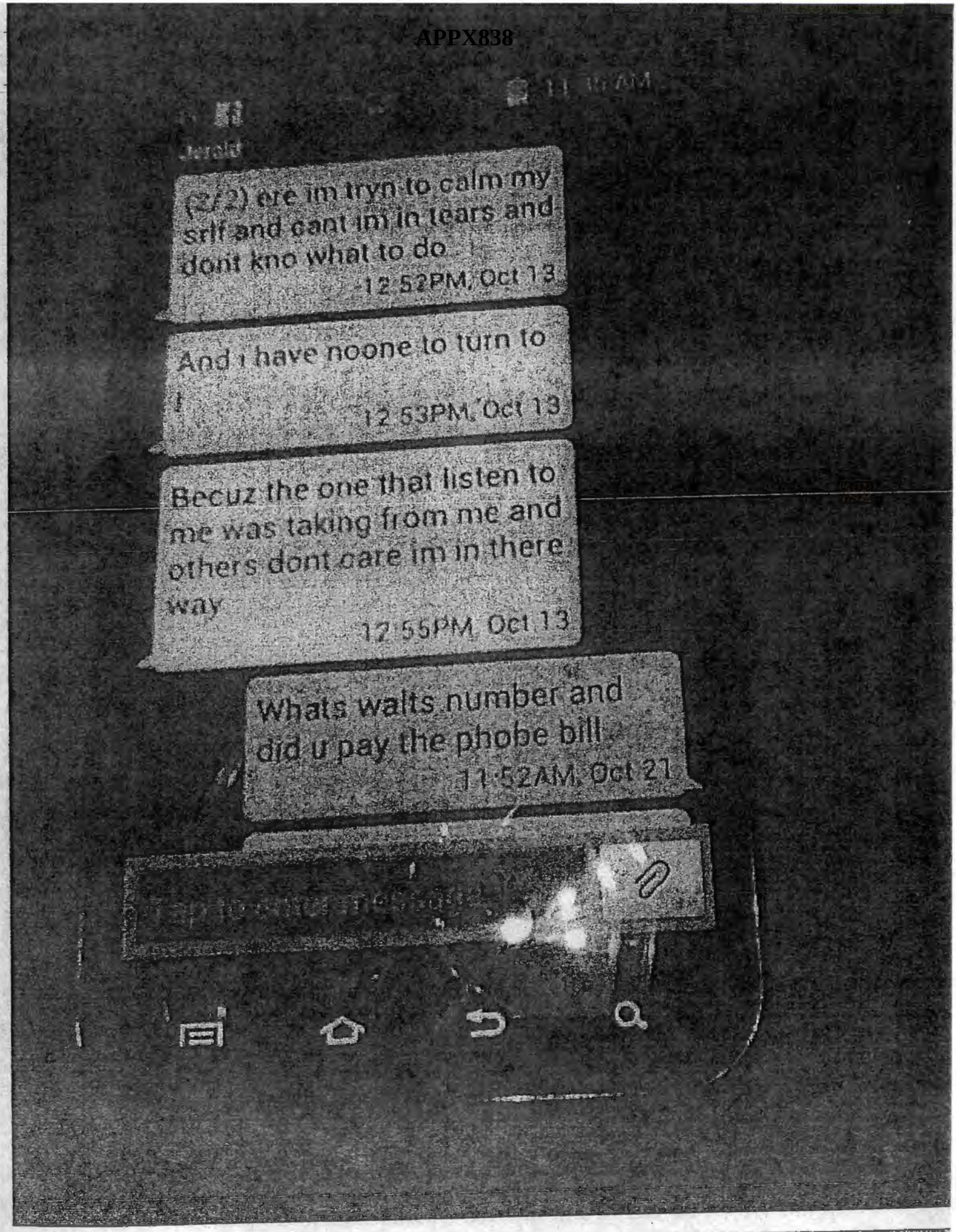

SAMSUNG
11:34 AM
Jerald
Yea well I never saw a future invite...end of story done txtn
12:01PM, Oct 13
And u dont half to ask to go places with us j u kno that ur always welcome
12:02PM, Oct 13
this last nite
12:02PM, Oct 13
Would u like to go bowling this saturday j
12:03PM, Oct 13
Well u dont make me feel that way cuz im never

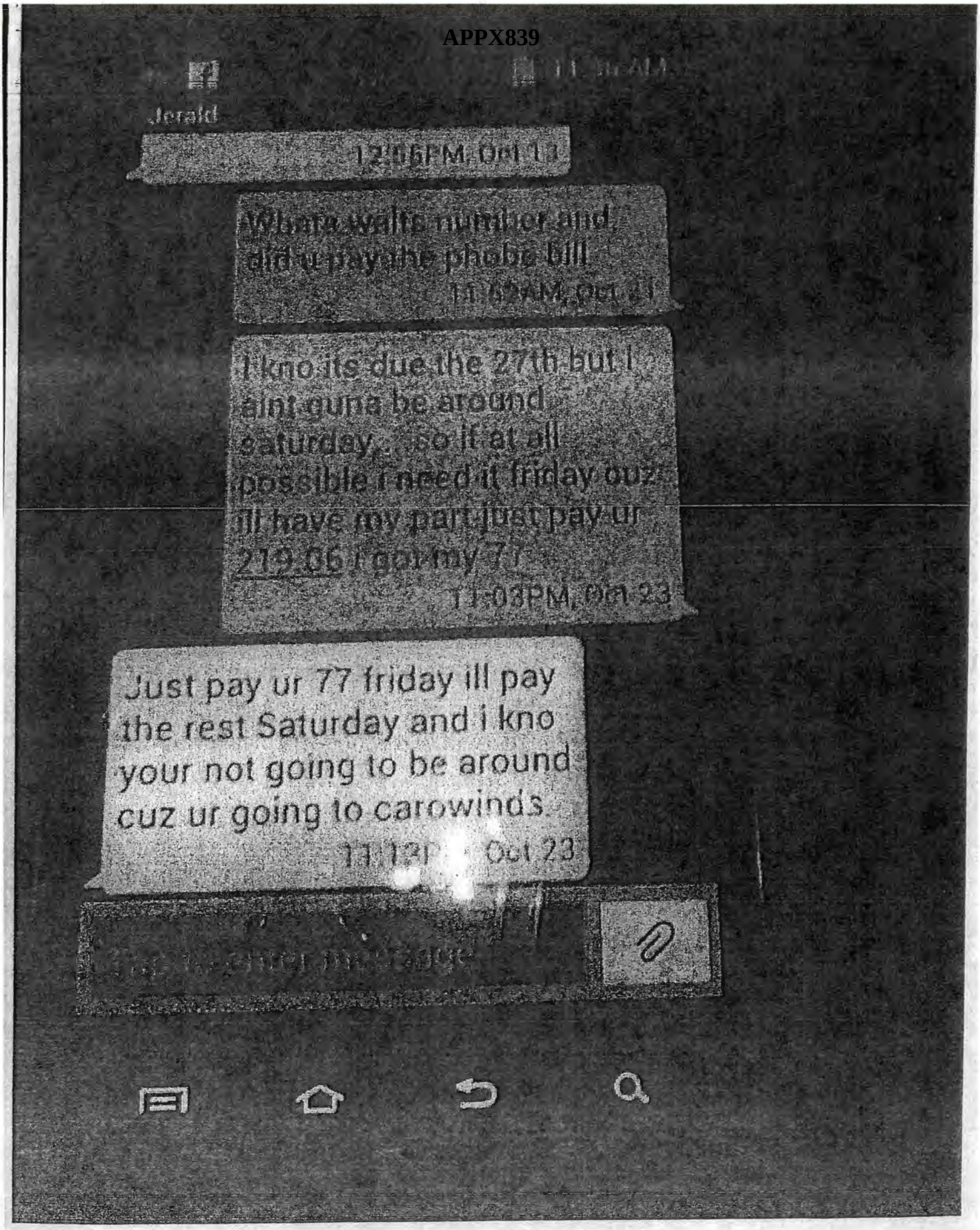

11:34 AM
Jerald
yesterday an today wouldnt be the way it is
12:14PM, Oct 13
(1/2) You guys are a motley crue is always yalls way aint no changen that so im giving u the phone back tmrw im done with the lies excusses and bull shit
c
12:17PM, Oct 13
(2/2) an do this on your on not to be mean lets see how far yall get
12:18PM, Oct 13
Ok and when u give me the


11:35 AM
Jerald
Ok and when u give me the phone ima need u to pay ur share 219.06
12:19PM, Oct 13
Nope pay it urself see how that works out for u
12:20PM, Oct 13
Ur a fuckin dick jus cuz u cant get what u want u fuck me over after ive done nothing wrong...what a real friend u r
12:21PM, Oct 13
What a real friend u are u treat me like shit and lie say i said things i dont say put


11:35 AM
Jerald
What a real friend u are u treat me like shit and lie say i said things i dont say put nat thru hell wtf do u think i should do take it dont think so
12:22PM, Oct 13
How did i lie i have the txt messages...but its w.e fuck u buddy im callin sprint havin ur shit shut off an takin u to court the charges u put on my bill
12:24PM, Oct 13
Your so dumb j cant prove shit god get a brain and life
12:26PM, Oct 13


Jerald
Look j im not tryn to be mean plz stop this call me and we can talk this out when u aint mad
12:35PM, Oct 13
Or the one that's on
Becuz of ur dad look im sorry j got alot on me i can never see nat again or my kids got alot to deal with
Ok
(1/2) And you can ask nat


Jerald
(2/2) ere im tryn to calm my srlf and cant im in tears and dont kno what to do
12:52PM, Oct 13
And i have noone to turn to
12:53PM, Oct 13
Becuz the one that listen to me was taking from me and others dont care im in there way
12:55PM, Oct 13
Whats walts number and did u pay the phobe bill
11:52AM, Oct 21


Jerald
12:06PM, Oct 13
Whats waltz number and did u pay the phone bill
11:52AM, Oct 21
i kno its due the 27th but i aint guna be around saturday... so if at all possible i need it friday cuz ill have my part just pay ur 219.06 i got my 77
11:03PM, Oct 23
Just pay ur 77 friday ill pay the rest Saturday and i kno your not going to be around cuz ur going to carowinds.
Oct 23

Jay Fowler - AKA for Gerald G.

- Conversation started October 10 2014
- 

10/10, 6:43pm

**Jay Fowler**

Hey

- 

10/10, 6:44pm

**Trinity Whiten**

Hey

- 

10/10, 6:45pm

**Jay Fowler**

Wyd

im so bored it aint even funny

- 

10/10, 6:47pm

**Trinity Whiten**

Me to why u board

- 

10/10, 6:48pm

**Jay Fowler**

Cause im home alone with nothing to do

EXHIBIT
Applicant's
3
10/24/18

Angle is at her moms

- 

10/10, 6:49pm

**Trinity Whiten**

Why are u not there? Mom said y'all were gonna come here

- 

10/10, 6:50pm

**Jay Fowler**

Im not allowed at her moms and yes we was but angel changed her mine

- 

10/10, 6:50pm

**Trinity Whiten**

Why?

- 

10/10, 6:50pm

**Jay Fowler**

Why what

- 

10/10, 6:51pm

**Trinity Whiten**

She change her mind

10/10, 6:51pm

**Jay Fowler**

That I dont know and im not aloud around yall without her



10/10, 6:52pm

**Trinity Whiten**

Why what did we do



10/10, 6:52pm

**Jay Fowler**

Angels orders and nothing she is just jealous is all

Im not allowed around no females



10/10, 6:53pm

**Trinity Whiten**

Why would she be jealous

Ooook



10/10, 6:54pm

**Jay Fowler**

Thats how angel is hun

So what you doing today

- 

10/10, 6:56pm

**Trinity Whiten**

I don't get it but OK...

Nothing board as always

- 

10/10, 6:56pm

**Jay Fowler**

So what do u wanna be for halloween cuz im buying your costume

- 

10/10, 6:57pm

**Jay Fowler**

- 

10/10, 6:58pm

**Trinity Whiten**

I'm not sure yet. U don't have to do that

- 

10/10, 6:58pm

**Jay Fowler**

I know I dont but I want to



Maybe I wanna spoil you lol

- 

10/10, 6:59pm

**Trinity Whiten**

Why

- 

10/10, 7:01pm

**Jay Fowler**

Because do I got to have a reason

- 

10/10, 7:01pm

**Trinity Whiten**

Ya most people do

- 

10/10, 7:02pm

**Jay Fowler**

Well if I got to have a reason then ummm I like you lol will that work

- 

10/10, 7:03pm

**Trinity Whiten**

Why u like me for

- 

10/10, 7:04pm

**Jay Fowler**

Because your sweet and beautiful u can dance and your not about drama or telling on ppl

- 

10/10, 7:05pm

**Trinity Whiten**

I'm not beautiful

- 

10/10, 7:05pm

**Jay Fowler**

And you listen well to problems

Yea you are

So stop saying your not plz

- 

10/10, 7:05pm

**Trinity Whiten**

Whatever

- 

10/10, 7:06pm

**Jay Fowler**

Why u say that



10/10, 7:06pm

**Trinity Whiten**

Learn the rest u said from my mom



10/10, 7:06pm

**Jay Fowler**

What

Oh ok

Your a good person and thats hard to fine



10/10, 7:07pm

**Trinity Whiten**

OK what?



10/10, 7:08pm

**Jay Fowler**

I just got the message that you sentvthat you said you learned from your mom



10/10, 7:08pm

**Trinity Whiten**

Oh sorry.

- 

10/10, 7:09pm

**Jay Fowler**

You good hun

- 

10/10, 7:09pm

**Trinity Whiten**

Ok

- 

10/10, 7:10pm

**Jay Fowler**

So do you really think im to old lmao

- 

10/10, 7:12pm

**Trinity Whiten**

Too old for what

- 

10/10, 7:12pm

**Jay Fowler**

For you

- 

10/10, 7:13pm

**Trinity Whiten**

What u mean for me

-

10/10, 7:14pm

**Jay Fowler**

Nevermine

- 

10/10, 7:14pm

**Trinity Whiten**

Why u say never mind

-

10/10, 7:15pm

**Jay Fowler**

Idk

- 

10/10, 7:16pm

**Trinity Whiten**

Yes u do



10/10, 7:17pm

**Jay Fowler**

Last nite you told me that you would think about if u wanted to date me thats why I asked about the age



10/10, 7:18pm

**Trinity Whiten**

R u wanting to date me



10/10, 7:19pm

**Jay Fowler**

Maybe are you wanting the same

Do u like me



10/10, 7:20pm

**Trinity Whiten**

Maybe isn't an answer



10/10, 7:20pm

**Jay Fowler**

Yes

And you

Whats your answer

- 

10/10, 7:21pm

**Trinity Whiten**

Why u want to date me? Ur with angel

- 

10/10, 7:22pm

**Jay Fowler**

Ill talk to you later about it

Maybe tonite

- 

10/10, 7:23pm

**Trinity Whiten**

Why later how tonight

- 

10/10, 7:23pm

**Jay Fowler**

On here

I mean its fine if you dont wanna be with me

Still gonna be your friend



10/10, 7:24pm

**Trinity Whiten**

I don't understand Why u wanna be with me



10/10, 7:25pm

**Jay Fowler**

I told I like you your sweet but its ok dont want you to do something you dontbwanna do



10/10, 7:25pm

**Trinity Whiten**

What would people say about u being with me



10/10, 7:26pm

**Jay Fowler**

Well I wouldnt let know one no right now



10/10, 7:26pm

**Trinity Whiten**

Oh ya I knew that.



10/10, 7:31pm

**Jay Fowler**

So is that a yes then hon

- 

10/10, 7:31pm

**Trinity Whiten**

Crap I got to go momma needs me

- 

10/10, 7:32pm

**Jay Fowler**

I ment hun

Ok

So no answer to that question

- 

10/10, 7:51pm

**Jay Fowler**

You there

- 

10/10, 7:57pm

**Trinity Whiten**

Ya sorry



10/10, 7:58pm

**Jay Fowler**

So did you have an answer to the question



10/10, 7:58pm

**Trinity Whiten**

Do u think I'm to young for



10/10, 7:59pm

**Jay Fowler**

No



10/10, 7:59pm

**Trinity Whiten**

Really



10/10, 7:59pm

**Jay Fowler**

Yes

So can you give me an answer



10/10, 8:01pm

**Trinity Whiten**

I'm shy grrr. My mom won't leave me alone



10/10, 8:01pm

**Jay Fowler**

Lol its cool just say yes or no and its fine if your shy

Just need an answer hun



10/10, 8:03pm

**Trinity Whiten**

U need one rt now



10/10, 8:03pm

**Jay Fowler**

It would be nice lol

Iv got to go to wal mart can you give me an answer when I get back be gone about 30 mins



10/10, 8:07pm

**Trinity Whiten**

- 

10/10, 9:34pm

**Jay Fowler**

Hey im back

- 

10/10, 10:03pm

**Jay Fowler**

Hello

- 

10/10, 10:15pm

**Jay Fowler**

Are u not gonna talk lol

- 

10/10, 10:48pm

**Jay Fowler**

Hello

- October 11
- 

10/11, 9:32am

**Trinity Whiten**

HELLO

- 

10/11, 9:48am

**Jay Fowler**

Hey

- 

10/11, 9:49am

**Trinity Whiten**

Having to sneak and use my phone cuz momma took my phone away

- 

10/11, 9:53am

**Jay Fowler**

Why

- 

10/11, 10:00am

**Trinity Whiten**

Cuz. I kicked Christian

- 

10/11, 10:01am

**Jay Fowler**

Oh so can u give me an answer today or not

- 

10/11, 10:02am

**Trinity Whiten**

What wud we do if we were together

- 

10/11, 10:03am

**Jay Fowler**

Whatever you wanted to do

- 

10/11, 10:03am

**Trinity Whiten**

Like what

- 

10/11, 10:04am

**Jay Fowler**

What would ubwanna do hun

- 

10/11, 10:06am

**Trinity Whiten**

I don't think I'd make a gud girlfriend cuz I've never kissed a guy before

- 

10/11, 10:06am

**Jay Fowler**

R u going to show me ? Plus Haley says said that whatever boy I date and sleep with I will be with that person for life



10/11, 10:20am

**Jay Fowler**

Yes and yes



10/11, 10:21am

**Trinity Whiten**

Awww. Crap got to hide the phone

I'm telling her I was texting Haley

10/11, 11:56am

**Jay Fowler**

U there



10/11, 12:02pm

**Trinity Whiten**

Yeah. Do some things wyd



10/11, 12:03pm

**Jay Fowler**

Im sure u would you will never know til you try right



- 

10/11, 10:11am

**Trinity Whiten**

But what if u don't like the way I kiss

- 

10/11, 10:11am

**Jay Fowler**

Its fine dont worry i will

- 

10/11, 10:16am

**Trinity Whiten**

What if I'm no gud at other things. U know like sexual things?

- 

10/11, 10:17am

**Jay Fowler**

Trinity it will be fine I dont expect you to know how to do these things hun .its all things u will learn in time

- 

10/11, 10:19am

**Trinity Whiten**

Nothing thinking about coming over later



- 

10/11, 12:04pm

**Trinity Whiten**

Really

- 

10/11, 12:04pm

**Jay Fowler**

Yes ibwanna see u so trinity are u gonna be my girl

Im not worried about u being shy we can work on that

But if u wanna be my girl then ill give u a chance to be

- 

10/11, 12:08pm

**Trinity Whiten**

- 

10/11, 12:08pm

**Jay Fowler**

So is that a yes

Its up to you

- 

10/11, 12:34pm

**Jay Fowler**

You there



10/11, 12:41pm

**Trinity Whiten**

Sorry cleaning



10/11, 12:42pm

**Jay Fowler**

Its ok so can u answer my question real quick

Ppzzzzz



10/11, 12:47pm

**Trinity Whiten**

Thought I did



10/11, 12:48pm

**Jay Fowler**

Nope I didnt get that message honey



10/11, 12:50pm

**Trinity Whiten**

R y'all coming over today



10/11, 12:50pm

**Jay Fowler**

Yes

I said I wanted to see you



10/11, 12:53pm

**Trinity Whiten**

When

10/11, 12:54pm

**Jay Fowler**

In a few may around 3

So did u answer the question

Lol



10/11, 12:55pm

**Trinity Whiten**

OK Cool can't wait. I got to go so I can get ready



10/11, 12:55pm

**Jay Fowler**

Why

Lol answer my question befor you go plz



10/11, 12:58pm

**Trinity Whiten**



10/11, 12:59pm

**Jay Fowler**

Is that a yes



10/11, 1:02pm

**Trinity Whiten**



10/11, 1:12pm

**Jay Fowler**

So is that a yes

Lol



10/11, 1:19pm

**Jay Fowler**

So what you gonna wear today

- 

10/11, 1:21pm

**Trinity Whiten**

My tank and shorts

- 

10/11, 1:23pm

**Jay Fowler**

You getting dressed up for me or angel lol and you still uave not gave me an answer babydoll

- 

10/11, 1:23pm

**Trinity Whiten**

Really

- 

10/11, 1:24pm

**Jay Fowler**

Really

Lol

- 

10/11, 1:30pm

**Jay Fowler**

You there

- 

10/11, 1:31pm

**Trinity Whiten**

Lol no

- 

10/11, 1:32pm

**Jay Fowler**

You funny loo

Lol

- 

10/11, 1:33pm

**Trinity Whiten**

Lol ty

- 

10/11, 1:34pm

**Jay Fowler**

For real I never got your txt for the answer to my question

- 

10/11, 1:35pm

**Trinity Whiten**

Go bk and read. I feel so bad for momma. I'm Really worried about her

- 

10/11, 1:36pm

**Jay Fowler**

I cant I erased the messages so noone could read them

- 

10/11, 1:37pm

**Trinity Whiten**

Oh I'll try to resend it

-

10/11, 1:39pm

**Jay Fowler**

Ok

Be easier just to wtite it again dont you think lol

- 

10/11, 1:45pm

**Trinity Whiten**

Well It wud sound better having it sent to u the way it was

-

10/11, 1:46pm

**Jay Fowler**

Ok so can you resend it

- 

10/11, 1:55pm

**Jay Fowler**

Hello

You there

- 

10/11, 2:00pm

**Trinity Whiten**

Trying to get ready.

- 

10/11, 2:01pm

**Jay Fowler**

For what

So can you not resend the messages

- 

10/11, 2:15pm

**Jay Fowler**

You there im not getting your messages

Can you resend the message if not just say yes or no hun

Ill be over soon

- 

10/11, 2:20pm

**Trinity Whiten**

Hold on. Txt me when y'all r on ur way. I will give u a node either way

-

10/11, 2:21pm

**Jay Fowler**

Ok

See you soon

- 

10/11, 2:23pm

**Trinity Whiten**

K. How soon

-

10/11, 2:25pm

**Jay Fowler**

Maybe 30 mins baby

- 

10/11, 2:26pm

**Trinity Whiten**

K

Angel coming too



10/11, 2:27pm

**Jay Fowler**

Yea I think so



10/11, 2:27pm

**Trinity Whiten**

y'all will be here in 30



10/11, 3:03pm

**Jay Fowler**

We are here now

*Choose a sticker or emoticon*



RECEIVED
Aug 19 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

---

Appellate Case No. 2019-000907
Lower Case № 2017-CP-23-5901

---

Jerald D. Gaskins, Jr. #00362923. ..... Petitioner,

vs.

