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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2021-000711

WILLIAM LEE CARPENTER……Petitioner,

v.

STATE OF SOUTH CAROLINA……Respondent.

PETITIONER'S BRIEF

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Questions Presented

I. Whether the South Carolina Court of Appeals erred in upholding the trial court's decision allowing the state to introduce evidence of Petitioner's sexual preferences because that evidence was irrelevant, unduly prejudicial, and improperly interjected Petitioner's character as an issue in the case.

II. Whether the South Carolina Court of Appeals erred in upholding the trial court's decision to allow the state to introduce a picture of Petitioner's girlfriend, naked in a bathtub and covered in feces, since this photograph was irrelevant to the charges against him, unduly prejudicial, and improperly interjected Petitioner's character as an issue in this case.

III. Whether the South Carolina Court of Appeals erred in upholding the trial court's decision to allow the state to introduce evidence of computer searches conducted on Petitioner's computer related to his sexual preferences when those searches were irrelevant to the charges against him, unduly prejudicial, and interjected Petitioner's character as an issue in this case.

Statement of the Case

William Lee Carpenter was indicted by the Greenville County grand jury for two counts of criminal sexual conduct first degree, two counts of exposing another to HIV, and two counts of criminal sexual conduct third degree. He was tried before the Honorable Letitia H. Verdin and a jury between September 10- 13, 2018. He was convicted and sentenced to 30 years for both counts of criminal sexual conduct in the first degree, 10 years for each count of exposing another to HIV, and 15 years for both counts of criminal sexual conduct in the third degree.

Petitioner timely filed an appeal. The South Carolina Court of Appeals denied relief via an unpublished opinion. *State v. William Lee Carpenter*, Appellate Case No. 2018-001745 (filed May 19, 2021). The court subsequently denied Petitioner's petition for rehearing on June 25, 2021.

Petitioner then filed a petition for a writ of certiorari on July 6, 2021. On June 28, 2022, this Court granted certiorari. This Petitioner's Brief timely follows.

I. Relevant Facts

Carpenter was convicted of the sexual abuse of two of the four grandchildren who were living with him, his girlfriend, and his son and daughter-in-law. App. 99. At issue in the trial of this case is that Petitioner has unusual sexual preferences that, though legal, the State exploited in its attempt to prove him guilty of the crimes against his grandchildren, even though these sexual preferences were irrelevant and highly prejudicial. Evidence relating to this aspect of Petitioner's character was improperly admitted into evidence.

Pre-Trial Motions and Pre-Trial Hearing

On August 18, 2016, defense counsel filed motions to exclude irrelevant and highly prejudicial evidence. App. 593-98. Relevant to the claims here, counsel filed a motion to exclude all references to any of Petitioner's sexual predilections that do not involve illegal activity. Counsel also filed a motion related to photographs pertaining to Petitioner's sexual preferences. A pre-trial hearing was held regarding the admission of this evidence. Counsel sought to keep out references to Petitioner's interest in coprophilia, but the hearing focused on two sets of evidence—photographs, including one of Petitioner's girlfriend-- naked and covered in human feces in a bathtub-- and computer searches related to Petitioner's sexual fetishes.

The Photograph

In response to counsel's motion to exclude admission of the photograph, the state argued the admission of this evidence was necessary to prove intent under SCRE, Rule 404(b), App. 637, and to "educate" the jury. App. 641. As the solicitor explained, the state would be unable to win its case without the evidence. App. 643.

> And so I don't believe that it's so prejudicial that it should not come in. I believe the converse, which is: If you sanitize this case, if you make it be what it is not, this case will never—this jury can never render a fair verdict. They just will not have the tools at their disposal to do that. The bottom line: If they don't understand that it's possible to have consenting adults engage in this in some way, they don't believe that that exists and their world view is that it doesn't exist, this case stops there.

App. 643, ll. 1-12.

The state additionally argued:

> Honestly, in all the years I've prosecuted, I've never come across one. I can find no case law related to coprophilia and how a court would deal

> with it. It's just not a regular sex act that you can draw the commonsense intent. And what I would say is: It is outside of the common knowledge of a jury that anybody would be sexually aroused by rubbing feces on a child's back. I just believe that.
>
> The basis of the CSC third charge is that that happened. And as we mentioned, the enema in the rectum. Your Honor, unlike those commonly understood sex acts, this type of physical contact where you're incorporating feces is outside the common knowledge that a Greenville County juror would have to understand that that act, in and of itself, would ever bring [gratification], which is one of the elements of CSC third. . .
>
> It almost sounds fantastical. If you have no knowledge of this, you know, until you have one look at a picture like that, it's hard to describe.

App. 638, l. 10- 640, l. 4.

