

STATE OF SOUTH CAROLINA  
In the Supreme Court  

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**RECEIVED**

AUG 17 2017

The Honorable Perry H. Gravely, Circuit Court Judge S.C. SUPREME COURT

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Civil Action No. 2014-CP-32-4479  

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Glenn Edwin Vanover, .....Petitioner,

v.

State of South Carolina .....Respondent.

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**REPLY IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

- I. Does the PCR court's finding regarding a failure to investigate lack support of probative evidence, or is it based upon an error of law?
- II. Did the PCR court base its decision on counsel's failure to object on an error of law?

## ARGUMENT

Having received and reviewed the Return to Petition for Writ of Certiorari, and arguments raised therein, Petitioner Glenn Edward Vanover (“Petitioner” or “Vanover”) hereby submits this Reply in Support of Petition for Writ of Certiorari pursuant to Rule 243(h) of the South Carolina Rules of Appellate Procedure, responding to those issues raised by Appellee and not previously addressed by Appellant.<sup>1</sup> Vanover submits this Brief as a supplement to the Petition for Writ of Certiorari, and hereby specifically adopts and reargues those arguments presented therein. For those reasons, as well as those presented herein, certiorari should be granted in the instant matter.

**I. The PCR court’s determinations on failure to investigate were not supported by probative evidence, and further were based upon an error of law.**

As outlined in the trial court’s Order

Applicant alleges trial counsel was deficient in failing to interview a teacher whom, Applicant alleges, the victim accused of making sexually harassing statements that were later recanted. During the PCR hearing, Kenneth Pace, the victim’s former teacher, testified that Applicant and Applicant’s wife called him and stated the victim had claimed he made comments about the color of her underwear. Mr. Pace testified he had not said these things to the victim. Mr. Pace testified he never heard directly from the victim about this allegation and did not speak with the victim again after receiving that phone call from Applicant.

Applicant states the witness should have been used at trial to show the character of the victim and previous false statements. However, this Court finds Applicant did not establish the testimony would have been admissible. Further, this Court finds Applicant failed to show that the failure to introduce the testimony prejudiced Applicant.

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<sup>1</sup> Vanover rests on the arguments presented in his initial Petition for Writ of Certiorari as sufficient where no Reply is included herein.

(Appx. p. 481-482).

As an initial matter, the trial court's characterization of the allegations as being simply "comments about the color of her underwear" misstates the true nature of the allegations and are taken out of context. According to trial counsel, the specific of the allegation was that "[the victim] almost had [Mr. Pace] fired because she said [Mr. Pace] said, "what color is your underwear." Appx. p.328, ll. 8-10. The context was that the victim only raised these denied allegations immediately after Mr. Pace had "written her up" in class for misconduct. Appx. p.351, l. 22 through p.353, l. 9. Mr. Pace also provided a more detailed recitation than Vanover's prior counsel, outlining that the allegations had been more than simply inquiring as to the color of underwear, but also included an inquiry as to the victim's menstrual cycle and whether she had a boyfriend. Appx. p.355, ll. 18-21. Thus, the "sexual nature" of the accusations the State indicates is missing (see Return, p. 8) is easily gleaned from Mr. Pace's testimony, and would have been readily apparent to trial counsel had he conducted any investigation.

Critically important is the fact that the accusation by the victim came only after she had gotten in trouble with Mr. Pace, which parallels the defense's theory of the case. The trial court's analysis fails to address this point at all. Further, any suggestion that prior counsel's efforts were reasonable under the circumstances are belied by his analysis that "I don't see that as being that bad a thing for a teacher to tell some young student running about – because old-school, you wanted the students to dress properly." Appx. 329, ll. 7-10. Such a response fails in any way to address an allegation that a teacher inquired into the color of a student's underwear, her menstrual cycle, or whether she had a boyfriend.

Such a response certainly is not a reasonable explanation as to why counsel failed to investigate in any way this information. Instead, counsel suggests the family should have done more to bring things to counsel's attention. Appx, p.329, ll. 12 through p. 330, l.3. The obligation and duty is on counsel, not the accused's family, "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 446 U.S. 668, 691 (1984); see also Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008)(citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007)). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Lounds (citing Ard, 642 S.E.2d at 597).

In Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008), this Court was able to evaluate the reasonableness of counsel's actions in the context of a limited defense – third party guilty. In Miller, the defendant averred that counsel was ineffective for failing to properly cross examine a witness regarding the specifics of other armed robberies that witness engaged in with the defendant's nephew who shared similarities in appearance. Here, the defense was that the victim manufactured the allegations to escape punishment. Trial counsel failed to investigate or question any witnesses regarding the victim's prior allegations levied against a teacher when he punished her for conduct occurring within his classroom. Like with Miller, based upon the limited defense, it was crucial for trial counsel to elicit testimony that showed the similarities. See Miller, 379 S.C. at 116, 665

S.E.2d at 600. Here, trial counsel failed to do that because he failed to investigate the matter at all.

While the State argues that the PCR Court correctly concluded that the victim's false allegations against Mr. Pace would not have been admissible. This assertion by the State and the PCR court is incorrect conclusion of law.

