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S.C. SUPREME COURT

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

PETITION FOR WRIT OF CERTIORARI

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INDEX

Table of Authorities

Cases: **Page:**

Rules:

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 not ineffective when he failed on several occasions to object to improper hearsay testimony as to statements made by the complaining witness was were improper under Rule 801(d)(1)(D) of the South Carolina Rules of Evidence?

III. Did the Post Conviction Relief Judge err in failing to find that trial counsel was not ineffective when he failed on several occasions to object to improper hearsay testimony as to statements made by the complaining witness was were improper under Rule 801(d)(1)(D) of the South Carolina Rules of Evidence?

IV. 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?

V. Did the Post Conviction Relief Judge err in failing to find appellate counsel was ineffective when appellate counsel admitted he knew that the South Carolina Supreme Court had granted a petition for writ of certiorari in *State v. Perez* to overturn *State v. Wallace*, but failed to disclose this fact to Jerald Gaskins prior to advising Mr. Gaskins to not file a petition for writ of certiorari to the South Carolina Supreme Court?

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 the 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.

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

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 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. The State never offered any testimony that the number was in fact registered to or used by Mr. Gaskins nor did 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 had been provided to defense counsel in discovery and he so testified at the Post Conviction Relief hearing. After the 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. He never asked the State to establish a good faith basis for the text messages. The State never called Mr. or Ms. Mucienko to verify the text messages. 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. 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. At the Post Conviction Relief hearing, the testimony of Mr. Mucienko proved Mr. Gaskins was telling the truth at his trial.

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 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 was not preserved, counsel was ineffective. The PCR judge noted that Walt Mucienko denied sending the text messages. He made no finding as to whether he was credible or not, which 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. Trial counsel, upon being shown the texts introduced at the Post Conviction Relief hearing, testified he had never seen the text messages until the Post Conviction Relief hearing.

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 can only be determined from a close examination of the texts. As they were not provided to trial counsel, neither he nor Mr. Gaskins had an opportunity to examine them in detail prior to trial. Mr. Gaskins was given a copy before the Post Conviction Relief hearing.

The text messages 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 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 before 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 this time.

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 12:00PM 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. Tr. 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 were never turned over to the trial counsel. 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.[1] 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. 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.

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, he would have obtained the text messages in question. He and his client would then have had the opportunity to examine the messages to point out the discrepancies that were pointed out in the Post Conviction Relief hearing. The discrepancies in the messages were significant. They easily could have convinced the jury they were not from Mr. Gaskins and the witness was not truthful when she said they were.

Trial counsel was ineffective in not raising a proper objection to these text messages.

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[1] 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.

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 messages, 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 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 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 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 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.[2] At trial all 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

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[2] 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 to this hearing. App. at 752, ll 4-12.

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 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.[3]

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

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[3] In the 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.

review this issue de novo.

Failure of trial counsel to object to improper character evidence in violation of Rule 404b of the South Carolina Rules of Evidence when the State asked about alleged drug dealing by Jerald Gaskins.

During the trial, Mr. Gaskins was asked the following questions on cross-examination:

> Q. (By Ms. Hodge) You're not supplementing that by selling pills or pot?
> A. (By Mr. Gaskins) No, ma'am.
> Q. Okay
> A. Actually, I've never done a drug in my life.
> Q. I didn't ask you if you did drugs.
> A. I've never sold a drug in my life.
> App. at 442, ll 10-16.

No objection was made to this question by trial counsel. The question suggests that the assistant solicitor has knowledge that Mr. Gaskins had sold drugs to supplement his income. At no time did Mr. Gaskins make a comment that would open the door to such a question. In fact, the question was asked notwithstanding the representation of the State that Mr. Gaskins had no record upon which he could be impeached. App. 364, ll 13-15. Under no known theory of law could this question have been admissible. The question introduced the issue of Mr. Gaskins being a drug dealer into a case involving criminal sexual conduct with a minor. Trial counsel was ineffective in failing to object to this testimony. Based upon the evidence in this case, the failure to object could have affected the outcome of the trial. No valid trial strategy was offered for not objecting. No valid trial strategy could exist for this error. As this Court has said "However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Matthews v. State*, 350 S.C. 272,

276, 565 S.E.2d 766, 768 (2002). Here, there was an error of law and Mr. Gaskins was prejudiced.

In ruling on this issue the Post Conviction Relief judge ruled, "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." App. at 773. No facts support this conclusion. Trial counsel admitted, "I think I was even rising to my feet as she said that." App. at 716A ll 23-24. Trial counsel admitted this was an attack on the character of his client. He stated, "And - - and I think she was speaking more - - of course, that just came out of nowhere. I mean she just came out with that." App. at 718, ll 3-5. At no point did trial counsel suggest his failure to object was based on a trial strategy. No facts support the finding by the PCR judge on this issue.