The state made a calculated decision not to use an expert to explain this subject matter to a jury because "a picture is worth a thousand words…." App. 655- 56.

The Computer Searches

The state also wanted to introduce Petitioner's computer searches into "urine" and "piss" into evidence to prove intent. The state argued:

> So the state is not offering to prove that he [is] some kind of deviant person, or character evidence at all, Your Honor. The issue here is that the intent behind this defendant's actions, when he put feces on their back, is not apparent. It's not like those cases where you—you know—excuse the words, I guess, garden-variety vaginal sex or anal sex or oral sex. The intent behind that is apparent, so the state doesn't have to really prove that. And that's what the cases are saying. They're saying you don't need to prove intent in that scenario. But this one is just a different animal. It's a different case.

App. 637, l. 21- 638, l. 9.

When the judge asked specifically why the internet searches were relevant, the state responded:

> Well, and there's a large amount of Internet searches related to urine and enemas. And when you go back to this very specific form of sexual activity, the children—Brendan is saying that they inserted—he calls it a "douche" in his rectum. And he tries to describe it. He says it's like shots are.
>
> But I think the fact that there are no many searches for enemas does educate the jury related to this unique form of sexual activity. I think, you know, a lot of people are not into drinking urine. A lot of people are not into—most people… And I'm just being honest in trying to think through it. When you have over 500 hits related to that and these children are going to say that they had to drink urine, I think it just goes to prove a totality of the circumstances.

App. 641, ll. 2-22.

Defense Counsel Objections and the Court's Ruling

The defense argued this testimony was inadmissible as violation of SCRE, Rule 404(b) and was irrelevant. App. 648-50; p. 654. The trial judge held it admissible because the state has the burden of showing some sexual gratification from the touching, and that the jury "might not understand" that the touching was sexual without this evidence. App. 650. The trial court judge found the probative value of the photograph illustrating Petitioner's naked girlfriend covered in feces in a bathtub outweighed its prejudicial value. App. 659. Per her ruling from the bench, she conducted both a SCRE, Rule 404 analysis and a SCRE, Rule 403 analysis. App. 660.

Before the start of the trial, the parties renewed objections to this testimony and clarified the scope of what evidence would be admitted. App. 27-31.

The Trial

The state offered the following evidence at trial: James Parris, an officer with the Traveler's Rest Police Department, testified he received a report of a possible

sexual assault on June 4, 2016. App. 110-11. The children's mother and two children came to the police department around 8:00pm that evening. App. 111. At that point, only her daughter was the complainant. App. 111. Mother was very distraught, and the officer wrote her statement for her. App. 112. He did not talk to the children. App. 113.

Tim Kelly, the Captain of the Traveler's Rest Police Department testified. App. 120. He was an investigator. App. 120. He was forwarded Parris's initial report. He contacted the Julie Valentine Center and set up forensic interviews with the two children. App. 121. According to Kelly, the female child disclosed sexual abuse that occurred at her grandfather's house. Kelly determined the child was at that house from Spring of 2014 to Spring of 2016. App. 123. At the time of the interview, the female child was 9 years old. Her brother was 10. She alleged the abuse occurred around Thanksgiving but was not specific as to whether it was 2014 or 2015. App. 123. The male child, during this interview, did not disclose any abuse. App. 123.

During the investigation, Kelly obtained a search warrant. App. 124. He testified they were trying to find evidence related to the allegations of sexual assault. App. 125. Kelly testified that while executing the search warrant, he located Petitioner's cell phone. Kelly said Petitioner told him, regarding what would be found on the cell phone, that "he had a varied sex life." Defense counsel immediately objected. App. 133. Then, according to Kelly, Petitioner showed him pictures on the cell phone of his girlfriend (and co-defendant), naked in the bathtub with feces on her. App. 134. The Solicitor entered this picture into evidence at the trial. App. 134.

Kelly testified that Petitioner told him that his phone and computers were password protected and that he left his bedroom locked when he was not there. App. 139.

Nearly four and a half months after the initial complaint to the police, Moore called Kelly and told him that her son disclosed sexual assaults committed against him. App. 139. Additional interviews were conducted, and Petitioner was charged with additional crimes. App. 139.

On cross-examination law enforcement admitted that Petitioner was highly cooperative. Petitioner told law enforcement about an additional computer tablet he had in the trunk of his car, and a computer he had his place of business. App. 143-44. Law enforcement never interviewed any of Petitioner's family members, his neighbors, or any of his associates. App. 145.

Kelly testified on cross-examination that he later became aware of some of the male child's serious psychological conditions. He had some cursory knowledge of his history but did not know the details. App. 155.