State of South Carolina ..... Respondent

---

# SECOND SUPPLEMENTAL APPENDIX

---

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Attorney General Office
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Columbia, SC 29211
S.C. Bar # 103282
(803) 734-3970

Attorney for Respondent

C. RAUCH WISE
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305 Main Street
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SC Bar # 6188
864) 229-5010

Attorney for Petitioner

SUPPLEMENTAL APPENDIX
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STATE OF SOUTH CAROLINA )
)
COUNTY OF GREENVILLE )

IN THE FAMILY COURT
THIRTEENTH JUDICIAL CIRCUIT

FILED CLERK OF COURT
GREENVILLE, S.C.
2012 APR 23 P 1:54

Jerald Gaskins, Jr., Plaintiff, )
vs. FAMILY COURT )
Rachel Gaskins, Defendant. )

**MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Docket No. 2012-DR-23- 1893

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| Ronald S. Clement, Bar No. 1277 | _____, Bar No. _____ |
| Address: | Address: |
| P.O. Box 10261, Greenville, SC 29603 | _____ |
| Phone: 233-6225 Fax 298-0033 | Phone: _____ Fax_____ |
| E-mail: _____ Other: _____ | E-mail: _____ Other: _____ |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: temporary relief
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES/☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — Date submitted: 4/23/2012

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

| JUDGE'S SECTION | |
|---|---|
| ☐ Motion Fee to be paid upon filing of the attached order. | JUDGE CODE _____ Date: _____ |
| ☐ Other: _____ | Judge Signature: _____ |

**CLERK'S VERIFICATION**

Collected by: BM Date Filed: 4-23-12
☒ MOTION FEE COLLECTED: $ 25
☐ CONTESTED – AMOUNT DUE: $ _____

Custodial Parent (if applicable): _____

SCCA 233F (12/2009)

EXHIBIT
Applicants 4
10/24/18

Clement, Ron

STATE OF SOUTH CAROLINA )
) IN THE FAMILY COURT
COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT
)
Jerald Gaskins, Jr., FILED CLERK OF COURT
GREENVILLE S.C.
Plaintiff, ) FAMILY COURT COVERSHEET
vs. 2012 APR 23 P 1:54
)
Rachel Gaskins, FAMILY COURT
Defendant. ) Docket No. 2012-DR-23- 1893

**NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for docketing purposes for the Clerk of Court and must be signed and dated, and filled out completely. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.**

| | | | |
|---|---|---|---|
| **Submitted by:** | Ronald S. Clement | **SC Bar #** | 1277 |
| **Address:** | P.O. Box 10261 | **Telephone #** | 864-233-6225 |
| | Greenville, SC 29603 | **Fax #** | 864-298-0033 |
| **Email:** | ____ | **Other:** | ____ |

**DOCKETING INFORMATION (Check one box below if filing in a Mandatory Mediation County)**
☐ This case is subject to MEDIATION pursuant to the Family Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

**Nature of Action Codes**
**(Check One)**

**Marital Dissolution**
- ☒ Divorce (110)
- ☐ Annulment (120)
- ☐ Separate Support and Maintenance (130)
- ☐ Registration of Foreign Divorce Decree – without support/custody (190)
- ☐ Registration of Foreign Divorce Decree – with support/custody (191)
- ☐ Marital Dissolution – Other (199) ____

**Abuse and Neglect**
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- ☐ Abuse and Neglect – Adult (220)
- ☐ Abuse and Neglect – Other (299) ____

**Juvenile Delinquency**
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- ☐ Incorrigible (312)
- ☐ Runaway (313)
- ☐ Criminal Offense (320)
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**Protection from Domestic Abuse**
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- ☐ Domestic Abuse – Minor (420)
- ☐ Registration of Foreign Order of Protection (490)
- ☐ Domestic Abuse – Other (499) ____

**Support**
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- ☐ Termination of Parental Rights – DSS (772)
- ☐ Miscellaneous Actions – Others (799) ____

**Submitting Party Signature:** Ronald S Clement **Date:** 4-23-12

Custodial Parent (if applicable): ____

**Note:** Frivolous civil proceedings are subject to sanctions pursuant to Rule 11, SCRCP and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et seq.

SCCA 467 (6/2011)

**FOR MANDATED ADR COUNTIES ONLY**

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Oconee (Family Court Only), Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York Counties.

**SUPREME COURT RULES REQUIRE MEDIATION OF ALL CONTESTED DOMESTIC RELATIONS ACTIONS.** IF THE DOCKETING INFORMATION ON PAGE 1 OF THIS COVERSHEET INDICATES THAT THIS CASE IS SUBJECT TO **MEDIATION** YOU ARE NOTIFIED THAT MEDIATED SETTLEMENT CONFERENCES ARE REQUIRED IN THIS CASE, AND THAT THE COURT-ANNEXED ADR RULES SHALL APPLY TO ALL CASES IN WHICH MEDIATION IS REQUIRED. FOR ADDITIONAL INFORMATION CONCERNING THE PROCESS AND TIME FRAMES, PLEASE CONSULT THE ADR RULES. KEY SECTIONS OF THE RULES ARE IDENTIFIED BELOW.

**CONTESTED ACTIONS INVOLVING CUSTODY AND VISITATION**

| | |
|---|---|
| Rule 3 | Actions Subject to ADR |
| Rule 4(d)(1)(3)(4) &(5) | Appointment of Mediator by Family Court |
| Rule 5(g) | Scheduling in Family Court |
| Rule 6(g) | Agreement in Family Court |
| Rule 7(f) | Reporting Results of Conference |
| Rule 9 | Compensation of Neutral |

**ALL OTHER CONTESTED ACTIONS**

| | |
|---|---|
| Rule 3 | Actions Subject to ADR |
| Rule 4(d)(2)(3)(4) &(5) | Appointment of Mediator by Family Court |
| Rule 5(g) | Scheduling in Family Court |
| Rule 6(g) | Agreement in Family Court |
| Rule 7(f) | Reporting Results of Conference |
| Rule 9 | Compensation of Neutral |

**Indigent Cases:** Where a mediator has been appointed, a party may move before the Chief Judge for Administrative Purposes to be exempted from payment of neutral fees and expenses based upon indigency. Applications for indigency shall be filed no later than ten (10) days after the ADR conference has been concluded. Determination of indigency shall be in the sole discretion of the Chief Judge for Administrative Purposes.

**Please Note: Attendance at mediated settlement conferences is mandatory. You must comply with the Supreme Court rules regarding court-ordered mediation. Failure to do so may affect your case and may result in sanctions.**

Note: Frivolous civil proceedings are subject to sanctions pursuant to Rule 11, SCRCP and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et seq.

CA 467 (6/2011)

STATE OF SOUTH CAROLINA ) IN THE FAMILY COURT
) THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE )

FILED CLERK OF COURT
GREENVILLE, S.C.
2012 APR 23 P 1:54

FAMILY COURT

Jerald Gaskins, Jr.,
Plaintiff,

VS

Rachel Gaskins,
Defendant.

**NOTICE OF MOTION AND MOTION FOR TEMPORARY RELIEF**

Judge Fuge

Docket No: 2012-DR-23- 1893

**TO: STEPHEN O. REID, DEFENDANT ABOVE NAMED:**

**YOU WILL PLEASE TAKE NOTICE** that on the 2nd day of May, 2012, at 11 a.m., or as soon thereafter as this matter may be heard, Plaintiff will move before the presiding Judge of the Family Court of Greenville County, South Carolina for an Order granting the following temporary relief:

1. For custody, care and control of the minor child of the parties;
2. For child support;
3. For possession of the 1998 Jeep Cherokee; and
4. For attorney's fees.

Respectfully submitted,

Ronald S. Clement, SC Bar # 1277
P.O. Box 10261
Greenville, SC 29603
(864) 233-6225

Greenville, South Carolina
4-23, 2012.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE FAMILY COURT |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| Jerald Gaskins, Jr., | ) | |
| Plaintiff, | ) | FAMILY COURT |
| | ) | |
| VS | ) | SUMMONS |
| | ) | |
| Rachel Gaskins, | ) | |
| Defendant. | ) | Docket No: 2012-DR-23- 1893 |

FILED CLERK OF COURT
GREENVILLE
2012 APR 23 P 1:55

YOU ARE HEREBY SUMMONED and REQUIRED to answer the Complaint in this action, a copy of which is herewith served upon you, (which was filed in the Office of the Clerk of Court on the _____ day of _____, 2012 and to serve a copy of your Answer or other responsive pleadings upon Ronald S. Clement, Attorney at Law, 8 Williams Street, Post Office Box 10261, Greenville, South Carolina, 29603, within thirty (30) days after the service hereof (exclusive of day of service). Failure on your part to answer the Complaint within that time will result in judgment by default for the relief demanded in the Complaint.

Ronald S. Clement - Bar #1277
Attorney at Law
Post Office Box 10261
Greenville,SC 29603
Phone: (864) 233-6225
Fax: (864) 298-0033

Greenville, SC
Dated: 4-23-12

STATE OF SOUTH CAROLINA ) IN THE FAMILY COURT
) THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE )

FILED CLERK OF COURT
GREENVILLE S.C.
2012 APR 23 P 1:55
FAMILY COURT

Jerald Gaskins, Jr., )
Plaintiff, )
)
VS ) **COMPLAINT**
)
Rachel Gaskins, )
Defendant. ) Docket No: 2012-DR-23- 1893

The plaintiff, complaining of the defendant above named, would respectfully allege as follows:

1. The parties hereto are husband and wife having been married on February 12, 2009 in Greenville County, South Carolina. At all times subsequent to the marriage of the parties, they have resided in Greenville County, South Carolina.

2. One child has been born of this marriage, to-wit: _____ Gaskins, DOB: _____. No other children are expected.

3. The plaintiff would show that the parties separated on April 14, 2012 when the defendant departed the marital residence. At that time she informed the plaintiff that she is dating a man. The plaintiff would therefore request a divorce a vinculo matrimonii on the statutory ground of adultery, or in the alternative, for an order of separate support and maintenance.

4. The plaintiff would show that since the defendant departed the marital residence, he has maintained physical possession of the minor child and would show that he is a fit and proper person to maintain custody, care and control of the minor child and would therefore request custody, both temporarily and permanently.

5. The plaintiff would show that the defendant is fully capable of providing support for the minor child and would therefore request child support, both temporarily and permanently.

6. The plaintiff would show that the parties own a 1998 Jeep Cherokee which is currently being repaired. The plaintiff would show that the vehicle is titled in his name and would request possession, use and ownership of the vehicle, both temporarily and permanently.

7. The plaintiff would show that there is no other marital property and that each party has his/her own personal belongings.

8. The plaintiff would show that as a result of the conduct of the defendant he has been required to retain the services of an attorney and would therefore request attorney's fees and costs for the bringing of this action, both temporarily and permanently.

9. The plaintiff would show that there is no fraud or collusion for the purpose of bringing this action.

10. The plaintiff would show that there is no chance of reconciliation among the parties.

WHEREFORE, having fully pleaded, the plaintiff prays as follows:

1. For a divorce a vinculo matrimonii on the statutory ground of adultery, or in the alternative, for an order of separate support and maintenance;

2. For custody, care and control of the minor child of the parties;

3. For child support;

4. For possession, use and ownership of the 1998 Jeep Cherokee;

5. For attorney's fees and costs;

6. For such other and further relief as the Court deems just and proper.

Ronald S. Clement, SC Bar#1277
Attorney for Plaintiff
Post Office Box 10261
Greenville, SC 29603
Phone: (864) 233-6225
Facsimile: (864) 298-0033

Greenville, SC
Dated: 4-23, 2012

J. FALKNER WILKES
*Attorney at Law*

114 Whitsett Street
Greenville, South Carolina 29601

Telephone: (864) 282-1292
Facsimile: (864) 271-6035

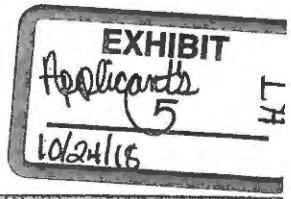
April 21, 2017

Jerald Denton Gaskins, 00362923
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

Dear Jerald,

I am sorry to inform you that the court has ruled on your appeal and affirmed the conviction and sentence. I have reviewed the opinion and given the nature of the ruling and issues I do not believe that it would be productive to pursue direct appeal any further. I say this because to continue the direct appeal to the state supreme court is by way of petition for writ of certiorari. That process can take years and given the ruling of the court of appeals, a petition for certiorari is very unlikely to get you any relief. The drawback to pursuing the direct appeal further is that you can not pursue a post conviction relief case until the conclusion of the direct appeal process. At this point I do not believe that the time involved in a petition for writ of certiorari to the state supreme court would be a good use of time or resources. Turning now to a PCR action would, in my opinion, be the better course of action. PCR allows you to raise the issue of prosecutorial misconduct, due process violations, and ineffective assistance of counsel. It also allows you to have an evidentiary hearing, so unlike the direct appeal, you have the ability to call witnesses and introduce evidence to prove your case in a PCR.

I am enclosing an application for post conviction relief for you to use if you would like to initiate a PCR action. If you file an action immediately you will be appointed counsel who should then have plenty of time to investigate the case and amend the application if necessary. If you intend to file a PCR now I highly recommend that you work on the application and get it filed within a month or so. You have a one year deadline to file after the conclusion of the direct appeal, but if you wait and try to file at the last minute you may find yourself out of time. It is always best to file early. The form must be properly executed which includes being witnessed by a notary public. You must then send it to the clerk of court in



the county in which you were convicted. You should request the clerk to return to you a clocked copy for your records. You also want to keep a copy or proof of mailing when you mail anything to the clerk of court. Filling out the affidavit of indigent status properly should cause the attorney general to make sure that an attorney is appointed to represent you.

Again I will remind you that I have been retained to handle the court of appeals case and nothing more. My representation does not extend past the court of appeals case. Plus, as you probably are aware, I was never paid all of the fees for the handling of the case in the court of appeals. Of course that has not stopped me from perfecting the appeal in the court of appeals, nor will it deter me from attempting to preserve your rights if you decide that you want to continue the direct appeal. If you want to continue the direct appeal to the state supreme court I will try to preserve your right to do so but will ask to be relieved and request the public defender to take over.

My recommendation is that you pursue the PCR at this time. There are numerous PCR issues that can be raised. Although I do not represent you on a PCR I will provide you with a list of things that I believe should be included in your PCR if you would like for me to do that. This would probably help you in filing a more complete application. Once an attorney is appointed your PCR attorney can then review the case and make any corrections or additions to the application that appear necessary by way of an amendment to the application.

Further direct appeal constitutes two steps. First is the petition for rehearing in the court of appeals. This is a necessary step to the second step, which is a petition for writ of certiorari in the state supreme court. The petition for rehearing must be filed within fifteen days of April 19, 2017. That means that the petition must be received by the clerk's office before the end of the day on May 4, 2017. If a petition for rehearing is not received by that date the direct appeal will be considered over and final and a remittitur will be sent to the circuit court letting it know that the direct appeal has concluded. Once this happens you will be able to file your PCR. If a timely petition for rehearing is filed, then the direct appeal continues. In your case I would anticipate the court would deny your petition for rehearing within a month or two. You would then have thirty days within which to file a petition for writ of certiorari with the supreme court. If that is done timely then you will wait a year or years for the court to rule on the petition. If you do

that I believe that the court would deny the petition. If that happens then you would be able to file your PCR at that time.

Let me know immediately if you want to continue the direct appeal process and I will file the petition for rehearing. I am enclosing an stamped self-addressed envelope for you to use to let me know if choose to continue the direct appeal process rather than move on PCR case. Unless I hear back from you within time to file the petition for rehearing I will not do so as I do not believe that it is in your best interests given all facts and circumstances and the options available to you. If I do not hear back from you I will assume that you are working on the PCR application. If you choose to do that, please let me know if you would like for me to send you my thoughts on issues that I am aware of that you should include in a PCR case. Of course by my doing that I am not indicating that I am representing you in the PCR. That would be part of my concluding my appellate representation and I would be glad to do that for you.

I am sorry that we did not get results in the direct appeal. I am hopeful that PCR will provide you a better result.

Sincerely,

J. Falkner Wilkes

RECEIVED
Apr 21 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

Certiorari -PCR- Greenville County
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

---

Appellate Case No. 2019-000907
Lower Case No. 2017-CP-23-5901

---

Jerald D. Gaskins, Jr.#00362923 ..... Petitioner,

v.

State of South Carolina ..... Respondent.

---

# BRIEF OF PETITIONER

---

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Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 6188

Attorney for Petitioner

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## Statement of Issues Presented

I. Did the Post Conviction Relief Court err in failing to find trial counsel was ineffective when trial counsel failed to object to the improper cross-examination of Jerald Gaskins when the prosecutor was permitted to ask Mr. Gaskins improper questions on cross-examination?

II. Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective when he failed tp object to the expert testimony of Officer Robert Perry as to delayed disclosure when the officer had not been qualified as an expert?

III. Did the Post Conviction Relief judge err in failing to hold trial counsel to be ineffective when trial counsel failed to object to the improper vouching for the credibility of the complaining witness?

## STATEMENT OF THE CASE

*Procedural History*

On February 4-5, 2015, Jerald D. Gaskins went to trial on four counts of criminal sexual conduct with a minor and two counts of a lewd act upon a minor child. He was convicted on all six charges. The judge sentenced him to 20 years for the criminal sexual conduct with a minor on these charges and 15 years on one count of a lewd act upon a minor child with all sentences to run concurrently. The judge sentenced him to five years on charge of a lewd act with that sentence to run consecutively to the other charges.

He filed a timely notice of appeal on February 13, 2015. On April 19, 2017, the South Carolina Court of Appeals affirmed the conviction. The Court of Appeals discussed the issue of other bad acts under Rule 404b of the South Carolina Rules of evidence. The court affirmed this issue based upon *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). The Court of Appeals also affirmed the issue of improper cross-examination by the solicitor on the ground the issue was not properly preserved.

On September 14, 2017, Mr. Gaskins filed a Post Conviction Relief petition dated August 29, 2017. He filed an amended Petition on September 14, 2018 and October 25, 2018. The hearing was held on October 25, 2018. By Order dated February 1, 2019, Judge Alex Kinlaw denied the Petition. A timely Rule 59 Motion dated February 19, 2019, was filed on March 8, 2019. The Motion was denied on March 4, 2019 and filed on March 5, 2019. The Order was received by counsel on May 30, 2019. App. at 795. A Notice of Intent to Appeal was filed on the same date.

On March 16, 2022, this Court granted the Petition for Writ of Certiorari as to the

improper cross-examination of Mr. Gaskins, the expert opinion testimony of the officer when he as not qualified as an expert, and the testimony was vouching for the credibility of the minor child by two witnesses.

## ARGUMENT

### Question I

**Did the Post Conviction Relief Court err in failing to find trial counsel was ineffective when trial counsel failed to object to the improper cross-examination of Jerald Gaskins when the prosecutor was permitted to ask Mr. Gaskins improper questions on cross-examination?**

*Failure of trial counsel to object to questions about text messages improperly attributed to Walt Mucienko, the father of the complaining witness*[1]

Mr. Gaskins first contends that trial counsel was ineffective in failing to object to questions by the prosecutor concerning text messages allegedly sent by Mr. Gaskins. App. at 432, l 17 to 433, l 25. The messages were introduced at the Post Conviction Relief hearing as Applicant's Exhibit 1. The State began their cross examination of Mr. Gaskins referencing text messages the State claimed were between Mr. Gaskins and Walt Mucienko, the father of the complaining witness. The cross-examination began with Mr. Gaskins denying that the phone number 561-7021 was in fact his number. App. 424, ll 19-20. At the trial, The State never offered any testimony that the number was in fact registered to or used by Mr. Gaskins. Nor did

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[1] The first three issues involved text messages that were introduced by Mr. Gaskins at the PCR hearing. Exhibit № 1 can be referred to as the "Mucienko messages." Exhibit № 2 can be referred to as the "Jamie messages." Exhibit № 3 can be referred to as the "Jay Fowler messages."

the State call Mr. Mucienko to verify the messages. At the Post Conviction Relief hearing, Mr. Gaskins' attorney called Mr. Mucienko as a witness. He denied ever texting Mr. Gaskins or having any conversation with him after the accusations were brought against Mr. Gaskins. App. at 650, l 5 to 651, l 24. At the trial, Mr. Gaskins denied ever texting Mr. Mucienko and continued to deny the phone number was his phone. App. 425, ll 2-24. The substance of the text messages is that Mr. Gaskins was asking Mr. Mucienko to drop the charges against him.

Trial counsel finally made an objection as to foundation which was sustained. App. 426, ll 6-23. During a non-jury discussion concerning these text messages, the State represented that the text messages were provided by Mrs. Mucienko, the wife of Walt Mucienko. The State represented that she could verify the authenticity of text messages and the fact that the phone number in question was the number of Mr. Gaskins. App. at 428, ll 8-14. These text messages, introduced at the PCR hearing as Applicants Exhibit 1, had not been provided to defense counsel in discovery and he so testified at the Post Conviction Relief hearing. App. at 722, l 23 to 723, l 9. After the objection and conference, the cross examination of Mr. Gaskins as to the text messages continued and Mr. Gaskins continued to deny having sent any text messages to Mr. Mucienko. Mr. Gaskins testified he cut all ties to the Mucienko family after his arrest on November 14, 2012. App. at 433, ll 22-25.

At the trial, defense counsel offered no further objections to the cross-examination of the text messages. The State never called Mr. or Ms. Mucienko to verify the text messages. The State never called the cell phone provider to establish that the number belonged to Mr. Gaskins. Based upon the testimony at the Post Conviction relief trial, if the defense counsel had properly objected to the questioning based upon the text messages, the State would never have been able

to establish a basis for asking the questions as the messages were not an exchange between Mr. Mucienko and Mr. Gaskins. Mr. Mucienko denied the phone number was his, the cell phone company was his or that he had sent and received those texts from Mr. Gaskins. App. at 650, l 10 to 651, l 22.

These questions were prejudicial to Mr. Gaskins. The State, with no basis for such questions, portrayed Mr. Gaskins as a liar when he denied sending the text messages to Mr. Mucienko. This was a direct attack upon the credibility of Mr. Gaskins. At the Post Conviction Relief hearing, the testimony of Mr. Mucienko proved Mr. Gaskins was telling the truth at his trial. Trial counsel was capable of providing the same testimony at the trial of Mr. Gaskins had trial counsel investigated the text messages or simply interviewed Mr. Mucienko.

As one Court noted "Although a prosecutor may impeach a witness on the basis of prior inconsistent statements, Fed.R.Evid. 613(a), a prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." *United States. v. Silverstein*, 737 F.2d 864, 868 (10th Cir. 1984); *State v. McGuire*, 272 S.C. 547, 550, 253 S.E.2d 103, 105 (1979)("Counsel should not be permitted to go on a fishing expedition in hopes of finding some misconduct involving moral turpitude by a witness. Merely asking a question that has no basis in fact may be prejudicial."); *State v. Creason*, 847 S.W.2d 482, 486 (Mo. Ct. App. 1993) ("On the other hand, there are limits to the scope of cross-examination. The prosecutor transcends those limits when the questions are asked merely for the purpose of improperly showing other crimes or for the purpose of going into collateral details. There is a general requirement of fairness in cross-examination, and if there is no reasonable basis on which to base such a cross-examination, it should not be made.")(internal citations omitted) The evidence at

the Post Conviction Relief hearing established that a proper objection to the cross-examination would have been sustained. The father of the complaining witness did not engage in a text message exchange with Mr. Gaskins. The sole purpose of this cross-examination of Mr. Gaskins was to impeach his character through improper means. Trial counsel should have made an objection to prevent the improper cross-examination.