An unfounded accusation of drug dealing was prejudicial to Mr. Gaskins as it would be to any defendant. If such a question and a denial are accepted as proper question and answer, then there is no punishment against the State for ever asking an improper question. This question, even if denied by Mr. Gaskins, was prejudicial to Mr. Gaskins.

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 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?
> 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 be 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 supposed 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. 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.

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.

Question II

Did the Post Conviction Relief Judge err in failing to find that trial counsel was ineffective when he failed on several occasions to object to improper hearsay testimony as to statements made by the complaining witness were improper under Rule 801(d)(1)(D) of the South Carolina Rules of Evidence?

Several witnesses testified as to details of the incidents that were given by the complaining witness. Trial counsel made no objection to this improper hearsay. Dr. Mary Fran

Ratchford Croswell testified as to the details the complaining witness told her. She stated:

> Q. (By Ms. Hodge) And did she tell you - - what did she tell you about the types of abuse?
> A. (By Ms. Croswell) She described that the alleged perpetrator had performed oral sex on her. And that he had performed penile-vaginal penetration with her. App. at 335, ll 19-23.

> A. (Dr. Croswell) She said the abuse started when she was 13. And that the last incident had been a couple of months prior to the medical appointment. It occurred either in his car or at his house. App. at 336, ll 7-10

Dr, Croswell was not a treating physician. Law enforcement had referred the minor child to her to conduct a sexual abuse evaluation. App. at 333, ll 19-20. This examination and its questions were obviously done for the purposes of developing evidence to be used in Court. As this Court has said "This improper testimony was nothing more than hearsay shrouded in a doctor's white coat, in violation of the South Carolina Rules of Evidence." *State v. Simmons*, 423 S.C. 552, 556, 816 S.E.2d 566, 568 (2018), reh'g denied (Aug. 2, 2018)

During the testimony of Officer Robert Perry, the State elicited several questions that constituted improper hearsay from the minor child. These questions greatly exceed the limitation placed upon such comments by Rule 801(d)(1)(D) of the South Carolina Rules of Evidence. The Officer was asked:

> Q. (By Ms. Hodge) And who was the suspect in the report?
> A. (By Officer Perry) Mr. Gaskins
> Q. All right. And how old was Mr. Gaskins at this time?
> A. 30.
> Tr. at 346, l 25 to 347, l 3.
>
> * * *
>
> Q. And did she disclose to you any sexual battery or sexual abuse?
> A. She did. In our conversation, she actually disclosed sexual activities that occurred in multiple areas. She stated there was an assault that took place on Tigerville Road at a house that Mr.

Gaskins was living at the time.

Later on, there was one at - - at least, one that occurred at Magnolia Avenue where he had moved to.
Tr. at 348, ll 14-22.

* * *

A. 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 10-14.

The officer testified without objection that the complaining witness had identified Jerald Gaskins as the person who assaulted her. The testimony was as follows:

Q. (By Ms. Hodge) Was a suspect identified?
A. (By Officer Perry) She identiifed by name and general description only.
Q. All right. So who was the suspect in this case?
A. She told me Jerald Gaskins was the suspect.
Tr. at 58, ll 16-19.

The answer by Officer Perry was improper and an objection should have been made. In *Dawkins v. State*, 346 S.C. 151, 155, 551 S.E.2d 260, 262 (2001) this Court stated the issue to be "Whether counsel was ineffective for failing to object to hearsay testimony that designated petitioner as the perpetrator of the sexual offenses?" In answering the question in the affirmative this Court stated, "Since the testimony was inadmissible hearsay, counsel's failure to object to the introduction of that evidence fell below an objective standard of reasonableness." *Id.* at 156, 551 S.E.2d at 263. Trial counsel at the Post Conviction Relief hearing admitted he knew the testimony was hearsay and improper. App. at 728, l 18 to 729, l 1. Also, Officer Robert J. Perry was also asked to identify the suspect. Tr. at 346, l 25 to 347, l 1. He testified the suspect was Mr. Gaskins. Obviously this was hearsay information which came from a third party. No objection was raised as to these hearsay statements.

This case should be controlled by *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018), which was also a Post Conviction Relief hearing case. In *Thompson*, the trial lawyer failed to object to the testimony of two witness who stated to the jury that the victim had identified Mr. Thompson as the individual who sexually assaulted her. The victim testified in the *Thompson* case, but the Supreme Court still found prejudice in failing to object to the hearsay testimony. Even though the State conceded error as to the deficient performance of trial counsel in *Thompson*, the South Carolina Supreme Court conducted an independent analysis of the deficient performance. The Court concluded, "The foregoing testimony from Ms. Elfering and Dr. Benedetto was clearly inadmissible hearsay. These accounts of their conversations with Victim meet the definition of hearsay under Rule 801(c), and these accounts provided information outside the time and place restriction set forth in Rule 801(d)(1)(D)" *Id.* at 241, 814 S.E.2d at 490. The Court held the error was prejudicial and reversed the conviction.

