

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APR 12 2016

Farid A. Mangal,

**S.C. SUPREME COURT**  
Respondent,

v.

State of South Carolina,

Appellant.

Appellate Case No. 2016-000610

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MOTION FOR BAIL PENDING APPELLATE REVIEW

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The Respondent hereby moves the Court pursuant to Rule 243(k), SCACR, to grant him bail. Appellant began serving a 30 year sentence for CSC with a minor- 1<sup>st</sup> degree, CSC with a minor- 2<sup>nd</sup> degree, lewd act on a minor and incest in 2007 after a pre-trial incarceration of nearly 3 years. PCR was granted because of the State's use of an expert witness to bolster the "victim's" credibility. It was the job of this witness to establish that the minor had been raped multiple times over a multi-year period even though she was a virgin. She did not allow the truth to get in her way to accomplish her mission.

By order dated December 30, 2015, the Court of Appeals, acting on this Court's Writ of Certiorari, reversed his conviction and granted Mr. Mangal a new trial for what are likely non-existent crimes. Since that time the State has delayed further disposition of the case with numerous extension requests.

The undersigned understands that the State is entitled to seek extensions, but his client has been incarcerated for more than a decade because his teenaged daughter wanted to punish him for his strict parenting. Mr. Mangal has strong ties to Spartanburg and is not a flight risk. At the time of his

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arrest he was the hard-working owner of his own business and had no prior convictions. He poses no danger to the community and has been a model prisoner. He is now 58 years old.

These are exceptional circumstances. The State has taken a dozen years of Farid Mangal's life when it knew or should have known that he did not commit any crime. Keeping him in prison during the State's fruitless appeal only aggravates the injury. This Court's commitment to due process and basic fairness must lead it to take the next step in righting the shocking injustice done to Mr. Mangal by granting him bail during the pendency of the State's appeal.

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Attorneys for the Respondent

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April 7, 2016

Attachment: Portion of Brief of Petitioner

PETITIONER'S CONVICTION WAS THE RESULT OF HIS ATTORNEY'S FAILURE TO PROTECT HIM FROM THE STATE'S IMPROPER BOLSTERING OF ITS WITNESSES.

At the heart of due process is the promise that a Defendant shall have a fair trial. A key part of that is that determination of the credibility of the witnesses is the sole province of the jury, and an important guarantee of this right is a prohibition against the State's bolstering its witnesses by having other witnesses vouch for their credibility. *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); Rule 608(a), SCRE. In this case defense counsel did not object to multiple incidents of bolstering and therefore could not seek curative instructions or move for a mistrial.

Unobjected to bolstering was pervasive in this case. The first bolstering witness was Wiley Garrett, a forensic interviewer who was wrongfully qualified as an expert without objection (A. 122/18- 123/2). See *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). He testified without objection that "her [the victim's] disclosure was [a] clear, consistent and compelling disclosure of sexual abuse." (A. 131/19-21.) This is indistinguishable from the language found to be reversible error in *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91, 94 (2011) ("[T]he children "provide[d] a compelling disclosure of abuse by [appellant].") and *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139, 141 (Ct. App. 2012). ("[In] both interviews that I conducted with her, I found them to be compelling for sexual abuse.")

The State in this case had a serious problem because the alleged teenage victim of multiple rapes (A. 46/20- 47/7; 136/3-10) had an intact hymen and was a virgin (A. 235/9-17; 235/23- 236/5; 254/23-255/2). To get past this, they put Dr. Nancy Henderson on the stand, who testified to an abnormality of the hymen, but "I cannot say for certain it was caused by the incident." (A. 164/21-22) She said that the ambiguity was resolved in favor of rape "based on the history she [the victim] shared, and she denied any other kind of trauma to that area" (A. 165/23-24). Even though she testified, "I can't say that the actual result I saw was caused by the penis" (A. 165/19), she concluded "I based it [her conclusion] on the information received by my patient." (A. 166/15)

As the Court of Appeals said in *State v. McKerley*, 725 S.E.2d at 142,

[The expert] never testified directly that she believed what the victim stated in her interviews or in her testimony...however, there is no way to interpret [her] testimony other than as her opinion that the victim was telling the truth. Citing Justice Pleicones' opinion in *State v. Jennings*, 716 S.E.2d at 94.