Investigator Perry of the Greenville County Sheriff's Office testified. App. 159. He was an investigator in the computer crimes investigation unit. App. 160. The State moved State's Exhibit #14 into evidence, again over defense counsel objection and published it to the jury. App. 164. It was the picture of Petitioner's co-defendant and girlfriend naked in the bathtub and covered in feces. The picture's date was June 28, 2015. App. 165.

Perry also testified to searches that Petitioner conducted on his computer. App. 167. There was a single search hit for "urine." App. 167. There were multiple search hits for "piss." App. 168. He got multiple hits for "enema." App. 168. Perry testified the sites visited by Petitioner were for sexual stimulation. App. 168. There was no testimony that Petitioner used his computers or cell phones to search for anything relating to child pornography or sexual interest in children.

The children's mother also testified. App. 188. She is married to the son of the defendant. She testified that she and her family moved in with her husband's father, Petitioner, in Spring of 2014. App. 191. Shortly after she moved in, Petitioner's girlfriend also moved into the house. App. 192. Moore testified that her son—the one who is the subject of indictments in this case—has ADHD. It apparently caused him to be held back in kindergarten. App. 193. Also, he struggles with communication skills. App. 194.

Moore testified that Owens had a drug problem. She used crack cocaine, marijuana, and pills. App. 198. During the day, both Moore and Owens would be present at the house while the children attended school, and the men went to work. App. 198. Moore admitted that sometimes when she was at the house with Owens, they would get "wasted." App. 199, l. 16. Moore testified that typically Petitioner would leave for work early in the morning and would get home late in the evening. App. 201. Petitioner and Owens would be left alone with the children if they had to go to the grocery store, if they had an occasional date, or if Moore had a doctor's appointment and her husband had to take her to it. App. 201.

Moore admitted she was not a very good parent. App. 202. She and Owens also had a sexual relationship which they engaged in at different places. App. 203. Moore and her family moved from Petitioner's home sometime in March 2016. App. 205.

Around June 2016, Moore testified she became aware that her daughter claimed she had been abused. App. 207. Her son told her that he had witnessed something while they were living at Petitioner's house. Based on what her son told her, they went to the police department. App. 207.

Moore's daughter told her she had been the victim of a sexual assault in Petitioner's bedroom around Thanksgiving. App. 208. She did not know which year around Thanksgiving these events allegedly occurred. App. 208. Several months after the daughter's disclosure, her son made his alleged disclosure. App. 211. She took him to the doctor because she was concerned about his health. He was experiencing hallucinations and hearing voices. He would urinate in the corners of their home. App. 212. He had nightmares and anger issues. App. 212.

Moore testified that she was aware that Petitioner and Owens had an unusual sex life because Owens told her. App. 214. Owens showed Moore a video that related to this unusual sex life. App. 215.

Moore's daughter, the alleged victim, testified. App. 246. She was 11 years old at the time of trial. App. 246. She testified Petitioner touched her twice in ways that she did not like. App. 251. On both occasions, she claimed that Regina Owens held her down. App. 253. She claimed Petitioner put "his poop" on her and her brother's backs. App. 251. Then they had to scrub each other with a rag. App. 254.

Dr. Mary Fran Croswell, a child abuse pediatrician with the Greenville Health System, testified for the State. App. 258. She examined the children in this case. App 262. She examined the female child on June 15. App. 262. Dr. Croswell testified that the child's father told her that she was "acting out, not listening, not doing what she was asked" and that those behaviors first alerted the parents that something was wrong. She was also having nightmares. App. 273. The child's medical examination came back normal with a small issue attributed to a form of irritation. App. 274-75. She tested negative for any sexually transmitted diseases. App. 276.

Dr. Croswell examined the male on November 21, 2016. App. 277. During this interview, he disclosed that he was sexually abused in the anal area. App. 279. She performed a physical and his results were normal. App. 279.

The male child testified before the jury after Dr. Crosswell. App. 293. At the time of his testimony, he was nearly 13 years old. App. 293. He said he was touched inappropriately in Petitioner's bathroom. App. 298. He claimed Petitioner put a syringe in his butt. App. 298. He did not know if anyone else was in the room when this happened. App. 299. After that, poop came out of his butt and it was rubbed all over his back. App. 300. He then claimed Petitioner anally penetrated him. App. 300. The male child also claimed Petitioner made him drink his own urine. App. 300.

Amber Hiott, a professional counselor from the Valentine Center, testified. App. 310. She first conducted her interviews of the children on June 14, 2016. App. 313. She conducted a second interview on November 10, 2016. App. 313. During the June 14th interviews, the female child disclosed sexual abuse; the male child did not.

App. 316. On November 10, 2016, she interviewed both children again. App. 317. During this last interview, the male child disclosed alleged sexual abuse. All four forensic interviews were published to the jury.

