

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
Court of Common Pleas  
Alex Kinlaw, Jr. Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2019-000907  
Lower Case No. 2017-CP-23-5901

Jerald D. Gaskins, Jr. #00362923. .... Petitioner,

vs.

State of South Carolina ..... Respondent

REPLY BRIEF

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## 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*

In arguing that Jerald Gaskins has not proven prejudice as to this issue, the State argues that “Petitioner’s denials regarding the text messages was the only testimony before the jury about them.” Ret. at 10. This is not correct. The record shows that the substance of the text messages were before the jury when the State asked questions about the text messages and represented to the jury the messages were between the father and Mr. Gaskins. App. at 431, 117 to 433, 125. The solicitor read the content of the messages she claimed were between Mr. Gaskins and Walter Mucienko.

The solicitor, with no objection from defense counsel, represented to the jury that specific text messages were sent between Mr. Gaskins and the father of the complaining witness. We now know that was false. App. at 650, 15 to 651, 124. More than the mere denial of Mr. Gaskins was admitted before the jury. Falsely representing to the jury that Mr. Gaskins was texting Mr. Mucienko after Mr. Gaskins was arrested was prejudicial to Mr. Gaskins. The prejudicial and false testimony should not have been admitted. The testimony would have been suppressed had trial counsel raised a proper objection 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*

The State argues that there was no prejudice to Jerald Gaskins by the use of the text messages because they were testified to by the sister of the complaining witness. Ret. at 8. This is not the error raised by Mr. Gaskins at the Post conviction Relief hearing. In the Opening Petition, Mr. Gaskins pointed out several inconsistencies that call into question the authenticity of the text messages. Had trial counsel properly objected both on the grounds that he had not been properly given the text messages in discovery and the State need to authenticate them, the messages would not have been admitted.

The messages introduced at the Post Conviction Relief hearing raise a serious question as to the authenticity of the messages. The State in the Return appears not to question the discrepancies in the messages raised by Mr. Gaskins. The State further argues that since the messages were not introduced, Mr. Gaskins was not prejudiced. Ret. at 9. In fact, the prejudice is greater because the messages were not introduced. Had they been introduced, trial counsel could have pointed out the discrepancies that Mr. Gaskins pointed out in his testimony at the PCR hearing. The prejudice here is more than merely asking improper questions. The questions asked involved the actual content of the alleged text messages. The jury heard the State represent to the them what the messages actually said. And the jury heard, without objection from defense counsel, the State represent to the jury the text messages were genuine.

*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*

As noted by the State in its Return, the Post Conviction Relief judge failed to address this issue in his Order. Ret. at fn. 2. First, counsel for Mr. Gaskins will acknowledge that present counsel for the State is not the PCR counsel for the State who prepared the proposed order of the trial judge and the proposed order denying the Rule 59e Motion. As present counsel had no part in preparing the Order, a request to remand back to the trial judge for a ruling may seem appropriate. The record in this case is, however, more than adequate for this Court to address this issue. A remand would simply further delay this proceeding.

The State apparently concedes that the questions were improper. The sole basis for sustaining the ruling of the PCR judge argued in the Return is that Mr. Gaskins was not prejudiced. The State argues that due to the limited questions, the error was not prejudicial. Simply because the State did not use the “Jay Fowler” testimony in closing does not mean it was not prejudicial. As the South Carolina Court of Appeals has said, “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *State v. Gray*, 408 S.C. 601, 617, 759 S.E.2d 160, 169 (Ct. App. 2014). Here, when Mr. Gaskins is on trial for criminal sexual conduct with a minor, the testimony of his texting a 12 year old girl while out on bond certainly could “lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”

The record is sufficient for this Court to make the determination that such testimony was prejudicial.