The Post Conviction Relief judge erroneously ruled that the performance of trial counsel on this issue was sufficient. No facts in the record sustain this conclusion. The Court of Appeals ruled that this issue was not preserved. App. at 618. If the issue is not preserved, counsel was ineffective. The PCR judge noted that Walt Mucienko denied sending the text messages. App. at 766. He made no finding as to whether Mr. Mucienko was credible or not. Such a finding would have been crucial to the admisisbility and to the prejudice as to the cross-examination.

*Failure of trial counsel to object to improper cross-examination of by use of alleged text messages to the sister of complaining witness*

In further cross-examination of Mr. Gaskins, the State asked Mr. Gaskins about an alleged text message to the sister of the complaining witness in this case. App. at 435, l 6 to 439, l 2. Mr. Gaskins at trial and in the Post Conviction Relief hearing testified he did not send the texts. The text messages were not introduced at trial. Mr. Gaskins introduced the messages as applicant's Exhibit 2. Trial counsel, testified that he received the pictures of the text messages the day before trial. App. at App. at 718, ll 14-18.[2]

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[2] In the original Petition for Certiorari, Mr. Gaskins inadvertently made stated that these pictures of the text messages with the sister, applicant's exhibit 2, were not given to defense counsel. Exhibit № 2 was given to defense counsel the day before trial. Applicants Exhibit №s 1

Mr. Gaskins testified that upon reviewing the text messages in detail, he noticed many abnormalities that bring the source of the texts into question. While the phone does have the name "Jerald" on the screen, the times on the screen and the times on the messages do not match. The screen times are from 11:18 A.M. until 11:36 A.M.. The times on the messages are from 2:19 A.M. September 30 until October 23 at 11:13 P.M.. The only possible explanation is the messages were forwarded from another phone. The source of that phone was not given at trial. This factual inaccuracy can only be determined from a close examination of the texts. As they were provided to trial counsel, only the day before trial, neither he nor Mr. Gaskins had an adequate opportunity to examine them in detail prior to trial. App. at 718, ll 14-23. Under Rule 5 of the South Carolina Rules of Criminal Procedure, the State is required to provide the defendant with the statements of the defendant. The rules requires disclosure of "any relevant written or recorded statements made by the defendant." The text messages certainly qualify as a written or recorded statement. Mr. Gaskins was given a copy of the texts before the Post Conviction Relief hearing to review. He did not have an adequate opportunity to review them before the trial. App. 653, l 18 to 654, l 5.

The text messages in Exhibit № 2, also contain references that would clearly indicate they were not from Mr. Gaskins. For example, on the 11:22 A.M. text, the statement is made "Hey tell momma that me and [complaining witness] are going to the movies if she needs me ill only answer the phone for yall." App. at 662, ll 18-20. Mr. Gaskins denied he sent such a message. He pointed out that the reference to "momma" would certainly not have been to his own mother

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and 3 were not provided to defense counsel. He did not see those exhibits until the Post Conviction Relief hearing. App. at 722, ll 15-25; 723, l 24 to 724, l 5.

and appears to be a reference to the complaining witness's mother. He also pointed out that on October 7 at 10:23 the text says "Thats good. Just wanted to say we should have one more cool out befor I go to new york." App. at 666, ll 3-4. Mr. Gaskins stated he had never been to New York and had never made plans to go to New York. He stated the brother of the complaining witness, however, had in fact been to New York and moved there around the time of the text.

He also pointed out the text of October 8 at 4:13. In response to "wyd" [what are you doing] the text is "Painting and waiting to pic up [complaining witness] from school. What are you doing?" App. at 663, ll 15-17. Mr. Gaskins stated he had never picked up the complaining witness from school and he does not paint except for painting rooms or houses. He stated the complaining witness's brother does paint in the artistic sense. App. at 663, l 25 to 664, l 6.

On the text following the text of October 13, at 11:52 A.M., the message is "I thought we hot straight last nite about bowling so why are u telling mom I didn't invite u this is BS Jamie [sister of complaining witness] and you know it. Who catches all the hell, Not you." App. at 664, ll 20-23. Mr. Gaskins testified that again this message would not have come from him as the reference in the text is to "mom." In the context of the conversation the reference would not have been to the mother of Mr. Gaskins. He also pointed out that again on the text message of October 13 at 12:00 PM makes no sense if the reference to "mom" is his mother.

These text messages were obviously prejudicial to Mr. Gaskins. The implication sought to be placed upon them by the State is that he was constantly texting about the complaining witness. The messages gave credibility to the testimony of the complaining witness. Many of these same texts were referred to during the direct testimony of the sister of the complaining witness. While defense counsel made an objection, it was overruled. The testimony was that the

sister had received the messages and she took pictures of her phone with her Ipad. App. at 111, ll 1-2. Her testimony suggests the pictures taken with Ipad were made before this case arose. App. at 111, ll 6-8.

This also raises a serious question as to the authenticity of the text messages. Mr. Gaskins was arrested on November 14, 2012. App. at 442, ll 17-22. This case was tried in February of 2015. The testimony at the trial was the photos of the text messages were not provided to the prosecution in this case until the actual trial of the case. These messages in Exhibit № 2 were turned over to the trial counsel the day the trial started. For over 27 months the sister of the complaining witness held on to the photos which, according to her testimony, she saved because this day may come.[3] There was no explanation at trial or the Post Conviction Relief hearing as to why she waited 27 months to disclose she had the photographs of the texts when she claimed the photographs were taken for the purpose of helping a prosecution. App. at 111, ll 6-8. Interestingly, the Ipad was also not brought to the trial for defense counsel to examine. At the Post Conviction Relief hearing, the State never explained the source of these text messages other than what the trial record established. At trial, the State never attempted to authenticate the text messages other than the sister testifying that she took a picture of the phone messages with her Ipad. App. at 105, ll 6-7.

Had trial counsel made a proper objection either during the direct examination of the sister of the complaining witness or during the cross examination of Mr. Gaskins, the State

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[3] Also, Officer Robert J. Perry testified that when the incident was first reported he specifically asked "[I]f anybody had any information that could corroborate some of the stuff [complaining witness] had stated." App. 348, ll 2-3. He previously had testified he believed her sister was present. App. at 347, ll 23-24.

would have been required to authenticate the messages. The failure to make a proper objection, enabled the state to use the text messages, which were never introduced or authenticated, to impeach Mr. Gaskins. The discrepancies in the messages were significant and call into question the authenticity of the texts. A proper examination of the messages easily could have convinced the jury they were not from Mr. Gaskins and the witness was not truthful when she said they were. No defendant in a criminal case should ever be subject to cross-examination about text messages that the state has not authenticated.

Trial counsel was ineffective in not raising a proper objection to these text messages. Had a proper objection been raised, the State would have ben required to authenticate these messages. The testimony at the Post Conviction relief hearing shows that the messages would not have been admissible as they could not have been authenticated as having been sent by Mr. Gaskins.

From a review of the order, the Post Conviction Relief judge did not rule on this issue. As noted above, Mr. Gaskins testified at length as to alleged text message, which were provided to defense counsel on the eve of the trial. The cross-examination of Mr. Gaskins about these messages, when the source of the messages were not authenticated, was prejudicial to Mr. Gaskins.

*Failure of trial counsel to object to text Messages that placed the character of Jerald Gaskins in issue in violation of Rule 404b of the South Carolina Rules of Evidence and which messages were not properly authenticated*

The third set of messages introduced at the hearing, applicant's Exhibit № 3, were apparently from October 10, 2014 and present two problems as to their admissibility. The

messages were apparently from a Facebook messenger. They are listed as being between "Jay Fowler" and a minor child under the age of 16. At trial the person named on the messages was represented to be 12 years of age. App. at 444, l 21. At the top of the page is a hand written notation "Jay Fowler - AKA for Gerald [sic] G." Neither at trial nor the Post Conviction relief hearing was any information provided to explain who wrote that notation nor as to how anyone determined how "Jay Fowler" is suppose to be Jerald Gaskins. No records from Facebook or an internet provider were introduced to establish this fact. The minor child mentioned in the messages did not testify to confirm this fact. The determination as to who is "Jay Fowler" is sheer speculation at best. Mr. Gaskins was cross-examined about the "Jay Fowler" messages. App. at 444, l 8 to 445 l 21.

The cross-examination of Mr. Gaskins in reference to the "Jay Fowler" texts was simply devastating to the defense of Mr. Gaskins. The texts imply that while Mr. Gaskins was out on bond for a criminal sexual conduct with a minor charge, he was on Facebook trying to solicit sex from a minor girl. More prejudicial evidence is hard to imagine. Trial Counsel should have objected to this improper cross-examination. The State never attempted at trial or the PCR hearing to introduce any source to verify the "Jay Fowler" in the text messages was in fact Mr. Gaskins.

At the Post Conviction Relief hearing the trial counsel testified he had not seen the "Jay Fowler" messages prior to the PCR hearing. App. at 723, l 24 to 724, l 5. This was the second batch of electronic messages that trial counsel had not seen until the PCR hearing.[4] At trial all

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[4] At the Post Conviction Relief hearing the parties stipulated that the electronic messages introduced into evidence were obtain by Post Conviction Relief counsel from the file of Assistant Solicitor Kristie B. Hodge. Copies of these documents were provided to opposing counsel prior

were presented by the state as being messages from Mr. Gaskins and should have been disclosed prior to trial. Trial counsel should not have to wait until the Post Conviction Relief hearing to receive all his discovery.

These messages presented two problems to which no objections were raised by trial counsel. First, trial counsel failed to object and ask for a good faith basis for asking about messages from a "Jay Fowler" and the good faith basis for the State to believe they were from Mr. Gaskins. Second, the messages imply that Mr. Gaskins is having an inappropriate conversation with a 12 year old girl. Such evidence is not relevant. This evidence under Rule 404b of the South Carolina Rules of Evidence would have been excluded as improper character evidence. Even if somehow admissible, the evidence falls far short of the clear and convincing standard imposed by our courts. From this record it is neither clear nor convincing that the messages were in fact from Mr. Gaskins. The failure to object to these messages was certainly prejudicial to Mr. Gaskins. Trial counsel was ineffective in failing to object both as to a good faith basis for the questions and failing to object as to improper character evidence under Rule 404b of the South Carolina Rules of Evidence.

Another unauthenticated text message exchange allegedly occurred involving the 404b witness. During cross examination by the state, Mr. Gaskins was again asked about a Facebook exchange with the 404b witness. He was asked about sitting in a car with her listening to music and about his asking her to call him. App. at 454, l 13 to 455, l 7. In this exchange, the prosecutor sarcastically made the statement "Well, maybe you did it under Jay Fowler?" App. at 454, l 25. The implication from the cross examination was that the Facebook exchange occurred

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to this hearing. App. at 752, ll 4-12.

while he was out on bond as Mr. Gaskins repeatedly said during this cross, he had not been on Facebook since 2012, when he was arrested. Again the implication was made that while Mr. Gaskins was awaiting trial on serious child sex abuse charges he was contacting young girls. The State never offered a basis for this allegation.[5] These alleged text messages were not introduced at trial or at the PCR hearing.

The Post Conviction Relief judge never ruled on this issue. In the Rule 59 motion this issue was specifically called to the attention of the PCR judge. App. at 783-784. This improper 404b evidence was completely ignored by the PCR judge. No trial strategy was given for not objecting to this issue. Because the PCR judge did not rule on this issue, this Court should review this issue de novo.

*Failure of trial counsel to object improper cross-examination of Jerald Gaskins when he was asked about an alleged violation of a restraining order in violation of Rule 404b of the South Carolina Rules of Evidence.*

During the trial, Mr. Gaskins and the prosecuting attorney engaged in what the cold transcript shows to be a heated discussion concerning other unrelated charges against Mr. Gaskins. The testimony involved an alleged charge brought by Angelina Campbell. On cross-examination Ms. Hodge asked Mr. Gaskins if Ms. Campbell were in the courtroom. Upon being told she was, the following exchange occurred between Mr. Gaskins and the prosecutor.

> Q. (By Ms. Hodge) Isn't there a no-contact order between you and Angelina?
> A. (By Mr. Gaskins) There was.
> Q. No. There is, isn't there?

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[5] In the direct testimony of the Rule 404b witness, she was never asked if she had had any Facebook communication with Mr. Gaskins after he was arrested. App. at 306-326.

A. I'm not sure. It's . . .
Q. As a condition of your bond, you're not suppose to have any contact with her; isn't that correct?
A. No, its not correct. It was suppose to have been dissolved.
Q. Am I your prosecutor on that case?
A. I don't know if you are or not - -
Q. Have you not called me numerous times asking me - -
A. No, ma'am, I have not. No. There was a letter sent to you, an affidavit filled out for you.
Q. And have you been instructed by our office that that case is not dropped and you are not to have contact with her?
A. Ma'am, I was once told it was dismissed. So, I don't know what's going on with it - -
Q. Who were you told by?
A. I guess your office.
Q. No, sir. No one from my office - -
A. Well, then - -
Q. - - who were you told that by - -
A. - - I have no idea - -
MR. CHAMBERS: Objection, Your honor. There's arguing at this point.
THE COURT: Sustained.
App. at 446, ll 3 to 447, l 10.

The objection by trial counsel was on the ground of "arguing." He did not argue the cross examination was introducing improper character evidence which would have been excluded under Rule 404b of the South Carolina Rules of Evidence. After the "arguing" objection was sustained by the trial judge, the assistant solicitor again asked about charges against Mr. Gaskins to which he responded he believed it was suppose to have been dismissed. App. at 447, ll 12-16.

Whether Mr. Gaskins had a charge brought against him by Ms. Campbell had no relevancy to the case being tried. Mr. Gaskins certainly did not open the door to such a question. The failure to object to this improper reference to another crime is further compounded by the exchange which pitted the credibility of Assistant Solicitor Hodge against the credibility of Mr. Gaskins. During the exchange, Ms. Hodge stated that Mr. Gaskins was being dishonest in his

testimony about the charges being dismissed and the "no contact" order being dissolved. She made specific reference to telephone calls between her office and Mr. Gaskins. The jury easily could have, and probably did, conclude that if Mr. Gaskins would lie to Ms. Hodge he would lie about any thing. An objection should have been raised to have prevented such an exchange. This exchange improperly pitted the credibility of the prosecuting attorney against Mr. Gaskins.

Trial counsel should have known that such questions by a prosecutor are improper and should have objected. By not objecting to the questions, trial counsel permitted the prosecutor to convey to the jury that Mr. Gaskins was lying about the charges and that the prosecutor knew he was lying. In essence, the prosecutor became a witness to attack the credibility of Mr. Gaskins.

Here, in the cross-examination, the prosecutor had said, based upon her personal knowledge, Mr. Gaskins is a liar. As the United States Supreme Court has said "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 88 (1935). The two errors combined deprived Mr. Gaskins of a fair trial. This error is further compounded as this was not the only reference to a prior crime that was un-objected to during the cross-examination. A defendant is entitled to be tried on the charges contained in the indictment. He should not be required to defend other criminal prosecutions not related to the case being tried. The record establishes prejudice against Mr. Gaskins in this case.

As to this issue, the Post Conviction Relief judge incorrectly concludes that trial counsel properly objected to the accusation that Mr. Gaskins was violating a restraining order. App. at 772. Trial counsel only objected to the questions as "arguing." No objection was made as to the fact the cross examination introduced improper character evidence under Rule 404b. No

evidence in the record exists to sustain the conclusion of the PCR judge that a proper objection was made. As the PCR judge failed to rule on the issues, this Court should review the issue de novo.

*Cumulative error*

This Court has not addressed the issue of cumulative error in a Post Conviction Relief hearing. Logic would seem to dictate that when numerous errors of improper character evidence are introduced, then the cumulative effect is greater than one isolated incident and therefore should be considered cumulatively. As the Alabama Supreme Court has said "In determining the question before the court, we do not think that each of the above statements must be analyzed separately to see whether or not, if standing alone, it would create an ineradicable bias or prejudice. We think, on the contrary, that these various statements should be considered together to determine whether or not, in their cumulative effect, they created a prejudicial atmosphere." *Blue v. State*, 246 Ala. 73, 79, 19 So. 2d 11, 16 (1944). The same principle should be applied in this case.

The cumulative error analysis is appropriate here because the assistant solicitor used all the unverified text messages in her closing argument to claim Mr. Gaskins is a liar. App. at 494, l 16-21. The failure of trial counsel to object to the unverified text messages permitted the solicitor to make reference to the text messages in her closing argument. The record only contains Mr. Gaskins' denial of the authenticity of the text messages. In her closing, the assistant solicitor treated every denial of the unauthenticated text messages as a lie by Mr. Gaskins. A timely and proper objection by defense counsel would have prevented such an argument. As the closing argument was cumulative, the analysis of the errors should be cumulative.

## Question II

**Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective for his failure to object to the expert testimony of Officer Robert Perry as to delayed disclosure when the officer had not been qualified as an expert?**

During the trial Officer Robert Perry was asked for his expert opinion about delayed disclosure of sexual abuse. The question and answer were as follows:

> Q. (By Ms. Hodge) And in your experience investigating those cases is - - what we called delayed disclosure or the child coming forward much after the events have, actually, occurred, is that common or uncommon?
> A. (By Officer Perry) Oh, yeah. It's such a rarity for me to see a case that a child has immediately told that it's like, you know, maybe one out of a hundred, you know. So that is a very common thing, very common.
> Tr. at 357, ll 3-10.[6]

Officer Perry was never qualified as an expert of any type. The question asked of him called for an expert opinion. This Court has said "Though she was admitted generally as an expert in child sex abuse dynamics, Galloway-Williams' testimony concerned two distinct concepts: delayed disclosure by sexual abuse victims and the behavior of nonoffending caregivers. As to the first area, the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized." *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270–71 (2018). This Court has held such

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[6] Immediately after this statement, the officer then explains at length how the delayed disclosure hampers their investigation. He even went so far as to explain how he could have obtained the text messages from a phone, but this was not an option in this case. App. at 357, l 11 to 358, l 9. Again, according to the sister, this information was available on her Ipad in the form of pictures. These pictures for some unexplained reason would not be turned over for more than two years.

testimony is only admissible through an expert. Officer Perry was not such an expert. Nor did he testify as to the source of his information. The assumption is his personal experience.

Rule 701 of the South Carolina Rules of Evidence provides, "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the *perception* of the witness, (b) helpful to a clear understanding of the witnesses testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other *specialized knowledge within the scope of Rule 702.*" (emphasis added). The testimony of the officer in this case, to which no objection was raised, falls within Rule 702. The testimony is specialized knowledge of an expert within Rule 702. This Court has explained the difference between expert testimony under Rule 702 and lay opinion testimony under Rule 701. "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. . . . On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010).

Trial counsel was ineffective in failing to object to such testimony. Had an objection been raised by trial counsel, the trial judge would have been required to sustain the objection and hold the testimony improper. Another piece of inadmissible evidence would have been excluded. This Court should find that Mr. Gaskins was prejudiced by the admission of this evidence. This inadmissible evidence helped advance the case for the State and was therefore prejudicial to Mr.

Gaskins.

As the Post Conviction Relief judge failed to discuss this issue, this issue should also be reviewed de novo. See, Rule 59 Motion, App. at 787.

**Question III**

**Did the Post Conviction Relief judge err in failing to hold trial counsel to be ineffective when trial counsel failed to object to the improper vouching for the credibility of the complaining witness**?

During the testimony of Officer Robert J. Perry, the following testimony occurred:

> Q. (By Ms. Hodge) And was it pretty easy for her to tell you what was - - to give you the statement, or were you having to prompt her a lot, or how was that going?
> A.(By Officer Perry) I felt like she was a little bit ashamed and kind of embarrassed, not necessarily talking to me as a male, but talking about what had occurred to her. She presented herself as bright and intelligent. And she presented herself, to me, as being a pretty articulate young lady, and kind of embarrassed that she got manipulated by Mr. Gaskins.
> Tr. at 351, ll 5-14.

These comments were simply a statement as to the credibility of the minor witness.

Subsequently Dr. Mary Fran Ratchford Croswell testified as an expert in "pediatric medicine and in child abuse pediatrics." App. at 332, ll 10-11. She conducted a sexual assault exam. App. at 333, ll 9-11. Trial Counsel asked a very simple yes or no question to start his cross examination.

> .Q. (By Mr. Chambers) Your testimony is not that there was sexual abuse, just that there could have been?
> A. (By Dr. Crosswell) My testimony is that my patient provided me a history of sexual abuse, and her exam was consistent with the history provided.
> App. 339, ll 13-17.

He further asked another simple yes or no question.

> Q. So, in other words, you - - through this exam that you did, you didn't make any independent findings of your own?
> A. I made findings based on the history and the physical exam of what she needed as a result.
> App. 340, ll 13-16.

These comments by Officer Perry and Dr. Croswell were in fact simply improper vouching that has been condemned by our courts.[7] *State v. Dawkins,* 297 S.C. 386, 377 S.E.298 (1989). As our Supreme Court has said "[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). *See, also, State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011)(" For an expert to comment on the veracity of a child's accusations of sexual abuse is improper.") When a finding of sexual abuse is based solely on the interview of the minor child, that is expressing an opinion as to the credibility of that child. The principles established in these two cases are followed by numerous courts in our country. *See Hamilton v. State,* 49 N.E.3rd 554 (Ct. App. Ind. 2015); *State v. Dudley*, 856 N.W.2d 668 (Iowa 2014); *Commonwealth v. Quinn*, 469 Mass. 641, 15 N.E.3rd 726 (2014); *State v. Lupoli*, 348 Or. 346, 234 P.3d 117 (2010); *State v. Churchill,* 98 S.W.3d 536 (Mo. 2003); *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986).

This same rule would apply to non-expert testimony such as Officer Perry. His statement

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[7] Sometimes the words "vouching" and "bolstering" are used interchangeably. As one court has noted, "In *State v. Higham*, 865 A.2d 1040, 1044 (R.I.2004), we used the term 'vouching,' rather than 'bolstering.' While these terms are technically distinct, they are frequently used interchangeably, and it is unnecessary to expound upon the differences here. *State v. Rushlow*, 32 A.3d 892, 900 (R.I. 2011). Vouching generally means supporting the credibility of the witness while bolstering means to lend support to the facts a witness has told.

about the minor child being bright and articulate and embarrassed at having to tell the details to him, was simply vouching for her credibility. As the supreme court has said, "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017). The statement to the jury both directly and indirectly gave the jury the opinion that Officer Perry believed the minor child. The testimony served no other purpose. Trial counsel failed to object to this improper vouching. Had an objection been raised, the trial judge would have been required to sustain it. Mr. Gaskins was prejudiced by the failure to object to this testimony. Had this improper bolstering been excluded, there is a reasonable likelihood that the result in this trial would have been different.

The Post Conviction Relief Judge failed to address this issue in his order. This was brought to the attention of the PCR judge in the Rule 59 Motion. App. at 786. As the PCR judge did not rule upon this issue, this Court should also review this issue de novo.

## CONCLUSION

For the foregoing reasons this Court should reverse the decision of the Post Conviction Relief judge and grant Jerald Gaskins a new trial.

April 21, 2022

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Oct 27 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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On Petition for Writ of Certiorari to Greenville County
The Honorable D. Garrison Hill, Trial Judge
The Honorable Alex Kinlaw, Jr., PCR Judge

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Appellate Case No. 2019-000907

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JERALD D. GASKINS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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# AMENDED BRIEF OF REPSONDENT

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## PETITIONER'S QUESTIONS PRESENTED

Did the Post Conviction Relief Court err in failing to find trial counsel was ineffective when trial counsel failed to object to the improper cross-examination of Jerald Gaskins when the prosecutor was permitted to ask Mr. Gaskins improper questions on cross-examination?

Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective when he failed to object to the expert testimony of Officer Robert Perry as to delayed disclosure when the officer had not been qualified as an expert?

Did the Post Conviction Relief judge err in failing to hold trial counsel to be ineffective when trial counsel failed to object to the improper vouching for the credibility of the complaining witness?

## RESPONDENT'S QUESTIONS PRESENTED

Was the post-conviction relief court correct to deny Petitioner's application when Petitioner has failed to prove that trial counsel was constitutionally ineffective with respect to the solicitor's cross-examination of Petitioner and when this Court should not adopt the theory of cumulative errors and use it to justify the grant of relief to Petitioner?

Has Petitioner failed to prove that trial counsel was constitutionally ineffective for not making an improper opinion testimony objection to a law enforcement officer's testimony when the testimony did not constitute an improper opinion and when Petitioner has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had the trial court sustained such an objection?

Has Petitioner failed to prove that trial counsel was constitutionally ineffective for not raising a vouching or bolstering objection to testimony from a law enforcement officer when he has not proven that the testimony was improper, trial counsel had a valid strategic reason for not objecting to the pediatrician's testimony, and Petitioner has failed to satisfy the prejudice prong of *Strickland*?

## STATEMENT OF THE CASE

During its April of 2013 term, the Greenville County Grand Jury indicted Jerald D. Gaskins, Jr. ("Petitioner"), for four counts of second-degree criminal sexual conduct with a minor and two counts of committing a lewd act upon a child. On February 4-5, 2015, Petitioner proceeded to a jury trial with the Honorable D. Garrison Hill ("trial court") presiding. Randall L. Chambers ("trial counsel") represented Petitioner at that trial. After the jury convicted Petitioner as indicted, the trial court sentenced him to imprisonment for twenty years for each count of second-degree criminal sexual conduct with a minor, fifteen years for one of the counts of committing a lewd act, and five years for the remaining count of committing a lewd act. The five-year sentence is to be served consecutively to the others, and to be served first; the other sentences are all to be served concurrently. On direct appeal, this Court unanimously affirmed Petitioner's convictions. App. 617-19. The remittitur was issued on May 5, 2017.

Petitioner then filed a timely application for post-conviction relief. An evidentiary hearing was convened before the Honorable Alex Kinlaw, Jr. ("the PCR court") on October 24, 2018. The PCR court denied Petitioner's application in an order issued on February 1, 2019. App. 754-80. The PCR court subsequently denied Petitioner's motion to alter or amend the judgment. App. 793-95. This Court's grant of a writ of certiorari to Petitioner followed.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief court's factual findings, the appellate courts defer to and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, at 180-81, 810 S.E.2d at 839-40. However,

pure questions of law will be reviewed de novo without deference to a post-conviction relief court. *Smalls*, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of a post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**I. The PCR court was correct to deny Petitioner's application because Petitioner has failed to prove that trial counsel was constitutionally ineffective with respect to the solicitor's cross-examination of Petitioner and because this Court should not adopt the theory of cumulative errors and use it to justify the grant of relief to Petitioner.**

Petitioner argues that the PCR court erred in not granting relief to Petitioner on his claims that trial counsel was constitutionally ineffective with respect to the solicitor's cross-examination of Petitioner about text messages that the victim's father and sister received, social media messages allegedly sent to the prosecution's Rule 404(b) witness and to an unrelated minor, and a no-contact order in place between Petitioner and his ex-fiancée, and in not finding that Petitioner is entitled to the adoption and application of the theory of cumulative errors. For the reasons that follow, Petitioner has failed to prove that he is entitled to post-conviction relief.

**A. Petitioner has failed to prove that the PCR court erred in finding that trial counsel was not ineffective for not preserving for appellate review the issue of the solicitor's questions about text messages allegedly sent to the victim's father because Petitioner has not proven that the solicitor lacked a good faith basis for asking the questions and because Petitioner has not proven that he suffered any prejudice from the questions.**

Walt ("Walt") and Sandra Mucienko ("Sandra"), the victim's parents, met Petitioner and Rachel Gaskins ("Rachel"), who was Petitioner's wife at the time, at a backyard horseshoe tournament, and the two families grew close. App. 61-64, 134-36, 392. Petitioner testified that he had already known Walt before meeting the rest of the Mucienkos at the horseshoe tournament because he had met Walt, and shared a drink and sang a song with him, at the Veterans of Foreign Wars post ("the VFW"). App. 392-93. The families spent time together on an almost-daily basis.

App. 83. Petitioner would give money to the Mucienkos to help them with their bills, and covered their cars on his insurance policy. App. 71, 85. The Mucienkos let the victim spend time with Petitioner and Rachel. App. 65. Eventually Sandra ended her friendship with Petitioner because he had become too controlling of the victim, and cut off contact between Petitioner and the victim. App. 74-75, 227. When Sandra confronted the victim about her relationship with Petitioner after being alerted to the matter by Rachel,[1] the victim disclosed to Sandra that Petitioner had been sexually abusing her. App. 228-29. The victim testified at trial that she and Petitioner had sexual intercourse on more than ten, and maybe on more than twenty, but fewer than one hundred occasions. App. 197, 303. After Sandra reported the abuse to law enforcement, Sandra never spoke with Petitioner again. App. 88-89. Sandra testified that Walt continued to have contact with Petitioner after that point, which was a factor in Sandra's and Walt's divorce. App. 89-91. Walt's continued relationship with Petitioner caused the victim to cut off her connection to Walt. App. 289. The victim affirmed that she was aware that Petitioner was spending time with Walt because he wanted Walt the sexual abuse charges dropped. App. 305.

Petitioner testified that he began to hate all of the Mucienkos after they filed charges against him, and that he tried to stay away from them. App. 423-24. Despite that, he admitted, he had sang a song together with Walt at the VFW after the charges were filed. App. 423-24. During her cross-examination of Petitioner, the solicitor questioned Petitioner about alleged text messages ("the Walt texts") sent to Walt. App. 424-25. Petitioner admitted that the messages referenced Rachel and his and her divorce, but denied that the phone number from which the messages were sent was his. App. 424-25. Petitioner testified that there had been "problems with . . . random texts coming

[1] By the time of Rachel's call to Sandra, Rachel and Petitioner had been going through a contested divorce. App. 414.

through throughout this whole thing." App. 425. The trial court sustained trial counsel's objection to the lack of foundation for the solicitor's questions. App. 425-26. The solicitor asked Petitioner directly if he had sent a text message to Walt that read as follows: "Will you drop charges, or are we going to go to court? Either way, I'm still going to hang out with you. Just be honest with me?" App. 426. Petitioner denied that he sent that message. The trial court then sustained trial court's objection to the solicitor's reading the messages aloud. App. 426.

The trial court heard argument about trial counsel's objection outside the presence of the jury. App. 426-31. The solicitor wanted to give Petitioner a chance to admit or deny that he sent the messages so that she could call a rebuttal witness who would lay a foundation for their admission. App. 427. Trial counsel doubted that anyone but Walt could lay such a foundation. App. 427-28. The solicitor stated that Sandra was her rebuttal witness, and that Sandra had had possession of Walt's phone, had provided the messages to the solicitor, and could verify that the sending phone number was Petitioner's. App. 428. The trial court overruled trial counsel's objection to the solicitor's questions asking Petitioner to admit or deny that he sent the messages because the solicitor was allowed to ask Petitioner his alleged prior statements. App. 428-29. Once the jury returned, Petitioner denied sending multiple messages to Walt asking Walt to drop the charges against him. App. 431-33. Petitioner insisted that he cut off all ties with the Mucienkos after being arrested and did not send text messages to Walt at any time during or after 2013. App. 432-33. The photographs of the text messages were not admitted into evidence at trial. App. 5, 428. After the defense rested, the solicitor did not call any witnesses in reply. App. 463. On direct appeal, this Court found that trial counsel had not preserved the issue for appellate review. App. 618. The PCR court found that trial counsel's performance with respect to the text messages was reasonable because he objected to the solicitor's questions twice, but was overruled. App. 772.

The PCR court found that Petitioner had failed to prove that trial counsel could have done anything more to prevent the questions, and that Petitioner had done nothing more than offer conjecture that the outcome of trial would have been different had trial counsel raised some further objection. App. 772.

In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the applicant must prove that the performance of his lawyer was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler v. State*, 286 S.C. 441, 444-45, 334 S.E.2d 813, 815-16 (1985) (quoting *Strickland*). "The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (quotation omitted). Second, the deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for [the lawyer'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. "[T]he defendant must show that [particular errors of counsel] actually had an adverse effect on the defense." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quotation omitted).

Because this Court found that trial counsel failed to preserve the issue of the Walt texts for direct appellate review, the PCR court should have analyzed the prejudice prong of *Strickland* by considering the merits of Petitioner's argument about the impropriety of the solicitor's questions and whether Petitioner proved that the outcome of the appeal would have been different but for the lack of preservation. *See Milledge v. State*, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through the same lens that would be applied on appeal . . . "); *see also McHam v. State*, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court erred in finding counsel was not deficient in failing to preserve an issue for appellate review but agreeing with the PCR court that McHam failed to establish prejudiced because the Fourth Amendment claim failed on the merits), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (2018).

Petitioner has failed to prove that he would have been successful on appeal had trial counsel preserved the issue of the solicitor's questions about the Walt texts because Petitioner has not proven that the solicitor lacked a good faith basis for asking the questions. A solicitor can question a defendant about his past conduct if he has a good faith basis for doing so. *See State v. McEachern*, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012) ("[O]ur courts have held that a cross-examiner must have a good faith factual basis before questioning a witness about his or her past conduct. Counsel should not be permitted to go on a fishing expedition, and merely asking a question that has no basis in fact may be prejudicial."). Sandra had given the texts to the solicitor, identified them as having been received on Walt's phone, and identified the sending number as Petitioner's. App. 428. Petitioner has not proven that Sandra did not do these things. While it is true that Walt denied at the PCR hearing that he had been exchanging texts with Petitioner during

the time in question, Walt's denial does not negate the good faith nature of the solicitor's questions. It can be true simultaneously that Sandra affirmed the truth of those details to the solicitor and that Walt denied them to the PCR court. The solicitor also had a reason to ask Petitioner about the texts. The questions about the Walt texts were responsive to Petitioner's testimony that he had cut off all contact with the Mucienkos, including Walt, after he had been arrested.

The questions led to no evidence prejudicial to the defense, despite, as the PCR court noted, Petitioner's conjecture that he suffered prejudice therefrom. The photographs that the solicitor was relying upon were not admitted into evidence. The solicitor did not call Sandra as a rebuttal witness to testify about the texts. The only evidence before the jury about the texts was Petitioner's testimony that he had not sent them and knew nothing of them. Petitioner is correct that the solicitor did not establish at trial that the texts were actually sent by Petitioner, but his point undermines his prejudice argument. *See id.* (finding that the issue of whether the solicitor improperly asked a witness if she had sold drugs to two other people without having a proper foundation for the question was unpreserved for appellate review, but noting anyway "that the mere asking of an improper question is not necessarily prejudicial, where no evidence is introduced as a result," and that the witness denied knowing either of the people to whom the solicitor's question referred); *State v. Benning*, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999) (while agreeing with the Benning that the solicitor's question of Benning was an attempt to pit him against the victim's mother, stating the principle that "[t]he mere asking of an improper question is not necessarily prejudicial, however, where no evidence is introduced as a result."); *Gainer v. Tyner*, 259 S.C. 629, 631-32, 193 S.E.2d 525, 526-27 (1972) (finding that, even if a questioned asked of a party on cross-examination was improper, the witness answered that she did not know the answer to the

questioned posed, and rejecting the plaintiff's argument that "there mere asking of the question resulted in prejudice").

Furthermore, the trial court's instructions to the jury ensured that the jury did not consider the solicitor's questions. During its preliminary remarks, the trial court said, "Evidence consists of two sources. The first is by way of sworn witness testimony. The second source of evidence is by way of exhibit. . . . Now, those are the only two things, typically, that you can use to determine what the facts are." App. 36. During its jury charge, the trial court instructed the jury that the lawyer's statements were not evidence, and that testimony and exhibits were. App. 498. The trial court's instructions insulated Petitioner from any harm from the questions. *See Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267, n.1 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice.").

In his closing, trial counsel argued that the victim, the victim's family members, the victim's friend, and Rachel had reasons to falsely accuse Petitioner. App. 472-79. Trial counsel argued that the jury should be able to discern from their testimony that they had been lying. App. 480-81. Trial counsel argued that the investigating officers had done a sloppy job in investigating the victim's allegations, and that a thorough investigation would have made it more difficult for the victim and those around her to create a false but coherent narrative. App. 479-83. Trial counsel argued that the prosecution had not met its burden of proof with respect to the "discussion about texts and phones," because the officers had not gotten phones or phone records. App. 483. In response, the solicitor mentioned in her closing that, among other things, Petitioner denied sending the messages to Walt, and argued that Petitioner was motivated to make false denials. App. 494-

95. In direct response to trial counsel's arguments, the solicitor argued that Petitioner was "the only person in this with something to gain or lose." App. 495. The solicitor confined her argument to evidence in the record because she accurately stated that Petitioner had denied sending the Walt texts, and she did not say that there was any other evidence supporting the contention that Petitioner had actually sent them.

**B. Petitioner has failed to prove that trial counsel was constitutionally ineffective with regard to the solicitor's cross-examination of Petitioner about text messages he allegedly sent to the victim's sister because the evidence was properly authenticated and because the solicitor had a good faith basis for asking questions about the messages.**

During the prosecution's case-in-chief, the solicitor offered Jamie Mucienko ("Jamie"), the victim's elder sister, as a witness. App. 94-129. Jamie had been friends with Rachel before Rachel and Petitioner were ever been married, and she met Petitioner when he and Rachel visited her home in Florida with the Mucienkos. App. 96-97. She testified that, when she moved back to her parents' home from Florida, she began to suspect that Petitioner was in an inappropriate relationship with the victim, so she tried to win Petitioner's trust in the hope that he would disclose the details of that relationship. App. 98-100. She testified that she exchanged text messages ("the Jamie texts") with Petitioner "on numerous occasions." App. 100-01. Trial counsel objected and asked to be heard outside the presence of the jury, at which point he argued that the contents of the messages were hearsay and that the solicitor had not laid a proper foundation that Petitioner was the author of the messages. App. 101-02. Trial counsel stated that he had received the messages from the solicitor on the previous afternoon and had given them to Petitioner to review that night. App. 102. The solicitor stated that she had turned the messages over to trial counsel as soon as she received them. App. 102. She argued that the admission of the statements would not violate the rule against hearsay and that Jamie could lay a foundation for the messages by testifying about them and that the photocopy of the messages did not need to be introduced. App. 102-03. The trial

court asked the solicitor to proffer evidence about the phone number that sent the messages. App. 103.

Outside the jury's presence, Jamie affirmed that she had had Petitioner's phone number saved in her phone in September and October of 2012, that she had labeled the contact information with Petitioner's name, that her text message conversations with Petitioner "would appear as" Petitioner on her phone, and that the messages she had shared with the solicitor came from Petitioner. App. 104. She testified that the phone she used at the time was no longer in service and that she had used her iPad to take the screenshots of the messages in order to preserve them. App. 104-05.[2] She affirmed that the photocopy was a "true and accurate picture[] of the texts between [her] and [Petitioner]." App. 105. The trial court overruled trial counsel's objection, and the jury returned to the courtroom. App. 105-06. Jamie then testified that: she and Petitioner had exchanged phone numbers when she moved back to her parents' home, she and Petitioner had sent text messages to each other, Petitioner referred to her in text messages as his sister, Petitioner sent a message to her that said that he loved the victim the most out of all of the Mucienkos, that she preserved her messages with Petitioner by taking a photograph of them using her iPad, and that she shared those messages with the solicitor only on the day before trial began. App. 106-11. Referring to the photographs to some extent in order to refresh her recollection, Jamie testified about the content of the messages: Petitioner referred to the victim as "[his] beautiful future wife"; during a time when the victim's parents prevented any contact between the victim and Petitioner, Petitioner said that he missed the victim the most out of all the Mucienkos; Petitioner told her that she could not go to a concert with him, the victim, and Petitioner's parents because he had only

[2] Jamie also testified later that she had no longer had or used the phone that she had been using at the time that she received the messages from Petitioner. App. 110.

four tickets; Petitioner shared his feelings toward the victim; Petitioner admitted that he was the reason that the victim's parents took her phone away from her; and Petitioner said the Mucienkos would regret their treatment of the victim "when she's gone." App. 112-16. Jamie also agreed with trial counsel's characterization of the messages as Petitioner's saying that he loved the victim the best and wanted to marry her. App. 123. Jamie testified that Petitioner made verbal statements to her that were of the same general nature as the aforementioned messages, and included statements from Petitioner that "[h]e can't ever be with [the victim]," that the Mucienkos were jealous of the victim, and that he was apologetic "for everything." App. 107-08, 116, 118. Trial counsel cross-examined Jamie about the messages, asking if she were really testifying that she could have gained Petitioner's confidence to such an extent that he would send messages that included admissions of guilt to her, and questioning her about the reason that she waited for so long to share the messages with anyone. App. 124-28. The photocopy of the messages to which Jamie referred was not admitted into evidence at trial.

The "requirement of authentication" is a condition precedent to the admissibility of a piece of evidence. Rule 901(a), SCRE. But the burden of authentication "is not high and requires only that the proponent offer a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *Berry v. Spang*, 433 S.C. 1, 10-11, 855 S.E.2d 309, 314-15 (Ct. App. 2021) (quotation omitted). A party offering evidence does not have to "rule out any possibility that the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019), *aff'd as modified*, *State v. Green*, 432 S.C. 97, 851 S.E.2d 440 (2020). Once a trial court makes a prima facie showing that the "true author" of some piece of evidence is who the proponent claims, it is for the jury to determine if it will accept "the evidence as genuine and, if so, what weight it carries."

*Id.* A text message bears no heavier a burden of authentication than does any other form of writing. *See id.* at 231, 830 S.E.2d at 714-15 (stating that the requirement of authentication does not apply differently based upon the form of the writing that is being offered).

Petitioner has not proven that the PCR court's finding that Petitioner did not satisfy the prejudice prong of *Strickland* because he has failed to prove that, even if trial counsel had preserved the issue of the Jamie texts for direct appellate review, the outcome of the appeal would have been different. The photocopy of the texts, though it was not admitted into evidence at trial, and the content thereof, was properly authenticated by Jamie's testimony. A writing can be authenticated "by testimony from a person who sent or received the writing." *Id.* at 231, 830 S.E.2d at 715. Jamie testified that she exchanged numbers with Petitioner and carried on conversations with him by text; she identified the texts in question as those which she had received from Petitioner, from whose phone the messages were sent. Petitioner himself identified the receiving phone, Jamie's phone, as a "contract phone" that Jamie and her brother shared. App. 437-38. Petitioner testified that he knew details about Jamie's phone. App. 438. Additionally, the distinctive characteristics of the texts authenticated them. This Court approves of the use of circumstantial evidence to authenticate writing. *See id.* at 232, 830 S.E.2d at 715 (pointing out that South Carolina law has "long endorsed authentication by circumstantial proof" and recognizing that "courts are growing more comfortable with using circumstantial evidence to authenticate social media content"). The author of the texts referred to Jamie and the victim using phrases or descriptions that Petitioner used to refer to them. The author referred to events or situations that corresponded with events occurring in Petitioner's and the Mucienkos' lives. The author sent the texts during the time frame in which the victim alleged that Petitioner was pursuing a sexual relationship with her. The author made statements about events and the Mucienkos that

corresponded with Jamie's testimony about similar statements that Petitioner had made to her verbally. Petitioner basically conceded that the content in the texts was distinctive and related to events in his life when he testified that anyone could have falsely sent or created the texts while pretending to be him because he testified that "everyone knew about [his] life" because people spread information about him to others. App. 438-39. The content in the texts was distinctive enough that a reasonable jury could have determined that Petitioner sent them to Jamie. The solicitor could have had the photocopy of the texts admitted if she had tried to do so.

Petitioner also attacks Jamie's credibility, arguing that it was clear that Petitioner did not actually send the texts. Supp. App. 15-36. Petitioner testified that he did not invite the victim to a concert, although he admitted that there had been "a discussion" about a concert. App. 420-21. He denied that he had been in a sexual relationship with the victim, and testified that he treated her as if she were his sister. App. 422. At one point, when the solicitor was asking Petitioner if he had sent a text to Jamie about his seeing her brother and that Petitioner loved him like a brother, Petitioner corrected the solicitor about her description of the text, testifying, "Past tense. Not in that text." App. 436-37. Although Petitioner immediately denied that he had been texting with Jamie at all, his testimony indicates that he was correcting the solicitor about what he actually texted to Jamie and, when he realized that he was implicitly admitting that he had been texting with her, switched back to the general denial that he had never texted with Jamie. Petitioner asserts that Jamie's testimony must have been false because there are alleged "abnormalities" on the photocopy. Brief of Petitioner at 7. Petitioner thinks that the difference between the time stamps on the text block of each of the texts and the time stamp at the top of the phone screen as shown at the top of each photocopy page is significant, but the typical phone user would recognize that the number in the text block shows the time at which the text was sent or received and the number at

the top of each page shows the time at which the photograph or screenshot was taken. Supp. App. 15-36. That time difference perfectly corroborates Jamie's explanation for the process that she used to preserve the texts. Petitioner's assertion about the significance of the difference aside, his arguments that the solicitor's turning the photocopy over to trial counsel on the day before trial constituted a violation of the solicitor's discovery obligations and prevented Petitioner from noticing the difference earlier should be rejected outright. The solicitor's statements to the trial court and Jamie's testimony prove that Jamie disclosed the existence of the photocopy of the texts to the solicitor right before trial and that the solicitor promptly delivered the same to trial counsel. That last-minute disclosure did no injustice to Petitioner because even the most casual of reviews of the photocopy reveals the difference between the times that Petitioner has identified. Petitioner's arguments concern the alleged lack of credibility in Jamie's testimony and the low weight that Petitioner believes the jury should have given her and the texts, but those are arguments for a jury to consider, not arguments that would go to the admissibility of the evidence.

The photocopy of the messages, and the content of the messages, was properly authenticated by Jamie's testimony and the distinctive content of the messages. The solicitor, therefore, had a good faith basis for her cross-examination of Petitioner. The trial court did not abuse its discretion by allowing the solicitor to ask those questions.

**C. Petitioner incorrectly asserts that the solicitor cross-examined him about social media messages alleged sent to a minor who did not testify at trial; regardless, Petitioner has not proven that trial counsel should have objected to the solicitor's questions about a Facebook profile under the name "Jay Fowler" or that Petitioner suffered any resulting prejudice.**

Petitioner argues that trial counsel should have objected to the solicitor's cross-examination of him about social media messages ("the Fowler messages") that he allegedly sent to a minor who did not testify at trial on the bases that the solicitor did not have a good faith basis for asking the questions, that the questions were irrelevant, and that the evidence constituted improper character

evidence.[3] When cross-examining Petitioner, the solicitor asked Petitioner if he knew Jennifer Anglin and Anglin's daughter. App. 444. Petitioner answered that he knew of Anglin, but denied that he had ever been to Anglin's home and testified that he did "[n]ot really" know of Anglin's daughter, whom the solicitor alleged was a twelve-year-old girl; when asked if he sent a friend request on Facebook to Anglin's daughter, Petitioner answered, "Not really." App. 444. Petitioner testified that he did not know Anglin's daughter, and did not know if "she's a Facebook friend or whatever. You can be anybody on Facebook. I don't know." App. 445. He testified that he did not send a friend request to Anglin's daughter "to [his] knowledge . . . ." App. 445. He denied that he had created a Facebook profile under the user name of "Jay Fowler" ("the Fowler profile") in order to send a friend request to the girl. App. 445. The solicitor never asked Petitioner about any messages sent from the Fowler profile to Anglin's daughter. The solicitor did not return to the topic during her questioning, nor did she seek to introduce any such messages into evidence.