The next instance of improper bolstering was a question by the Solicitor to the victim's mother about whether she believed her daughter. There was no objection, and she said she did (A. 321A/8-10). In response to the question of why she believed her daughter she replied, "She had no reason, she had no reason to lie about something like that." (A. 321A/14-15). There was again no objection, even though this was exactly the kind of testimony found to be improper in *South Carolina Department of Social Services v. Lisa C.*, 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2007). See also A. 113/13-15 where the victim's brother testified that he was only going on what his sister said concerning sex abuse, a further incident of bolstering.

For reasons which are not clear, defense counsel called the victim's mother, who had divorced Petitioner and was obviously hostile to him, as a witness. He tried unsuccessfully to get her to say that she did not believe her daughter's accusations, but the result was "I do believe my daughter." (A. 321C/14). Because this came after the prosecutor had gotten the witness to say she believed her daughter, the answer (and the inadvisability of the question) was not a surprise. Thus defense counsel participated in the bolstering damage to his client.

This pervasive bolstering was clearly prejudicial, because the credibility of the Complainant was a major issue in the case. "Because the children's credibility was the ultimate determination for the jury to make in deciding appellant's guilt, the trial court's error in admitting the [improper bolstering] could not have been harmless." *State v. Jennings*, 716 S.E.2d at 94. "Improper corroboration testimony that is merely cumulative to the victim's testimony... cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Id.*

The Complainant admitted she considered her foreign-born father to be very strict (A. 64/11. See also A. 290/10-11, 16-22). He would not let her date (A. 64/12-13) or go out at night

(A. 336/24-25), and she hated that (A. 61/11-13; 63/2-10). Not long before her accusation, the Appellant had found a boy in his daughter's bedroom (A. 352/118; 354/15-20). After Petitioner's incarceration, his daughter was in and out of the home at night (A. 416/6-12) and was keeping late hours with boys (A. 409/16-19; 414/12-20; 439/5-14).

There was no question she wanted her father out of the way; and as soon she accomplished that, she started smoking and drinking (A. 66/5-8) and using drugs (A. 298/2-3). She admitted she "kind of went wild" after his arrest (A. 66/17-18. See also A. 296/9-17.) and developed a drinking problem (A. 66/9-14; 89/15-17). She admitted that she had been disciplined at school for giving oral sex to a fellow student (A. 23/25; 67/4-12; 293/3-4), and even the State's witness, Wiley Garrett, testified she was "parent defiant." (A. 144/13-15. See also A. 82/1-5, 20-23; 297/10-16 and 321B/12-17). In the absence of eyewitnesses or unambiguous physical evidence, the case boiled down to he says/she says, so the prosecutrix's credibility was the linchpin of the State's case.

It was therefore crucial that defense counsel impress upon the jury the victim's shaky credibility and not allow that credibility to be bolstered by experts and anyone else. By not objecting to this evidence and by actually encouraging it, defense counsel destroyed the reasonable doubt created by his own expert, who said that the condition of the victim's hymen showed absolutely that no rape had occurred (A. 235/14-17; 235/23- 236/5). The prosecution's expert admitted that the "victim's" hymen was in place even after the charge was made, although she noted one small narrowing of it (A. 164/2-15), which she declined to label as consistent with penetration (A. 163/15- 164/11).

It was the duty of defense counsel to object to the bolstering and to keep the jury's evidence from being polluted by it. He had a duty to seek a curative charge and to move for a mistrial because of the extreme prejudice inflicted on his case, but he did none of these things and his client suffered accordingly.

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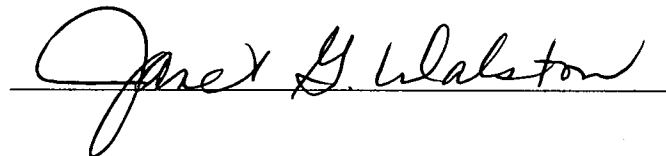
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CERTIFICATE OF SERVICE

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The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 7<sup>th</sup> day of April, 2016 she served the Motion for Bail Pending Appellate Review with attachment herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

Alicia A. Olive, Esq.  
Asst. Attorney General  
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April 7, 2016