*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.*

Again, on the issue of whether trial counsel was ineffective in failing to object to the cross examination of Jerald Gaskins about alleged drug dealing, the State, as it should, concedes the question was improper. Their sole argument is that the solicitor only asked a few improper questions, therefore there is no prejudice. What this argument says, is there is never any relief if the State only asks a couple of improper questions. Such a ruling would give the State the right to ask improper questions with impunity if they only ask two or three. The South Carolina Supreme Court has said, “[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). If the State can ask improper questions with impunity, then a defendant is not even being given a fair trial. The rules of evidence matter.

*Failure of trial counsel to object to 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.*

The State argues here, again, that the clear error was not prejudicial. What the State has not discussed, but was noted in the Petition of Jerald Gaskins, is the solicitor in essence gave unsworn testimony in which she stated Mr. Gaskins was not being truthful. Such a tactic is not proper. The South Carolina Supreme Court has said, “A prosecutor improperly vouches for a witness’ credibility and places the government’s prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony.” *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). In this case, the solicitor made the “explicit personal assurances” that Mr. Gaskins was lying when she asked, “Q.

And have you been instructed by our office that that case is not dropped and you are not to have contact with her?" App. at 446, ll 22-24. Such a question was improper because it was related to a matter not involved in the trial and put the credibility of the solicitor against that of Mr. Gaskins. Again, if this improper line of questioning is deemed to be none prejudicial, there is no deterrent to the State against asking improper questions in other cases. While the State argues that Mr. Gaskins' denial was strong, it was not as strong as the solicitor saying he was lying. This error was prejudicial to Mr. Gaskins.

#### *Cumulative error*

The State correctly notes that the issue of whether cumulative error is recognized in South Carolina is unsettled. *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). The cumulative error urged by Jerald Gaskins in this case is for this Court to consider cumulative error of very similar errors. The errors which Mr. Gaskins contend deprived him of a fair trial all related to his credibility and character. To ignore the cumulative effect of such errors would be the legal equivalent of a "death by a thousand cuts." While Mr. Gaskins contends that any one error is prejudicial, to ignore the cumulative effect would be to ignore the reality of the jury hearing numerous attacks on his credibility and character. A juror would have great difficulty ignoring the numerous attacks on Mr. Gaskins credibility.

#### **Question II**

**Did the Post Conviction Relief Judge er r 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?**

The State in its Return acknowledges that “Trial counsel testified at the PCR hearing that he could have objected to Officer Perry’s testimony about what the victim told him, but that the facts were already in evidence since the victim testified before Perry took the stand, giving similar factual testimony.” Ret. at 14. Such a justification for not objecting to improper testimony has never been sustained by our courts. In *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) the complaining witness testified. Notwithstanding this fact, the South Carolina Supreme Court reversed the denial of Post Conviction Relief stating, “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. *See also, Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018).

The State further errs in its Return on this issue when it contends that the hearsay statement from the examining physician was admissible as a medical diagnosis or treatment. The State fails to note that the testimony of Dr. Mary Fran Ratchford Crosswell was not that of the treating physician. The South Carolina Supreme Court has eliminated hearsay in a white coat. *State v. Simmons*, 423 S.C. 552, 556, 816 S.E.2d 566, 568 (2018), reh’g denied (Aug. 2, 2018). The failure of trial counsel to object to inadmissible hearsay has been found by the appellate courts of our state to be deficit representation.

### **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?**

Contrary to the argument of the State in its return, the opinion testimony given by Officer

Robert Perry was not an explanation as to why he was not able to collect physical or other evidence. This is indeed a strange argument because Officer Perry did not obtain the allegedly available evidence that was claimed to have been on the Ipad of the sister of the complaining witness.

The testimony of Officer Perry was in fact an opinion statement of an expert. He was never qualified as an expert and an objection should have been raised. Again, this is an issue the Post Conviction Relief judge did not rule upon notwithstanding the Rule 59e motion filed by Mr. Gaskins. The State has suggested that the matter be remanded to the PCR judge to consider this issue. Mr. Gaskins believes the record in this case is more than adequate for this Court to rule upon this issue.