A defendant in a criminal case is guaranteed a right to "meaningful" cross examination pursuant to the Sixth Amendment. See State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998); State v. Cheeseboro, 346 S.C. 526, 544, 552 S.E.2d 300, 309 (2001). "(A)ny matter is a proper subject of cross-examination which is responsive to testimony given on direct examination, or which is material or relevant thereto, and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness." State v. Allen, 266 S.C. 468, 483, 224 S.E.2d 881, 887 (1976)(citing with approval 98 C.J.S. Witnesses s 378 at 134—5 (1957))(overruled on other grounds). Clearly counsel would have been able to cross examine the victim regarding the Pace situation. *See* SCRE Rule 608(b)(1). Further, had trial counsel conducted any investigation, he could have questioned other witnesses who testified at trial, notably the defendant and the defendant's wife, regarding the allegations against Mr. Pace, both of whom discussed the allegations with Mr. Pace as outlined in the testimony at the PCR hearing. *See* SCRE Rule 608(b)(2). That the conduct may not be proved by extrinsic evidence does not operate to preclude this inquiry.

The State additionally argues Rules 403 and 404(b) of the South Carolina Rules of Evidence would prevent admission of the victim's earlier accusation against Mr. Pace.

Citing a “marked dissimilarity,” the State fails to acknowledge that “a close degree of similarity exists when the ‘similarities outweigh the dissimilarities.’” See State v. Scott, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013)(quoting State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 278). Here, the victim levied an accusation against a male authority figure who punished her as a result of her improper conduct. The accusations by the victim arose immediately following the punishment, and in an attempt to deflect from her own conduct. The victim’s allegations both were of an improper sexual nature, although to varying degrees. The “similarities outweigh the dissimilarities.” See Scott, supra. Using these same facts, the probative value of revealing the victim’s prior false allegations of such a similar nature outweighs the danger of any unfair prejudice. See SCRE Rule 403. The PCR Court’s decision was controlled by an error of law in concluding that the evidence was inadmissible, and therefore Vanover respectfully petitions this Court for a grant of certiorari.

**II. The PCR court’s decision on trial counsel’s failure to object was based upon an error of law.**

It is undisputed that trial counsel did not object to the victim’s reference to Vanover “hit[ting]” his wife as improper character evidence. The State argues that no prejudice was shown because the grant of a mistrial was unlikely. See State v. Beckham, 334 S.C. 302, 309-10, 513 S.E.2d 606, 609-10 (1999). In Beckham, the reference was to the victim’s presence at a women’s shelter, without any specific reference to the defendant physically assaulting the victim. It was noted that because there were other reasons the victim could have been present at the shelter, aside from being the victim of an assault, a mistrial was not proper. See Beckham, 334 S.C. at 310, 513 S.E.2d at 610. There is no

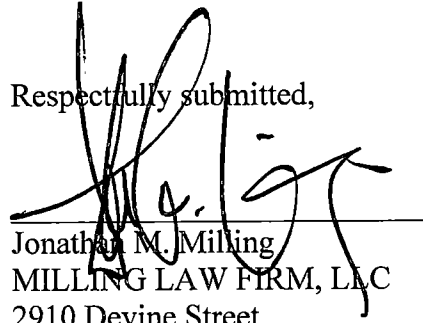
cause for such confusion in the instant matter as the victim specifically addresses her allegation that Vanover assaulted his wife. This is despite the fact that there was no evidence to corroborate this accusation, and no charges brought. While an extreme measure, it was warranted in this case.

The Petition for Certiorari fully addresses an analysis of the question and response under both Rules 404 and Rule 403, outlining why the response was improper character evidence. The Petition further addresses the Rule 403 prejudice analysis, which is not addressed by the State. Here, it is apparent that testimony from the victim that the defendant assaulted his wife creates an “undue tendency to suggest a decision on an improper basis.” State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)(citations omitted). This “undue tendency” is supported by the fact that the defendant’s wife testified on his behalf, with her testimony clouded by a suggestion that she was a battered spouse. The prejudice to the defendant is substantially outweighed by any probative value associated with the victim’s unsubstantiated claim that the defendant abused his wife. The PCR court’s decision was based upon an error of law.

**CONCLUSION**

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Milling', is written over a horizontal line.

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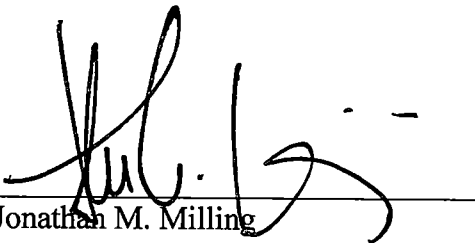
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**PROOF OF SERVICE**

The undersigned hereby certifies that on the date indicated below he personally served the Attorney General's Office with a copy of the Reply in Support of Petition for a Writ of Certiorari and the Consent Supplemental Appendix at 1000 Assembly Street, Columbia, South Carolina 29201.

  
Jonathan M. Milling

August 17, 2017