

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO THE COURT OF APPEALS  
Appeal from Spartanburg County  
The Honorable J. Derham Cole, Post-Conviction Relief Judge

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

Appellate Case 2016-000610

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Farid A. Mangal,

Respondent,

v.

State of South Carolina,

Petitioner.

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~~REPLY~~ TO PETITION FOR WRIT OF CERTIORARI

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APR 19 2016

**SC SUPREME COURT**

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## ARGUMENT

The State's Petition for Writ of Certiorari is both a rehash of its previous failed arguments and an inappropriate attempt to introduce new arguments. It affords no sufficient reason for this Court to overturn, or even review, the unanimous opinion of the Court of Appeals.

The victim's family doctor testified that she was a virgin (See Attachment), and the State's expert witness had so much difficulty disputing that that she merely noted in her report that there was an inconsistency (A. p. 162 lines 2- 15. See also A. p. 162 lines 14-15, 20-22). The victim's testimony itself was inconsistent about the number of times she was supposedly raped by her father, but she asserted three or four times at a minimum after the first incident (A. p. 53 line 24- p. 145 line 1. Cf. p. 21 line 25- p. 22 line 9.). She also said that it was painful, she bled and her seal was broken (A. p. 21 lines 8-12, p. 53, lines 12-19), but physically she remained a virgin.

The undersigned joined the PCR after it was already on appeal and discovered the case boiled down to a swearing contest between the Defendant and his teenaged daughter and that bolstering her testimony had been a key part of the State's trial strategy. Trial counsel totally failed to recognize the bolstering issue; and the original PCR counsel, though he raised the issue, did a poor job of it.

Bolstering was in fact pervasive in the case. Although PCR counsel raised the issue only as to Dr. Henderson, the State's key witness to repair the deficiencies in its victim's testimony, the context of this testimony was bolstering by most of the other State's witnesses, which magnified the effect of the Henderson bolstering. The harmless error analysis required of the PCR judge made necessary that he consider that total context of the Henderson testimony.

For the first time the State asserts that the PCR judge and the Court of Appeals

were required to ignore those portions of the transcript which were not specifically called to the PCR court's attention, even though the entire transcript was before that court. This argument comes too late, it has been waived and no court can subordinate justice to self-imposed blinders. See *Boykin v. Boykin*, 296 S.C. 100, 101, 370 S.E.2d 884 (Ct. App. 1988) about resolving appeals based on substance and not procedural technicalities.

The State claims that the bolstering argument was not preserved for appellate review, but on page 11, paragraph 1 of its Petition for Writ of Certiorari, the State itself quotes an exchange between PCR counsel and trial counsel concerning improper bolstering. The question is not how extensively the issue was raised but whether it was raised at all. PCR counsel made a more complete argument in his Motion to Alter or Amend (A. p. 623), but the judge declined to rule on that motion (A. p. 639). The State cannot at this stage claim that the PCR court had no opportunity to deal with the bolstering issue. Given the profound injustice arising from imprisoning an innocent man, the Court of Appeals rightly ruled on the issue based on the extensive record before it.

The State launches into rank speculation that there was "the possibility Counsel had a strategic reason to elicit the [bolstering] testimony." (P. 17, paragraph 2 of the Petition for Writ of Certiorari). The State did not bother to come up with a reasonable theory of how the Defendant/Respondent could possibly have been benefitted by his trial counsel's assisting in the bolstering of the complainant's credibility, and this is preposterous.

The State claims that the appellate court cannot review the bolstering issue because the PCR court erroneously found that the issue had not been raised and therefore made no findings. This is not the law. Appellate courts can make a full review of the factual finding of a judge sitting without a jury, and here it promotes judicial economy..

The State claims that the argument that trial counsel was ineffective for not failing to move for a mistrial has been abandoned. This is disingenuous and not supported by

the briefs. First of all, trial counsel's ineffectiveness is res judicata. In *State v. Mangal*, S.C. Ct. App. Op. No. 2009-UP-113 (2009) cited on p. 9 of the Brief of Petitioner (A. p. 650), the Court held that it could not reach the mistrial issue because trial counsel had not preserved it. This is ineffectiveness per se. The undersigned further rebutted the State's baseless assertion of abandonment on pp. 4-5 of his Reply Brief of Petitioner (A. pp. 677-8).

The State claims that the statements in question were not bolstering, but it is self-evident that they were. Mr. Mangal proved both Strickland prongs. It is also important to note that the context of the Henderson testimony was pervasive bolstering by the other State's witnesses (See for example A. p. 122 line 18- 123 line 2; p. 145 lines 3-7; p. 204 lines 13-15; p. 321 lines 8-10, 14-15). This was not an accident by the State, nor a momentary lapse by defense counsel.

The State has argued multiple times (after not raising the issue at the PCR hearing or in its appellate briefs) that the law concerning bolstering changed after the trial of the case. Each time the undersigned with declining patience has explained that this is in error. From the infancy of our State we have jealousy guarded the jury's prerogative. See S.C. Constitution Art. V, Section 21 forbidding the British practice of charges on the facts. *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000); *State v. Supps*, 295 S.C. 484, 369 S.E.2d 145 (1988) and *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 503 (Ct. App. 1997) were all decided before the trial of Mr. Mangal and all held that it is improper to bolster a witness.

The State claims that there is no proof that the Henderson testimony was prejudicial, but the State was asserting that their virgin complainant had been raped multiple times over the course of some years. The victim's credibility was crucial to the State's case, so such reparative testimony cannot have been harmless. See *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2001).

CONCLUSION

Rule 242(b), SCACR, states the Petitioner for a Writ of Certiorari must show “special and important reasons” for the relief. The State has failed to do that or to bring its Petition under any of the grounds set forth in the rule, so it must be denied. The State and not the Respondent should have to bear the burden of the extra attorney fees and costs caused by the State’s multiple maneuvers after the Court of Appeals vacated Respondent’s conviction and granted him a new trial.

Respectfully submitted,

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April 14, 2016

Attachment (portion of trial transcript including omitted page)

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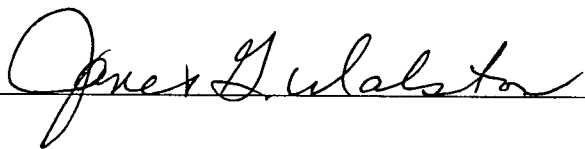
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CERTIFICATE OF SERVICE

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The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 14<sup>th</sup> day of April, 2016 she served the Reply to Petition for Writ of Certiorari herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

Alicia A. Olive, Esq.  
Asst. Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549.

  
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April 14, 2016