#### **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?**

This is the third issue that the Post Conviction Relief judge did not rule upon notwithstanding the fact that the issue was discussed in the Rule 59e motion of Jerald Gaskins. Mr. Gaskins believes that this issue is completely developed in the record in this case and that this Court can address the issue without a remand to the PCR judge.

When a physician who examines the complaining witness with no physical findings testifies "My testimony is that my patient provided me a history of sexual abuse, and her exam was consistent with the history provided" that physician has testified that she believed the complaining witness. The reason is simple. No physical evidence is present to support the

complaining witness. The only way the physician could conclude the finding is consistent with the history was to conclude the complaining witness was telling the truth. This is exactly what has been prohibited in a long line of cases in our state. *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

When a law enforcement officer describes the complaining witness as:

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. App. at 351, ll 8-14.

that officer has in fact testified as to the credibility of the witness. No reasonable juror would interpret this statement in any other manner.

The State appears to argue that because Officer Perry is a lay person and not an expert, then different rules should apply. Ret. at 18. No such case in South Carolina makes such a distinction. If a solicitor is prohibited from making a comment on the credibility of a witness, so should a law enforcement officer. “[A] prosecutor cannot vouch for a witness' credibility.” *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004)

#### Question V

**Did the Post Conviction Relief Judge er 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?**

The State in discussing this issue ignores that appellate counsel for Jerald Gaskins testified he was aware of the fact that the South Carolina Supreme Court had granted the request of counsel for *Perez* to argue against the opinion in *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). With this knowledge, the advice to dismiss the appeal is not a rational decision. Under this logic, appellate counsel should have advised Jerald Gaskins not to file any appeal and go directly to the Post Conviction Relief process. Any reasonable appellate counsel would have known that the court of appeals did not have the power to overturn a South Carolina Supreme Court decision.

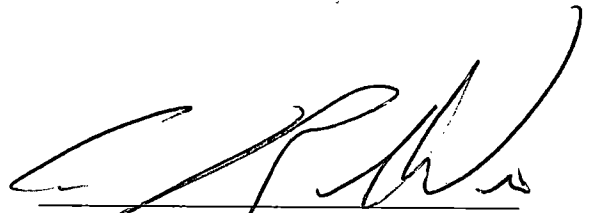
The only reason *State v. Perez*, 423 S.C. 491, 816 S.E.2d 550 (2018) did not overturn *Wallace* was that only four justices participated. Two of the four justices would have voted to overturn *Wallace*. The fallacy of appellate counsel in not pursuing the direct appeal will be shown when *State v. Perry*, Appellate Case № 2017-001965, *State v. Durant*, Appellate Case № 2016-001264 and *State v. Cotton*, Appellate Case № 2017-002402 are decided. With the knowledge that appellate counsel had about the status of the *Wallace* opinion, his decision not to further appeal was manifestly without merit.

On this issue, Mr. Gaskins also argued that appellate counsel was ineffective in failing to share with Mr. Gaskins the knowledge appellate counsel had about the status of the *Wallace* case. The decision to further appeal the case belongs to the client. And that client is entitled to be fully informed of the current state of the law to make that decision.

## CONCLUSION

For the foregoing reasons and the reason set forth in the initial Petition, this Court should grant the Petition for Writ of Certiorari in this matter, reverse the order of the Post Conviction Relief judge and grant Jerald Gaskins a new trial.

January 13, 2020



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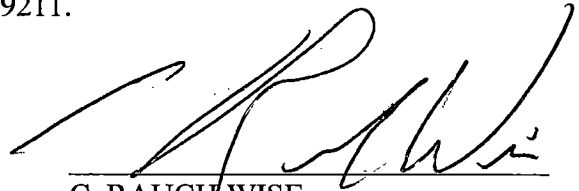
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I hereby Certify that I am the attorney for the Petitioner in the above entitled case.

That on January 13, 2020, I did deposit in the United States Mail with proper postage affixed thereto,  
a copy of the Reply Brief in the above case addressed to Taylor Zane Smith, Office of the Attorney  
General, P.O. Box 11549, Columbia, South Carolina 29211.

January 13, 2020



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