Trial counsel was ineffective in failing to object to the hearsay testimony. As in *Thompson,* this case does not present an overwhelming case of guilt. The complaining witness testified that full penile-vaginal penetration took place over a period of well over a year, but the examining physician found the examination to be normal. App. at 337, ll 8-18. While there was a claim of a picture being sent, no such picture was ever introduced. No cell phone records, as opposed to text messages, were produced from the provider to prove the phone numbers for the exchanges. The admission of the hearsay testimony was error and prejudicial to Mr. Gaskins.

As to this issue the Post Conviction Relief judge erred as a matter of law in stating as to this hearsay issue, "Trial counsel cannot be deficient for failing to object to testimony when no case law existed at the time of Applicant's trial cautioning against the use of similar testimony."

App. at 774. In his Rule 59 motion, Mr. Gaskins called to the attention of the PCR Court that law had existed since 2001 supporting his position. As PCR Court made an error of law on this issue, this issue should be reviewed de novo.

Question III

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.[4]

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

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[4] 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.

caregivers. As to the first area, the law in South Carolina is settled: behavioral characteristics of sex abuse victims are 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 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.

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 IV

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 Mc. 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 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). 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 about the minor child being bright and articulate and embarrassed at having to tell the details to him, was simply vouching for her credibility. Trial counsel failed to object to this improper bolstering. 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 PCT judge did not rule upon this issue, this Court should also review this issue de novo.

Question V

Did the Post Conviction Relief Judge err in failing to find appellate counsel was ineffective when appellate counsel admitted he knew that the South Carolina Supreme Court had granted a petition for writ of certiorari in *State v. Perez* to overturn *State v. Wallace,* but failed to disclose this fact to Jerald Gaskins prior to advising Mr. Gaskins to not file a petition for writ of certiorari to the South Carolina Supreme Court?

This Case should not be controlled by *Douglas v. State,* 369 S.C. 213, 631 S.E.2d 542 (2006). *Douglas* and *Jones v. Barnes*, 463 U.S. 745 (1983) pitted the professional judgment of the lawyer against the judgment of the defendant. No such conflict exit here. If Mr. Gaskins had

asked that a petition for writ of certiorari be filed, appellate counsel would have filed it. Here, appellate counsel failed to inform Mr. Gaskins of sufficient facts for Mr. Gaskins to make an intelligent decision about his further appeal.

At the Post Conviction Relief hearing in this matter appellate counsel admitted that he advised Jerald Gaskins not to appeal any further after the Court of Appeals ruled against him. He stated Mr. Gaskins made the decision based upon his advise. App. at 744, ll 7-17. After the Court of Appeals ruled against Mr. Gaskins, appellate counsel wrote Mr. Gaskins and suggested that he go no further with this appeal and file a post conviction relief petition. Exhibit A-5

Appellate counsel admitted that he was aware that the South Carolina Supreme Court had granted a petition for Writ of Certiorari in *State v. Perez*, Appellate Case № 2015-001576. This petition was granted on June 16, 2016, some ten months before the final decision in this case. Appellate counsel admitted that he knew the issue in the *Perez* to be whether the South Carolina Supreme Court should overturn *State v. Wallace*, 384 S.C. 428, 638 S.E.2d 275 (2009) which had held that other acts of sexual misconduct were admissible in a criminal sexual conduct case. Thus, appellate counsel was aware before he advised Mr. Gaskins not to appeal his case any further, that the South Carolina Supreme Court had agreed to review the very case that was used against Mr. Gaskins at trial and his appeal.

Mr. Gaskins testified that had he known of the fact that South Carolina Supreme Court had granted review in a case to overturn *Wallace*, he would have elected to apply for a Writ of Certiorari to the South Carolina Supreme Court. App. at 682, ll 3-10. Appellate counsel failed to inform Mr. Gaskins of this fact. A client is entitled to be advised as 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 advice given him by his counsel. When counsel fails to advise him of all the relevant facts, 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. Just as Mr. Padilla cannot make an informed decision to enter a guilty plea without knowing the full consequences of his plea, Mr. Gaskins could not make an informed decision to abandon his appeal without knowledge possessed by his lawyer as to the current state of the law. Appellate counsel had to have known that the Court of Appeals could not have overturned the *Wallace*. He should have informed Mr. Gaskins of the information he knew so that Mr. Gaskins could make a rational decision on further appeal.

CONCLUSION

For the foregoing reasons this Court should grant the Petition for Writ of Certiorari and reverse the decision of the Post Conviction Relief judge and grant Jerald Gaskins a new trial.

August 29, 2019

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S.C. SUPREME COURT

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.

AFFIDAVIT OF SERVICE

Personally appeared before me Sandy Traynham, who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on August 29, 2019, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to Sherri ButterBaugh, S.C. Attorney General's Office, PO Box 11549, Columbia, SC 29211.

Sandy Traynham

Sworn to and Subscribed
before me this 29th day
of August, 2019.

C. Rauch Wise

Notary Public for South Carolina
My Commission Expires: 12/7/2019