At the PCR hearing, Applicant testified that he knew Anglin's daughter "[v]aguely" because his ex-fiancée was Anglin's sister-in-law. App. 669-70. Applicant denied that the Fowler profile was his. App. 670. Referring to Applicant's exhibit three, he testified that the solicitor had asked him about the messages ("the Fowler messages") at trial, which were sent from the Fowler profile to Anglin's daughter. App. 669; Supp. App. 37-66. He testified that Anglin's daughter was fourteen-years old, which presumably was a reference to her age at the time of the PCR hearing. App. 670. Trial counsel testified that he had not seen the Fowler messages before he testified at the PCR hearing, he denied that he had received the messages in discovery, and he denied that the solicitor had represented to him that she had a good faith basis for believing that Petitioner was

[3] The PCR court declined to address this issue after Petitioner brought the omission to its attention through the motion to alter or amend the judgment. App. 771-72, 783-84, 793-95.

the author of the messages. App. 724. He testified that it was his understanding from a previous ruling from the trial court that the solicitor could question Petitioner about the messages and would be stuck with whatever answer Petitioner gave. App. 724-25. Trial counsel agreed with Petitioner that the solicitor had cross-examined him about the messages in order to create a belief in the jurors' minds that Petitioner had been trying to talk to Anglin's daughter. App. 725-26.

As an initial matter, Petitioner's assertions that he was "cross-examined about" the messages is an inaccurate characterization of the record. Brief of Petitioner at 11. As already noted, the solicitor asked Petitioner if he knew Anglin's daughter, had created the Fowler profile, and had sent a friend request from that profile to the girl, but she never asked him about messages. Petitioner argues that the content of the messages imply that Petitioner was trying to solicitor sex from a minor while out on bond for the underlying crimes, but the jury never heard or saw the messages or was made aware that any such messages existed. Petitioner argues that the solicitor lacked a good faith basis "for asking about [the] messages from a 'Jay Fowler' and a good faith basis to believe that they were from" Petitioner, but the solicitor did not ask about the messages; Petitioner argues that the messages' implication that Petitioner was conversing inappropriately with a twelve-year-old girl is not relevant, but the jury did not hear of the messages' existence or content, and thus, could not have picked up on any such of implication; and Petitioner argues that "[t]his evidence," i.e., the messages, constituted improper character evidence, but the jury did not know of the messages. Brief of Petitioner at 12. Petitioner's entire argument concerns the existence and content of the messages and asserts, or at least assumes, that the jury knew of the same. No possible harm could have come to Petitioner's defense from evidence that was not admitted, introduced, or even mentioned during the trial.

Petitioner has failed to prove that trial counsel's performance was deficient due to trial counsel's not objecting to the solicitor's questions about the Fowler profile. The solicitor did not testify at the PCR hearing and, as a consequence, her basis for asking about the profile is not known, but the solicitor's questions surely indicate that she had some reason to think that Petitioner was behind the Fowler profile; regardless, details of the messages are clues for this Court that Petitioner was behind them. For example, the author wrote that he was home alone because "Angle" [sic] was elsewhere, that he and others had been planning to go to the Anglin's daughter's home until "angel" changed her mind, that he was not allowed to be around the girl and others alone on "Angels orders" due to the fact that "Angel" was "jealous," that he wanted to know if the girl was getting dressed up for a visit for the benefit for him or for "angel," and that he was coming to visit the girl while he was being accompanied by "Angel"; the girl asked the author why he would want to date her when he was "with angel." Supp. App. 37-40, 47, 61, 65-66. "Angel" could easily be a nickname for Angelina Campbell, to whom Petitioner was engaged at the time of trial. App. 445. Petitioner testified at the PCR hearing that Campbell had previously been his fiancée, and that she was the mother of his third child. App. 682, 694-95. The messages' author wrote that he was not allowed to be on his own around "females," which undoubtedly included the twelve-year-old girl, because "Angel" was jealous, which is similar to Jamie's testimony that Petitioner told her that the Mucienkos were jealous of the victim. App. 116; Supp. App. 39-40. The messages' author told the girl that he wanted to "spoil" her, which matched what the victim said that Petitioner told her that he wanted to do to her. App. 190-92. Supp. App. 41. The author said that he was going to buy a Halloween costume for the girl, which is similar to the evidence that Petitioner bought gifts for the victim and her friend, both of whom were minors at the time. App. 73, 99, 252-53, 288, 293, 422; Supp. App. 40-41. The author wrote that he liked the girl because, among other

reasons, she was not "about drama or telling on people," which, coupled with the timing of the messages and the events going on in Petitioner's life at the time, sounds like something Petitioner would say if he wanted to continue his sexual advances on children while his criminal case was pending without incurring further detection. Supp. App. 42. The author referenced his being older than the victim and inquired into whether the age difference bothered the girl; when she asked what he thought people would say about their being in a relationship despite the age difference, the author wrote, "Well I wouldnt let know one no right now." Supp. App. 44-48, 50. Considering the criminal trouble that Petitioner was facing at the time, he would likely have had the same concerns about it being known publicly that he was engaged in a romantic relationship with yet another minor female. The girl answered, "Oh yea I knew that," which would also fit Petitioner's situation because, as Petitioner testified, it was known generally that he was facing sexual abuse allegations from the victim at the time. Supp. App. 48. If the solicitor believed that the circumstances surrounding the Fowler messages resembled the details of Petitioner's behavior with respect to the victim and her friend, she did so justifiably, and would have therefore had a good faith basis for asking Petitioner if he was behind the Fowler profile.

Petitioner has failed to prove that, even if trial counsel had objected to the solicitor's questions about the Fowler profile, there is a reasonable likelihood that the outcome of trial would have been different. The Fowler messages were not admitted, so the jury's knowledge of the Fowler profile was limited to the facts that Petitioner denied that he was behind the profile and denied that he sent a Facebook friend request to Anglin's daughter. As trial counsel testified, the solicitor was "stuck with" Petitioner's denial. App. 724-25. The trial court told the jury preliminarily that there were only two sources of evidence: witness testimony and exhibits. App. 36. The trial court later charged the jury that nothing but testimony and exhibits, even the lawyers'

statements, were evidence. App. 498. Although this second charge specifically refers to the parties' closing arguments, it would apply implicitly to the lawyers' questions for the witnesses. The jury heard testimony directly from the victim about Petitioner's actions, and heard corroborating testimony from the victim's friend and family members and from Rachel. The solicitor's few questions about the Fowler profile and Petitioner's denials had negligible effect on the jury's verdict, if any.

**D. Petitioner did not preserve for this Court's review his claim that trial counsel was constitutionally ineffective for not objecting to the solicitor's cross-examination of him about social media messages that the prosecution's Rule 404(b) witness had received from the "Jay Fowler" Facebook profile; notwithstanding the lack of preservation, Petitioner's claim fails on the merits.**

H. Barton ("Barton"), the victim's friend, testified at trial about the criminal sexual acts that Petitioner committed against her while she was a minor, the details of which were shockingly similar to his sexual acts against the victim. App. 306-27. The solicitor offered Barton's testimony as a common scheme or plan exception. App. 236, 240. After trial counsel objected and asked for precedential case law to be overturned, the solicitor proffered Barton's testimony. App. 243-56. The trial court heard argument from the parties and overruled trial counsel's objection. App. 256-67. When the solicitor was cross-examining Petitioner, she asked him about his relationship with Barton, and Petitioner answered that he did not know her, that he had met her on about two occasions, and that he had never "hung out" with her. App. 454. The solicitor asked if Petitioner had sat in the car with Barton and talked about music, which was something that Barton had already testified about. App. 310, 454. The solicitor asked if Petitioner had sent a message to Barton on Facebook ("the Barton message") two weeks previously asking for her to call him, and Petitioner denied that he had done so. App. 454. The solicitor asked if Petitioner had sent the message using the Fowler profile, and Petitioner answered, "Maybe not. Prove that, ma'am." App. 454-55. The

solicitor did not seek to introduce the messages to Barton or call Barton as a reply witness to testify about the matter.

The PCR court's order of dismissal noted that Petitioner alleged that trial counsel had not objected to the solicitor's questions "regarding text messages or Facebook messages," but apparently did not specifically address the Barton messages. App. 771-72. Petitioner's motion to alter or amend the judgment did not ask the PCR court to make findings regarding Petitioner's arguments as to the Barton messages. App. 782-88. Petitioner argues now that his motion highlighted the PCR court's failure to address the claim. However, that argument is incorrect because Petitioner addressed in his motion, on the pages he cites in his Brief, only the solicitor's "cross examination . . . concerning the daughter of Jennifer Anglin," and even cited to pages of the trial transcript on which the solicitor asked questions about Anglin's daughter but not any questions about the Barton message. App. 783. Petitioner asked the PCR court to make findings to address other claims that were properly raised by not addressed in the order of dismissal, but he did not do so with regard to this claim about the Barton message. This Court should decline to address issue now.

Notwithstanding Petitioner's failure to preserve this issue for this Court's review, his claim fails on the merits. Petitioner's argument that trial counsel had a duty to object to the solicitor's questions on the ground of the lack of authentication of the Barton message is incorrect because the requirement of authentication applies to exhibits, not testimony. "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a) (emphasis added); *see, e.g.*, *State v. Hall*, Op. No. 5919 (S.C. Ct. App. filed June 22, 2022) (Howard Adv. Sh. No. 22 at 34) (finding that the trial court's error in not admitting Snapchat video messages was harmless). If the solicitor had tried to introduce

a photocopy of the Barton message while cross-examining Petitioner, the message would not have been admissible due to the lack of authentication, absent confirmation of authenticity from Petitioner, but because the solicitor did not try to do so, the requirement of authentication was not triggered by the questions.

Additionally, this Court has already determined that Barton's testimony was properly admitted under the common scheme or plan exception to the prohibition on evidence of prior bad acts. This Court found on direct appeal that the trial court did not abuse its discretion in admitting the testimony. App. 618. This Court's opinion indicates that the Court found that "the vast majority of [Barton's] specific allegations directly aligned" with the victim's testimony. App. 618 (quotation omitted). Petitioner denied at trial that he had engaged in sexual intercourse with Barton, disputing her testimony. App. 421. The solicitor's question about the Barton message was a follow-up to that earlier testimony, and as Petitioner denied communicating with Barton, the solicitor was entitled to question Petitioner about his alleged post-arrest communications with Barton. App. 419-21.

**E. Petitioner has failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel objected more thoroughly to the solicitor's cross-examination of Petitioner about a no-contact order.**

While cross-examining Petitioner, the solicitor elicited testimony from him that he was engaged to Campbell and that Campbell was sitting in the courtroom. App. 445-46. The solicitor asked Petitioner if there was a no-contact order in place between him and Campbell due to an "active charge with her," and then essentially engaged in a back-and-forth dispute with Campbell over whether that order was still in effect. App. 446-47. Eventually, trial counsel objected to the solicitor's engaging in argument with Petitioner, and the trial court sustained the objection. The solicitor then asked again if Petitioner had an "active charge with [Campbell]," and Petitioner answered that he was apologetic if he did, but that he was not sure because he thought that the

charge was being dismissed due to Campbell's testimony or statement. App. 447. The solicitor did not question Petitioner about the matter further. The PCR court correctly found that trial counsel objected to questions about a criminal charge concerning Petitioner's fiancée, even if Petitioner wishes that trial counsel's objection had been for a different reason than the one given at trial. App. 772, 784.

Petitioner has not proven that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected more thoroughly or differently to the solicitor's questions.[4] While the exchange admittedly did communicate the solicitor's belief about the lack of credibility in Petitioner's testimony that there was not a no-contact order, Petitioner's credibility was already thoroughly rebutted through the other evidence presented at trial. Petitioner, by that point, was already at odds with the testimony given by Sandra, Jamie, Rachel, the victim, and Barton. Petitioner testified that all involved were lying and that he was the victim of false accusations, as he had been for his entire life. App. 439. Trial closing's closing argument was that "these people got together and they made this up . . ." App. 479. The jury's determination about the credibility of Petitioner's testimony did not depend on the brief exchange about a no-contact order between him and Campbell. *See Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (finding that the post-conviction relief applicant was prejudiced by his lawyer's failure to object to the solicitor's vouching for a witness because the witness was the prosecution's key witness and the jury could have convicted the applicant only if it had believed that that witness was telling the truth, and the witness's credibility was questionable).

[4] The PCR court did not make any findings as to the prejudice prong of *Strickland* with respect to this claim.

**F. This Court should deny Petitioner's request that South Carolina begin applying the theory of cumulative errors because Petitioner failed to preserve the argument for appellate review; notwithstanding the lack of preservation, the theory deviates from the correct prejudice analysis prescribed by *Strickland*; furthermore, even if the Court applies the theory, Petitioner has not proven that the theory entitles him to post-conviction relief.**

This Court should not consider Petitioner's argument about the theory of cumulative errors. Petitioner did not specifically argue at the PCR hearing that our South Carolina courts should adopt the theory and apply it in his case. The PCR court's order of dismissal did not address the theory at all. App. 770-80. Petitioner did not ask the PCR court to make any findings regarding the theory in his motion to alter or amend the judgment. App. 782-88. Petitioner's argument is not properly before this Court now. Notwithstanding Petitioner's failure to preserve the issue, this Court should reject Petitioner's argument because this Court is required to consider the prejudice of the alleged errors individually and because, even if the theory of cumulative errors is applied, Petitioner has failed to prove that trial counsel committed multiple errors.

"Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. "Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. A court that is reviewing an ineffectiveness claim is required to determine" whether the specified errors resulted in the required prejudice. . . ." *Strickland*, 466 U.S. at 694. The reviewing court is to consider all of the evidence before the jury because each error on the defense lawyer's part likely had varying degrees of effect on the jury's decision. *Strickland*, 466 U.S. at 695-96.

Our Supreme Court has not decided whether a PCR court can analyze an applicant's arguments as to the prejudice prong of *Strickland* cumulatively. *See Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (rejecting the post-conviction relief applicant's argument

that the PCR court erred in not conducting a cumulative error analysis because there was only a single error for the PCR court to consider), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 ("Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina.")) Instead, as the Court put it recently, "[i]n determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's errors had on the outcome of trial." *Smalls*, at 188, 810 S.E.2d at 843 (citing *Strickland*). This Court should continue to do as our Supreme Court has done in analyzing prejudice this way, as such is required by *Strickland*, whose language suggests a prejudice analysis that takes in all of the evidence but is focused solely on the corresponding alleged deficiency in defense counsel's performance.

The only authority that Petitioner cites in support of his request for an adoption of the cumulative effect theory is *Blue v. State*, 19 So. 11 (Ala. 1944). Petitioner's reliance is misplaced, however, as that case was decided before the United States Supreme Court decided *Strickland*, and concerned not post-conviction relief, but whether multiple, improper statements made by the prosecutor during cross-examination and closing argument inject[ed] the poison of bias and prejudice into the minds of the jury" and "created an atmosphere of bias and prejudice which no remarks by the [trial] court could eradicate." *Blue*, at 16-17.

Petitioner argues that it is only logical that the theory should be recognized. It that were really the case, though, courts would be more in agreement about the theory than they are. For example, it is not a settled question among the federal Courts of Appeal whether the theory of cumulative errors can be applied when ineffective assistance of counsel claims are being considered. *Compare United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021) ("[W]e have long held that the prejudice inquiry under *Strickland* can be a cumulative one as to the effect of all of

counsel's slipups that satisfy the deficient-performance prong—meaning that a defendant need show it more likely than not that the several blunders, even if not prejudicial on their own, prejudiced him when take together."), *with Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998) (holding "that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively . . . .").

Even if this Court decides now for the first time to apply the cumulative effect theory in post-conviction relief cases, it should find that the theory affords no aid to Petitioner. The theory, as has been applied in other contexts in South Carolina, affords relief to a party when a combination of errors that are insignificant by themselves prevents him from receiving a fair trial and "the cumulative effect of the errors affects the outcome of the trial." *State v. Daise*, 421 S.C. 442, 466, 807 S.E.2d 710, 722 (Ct. App. 2017) (quotation omitted). In order to merit the reversal of his conviction based on the doctrine, an appellant must demonstrate "more than error." *McEachern*, at 149, 731 S.E.2d at 616 (citation omitted). The errors must adversely affect the appellant's right to a fair trial, not merely deprive him of a trial that is perfect. *Id.* First, as argued throughout this Brief, Petitioner has not proven that trial counsel's performance was deficient in any of the particulars identified by Petitioner. Second, Petitioner has not proven that he suffered any prejudice from those alleged deficiencies. Finally, Petitioner has not proven that the alleged instances of prejudice, which would be constitutionally insignificant in and of themselves for the purpose of a Sixth Amendment inquiry, cumulate to create a reasonable likelihood that the outcome of trial would have been different but for the accumulated deficiencies.

**II. Petitioner has failed to prove that trial counsel was constitutionally ineffective for not making an improper opinion testimony objection to a law enforcement officer's testimony because the testimony did not constitute an improper opinion and because Petitioner has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had the trial court sustained such an objection.**

Robert J. Perry, an investigator with the Greenville County Sheriff's Office, testified at Petitioner's trial. App. 345. Inv. Perry was a detective in the special victims' unit at the Sheriff's Office, and was the investigator assigned to Petitioner's case. App. 345-46. Inv. Perry testified about the details of his investigation into the allegations against Petitioner. App. 346-56. In response to a question from the solicitor, Inv. Perry testified that he and three others had been assigned to investigate sex crimes involving minors whenever the special victims' unit was formed in 2011, and that he had conducted an investigation in "several hundred, probably over 500" of such cases since that time. App. 356-57. At that point, the following exchange occurred:

> Q: And in your experience investigating those cases, is – what we call delayed disclosure or the child coming forward much after the events have, actually, occurred, is that common or uncommon?
>
> A: Oh, yeah. It's such a rarity for me to see a case that a child has immediately told that it's like, you know, maybe one out of a hundred, you know. So that is a very common thing, very common.

App. 357. The solicitor then asked if a victim's delayed disclosure hampers Inv. Perry's ability to investigate, and Inv. Perry testified that it does because a delay between an act of abuse and the reporting of it makes "the gathering of physical evidence [] much more difficult." App. 357. When asked if there would be any "DNA or serological type evidence" considering the amount of time between the instances of sexual assault and the victim's disclosure, Inv. Perry terrified that such evidence was "gone." App. 358. Inv. Perry testified that he had not found any physical or digital evidence to support the victim's allegations, meaning that he had been unable to corroborate the victim's statement beyond confirming that Petitioner and the victim lived at specific locations at specific times, as the victim alleged. App. 357-59.

Petitioner is correct that the topic of the behavioral characteristics of sex abuse victims is one that is properly in the domain of expert testimony. *See State v. Makins*, 433 S.C. 494, 860 S.E.2d 666 (2021) (finding that the trial court did not err in ruling that a dual expert in the treatment of child trauma and child sexual abuse dynamics and as the minor victim's treating therapist did not improperly bolster the victim's credibility, not deviating from an earlier recognition of the expertise of child abuse assessment experts, but declining to retreat from an earlier warning that the use of dual experts runs the risk that the expert will vouch for the victim's credibility); *State v. Weaverling*, 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor." (citations omitted)). Petitioner's argument as to the deficiency prong of *Strickland* fails, however, because Inv. Perry's testimony did not concern the behavioral characteristics of sex abuse victims; instead, Inv. Perry's testimony was about his personal observations in many sexual abuse investigations that it is common for victims to delay disclosing the abuse and that the delay hampers law enforcement officers' ability to acquire evidence to corroborate the allegations. "[L]aw enforcement and other government officials are not permitted to offer opinions other than those that could otherwise be offered by lay witnesses. However, in limited circumstances, law enforcement officers are allowed to draw on their experiences while testifying. The dividing line that many courts have drawn—and that our supreme court appears to have adopted—is that officers may provide lay opinions based on their observations, experience and training, but may not provide lay opinions on such matters if they

did not either observe the events in questions or actively participating in the investigation." *State v. Ostrowski*, 435 S.C. 364, 385, 867 S.E.2d 269, 279-80 (Ct. App. 2021) (citations omitted).

"A common distinction between expert witnesses and lay witnesses is that most lay witnesses do not state 'opinions.' Even so, the evidentiary rules allow a lay witness to offer an opinion if certain criteria are met." *State v. Pickrell*, 435 S.C. 417, 443-44, 867 S.E.2d 465, 479 (Ct. App. 2021) (quotation omitted). The following rule applies whenever a lay witness is giving opinion testimony:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony of the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE.

Even if this Court finds that trial counsel should have objected to Inv. Perry's testimony on the ground that it constituted improper opinion testimony, Petitioner has still failed to prove the prejudice prong of *Strickland*. The only testimony that Petitioner offered before the PCR court as to prejudice was when he affirmed that he thought that Inv. Perry's testimony was prejudicial to him. App. 686. Other than this testimony, Petitioner offered no evidence or argument as to prejudice before the PCR court. In Petitioner's motion to alter or amend, the only argument Petitioner offered as to prejudice was that Inv. Perry's "testimony [] was prejudicial against [Petitioner]." App. 787. Petitioner now argues only that, if trial counsel had objected to the testimony, "[a]nother piece of inadmissible evidence would have been excluded," and that the testimony "helped advance the case for the State and was therefore prejudicial to [Petitioner]." Brief of Petitioner at 18-19. Petitioner has not proven that there is a reasonable "probability that, but for [the alleged] unprofessional error[], the result of the proceeding would have been different." *Cherry*, at 117-18, 386 S.E.2d at 625. He has not proven that the alleged error "actually had an

adverse effect on the defense." *Hill*, 474 U.S. at 58. All that Petitioner has done is assert that he suffered prejudice and hope that this Court would presume prejudice where none had been shown. Petitioner's failure to make any argument as to the prejudice prong alone should be fatal to his claim.

Regardless, such argument would have failed even if petitioner had made it. The victim was seventeen years old at the time of Petitioner's trial. App. 183. She testified that Petitioner once asked her, while his wife was putting Petitioner's baby to sleep, if she was a virgin, and said that he would "make love to [her] and spoil [her] for the rest of [her] life" if he was to take her virginity. App. 189. The victim testified that, as she had been thirteen years old at the time, the idea of being spoiled had appealed to her, and she affirmed that Petitioner's statement made her feel special, and affirmed that that conversation represented the start of Petitioner's sexual advances towards her. App. 190. She testified that, after the first time that Petitioner had intercourse with her, she thought that Petitioner cared for her, that Petitioner gave her material gifts, that Petitioner gave her lots of attention, that Petitioner told her not to tell anyone and that he would give her anything she wanted in exchange, that she enjoyed getting things from Petitioner, that she feared getting in trouble if she told anyone, and that she came to like Petitioner. App. 195-96, 293-96. She testified that, by the time that she was in the ninth grade and had had sexual intercourse with Petitioner on more than ten occasions, she thought of Petitioner as her boyfriend. App. 192-204. She denied that Petitioner had ever made specific threats in order her sexual compliance, but she testified about seeing Petitioner's temper and affirmed that her knowledge of Petitioner's temper made her more likely to give in when he pushed her to have intercourse. App. 210-13. She testified that Petitioner told her to tell her parents that she lost her virginity by using a tampon if her parents ever had her examined. App. 216-17. She testified that, after Petitioner separated from his wife, he told her that

she would start a new life with her and his child, that they would get married, and that they would live together forever, and that he encouraged her to get emancipated and told her negative things about her parents. App. 222-23, 301. She testified that she kept returning to Petitioner's home despite the sexual abuse because she was a social person and she liked Petitioner's child. App. 279. She testified that Petitioner isolated her from others by telling her that she "was his" and that she could not go places with other people because they "were bad, or they weren't good influences, or they weren't real friends," and that Petitioner told her that others she knew were expressing sexual interest in him. App. 281, 300, 302. She testified that she did not cut off contact with Petitioner despite the sexual abuse because she was scared, and that she did not want to have to answer questions about cutting off contact. App. 291-92.

The jury also heard evidence that Petitioner had been giving financial support to the victim's parents before the victim disclosed the sexual abuse, that Petitioner was possessive of the victim and had even given her a secret phone, and that others had noticed that Petitioner was giving gifts to the victim. App. 71, 73, 78, 85, 99, 109, 115. One of the victim's friends testified about Petitioner's sexual abuse of her, which began when she was fourteen years old. App. 306-313. The friend testified that Petitioner made her feel "special like [she] was going a good favor," and the details that she provided about the three times that Petitioner sexually abused her were similar to the victim's testimony about Petitioner's abuse of her. App. 313-16. She also testified that Petitioner told her "that he was going to go after [the victim] next" when she told Petitioner that she would no longer have sexual intercourse with him. App. 316-17.

Had trial counsel objected to Inv. Perry's testimony on the basis that it was improper opinion testimony, and the trial counsel had sustained that objection, the testimony of multiple witnesses would still have supplied the jury with all the evidence that it needed to understand the

reason that the victim delayed her disclosure, declined to cut off contact with Petitioner, and continued to give into Petitioner's sexual advances. The evidence demonstrated that Petitioner had made the victim feel special and appreciated, made the victim feel apprehensive about denying Petitioner's sexual requests, and caused the victim to feel somewhat isolated from others around her, among other things. The victim, seventeen years old by the time of trial, had been able to express those reasons all on her own without the need for testimony from an expert. Inv. Perry testified that delayed disclosure was common, but that testimony was dwarfed in prejudicial effect by the evidence highlighted above. Even if the jury had not heard Inv. Perry's brief testimony that delayed disclosure was common in the cases that he had investigated, it had ample evidence to lead it to conclude that the victim's explanations for not disclosing the sexual abuse right away were credible.

This Court should find that Petitioner has failed to prove that trial counsel was constitutionally ineffective for not objecting to Inv. Perry's reference to delayed disclosure because Petitioner has failed to prove that the testimony was objectionable as improper opinion testimony and because Petitioner has failed to prove that, even if the trial court had sustained an objection on the basis, there is a reasonable likelihood that the outcome of trial would have been different. This Court should deny relief to Petitioner as to this claim.

**III. Petitioner has failed to prove that trial counsel was constitutionally ineffective for not raising a vouching or bolstering objection to testimony from a law enforcement officer because he has not proven that the testimony was improper, trial counsel had a valid strategic reason for not objecting to the pediatrician's testimony, and Petitioner has failed to satisfy the prejudice prong of *Strickland*.**

Petitioner argues that the PCR court erred in finding that Petitioner failed to prove that trial counsel was constitutionally ineffective for not objecting to testimony from two witnesses that

constituted improper bolstering for the victim's credibility.[5] Petitioner alleges that certain testimony from a law enforcement witness and from a pediatrician served no other purpose than to communicate to the jury that the two witnesses believed that the victim's allegations against Petitioner were credible.[6]

**A. Petitioner has failed to prove that there was any deficiency in plea counsel's performance with respect to the pediatrician because the pediatrician's testimony did not constitute improper bolstering and because, even if it did, trial counsel had a valid and strategic reason for not objecting to it.**

Mary Fran Ratchford Croswell, a pediatrician working in the Greenville Health System's division of forensic pediatrics, child abuse, and neglect, was qualified at Petitioner's trial without objection as an expert in pediatric medicine and child abuse pediatrics. App. 329-32. Immediately after it qualified Dr. Croswell, the trial court explained the difference between an expert and a lay witness, but then said, "But expert witnesses and all other witnesses have this in common, they're [sic] credibility is determined entirely by you." App. 332-33. Dr. Croswell testified that she had conducted a sexual assault examination of the fifteen-year-old victim after the victim had been referred to her by law enforcement officers for a sexual abuse evaluation. App. 333, 336. Dr. Croswell explained that she took "a detailed medical history and history of any incident" from both the victim and her parents, performed a physical examination of the victim, and then made

[5] Improper bolstering is something that one witness does with respect to another witness's credibility, while improper vouching is something that a prosecutor does with respect to a witness's credibility. *See State v. Geter*, 434 S.C. 557, 864 S.E.2d 569 (Ct. App. 2021).

[6] Petitioner did not explicitly raise this claim in his pro se application or his amended application, although he did raise a different argument in his amended application with respect to the pediatrician's testimony. App. 621-27, 634-43. The PCR court heard testimony about the claim. App. 686-87, 710-12, 728-29, 736-40. The PCR court did not explicitly make findings of fact or conclusions of law with respect to the claim in its order of dismissal. App. 770-80. It did, however, make findings about trial counsel's performance with respect to the pediatrician's testimony that are applicable to this claim. App. 773. Petitioner noted in his motion to alter or amend the judgment that the order of dismissal did not address the claim that trial counsel did not object to improper bolstering from the officer and the pediatrician. App. 786.

recommendations. App. 334. Dr. Croswell related the particulars of the changes in the victim's behavior as told to her by the victim's parents. App. 334. Dr. Croswell testified that this information "would support other history that was provided" to her so that she could form her diagnosis. App. 334-35. She testified that the victim told her that her abuser had performed oral sex on her and penetrated her vagina with his penis, which assisted her in making appropriate recommendations for sexually transmitted disease ("STD") tests. App. 335-36. Dr. Croswell visually inspected the victim's body and used a colposcope to help her "visualize the anogenital area" and photographically document her findings. App. 336. Dr. Croswell classified the examination as "normal," and testified that the victim "had normal hymenal tissue." App. 337. She did not see physical indications of trauma to the victims' hymenal tissue or vaginal canal. App. 337-38. She agreed with the solicitor that her findings would be "consistent with the allegations of sexual abuse" because medical studies show that 85 to 90 percent of children who have been sexually abused show no physical signs of the abuse. App. 338. She did not determine that any further medical treatment was needed "for sexual abuse," although she did have the victim undergo additional STD testing six months later and referred the victim for "appropriate mental health counseling." App. 338-39.

When being cross-examined by trial counsel, Dr. Croswell testified that her findings were consistent with the patient history that the victim provided to her, but also admitted that she "did not have physical findings specific for sexual abuse." App. 339. Dr. Croswell admitted twice that everything she recounted during her testimony had been supplied to her by the victim or the victim's parents. App. 339-40. She testified that normal physical exams have "repeatedly" been shown that they "can be consistent with the allegations that she made." App. 340. She testified that she was "not hesitant in saying that" the normal exam could also be consistent with their having

been no sexual abuse; however, she said that such a conclusion was contradictory to what the victim and her parents had told her. App. 340-41. She agreed that it was possible that a patient could lie when providing his or her history, but said that she accepts what a patient says to her as true because she is a doctor. App. 341. She agreed that she had elicited the patient history from the victim by questioning her using a sixteen-page, detailed report. App. 341-42. She agreed that she had testified on the solicitor's behalf on "numerous occasions." App. 343.

During his closing, trial counsel argued that Dr. Croswell's testimony provided no value to the jury because she "did a physical exam and she found nothing." App. 483. Trial counsel argued that the solicitor had called Dr. Croswell as a witness because the solicitor wanted the doctor to repeat the victim's allegations. App. 483-84. Trial counsel pointed out that Dr. Croswell initially testified that her findings were consistent with the victim's allegations of abuse, and that she admitted on cross-examination that her findings were also consistent with the victim's not having been abused. App. 484. Trial counsel argued that "they" wanted the jury to find Petitioner guilty, and said that Dr. Croswell "knew before she did that physical exam that they weren't going to find anything. And she found nothing to indicate that there was anything going on." App. 484.

Petitioner testified at the hearing before the PCR court that trial counsel had not objected when the pediatrician testified that her normal examination of the victim did not exclude sexual abuse and that she had referred the victim for mental health counselling. App. 686. Petitioner opined that he did not think that the fact that the pediatrician referred the victim for counselling was relevant at trial. App. 687.

Petitioner's argument that trial counsel performed deficiently by not raising a vouching objection to Dr. Croswell's testimony fails because the witness's testimony did not constitute improper vouching or bolstering. "The assessment of witness credibility is within the exclusive

province of the jury. While experts can testify to their opinion, they are precluded from offering an opinion about the credibility of another witness. Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. A witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Makins*, at 501-02, 860 S.E.2d at 670-71. "[W]hen the expert witness gives no indication about the victim's veracity, it does not amount to bolstering." *State v. Perry*, 420 S.C. 643, 663, 803 S.E.2d 899, 910 (Ct. App. 2017), *overruled on other grounds by State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). Petitioner wants this Court to consider only a single sentence from Dr. Croswell's testimony. But that sentence should not be "considered in isolation." *Perry*, at 665, 803 S.E.2d at 911. Arguably, that sentence, when Dr. Croswell testified that "[her] patient provided [her] a history of sexual abuse, and her exam was consistent with the history provided," taken alone, could be interpreted to mean that Dr. Croswell believed that the victim could have been sexually abused despite the normal examination. App. 339.

However, Dr. Croswell's testimony, considered in its entirety, was not a comment on the victim's credibility. Trial counsel elicited testimony from Dr. Croswell that her understanding of the victim's patient history, and the sexual abuse allegations, were based entirely on what the victim and the victim's parents told her, that it was possible that the victim and her parents had been lying to her when relaying the victim's history, that she takes at face value the patient history that each of her patients provides to her, and—perhaps most importantly—that she found no physical indications that the victim had suffered sexual abuse, which she admitted could mean that there had been no such abuse. Dr. Croswell even testified when being questioned by the solicitor that she determined based on her examination that the victim did not require any medical treatment, and it would be a bridge too far for this Court to conclude that Dr. Croswell's counselling referral

for the victim meant that she believed that the victim's allegations were true. *See Makins*, at 503-04, 860 S.E.2d at 671-72 (disagreeing with this Court's conclusion that a treating expert's affirmation that she had provided treatment to a victim constituted improper bolstering because the affirmation, without more, did not convey to the jury that the expert believed the victim's allegations to be true). Petitioner's contention that Dr. Croswell based a finding of sexual abuse "solely on the interview of the minor child" is a misrepresentation of Dr. Croswell's testimony, which did not include a finding from Dr. Croswell that the victim had been sexually abused. Brief of Petitioner at 20. Dr. Croswell was not vouching for the victim's credibility because she admitted that she accepts as true every patient history that one of her patients provides and that there was no medical evidence that the victim had been sexually abused. The "most likely interpretation" of Dr. Croswell's testimony, and really the only one that is possible when her testimony is considered on the whole, is that Dr. Croswell found no physical evidence during her examination that would prove or disprove the truth of the victim's allegations.[7] *Perry*, at 665, 803 S.E.2d at 911.

Even if Dr. Croswell improperly vouched for the victim's credibility, trial counsel had a valid and strategic reason for not objecting to it. Trial counsel testified before the PCR court that he had heard similar testimony from Dr. Croswell in past trials, that he did not think that Dr. Croswell's testimony was objectionable, and he did not want the jury to think that he was trying to hide something from it in the event that the trial court overruled an objection from him, which he felt would be the likely ruling in that situation. App. 711-12. Trial counsel testified that he does

[7] Petitioner has not proven that Dr. Croswell's testimony that the normal exam can be consistent with sexual abuse is false. Dr. Croswell's testimony on that point was a blanket statement that she based upon research that she said applied generally. *See State v. Acker*, 435 S.C. 716, 733, 869 S.E.2d 873, 882 (Ct. App. 2022) ("Nor did [an expert's] testimony about false denials [from child sexual abuse victims] being more common than false allegations improperly bolster [the minor victim's] credibility.").

not always object to evidence that could be objectionable because, in some cases, if the evidence is not very harmful to the defense, he does not want the jury to think that he is trying to hide something. App. 710-11. The PCR court found that trial counsel's strategy was to not object to testimony from Dr. Croswell because trial counsel thought that he could "handle it" when he cross-examined her, and concluded that trial counsel's strategy was reasonable. App. 773. The PCR court's finding was correct; furthermore, trial counsel did "handle" the situation, and was able to elicit admissions from Dr. Croswell that essentially negated any support to the solicitor's case that the testimony may have had.

**B. Petitioner has failed to prove that there was any deficiency in plea counsel's performance with respect to the law enforcement officer because the officer's testimony did not constitute improper bolstering and because Petitioner has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected.**

"[T]he testimony of a witness is improper bolstering if: (1) the witness directly states an opinion about the other witness's credibility; (2) the sole purpose of the testimony is to convey the witness's opinion about the other witness's credibility; or (3) there is no way to interpret the testimony other than to mean the witness believes the other witness is telling the truth." *Geter*, at 569, 864 S.E.2d at 575 (quoting *Chappell v. State*, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019)).

Inv. Perry, while testifying about the course of his investigation into the victim's allegations, described his interview of the victim, which took place at her school. App. 348. Inv. Perry testified that, in that interview, the victim disclosed that she had been subjected to multiple sexual assaults and gave information about the times and locations of those assaults. App. 348-51. While the solicitor was questioning Inv. Perry about the approximately forty-five-minute interview, the following exchanged occurred:

> Q: And was it pretty easy for her to tell you what was – to give you the statement, or were you having to prompt her a lot, or how was that going?

> A: I felt like she was a little bit ashamed and kind of embarrassed, not necessarily talking to me as a male, but talking about what occurred to her. She presented herself as bright and intelligent. And she presented herself, to me, as being a pretty articulate young lady, and kind of embarrassed that she kind of got manipulated by [Petitioner].

App. 350-51. Inv. Perry then went on to testify about the steps he took after the conclusion of that interview to see if he could find evidence to corroborate the victim's allegations. App. 351.

In his opening statement, trial counsel said that the jury would hear evidence that Petitioner had been generous towards the victim and her family, that Petitioner came to feel that the victim's family was taking advantage of his generosity, that the victim's family became angry when Petitioner cut off his financial support of them, that the victim's family told Petitioner "that he would be sorry," that Petitioner and Rachel were going through a divorce, and that the victim's sexual abuse allegations followed, implying that the allegations were false and stemmed from ill will on the part of the victim, the victim's family, and Petitioner's soon-to-be ex-wife. App. 46-47. When Sandra testified, trial counsel cross-examined her about Petitioner's financial support of her family, although she denied that Petitioner ever cut off his support for her. App. 85-87. Sandra testified that Rachel called her while Rachel's custody dispute with Petitioner was ongoing to say that she should look into whether Petitioner had something "going on" with the victim. App. 88. The solicitor elicited a denial from Jamie that the victim's family cut off the victim's contact with Petitioner because they were angry that he was no longer giving them financial support. App. 109. Jamie had been friends in the past with Petitioner's wife and had gotten acquainted with her again before the victim disclosed the sexual abuse. App. 109-10. Rachel[8] testified that she told Sandra that she felt that Petitioner's relationship with the victim was not normal and that she had caught

[8] Rachel testified that she met Petitioner when she was seventeen years old and he was twenty-six. App. 131.

him sleeping on a couch with the victim with his legs on her. App. 157. On cross-examination, Rachel admitted that she had previously falsely told her grandmother and law enforcement officers that her father had cut and raped her, although she claimed that Petitioner had forced her to do so. App. 165-66. Trial counsel vigorously questioned Rachel on the fact that she did not leave Petitioner, despite alleging that he was abusive towards her, which obviously was meant to make the jury question her credibility. App. 161-65. Rachel affirmed that Petitioner had threatened to take away her child if she ever "[went] against him," and that he had strangled her twice and held a gun to her head while threatening to kill her if she ever told anyone about him and the victim. App. 177-78. While being questioned by trial counsel, she testified that she had never before told anyone about Petitioner's threatening her with a gun to her head because she "wasn't asked." App. 180. On cross-examination, the victim agreed that she had been friends with Petitioner's ex-wife. App. 272. Trial counsel questioned the victim about her continued visits to Petitioner's home if Petitioner was actually sexually abusing her. App. 279. The victim testified that she did not remember if Petitioner at some point refused to financially support her family. App. 288.

Trial counsel argued in closing that the solicitor's case was built on the victim's testimony, whose story did not add up. App. 466-67. He argued that the victim was falsely accusing Petitioner because of the feud between her family and him. App. 473. He argued that the victim was lying because she was trying to help Petitioner's ex-wife, who was friends with the victim's older sister, in her divorce from Petitioner. App. 473-76. He argued that the victim's friend was lying about Petitioner's sexual activities in order to help the victim. App. 476-77. He argued that Petitioner's ex-wife had a motive to lie and was not credible because she had falsely accused her own father of rape in the past. App. 477-78. He argued that the victim's mother was lying because Petitioner stopped financially supporting her and because she did not like that Petitioner was friends with her

ex-husband, the victim's father. App. 479. As trial counsel put it, "I don't want to beat around the bush. I'm flat out telling you that these people got together and they made this up, that it didn't happen." App. 479.

Petitioner's defense was that the victim, the victim's family members, and Petitioner's ex-wife were falsely accusing him. It was essential for the solicitor, as part of making the case against Petitioner generally and to rebut Petitioner's defense, to establish the victim's credibility. The question and answer about the victim's demeanor or behavior during her schoolhouse statement were appropriate because the victim's demeanor while giving her statement was helpful for the jury in its assessment of the victim's credibility. *See State v. Tillman*, 433 S.C. 58, 63, 856 S.E.2d 168, 171, n.3 (Ct. App. 2021) (when considering whether the trial court erred in denying the defense's motion for a directed verdict, reasoning that the admission of law enforcement officers' interviews of the defendant could have enabled the jury to properly form conclusions about the defendant's credibility because the interviews were admitted during the prosecution's case-in-chief); *State v. Barrett*, 416 S.C. 124, 132-33, 785 S.E.2d 387, 391 (Ct. App. 2016) (in finding that a forensic interviewer did not improperly bolster a minor victim's credibility, noting that the interviewer testified to, among other things, her personal observations about the victim's demeanor); *State v. Palmer*, 415 S.C. 502, 513, 783 S.E.2d 823, 828 (Ct. App. 2016) (quoting authorities for the proposition that a trial court, in determining whether a lawyer has committed purposeful discrimination in its juror selection, usually has to rely on its evaluation of the lawyer's demeanor and credibility); *State v. Johnson*, 413 S.C. 458, 468, 776 S.E.2d 367, 372 (2015) (finding that the trial court's finding that Johnson was not credible was supported by the record because, among other reasons, the trial court was able to assess her demeanor on the witness stand); *State v. Berry*, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015) (finding that testimony from an expert

witness, who was a psychotherapist and social worker, about things she noticed in the victim's demeanor, did not constitute improper bolstering).

Petitioner's only reference to the prejudice prong of *Strickland* comes from his assertions that the trial court would have been required to sustain an objection to bolstering, if trial counsel had made one, that Petitioner "was prejudiced by the failure to object," and that "there is a reasonable likelihood that the result in this trial would have been different." Brief of Petitioner at 21. This is not an argument, and is merely an unsupported conclusion. For that reason alone, Petitioner has not proven that the alleged error "actually had an adverse effect on the defense." *Hill*, 474 U.S. at 58. After the jury was sworn, the trial made the following remarks to it:

> [A]s the judge of the facts, you will have to, by necessity, determine the credibility of all the evidence. So that means for every witness who takes the stand and testifies . . . you'll have to determine its believability.
>
> In the case of a witness who testifies, I can give you some general guidelines that you may or may not find useful in gauging credibility. But you can consider, for instance, what opportunity the witness had to observe the things they're here to tell you about. You may consider if they have some interest in the outcome of this case, whether they have something to gain or lose by the decision in the case. That is, whether they're biased or prejudiced towards someone or some issue in the case.
>
> You may consider how their testimony stacks up to the other evidence in the case, whether it's consistent or inconsistent. You may consider their demeanor on the stand. And you may use whatever it is you use in your daily life to determine whether someone is being truthful. You can use your common sense. It didn't evaporate when you walked into the courthouse. So you will make this decision, however, about credibility, I know, using your good common sense and your sense of logic and reason and not arbitrarily.

App. 36-37. After the parties finished their closing arguments, the trial court instructed the jury as follows:

> I told you, also, that you were, also, the judges of the credibility of the evidence. And I'm not going to repeat that, because I know you heard me the first time.

> But I will tell you that in deciding credibility, you may believe everything a witness says, or you may believe nothing a witness says. You may believe parts of their testimony, and disbelieve other parts. You may believe one witness over several, or several over one.

App. 499.

## CONCLUSION

Petitioner was convicted because the jury heard damning evidence of: Petitioner's gross and criminal behavior, as given by the minor victim; Petitioner's conduct with respect to Barton, who—a minor herself during the period of time at issue—was the victim's friend, conduct which was almost identical to the sexual acts Petitioner performed on the victim; and Petitioner's unusual public behaviors with respect to the minor victim from her and his family members, which corroborated details of the victim's testimony. For the foregoing reasons, the State respectfully requests that this Court affirm the PCR court's denial of Petitioner's application for post-conviction relief.

Respectfully submitted,

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October 27, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Certiorari -PCR- Greenville County
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

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Appellate Case No. 2019-000907

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Jerald D. Gaskins, Jr.#00362923 ..... Petitioner,

v.

State of South Carolina ..... Respondent.

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# REPLY TO RETURN

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## Question I.

**Did the Post Conviction Relief Court err in failing to find trial counsel was ineffective when trial counsel failed to object to the improper cross-examination of Jerald Gaskins when the prosecutor was permitted to ask Mr. Gaskins improper questions on cross-examination?**

*Failure of trial counsel to object to questions about text messages improperly attributed to Walt Mucienko, the father of the complaining witness*

In contending that Petitioner should fail on this issue, the State has argued, "Petitioner has failed to prove that he would have been successful on appeal had trial counsel preserved the issue if the solicitor's questions about the Walt texts because Petitioner has not proven that the solicitor lacked a good faith basis for asking the questions." This is simply not correct. At the Post Conviction Relief hearing, Mr. Gaskins proved there was no good faith basis for asking the question about the alleged tests with the father of the complaining witness. When the father testified the messages used to impeach Mr. Gaskins were not his messages, the lack of a good faith basis has been established. Had trial counsel raised a proper objection as to the good faith basis, this would have been established at the trial. Trial counsel could also have raised the issue that the State failed to disclose the texts as required by Rule 5 of the South Carolina Rules of Criminal Procedure.

Neither at the trial nor at the Post Conviction Relief hearing did the State introduce any evidence that Sandra, the wife of Walter Mucienko gave the solicitor the text messages. The trial counsel did not attempt to cross examine the solicitor as to her

good faith basis for the claim the text messages came from Mr. Gaskins. At the Post Conviction Relief hearing Mr. Gaskins did establish facts that the wife could not have made the representations to the assistant solicitor that the messages were Mr. Mucienko as he denied sending the messages.

The law is well established that a lawyer must have a good faith basis for asking a question. *State v. McEachern,* 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012). In a serious criminal case when the validity of the good faith basis is called into question, the State should not be entitled to reply upon a representation made at trial as to the good faith basis. The State further argues that both the fact that the messages were not sent by Walt and that Sandra made the representation to the assistant solicitor both could be true. Br. of Resp. at 8. What the State appears to be arguing is that a trial is fair when the State is permitted to use representations made to them are in fact false. Thus, a fair trial permits Mr. Gaskins to be impeached with false statements. This should not be the law. Impeaching a witness with false statements is not a fair trial, even if the State did not know the statements were false. If the State elects to cross examine a witness with unverified facts, it should do so at its peril.

The State has argued that Mr. Gaskins has suffered no prejudice as a result of the improper questions. The questions were asked to make Mr. Gaskins out to be a liar. The State argued as much in it closing argument. The State argued:

> What he came to court and presented to you was e3verything is a lie, everything. No, I never tested that dad. No, I never tested that sister. No, I don't even like country music. No, I never said I had tickets to this concert. No, I never went to that concert where I got into it with my wife. No, I don't have Facebook, no, no, no, no, no, nothing.
> App.at 494, ll 14-21.

The State in its brief has attempted to argue that the question was not evidence against Mr. Gaskins and that "[t]he trial court's instructions insulated Petitioner from any harm from the questions." Br. of Resp. at 9. In making this argument the State contends that a jury instruction telling the jury that evidence consists of sworn testimony and exhibits insulates Mr. Gaskins from prejudice when he denied sending the text messages. As noted above, this was certainly not the position taken by the State in its closing argument. The state argued that Mr. Gaskins' denials of the text messages were evidence of his being a liar and a basis to convict him of the charges. By telling the jury sworn testimony is evidence, the prejudice to Mr. Gaskins is actually increased. The jury was told they can consider Mr. Gaskins' denials as evidence. The State argued those denials are evidence of his being a liar.

Today, because of the testimony at the Post Conviction Relief hearing, we know those denials are the truth and not the lie the State represented them to be at the trial. Prejudice to Mr. Gaskins in permitting the cross-examination of alleged texts between Mr. Gaskins and Mr. Mucienko has been shown.

*Failure of trial counsel to object to improper cross-examination of by use of alleged text messages to the sister of complaining witness*

Trial counsel should have objected to any use of the text messages given the day before trial as a violation of Rule 5 of the South Carolina Rules of Criminal Procedure. Had a proper objection been made, the trial judge would have been forced to either exclude the evidence or permit a continuance so that defense counsel would have the opportunity if the messages were authentic.

In its brief, the State apparently does not take serious issue with the argument of Mr. Gaskins that the text messages when closely examined indicate they did not come from Mr.

Gaskins. (See, Br. of App. at 7-8). The State has not attempted to explain the numerous inconsistencies pointed out by Mr. Gaskins at the Post Conviction Relief hearing and in his brief on this appeal.

The State argues, and somewhat properly, that these inconsistencies were questions for the jury. The problem with the State's argument is that with the late disclosure of the text messages, neither Mr. Gaskins nor his counsel had the time to review the messages in detail to point out the inconsistencies that Mr. Gaskins was able to point out in his testimony at the Post Conviction Relief hearing. When the evidence is fully examined, then perhaps the question is for the jury, assuming the trial judge would have permitted them to be introduced once the discrepancies are pointed out. As noted in the opening brief, a review of the messages shows that the texts were not from Mr. Gaskins. A trial judge would have abused its discretion if the judge had permitted the introduction of the messages without further authentication.

Mr. Gaskins was prejudiced by the admission of the testimony and cross-examination of Mr. Gaskins about these messages. An argument could be made that Mr. Gaskins would have been less prejudiced had the actual messages been introduced. Then, and only then, could the jury have seen that the messages make sense only if they were not from Mr. Gaskins. As noted above, the State used the denials of Mr. Gaskins to its benefit in its closing argument. The State used these messages as a further basis for contending Mr. Gaskins is a liar.

*Failure of trial counsel to object to text Messages that placed the character of Jerald Gaskins in issue in violation of Rule 404b of the South Carolina Rules of Evidence and which messages were not properly authenticated*

Without any basis in fact to establish that "Jay Fowler" is Jerald Gaskins, the State wants to argue that Mr. Gaskins was not prejudiced when the State asked him if, using pseudonym "Jay

Fowler," he befriended a 12 year old girl while out on bond for criminal sexual conduct with a minor. In a trial such as this, one would have to look long and hard to find a more prejudicial question. At the Post Conviction relief hearing the State made no effort to prove or even introduce any evidence to establish that Jerald Gaskins had opened a Facebook account under the name "Jay Fowler."

While the assistant solicitor never asked about the specific messages, the prejudice from the questions asked is readily apparent. The State has argued that this brief cross-examination was not prejudicial because "[t]he solicitor did not return to the topic during her questioning, nor did she seek to introduce any such messages into evidence." Br. of Resp. at 17. As pointed out in the Brief of Appellant at page 12, when cross-examining Mr. Gaskins about an alleged text exchange with the 404b witness, the assistant solicitor asked Mr. Gaskins, "Well, maybe you did it under Jay Fowler?" App. at 454, l 25. This sarcastic comment simply drove home the argument by the State that Mr. Gaskins had opened up a Facebook account in the name of "Jay Fowler."

The State has argued that the lack of evidence at the Post Conviction Relief hearing as to a good faith basis for asking the question is proof of a good faith basis for asking the question about "Jay Fowler." The State argues, "The solicitor did not testify at the PCR hearing and as a consequence her basis for asking about the profile is not known, but the solicitor's questions surely indicate that she had some reason for to think that Petitioner was behind the Fowler profile;" Br. of Resp. at 19. The State then reviews the text messages to make an assumption that the assistant solicitor may have had a basis to ask the question. Without even knowing how these messages cam into the possession of the assistant solicitor, such a conclusion is sheer speculation.

These text messages were never given to defense counsel. This is another violation of Rule 5 to which no objection was made. Had trial counsel objected to the questions as not having a good faith basis and a violation of Rule 5, the issue would have been preserved for appeal and a reversal would have been very likely. This is especially true since this was not the only Rule 5 violation.

*Failure of trial counsel to object improper cross-examination of Jerald Gaskins when he was asked about an alleged violation of a restraining order in violation of Rule 404b of the South Carolina Rules of Evidence.*

In discussing this issue, the State appears to concede the questions were not proper and addresses the issue of whether the testimony was prejudicial. As noted in the Brief of Appellant, the only objection preserved for appellate review was that the assistant solicitor and Mr. Gaskins were arguing. Such an objection preserves virtually nothing for appellate review.

In arguing that Mr. Gaskins was not prejudiced, the State argues, "Petitioner's credibility was already throughly rebutted through other evidence presented at trial." Br. of Resp. at 26-27. The other evidence presented at trial are the errors previously discussed in the Opening Brief and this Reply Brief. The essence of the argument of the State is that because other inadmissible impeaching evidence has been introduced, this inadmissible impeaching evidence is harmless.

The point the State does not consider, and will be discussed later, each inadmissible impeaching evidence makes the other inadmissible impeaching evidence have more credibility. This was a complete credibility case. No forensic evidence proved the crime. In fact, the only forensic evidence presented, that the physical examination was normal, tends to prove a crime had not occurred. As this case was purely a credibility case, the improper impeachment as to the violation of a restraining order could easily have led the jury to believe Mr. Gaskins is a liar and

therefore he is guilty.

This Court has reversed cases in a Post Conviction Relief setting when the error as to bolstering is involved in a credibility case. This Court has said, "'The determination whether a bolstering error [prejudiced the outcome of a trial] depends on whether the case turn[ed] on the credibility of the victim.' . . . The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or 'relie[s] solely upon the victim's testimony to establish the details of the crime ....'" *Chappell v. State,* 429 S.C. 68, 80, 837 S.E.2d 496, 502 (Ct. App. 2019)(internal citations omitted). This case turned solely on the credibility of the complaining witness and Mr. Gaskins. The principle established in *Chappell* require reversal.

*Cumulative error*

Mr. Gaskins is not arguing that all issues raised in this case should be looked at as cumulative error. He is only arguing that identical issues attacking the credibility of Mr. Gaskins be looked at as cumulative error. This only makes logical sense. If the credibility of a defendant is attacked in 100 improper ways, while no one attack on his credibility may be sufficient, the cumulative effect of 100 improper attacks on his credibility should be view cumulatively. The attacks on Mr. Gaskins credibility were all very similar as they all involved his believability. The State in cross examination and in closing attempted to portray Mr. Gaskins as a person who would lie about any thing, from texting Walt Mucienko, to opening a Facebook account in the name of :Jay Fowler: to lying about a restraining order being issued. All the accusations were an attempt to portray Mr. Gaskins as a liar. They should all be considered together.

**Question II**

**Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective for his failure to object to the expert testimony of Officer Robert Perry as to**

**delayed disclosure when the officer had not been qualified as an expert?**[1]

The State first argues that the statement by Officer Robert Perry was not improper opinion testimony. They argue, "Perry's testimony did not concern the behavioral characteristics of sex abuse victim; instead, Inv. Perry's testimony was about his personal observations in any sexual abuse investigations that it is common for victims to delay disclosing the abuse and that the delay hampers law enforcement officer's ability to acquire evidence to corroborate the allegations." Br. of Resp. at 35. Had Officer Perry simply testified that the delay hampered the investigation in this case, that would arguably be permissible. In this case he went further. He gave an opinion as to whether a delayed report is common or uncommon in child sex abuse cases. This answer was an opinion for which he was not qualified as an expert.

The question and answer went well beyond his experience as to how a delay hampers the investigation. This does not qualify as a lay opinion statement permitted by Rule 701 of the South Carolina Rules of Evidence permit lay opinion testimony. The rule does not permit expert testimony under the guise of lay opinion testimony.

Prejudice in shown in this case as the jury could have had a question in their mind as to why the delay in reporting. The answer to this concern was supplied by Officer Perry who gave his expert opinion without being qualified as an expert. The fact that the complaining witness was 17 years old at the time of the trial has no bearing as to whether this improper testimony impacted the jury's decision. Whether she is 12 or 17 at the time of the trial is simply not a

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[1] In footnote 7, the State argues this issue was not raised below. The issue was not raised in the original or first amended Post Conviction Relief application. It was raised in the second amended application filed on October 25, 2018 which inadvertently was not included in the Appendix.

justification of an improper question and answer. She claimed the alleged abuse started when she was 13 and last about "a year, a year and a half." App. at 197, ll 9-11. Thus, the delay in the reporting was for about one year as she was 15 when she reported it. App. at 56, ll 18-19.

Regardless of the other facts cited by the State to support the conviction, this case still remains a credibility case between Mr. Gaskins and the complaining witness. For that reason alone, the improper testimony was prejudicial against Mr. Gaskins.

**Question III**

**Did the Post Conviction Relief judge err in failing to hold trial counsel to be ineffective when trial counsel failed to object to the improper vouching for the credibility of the complaining witness**?

The issue as to bolstering plows no new ground in the jurisprudence of our state. Improper bolstering as to the credibility of a witness in child sex abuse cases has been improper since at least 1989. *State v. Dawkins,* 297 S.C. 386, 377 S.E.298 (1989). Improper bolstering as to the credibility of witness has long been prohibited in our state. *State v. Carroll*, 182 S.C. 19, 188 S.E. 374, 376 (1936)("It is undoubtedly true, we think, that the only possible reason for having the witness testify to these declarations made by him out of court was to bolster up and to lend effect to his positive testimony as to how the killing occurred." ). In this case the statements elicited from Officer Perry simply constituted improper bolstering as to the credibility of the complaining witness.

When an investigating officer is permitted to testify that the minor child "presented herself as bright and intelligent. And she presented herself to me as being pretty articulate young lady, and kind of embarrassed that she kind of got manipulated by Mr. Gaskins." (App. at 351, ll

10-14) the officer is simply saying he believes the witness is telling the truth. This is improper bolstering. The jury could not have interpreted the testimony in any other fashion. The state does not discuss this statement as to being improper bolstering. Apparently the State concedes this is improper bolstering. The State simply argues this testimony is not prejudicial to Mr. Gaskins.

The testimony as to Dr. Mary Fran Ratchford Croswell is likewise bolstering. The State had no need to ask the doctor the question, "And would her findings in this exam be consistent with the allegation of the sexual abuse." When the doctored answered, "Yes" (App. a t 338, ll 3-5) she is saying she believed the minor child. This is true because there were no physical findings that would justify the allegation of sexual abuse. This series of questions led to the question on cross-examination when the doctor said, "My testimony is that my patient provided me with a history of sexual abuse, and her exam was consistent with the history provide." App. at 339, ll 15-17. This statement is a comment on the fact that the doctor believed the information given by the minor child. Such testimony is prohibited. *See, State v. Kromah*, 401 S.C. 340 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011).

As noted previously, *Chappell v. State,* 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019) holds that when credibility is the sole issue, improper bolstering is prejudicial to a defendant. No charge to the jury can undo the harm of the bolstering testimony in this case. A reasonable trial attorney who handles child sex abuse cases would know the law prohibited this type of testimony. He would know to object to this type of testimony. To fail to do so falls well below the standard of a reasonablely competent criminal defense trial attorney. Mr. Gaskins was prejudiced by the failure to object.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in the Opening Brief, this Court should reverse the conviction of Jerald Gaskins and order a new trial to be held.

September 12, 2022

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Sep 12 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Certiorari -PCR- Greenville County
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

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Appellate Case No. 2019-000907
Lower Case No. 2017-CP-23-5901

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Jerald D. Gaskins, Jr.#00362923 ..... Petitioner,

v.

State of South Carolina ..... Respondent.

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CERTIFICATE OF SERVICE

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I, Sandy Traynham, hereby Certify that I am the Secretary for Attorney for the Petitioner in the above entitled case. That on September 12, 2022, I did send via e-mail and US Mail, a copy of the Reply to Return to Taylor Zane Smith, SC Attorney General Office, PO Box 11549, Columbia, SC 29211-1549 and tsmith@scag.gov.

September 12, 2022

Sandy Traynham
Secretary

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September 12, 2022

e-mail
Jenny Abbott Kitchings, Clerk
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Jerald D. Gaskins, Jr. #00362923 vs. State of South Carolina, Case No. 2019-000907

Dear Ms. Kitchings:

I am enclosing herewith for filing the Reply to Return regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc Taylor Zane Smith, SC Attorney General Office

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Jerald D. Gaskins, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-000907

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Appeal From Greenville County
Alex Kinlaw, Jr., Circuit Court Judge

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Unpublished Opinion No. 2025-UP-046
Heard February 13, 2024 – Filed February 5, 2025

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**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

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Clarence Rauch Wise, of Greenwood, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Melody Jane Brown, both of Columbia, for Respondent.

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**MCDONALD, J.:** Jerald D. Gaskins, Jr. (Petitioner) appeals the denial of his application for post-conviction relief (PCR), arguing the circuit court erred in finding he received effective assistance at his trial for criminal sexual conduct (CSC) and lewd act upon a child. Petitioner contends trial counsel was ineffective

in failing to properly object to the State's questioning on multiple points during his cross-examination, inadmissible expert testimony addressing delayed disclosure, and improper vouching by both a police officer and an expert in child abuse pediatrics. We affirm in part, reverse in part, and remand to the circuit court for a new trial.

**Facts and Procedural History**

A Greenville County grand jury indicted Petitioner on four counts of second-degree CSC with a minor and two counts of lewd act upon a child. Petitioner pled not guilty and was convicted on all six counts. The trial court sentenced Petitioner concurrently to twenty years on each of the CSC charges, a concurrent fifteen years on one of the lewd act charges, and a consecutive five years on the remaining lewd act count.

At trial, Victim's mother (Mother) testified that her family met Petitioner and his family in 2011 during a horseshoes tournament. The families then began socializing and grew close. Mother acknowledged that Petitioner had provided financial assistance to the family in the past. Victim, who was thirteen years old when the families met, was often allowed to go to Petitioner's home to visit with his wife and the couple's infant daughter.

Mother recalled that after Victim started spending time with Petitioner's family, she began "back talking," staying in her room, and isolating herself from friends and family; she also stopped attending church on a regular basis. When Victim's phone service expired, Petitioner "offered to put her on his plan." Later, after Mother confiscated Victim's phone because her grades had dropped, Mother found the teenager with a replacement phone provided by Petitioner.

Mother became concerned when Petitioner "started to act a little more controlling towards" Victim. On one such occasion in early October 2012, Father asked Petitioner to bring Victim home after a night of babysitting, but Petitioner "kept coming up with excuses" to avoid bringing Victim home. At this point, Mother told Petitioner "the friendship has run its course" and noted Petitioner "was just being too possessive over her." In November 2012, Mother received a Facebook message from Petitioner's mother-in-law, which led Mother to contact her. After the two women spoke, Petitioner's estranged wife joined the call.

Following this conversation, Mother asked Victim "if there was something going on that she needed to tell me about." Victim initially denied anything untoward

had occurred; however, Victim's sister (Sister) intervened and advised, "There's something you need to tell [M]om. You need to tell her." Victim then began crying and said "a few things" about her time with Petitioner, prompting Mother to call the police.

Victim testified that Petitioner approached her sexually after she been spending time with his family hanging out, playing video games, and babysitting the couple's five-month-old daughter. Victim estimated between ten and twenty sexual encounters occurred at various locations over the course of a year and a half. Petitioner also testified—he denied ever having sexual or otherwise inappropriate interaction with Victim. Petitioner discussed his contentious divorce and custody proceeding and claimed Victim's family was retaliating against him for ending his financial assistance to them. During closing arguments, Petitioner's trial counsel suggested Victim's family acted in concert with Petitioner's wife, from whom Petitioner was estranged, to fabricate lies about Petitioner.

The State also presented the testimony of Victim's friend (Friend) who testified that Petitioner sexually abused her shortly before he approached Victim. Friend was fourteen when the two sexual encounters with Petitioner occurred, and the details of her abuse were quite similar to the acts described by Victim.

On direct appeal, this court rejected Petitioner's challenge to the admission of Friend's testimony.[1] We found unpreserved Petitioner's assertion that the trial court erred in allowing the State to cross-examine Petitioner about his purported text messages to Victim's father (Father) and Sister. *See State v. Gaskins*, Op. No. 2017-UP-166 (S.C. Ct. App. filed Apr. 19, 2017).

Petitioner did not seek further review after this court declined to rehear the matter, but he timely filed this action for post-conviction relief. The PCR court denied relief and dismissed Petitioner's application with prejudice. The PCR court also denied Petitioner's motion to alter or amend.

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[1] At the time of Petitioner's trial and direct appeal, our supreme court had not yet overruled *State v. Wallace*. *See* 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009), *overruled by State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654 (2020) (overruling *Wallace*'s "similarity" test and reiterating that a proper analysis addressing the admissibility of such "bad acts" requires application of the long-standing "logical connection" test seemingly abandoned in *Wallace*).

Petitioner sought certiorari on five issues, and we granted his petition to consider three separate grounds:

1) Whether the PCR court erred in declining to find trial counsel ineffective for failing to object to the State's improper cross-examination of Petitioner;

2) Whether the PCR court erred in declining to find trial counsel ineffective for failing to object to a police officer's delayed disclosure testimony where the officer was not properly qualified as an expert witness; and

3) Whether the PCR court erred in declining to find trial counsel ineffective for failing to object to improper vouching?

**Standard of Review**

"Our standard of review in PCR cases depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "In [PCR] proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* at 180, 810 S.E.2d at 839. "Questions of law are reviewed de novo," and we will reverse when the PCR's decision is controlled by an error of law. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

**Analysis**

**I. The Problems with Petitioner's Cross-Examination**

Petitioner argues the PCR court erred in declining to find his trial counsel ineffective despite his failure to object on multiple grounds during his cross-examination. As to some of his arguments on this point, we agree.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "Counsel's

performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690).

"[O]ur courts have held that a cross-examiner must have a good faith factual basis before questioning a witness about his or her past conduct." *State v. McEachern*, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012). "Counsel should not be permitted to go on a fishing expedition, and '[m]erely asking a question that has no basis in fact may be prejudicial.'" *Id.* (quoting *State v. McGuire*, 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979)).

### A. Facebook Inquiries and Rule 404(b)[2]

At his PCR hearing, an exhibit described as messages between "'Jay Fowler' and a minor child under the age of 16" was introduced. Although the notation, "Jay Fowler – AKA for Gerald [sic] G" appears at the top of this exhibit, the State presented no information either at trial or before the PCR court to explain who made this notation or to otherwise explain how "Jay Fowler" was tied to Petitioner. Yet, during his trial cross-examination, the State asked Petitioner:

> Q. Do you know a lady named [JA]?
>
> A. I know of [JA].
>
> Q. You went to [JA's] house and had dinner with her, didn't you?
>
> A. No. I have not—
>
> Q. October of—
>
> A. I have never been to [JA's] house.

---

[2] Rule 404(b), SCRE, states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

Q. October of 2014?

A. No.

Q. Do you know [JA's] daughter, [Daughter]?

A. Not really.

Q. Age 12?

A. Not really.

Q. You sent [Daughter] a Facebook request?

A. Not really?

Q. You not really did?

A. No, ma'am. I'm—what I'm saying is I don't know [Daughter], if she's a Facebook friend or whatever. You can be anybody on Facebook. I don't know.

Q. Did you send her a Facebook request?

A. Not to my knowledge, I did not.

Q. Well, did you—

A. Because I haven't had Facebook in some time.

Q. October of 2014. October 9th of 2014—

A. That would be incorrect. I haven't had Facebook in some time. If you would check it right now, I guarantee you there's nothing on there.

Q. Is that because you started to use the name Jay Fowler now?

> A. No. I wouldn't know who Jay Fowler really is. I guess that's someone that's made up, too, I guess.
>
> Q. Yeah, it's like somebody out there is making a lot of stuff up on you?
>
> A. Well, ma'am that is your duty to find that out, isn't it. It's not mine. Because I have no recollection, no knowledge of anything happening—what you're throwing at me.

The State then immediately transitioned into questioning Petitioner about a restraining order and his "active charges." *See infra* Section I.B. At no time during the cited questioning did trial counsel object. Trial counsel failed to object to the State's lack of foundation or the Rule 403 and 404(b) issues implicated by the State's use of the "Jay Fowler" inquiry to suggest Petitioner had approached yet another young girl—this time, a twelve-year-old.

Later, the State again raised the spectre of "Jay Fowler," this time in cross-examining Petitioner about his alleged communications with Friend through Facebook Messenger. Again, the State laid no foundation and did not seek to introduce the messages into evidence. Instead, the State asked Petitioner whether he knew Friend and whether he messaged her:

> Q. Okay so [Friend]—you said you don't know [Friend]—
>
> A. I don't know [Friend]. I met her about twice is all I know of her. I never hung out with her.
>
> Q. Y'all didn't sit in the car and—
>
> A. No ma'am.
>
> Q. —talk about music?
>
> A. No. We did not.
>
> Q. Okay. So why did you send her a message on Facebook two weeks ago asking her to call you?

> A. I never sent her a message on Facebook asking her to call me. Because I haven't been on Facebook since 2012.
>
> Q. Well, maybe you did it under Jay Fowler?
>
> A. Maybe not. Prove that, ma'am.
>
> Q. So is it your testimony [that] you did not send her a Facebook message—
>
> A. I'm telling you right now, I never sent her a message on Facebook. Because I haven't had Facebook since 2012, since the day I was arrested on November 14, 2012, was—marked the day of my life that was changed forever.

The PCR court's order of dismissal notes Petitioner's allegation that trial counsel failed to object to the State's questioning "regarding text messages or Facebook messages," but does not further address whether trial counsel performed deficiently in failing to object to the State's inquiry regarding Facebook messages Petitioner allegedly sent to Friend nearly two years after his arrest. In his motion to alter or amend, Petitioner again asked the PCR court to make findings regarding the State's cross-examination of Petitioner regarding whether the State improperly alleged he was using the false name "Jay Fowler" on Facebook. Yet again, the PCR court failed to address this issue.

Because the PCR court did not address trial counsel's failure to object to the "Jay Fowler" cross-examination even after Petitioner moved to alter or amend on this specific ground, we are faced with whether or not to remand this matter to the PCR court to set forth appropriate findings. *See* S.C. Code Ann. § 17-27-80 (2014) (stating a PCR court must "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); *Reese v. State*, 425 S.C. 108, 109-11, 820 S.E.2d 376, 377-78 (2018) (citing numerous cases and noting that "[t]his is not the first time this Court has raised concerns over orders . . . that do not comply with section 17-27-80 and Rule 52(a)"); *Smalls*, 422 S.C. at 195, 810 S.E.2d at 847 (observing that "[o]rdinarily," the PCR court rather than the appellate court should make findings of fact).

We decline to remand this matter to the PCR court to set forth these findings because our own review of the record reveals trial counsel's failure to properly object enabled the State to pursue the allegation that he had communicated with another minor female by using a social media alias. Trial counsel's performance regarding the Facebook messaging was deficient, and this "deficient performance prejudiced the applicant's case." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514.

**B. Restraining Order**

Petitioner admitted on cross-examination at trial that he was engaged to be married and that his fiancé was present in the courtroom. The State then inquired:

> Q. Isn't there a no-contact order between you and [Fiancé]?
>
> A. There was.
>
> Q. No, there is, isn't there?
>
> A. I'm not sure. It's—
>
> Q. As a condition of your bond, you're not supposed to have any contact with her, isn't that correct?
>
> A. No, it's not correct. It was supposed to have been dissolved.
>
> Q. Sir, you have an active charge with her, correct?
>
> A. Ma'am, once again, it was supposed to be dissolved.
>
> Q. Sir, you have an active charge with her, do you not?
>
> A. I don't know if I do or not, ma'am. But, once again, it was supposed to have been dissolved.
>
> Q. Am I your prosecutor on that case?
>
> A. I don't know if you are or not—

> Q. Have you not called me numerous times asking me—
>
> A. No, ma'am, I have not. No. There was a letter sent to you, an affidavit filled out for you.
>
> Q. And have you been instructed by our office that that case is not dropped and you are not to have contact with her?
>
> A. Ma'am, I was told it was dismissed. So I don't know what's going on with it—
>
> Q. Who were you told that by?
>
> A. I guess your office.
>
> Q. No, sir. No one from my office—
>
> A. Well, then—
>
> Q. —who were you told that by—
>
> A. —I have no idea—

Finally, trial counsel objected—but his only objection was that Petitioner and the solicitor were merely arguing at this point. And, although the trial court sustained the objection, the State continued:

> Q. But you do have an active charge with her?
>
> A. Well, then I'm sorry if I do, ma'am. But, like I said, once again, I don't know if it was there or not. Because it wasn't supposed—it was supposed to have been dismissed due to her testimony or her statement.

No further objection followed before the State transitioned to asking Petitioner about his various residences during the time frame of his alleged sexual encounters with Victim. For the reasons discussed below, trial counsel's failure to object to the State's questioning during this contentious exchange was ineffective, and this deficient performance prejudiced Petitioner.

Whether or not Petitioner's fiancé sought to pursue a criminal charge against Petitioner or obtained a no contact order against him had no relevance to the case being tried, and we see nothing in the record to suggest Petitioner opened the door to this line of questioning. The prejudice resulting from trial counsel's failure to object to the improper reference to an "active charge" stemming from a separate criminal act was compounded by the testy exchange pitting the credibility of the assistant solicitor against the credibility of Petitioner. Nevertheless, the PCR court concluded trial counsel properly objected to the State's accusation that Petitioner violated his fiancé's restraining order, and that there was no deficient performance. This was error.

Trial counsel performed deficiently by failing to promptly object at the outset of the "restraining order" inquiry—and later failed to object to the State's continued inquiry after the trial court sustained his belated objection. We note trial counsel should have objected under Rules 402, 403, and 404(b) to this entire inquiry.[3]

And, again, this deficiency was prejudicial. Although Petitioner's credibility was already questionable, this exchange further communicated the solicitor's belief about Petitioner's lack of credibility when the two argued over whether or not a no-contact order remained in place and an "active charge" was pending. No such discussion should have happened in the presence of the jury.

### C. Text Messages to Father

During Petitioner's cross-examination, the State read aloud and questioned Petitioner about text messages he purportedly sent to Father. Petitioner denied sending the messages and maintained the phone number from which they were sent was not his number. Trial counsel objected on the ground that the State had not laid a proper foundation for the texts, and the trial court initially sustained the objection. The 2013 text asked Father, "[W]ill you drop charges, or are we going to go to court? Either way, I'm still going to hang out with you. Just be honest with me?" After Petitioner denied sending this text, the State asked if he sent Father another text message that read, "Please, my life is . . . f**ked up . . . ." Trial counsel again objected, reiterating his earlier complaint that the State was essentially introducing these text messages by reading them aloud without having

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[3] Rule 402 addresses relevant versus irrelevant evidence; Rule 403 addresses the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time; and Rule 404(b) addresses evidence of other crimes or bad acts.

laid the necessary foundation. The trial court again sustained the objection; however, the State requested to be further heard on the matter.

Outside the presence of the jury, the State noted Mother had copies of Father's text messages and could verify that the texts were sent to Father's phone number. The State explained Mother had photographed the texts and claimed the texts had been provided to trial counsel "several weeks, if not months, ago." Trial counsel conceded the State could ask Petitioner if he made such a statement but argued that the State, when questioning Petitioner, was "actually, reading the text messages verbatim." The trial court agreed "it appeared that way," but ultimately ruled the State could ask Petitioner about his alleged texted statements. Trial counsel agreed "she can ask if he makes a statement" but noted "it's almost like you're publishing something to the jury that's not in evidence."

Once the jury returned, the State again asked Petitioner about the texts to Father and referenced specific details from the messages. In response, Petitioner insisted he did not text Father "from 2013 forwards at all" and claimed he cut all ties with Victim's family following his November 2012 arrest.

Father did not testify at Petitioner's trial, but he did appear as a witness at Petitioner's PCR hearing. Although Father admitted he pursued charges against Petitioner for molesting his daughter, he denied receiving these texts from Petitioner. Father claimed he had "not had access to a cell phone since before [he] went to prison" and he "never had Verizon." Father further testified the phone number to which the text messages were sent was not his number and denied knowledge as to whom this phone number belonged.[4]

The PCR court found trial counsel's handling of Father's text messages was reasonable, noting he "objected to questions about the messages twice, the objections were sustained, and counsel further argued against the questions outside of the jury's presence" but the objections were ultimately overruled. The PCR court further stated, "It is unclear from the record what more counsel could have reasonably done to prevent further questions about the messages . . . . [and] it is

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[4] We note that at trial, the State did not call Mother, Father, a Verizon employee, or any other witness to authenticate the challenged text messages, nor did the State otherwise confirm that the phone number was assigned to or used by Father. Had Father given the same testimony at trial that he gave during the PCR hearing, the trial court likely would have found the State failed to properly authenticate or lay an adequate foundation upon which to cross-examine Petitioner about the texts.

pure conjecture to claim any further objection would have affected the outcome of the trial."

Father's testimony before the PCR court corroborated Petitioner's trial testimony that he did not send the text messages, but it is unclear what more trial counsel could have done at trial. We find it unlikely that the parent of a CSC victim would have cooperated with Petitioner's defense at trial, and it likely would have been dangerous for trial counsel to attempt to call him as a witness solely to address these text messages. Thus, on this point, we find evidence supports the PCR court's finding that trial counsel was not ineffective because he "objected to questions about the messages twice, the objections were sustained, and counsel further argued against the questions outside of the jury's presence" but the objections were ultimately overruled.

### D. Sister's Text Messages

The handling of the copies of text messages provided by Sister to the State on the eve of trial was also problematic. Sister, who was an adult at the time of trial, testified that she received text messages from Petitioner that caused her to suspect an inappropriate relationship between Petitioner and Victim. Trial counsel objected to Sister's testimony, arguing it was hearsay and that, again, the State needed to lay a proper foundation for the text messages. Trial counsel also objected to the late production of the messages.

In camera, Sister testified that she received texts from Petitioner and conversed with him through text messages and voice calls. She claimed she photographed the text messages with her iPad and emailed these photos to the State the day before trial. The trial court overruled trial counsel's objections to Sister's testimony. Before the jury, Sister testified Petitioner sent her both text and verbal messages in which he stated he loved Victim "most of all out of all of us" and noted she took the photos of the text messages with her iPad. When the State later questioned Petitioner about his purported exchange of text messages with Sister, trial counsel failed to object. Petitioner denied messaging with Sister.

The PCR court did not separately address whether trial counsel performed deficiently in failing to object to the State's cross-examination regarding the alleged texting between Petitioner and Sister, and Petitioner did not seek a separate ruling as to these messages in his motion to alter or amend. Thus, as it argued in *Fishburne v. State*, the State argues here that the issues relating to Sister's photographed messages are not preserved for our review. *See* 427 S.C. 505, 517,

832 S.E.2d 584, 590 (2019) (abrogating prior cases in PCR preservation context and remanding "for the issuance of a supplemental order setting forth findings of fact and conclusions of law" on PCR ground not addressed in the original order). In this case, however, because we reverse the order of dismissal on other grounds, we find it unnecessary to remand this matter for a supplemental order.

### E. Cumulative Error

Petitioner urges this court to address the novel issue of cumulative error in a PCR context, but Petitioner did not raise this argument before the PCR court. Therefore, we find this argument unpreserved. *See State v. Eubanks*, 437 S.C. 458, 489, 878 S.E.2d 335, 352 (Ct. App. 2022), *cert. denied* (June 20, 2024) (finding cumulative error argument unpreserved where defendant failed to raise it before the circuit court or in his motion for a new trial).

## II. Petitioner's Remaining Issues

Because we reverse the denial of Petitioner's application due to his trial counsel's ineffective assistance during Petitioner's cross-examination, we decline to address whether the PCR court further erred in addressing (or failing to address) the remaining assignments of error. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting a reviewing court need not address remaining issues when resolution of a prior issue is dispositive).

## Conclusion

When trial counsel was questioned about his strategy, he responded that his theory was that "the whole thing" was a false allegation concocted by Petitioner's wife and Sister to gain advantage during a "nasty divorce." The messages Mother and Sister provided to the State could to some extent be argued to be part of this alleged concocted scheme. The same cannot be said for the State's "Jay Fowler" inquiries or its questioning about the unrelated restraining order and charge stemming from Petitioner's treatment of his adult fiancé. For these reasons, Petitioner suffered prejudice from trial counsel's defective performance on these points. Accordingly, the PCR court's denial of Gaskins's application for PCR is

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**THOMAS, J., and VERDIN, A.J., concur.**

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STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable D. Garrison Hill, Trial Judge
The Honorable Alex Kinlaw, Jr., Post-Conviction Relief Judge

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Appellate Case No. 2019-001306

JERALD D. GASKINS, JR.,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PETITION FOR REHEARING**

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On February 5, 2025, this Court affirmed in part, reversed in part, and remanded Petitioner's case for a new trial in an unpublished opinion. *Gaskins v. State*, Unpublished. Op. No. 2023-UP-046 (S.C. Ct. App. filed February 5, 2025). Petitioner initiated his PCR action on September 14, 2017, and an evidentiary hearing was convened on the matter on October 24, 2018. Subsequently, the PCR Court denied Petitioner relief by Order filed February 4, 2019, finding that Petitioner failed to establish any constitutional violations that would require his application to be granted. Petitioner appealed the PCR Court's denial of relief, and after further briefing and oral argument, this Court found that trial counsel was deficient, and that Petitioner was prejudiced on two issues.

In regard to the Facebook inquiries, this Court found that "[T]he review of the record reveals trial counsel's failure to properly object enabled the State to pursue the allegation that [Petitioner] had communicated with another minor female by using a social media alias." *Id*. at 9. In regard to the restraining order, this Court found that "[t]rial counsel performed deficiently by failing to promptly object at the outset of the 'restraining order' inquiry – and later failed to object to the State's continued inquiry after the trial court sustained his belated objection." *Id*. at 11. Further, this Court noted, "[a]lthough Petitioner's credibility was already questionable, this exchange further communicated the solicitor's belief about Petitioner's lack of credibility when the two argued over whether or not a restraining order remained in place and an 'active charge' was pending." *Id.* at 11.

Pursuant to Rule 221(a), SCACR, Respondent respectfully petitions this Court for rehearing because this Court has seemingly applied an overly stringent deficiency standard, followed by a prejudice analysis that overlooks the relevant facts and circumstances of this case in regard to both issues contrary to *Strickland*.

## I. This Court overlooked the credence given to trial counsel's testimony that he understood that the Court had ruled on the State's inquiry into messages allegedly sent by the Petitioner and overlooked that the "Jay Fowler" line of questioning could not have been more prejudicial than the testimony of the minor witness in regard to a 404(b) analysis.

As to this Court's conclusion that trial counsel was deficient for not objecting to the exchange in regard to the "Jay Fowler" Facebook messages, Respondent submits that this Court did not render its analysis through the lense *Strickland* intended and overlooked the reasonableness of trial counsel's testimony. There are two reasonable conclusions to be made. As exemplified by trial counsel's testimony, it was his understanding that his overruled objection meant that the State could question Petitioner about the messages and the State would have to accept his answer. *See*

App. 425-30; 724-25. Thus, the reasonable inference would be that trial counsel believed the ruling applied to messages, Facebook or text. This conclusion requires a finding that trial counsel did object to the messages, thus a deficiency finding on his failure to object would be incorrect, and a further inquiry into prejudice is not necessary.

Alternatively, the second reasonable conclusion, which this Court has found, is that trial counsel should have objected under Rule 404(b), SCRE to the State's inquiry of the "Jay Fowler" messages at the time they were asked. Even so, a prejudice finding based on the specific error must conclude that the error affected the outcome of the trial. This Court did not address the prejudice the Petitioner allegedly suffered and offered a broad conclusion that trial counsel's "deficient performance prejudice[d] the applicant's case." *Gaskins*, at 9. However, deficiency does not automatically infer prejudice, and "a court making the prejudice inquiry must ask if the [Petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2096.

Notably, this Court found that trial counsel's failure to object "*enabled* the State to pursue the allegation that he had communicated with another minor female by using a social media alias." *Gaskins*, at 9.(emphasis added). However, the State's pursuit of introducing the messages between Petitioner and any other minors appears to have been in vain. The "Jay Fowler" Facebook messages were not admitted into evidence and the jury never saw the exchanges between "Jay Fowler" and the minor. Further, Petitioner denied that he used the name "Jay Fowler" on Facebook and denied that he sent minors messages under an account named "Jay Fowler." *See* App. 445-46 The only potential prejudice that could have occurred was the State's inquiry of the messages itself, which trial counsel testified he understood from a previous ruling that the State was permitted to ask. *See* App. 724-25. Even so, the State had already presented witness testimony that Petitioner

used Facebook to message another minor. Barton, who was the victim's friend at the time Petitioner was abusing the victim, testified as to her own sexual encounters with Petitioner, which occurred in an identical manner as the victim depicted. *See* App. 309-317.

Given that this Court identified the "Jay Fowler" line of questioning to enable the State's allegation that he communicated with other minors via Facebook, the weight of the witness testimony of Barton should be compared to the "Jay Fowler" line of questioning which was contested and denied by Petitioner. Doing so reveals that Barton's testimony depicts the result the State intended, and that even without the "Jay Fowler" line of questioning, the jury would have reached the same conclusion of Petitioner's guilt. Respondent submits that a deficiency finding on this issue is error, however even upon such a finding, this Court overlooked the evidence that was properly before the jury which would allow the jury to reach the same conclusion of guilt. Petitioner has not shown otherwise.

## II. Upon finding that trial counsel's belated objection and omission of supporting grounds for the objection to the restraining order inquiry was deficient, this Court misapprehended the prejudice prong of *Strickland* in its review by overlooking the ample testimony heard prior to the restraining order exchange that hindered Petitioner's credibility and character.

This Court found that trial counsel should have objected earlier in the State's line of questioning in regard to the no contact order Petitioner's fiancé initiated. The State asked Petitioner if there was a no contact order between Petitioner and his fiancé, and the exchange led to a back and forth between the solicitor and Petitioner on whether or not the no contact order had been dissolved. *See* App. 446-47. Trial counsel then objected, and this Court notes "his only objection was that Petitioner and the solicitor were merely arguing at this point." *See* App. 447. This Court appears to take issue with the grounds of the objection and that trial counsel did not object sooner.

At the PCR evidentiary hearing, when asked about the State's question on the restraining order and whether he believed it to be objectionable, trial counsel testified, "I mean given the way that the back and forth went there, it doesn't bother me a whole lot, I don't think it really hurt him in the grand scheme of things as far as this trial goes. But it might be an improper question." (App. 714). *Strickland* "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689, 104 S. Ct. at 2065. Considering the testimony that had already been presented, trial counsel's testimony is a reasonable conclusion supported by the record.

But regardless, even if trial counsel rendered deficient performance, it is not reasonable to conclude that Petitioner was prejudiced by trial counsel's belated objection or lack thereof. That is, Petitioner cannot show a reasonable probability that, but for trial counsel's belated objection or failure to object on different grounds, the outcome of the proceeding would have been different. *See Harrington v. Richter*, 562 U.S. at 112, 131 S.Ct. 770 (explaining that to establish prejudice "[t]he likelihood of a different result must be substantial, not just conceivable"). The PCR Court did not make a prejudice inquiry as to this issue due to the finding that "[c]ounsel objected to the question, the trial court sustained the objection, and [Petitioner] contradicted the solicitor about the charge in front of the jury." (App. 772). However, contrarily, this Court found that trial counsel's belated objection was deficient and in a prejudice analysis, found that Petitioner's credibility was already in question and that the "exchange further communicated the solicitor's belief about Petitioner's lack of credibility[.]" *Gaskins*, at 11.

While it is true that credibility is an essential consideration in this case, here it is not simply the victim's account against the Petitioner's account - or rather his complete denial. Petitioner's

defense was that he did not commit this crime, and the allegations were orchestrated by his ex-wife and the Mucienko family in the midst of their contentious divorce proceedings. *See* App. 701.

The witness testimony the State presented challenging Petitioner's version of events included the testimony of the victim, who described and detailed the ongoing sexual interactions and manipulation over the course of her relationship with Petitioner. The victim's mother, who testified about how Petitioner became close with their family, even helping pay their bills, and how she came to discover the abuse. The victim's sister, who testified that she became suspicious of her sister and Petitioner's relationship. She testified that Petitioner texted her about how much he loved the victim, calling her his "beautiful future wife" and that he missed the victim the most of all out of the Mucienko family. Petitioner's ex-wife testified about the abuse and manipulation she endured over the course of her relationship with Petitioner. She testified that she saw Petitioner and the victim sleeping together in her and Petitioner's home, and that the victim and Petitioner would often be alone together. She testified that after she left Petitioner, she was able to warn the victim's mother of her suspicions in hopes they would believe her. Lastly, Barton, who was 18 at the time of trial, testified that she had met Petitioner at a bad point in her life; custody was taken away from her mother and her grandmother was sick in the hospital. She testified that she had met Petitioner through the victim and began communicating with him through Facebook. At their first encounter, Petitioner invited her over to his home through Facebook message and kissed her in a back room of his home while the victim and his ex-wife were in the living room. After that, she testified to two more sexual encounters with Petitioner, practically identical to the encounters the victim also had with Petitioner.

Petitioner and Petitioner alone, testified in his own defense. He testified that everyone involved was lying and that he was the victim of false accusations, as he had been for his entire

life. *See* App. 439. He simply denied any sexual encounters with the victim and Barton; contended that he saved his ex-wife from an abusive home life and divorced her because she had cheated on him; never sent the victim's sister text messages; and that he only stopped paying the victim's family's bills because he felt they were taking advantage of him.

The nature of Petitioner's character had already been established prior to the exchange regarding the restraining order. Petitioner's ex-wife testified that during their relationship Petitioner had cut her off from friends and family; that Petitioner threatened her with a gun and strangled her twice; that Petitioner would threaten to take their daughter away from her, and that she made false allegations against her own father in efforts of keeping herself safe from Petitioner. It would appear to be unreasonable that the existence of a restraining order between Petitioner and his then fiancé would have hindered his character or credibility any more than had already been portrayed. Further, based on the questions from the jury, the restraining order nor credibility concerns appeared to be relevant to their verdict. The jury inquired about the written description of the indictments, the dates of the indictments and age of the "Plaintiff," presumably the victim, during each of the charges. (App. 507-09).

Respondent submits that a deficiency finding is not supported under these circumstances, nevertheless, Respondent respectfully submits that this Court overlooked the numerous facts of this case supporting Petitioner's conviction, and that Petitioner failed to show the outcome of his trial would have been different had counsel objected in the manner identified by this Court.

**[Signature Page to Follow]**

## CONCLUSION

For all the above reasons, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court grant rehearing and reinstate Petitioner's convictions.

Respectfully submitted,

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Columbia, South Carolina

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable D. Garrison Hill, Trial Judge
The Honorable Alex Kinlaw, Jr., Post-Conviction Relief Judge

---

JERALD D. GASKINS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA

Respondent.

Appellate Case No. 2019-000907

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**PROOF OF SERVICE**

---

I, **Kaylee C. Kemp**, attorney for Respondent, hereby certify that the **Petition for Rehearing** has been forwarded to Petitioner's counsel, C. Rauch Wise, Esq., via email today, February 20, 2025, to rauchwise@gmail.com.

I further certify that all parties required by Rule to be served have been served.

This 20TH day of February 2025.

*s/ Kaylee C. Kemp*
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## Kaylee Kemp

**From:** Kaylee Kemp
**Sent:** Thursday, February 20, 2025 6:25 PM
**To:** rauchwise@gmail.com
**Cc:** Brandy Rankin; Melody Brown
**Subject:** Gaskins, Jerald - Petition for Rehearing and Proof of Service - February 20, 2025
**Attachments:** Gaskins, Jerald - Petition for Rehearing - February 20, 2025.pdf

Good evening –

Attached is the State's Petition for Rehearing and Proof of Service in the matter of Jerald Gaskins, Jr. I will be sending it to the Court for filing this evening.

Kind regards,

Kaylee C. Kemp, Assistant Attorney General
South Carolina Attorney General's Office
Capital and Collateral Litigation Section | 803-734-6307
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# The South Carolina Court of Appeals

Jerald D. Gaskins, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-000907

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ORDER

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The State has filed a petition for rehearing in this post-conviction relief matter. After careful consideration, 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.

Paula A. Thomas J.

Stephanie P. McDonald J.

Deborah H. Verdin A.J.

Columbia, South Carolina
cc:
Clarence Rauch Wise, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Kaylee Christene Kemp, Esquire
Jerald Denton Gaskins, Jr., 00362923
The Honorable Alex Kinlaw, Jr.

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