The defendant's son, William Carpenter, also testified. App. 377. He testified, contrary to Dr. Croswell's testimony, that his daughter had not had any behavioral or emotional problems, and that she does "wonderful" in school. App. 378. His son began to hallucinate when they moved to Pickens, South Carolina after leaving Petitioner's house. App. 378. He confirmed that both his wife and Owens were using drugs while they lived there with the children. App. 383. He confirmed the children were left alone with Petitioner and Owens on very limited occasions; like when they went grocery shopping, or when they were searching for a new place to live. App. 384. He admitted on cross-examination that he is also a drug user. App. 390.

Petitioner testified at trial. App. 403. He was 57 years old. He denied guilt. App. 404. He has owned his own company in Greenville, South Carolina for 24 years. App. 405. He said he worked long hours, especially during hail season when he was responsible for fixing the dents out of cars. App. 406-407. Petitioner explained he often provided financial support for the family, even when his son and his family were living in Charleston. App. 408. Petitioner testified he received an inheritance when his mother passed. App. 410.

Moore and the children moved in with Petitioner in February or March of 2014. App. 411. Owens moved in shortly afterwards. The house is a little over 2300 square feet. App. 412. The house has a lot of wood floors, and everything echoes. App. 423.

Petitioner testified he was at the house most Sundays, but other than that, it was a rare occasion. App. 424. During the week, he would get home from work around 8:00 and 9:30pm. App. 424. Petitioner denied that he used crack cocaine, meth, or pills. Instead, he said he liked to have a joint or two in the evenings when he got home, and after the kids were in bed. App. 427.

The family prepared to move out in early 2016. Petitoner gave his son a talk about being financially responsible. App. 431. It appeared there were money issues. Petitioner testified that his son and daughter-in-law informed Petitioner they found a trailer down the road from him, but they needed help making the down payment. He felt they were using the children to guilt him into making the down payment since the children were excited. App. 432-33.

Shortly after they moved out, Petitioner visited the family at their new house. An issue arose concerning money. Shortly after, the police came to Petitioner's house. App. 434-35.

When law enforcement executed its search warrant, Petitioner cooperated. He told them about a laptop that was at his business. There was also a tablet in the van that he voluntarily turned over, even though law enforcement did not have a warrant to search vehicles. App. 435-36.

Petitioner testified to his unusual sex life. App. 436. He testified he has had "ED" for 15 to 18 years and that he has not had a functional erection in over six years. App. 439. Petitioner denied that he sexually abused his two grandchildren. App.

443. He testified he never "sat alone at the house with those kids." App. 446, l. 25-447, l. 1.

The State once again brought Exhibit #14 to the jury's attention to ask Petitioner questions about it. The Solicitor started asking questions about his being aroused by it, completely unrelated to anything relating to claims of abuse against his grandchildren. App. 448. The judge asked the state to make the photograph unavailable to the jury as they approached the bench for a sidebar. App. 449. The State asked Petitioner about Owens' sexual satisfaction reflected in the photograph, a topic completely unrelated to the allegations of abuse. App. 449. She wanted to know "what is it about urine that you enjoy?" App. 450. She asked a series of questions about Petitioner's sexual activity with consenting adults, again completely unrelated to the allegations of abuse. App. 451. The Solicitor asked Petitioner about his enjoyment of enemas and feces. App. 452. She asked how he would use enemas on other consenting adults. App. 452.

Petitioner was found guilty on all charges. App. 581.

ARGUMENTS

I. The South Carolina Court of Appeals erred in upholding the trial court's decision to allow the state to introduce evidence of Petitioner's sexual preferences because they were irrelevant, unduly prejudicial, and improperly interjected Petitioner's character as an issue in the case.

The state's admission of evidence of Petitioner's sexual proclivities, including his sexual arousal at the sight of feces, inserted rank character propensity evidence into the trial and rendered it fundamentally unfair. It has long been established in this state that evidence of other crimes or bad acts is generally inadmissible to prove

the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *State v. Stokes*, 279 S.C. 191, 304 S.E.2d 814 (1983); *State v. Lyle*, 125 S.C. 406, 118 S.E.803 (1923). This rule is grounded on the policy that character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime for which he is charged." *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990).

The introduction of this crude and obscene evidence invited the jury to base its verdict on its revulsion towards Petitioner's sexual acts and not the evidence in the case. The state's case consisted entirely of the delayed disclosures of young children, who were being raised in a chaotic and neglectful environment. Their disclosures were interspersed with claims of clear fantasy as reflected in the videotaped forensic interviews. Beyond those disclosures, there was no evidence that tended to prove Petitioner was guilty of these crimes. The introduction of Petitioner's sexual fetishes was inadmissible under SCRE, Rule 404(b) and was unduly prejudicial. *See State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991) (even relevant and otherwise admissible evidence may be excluded for undue prejudice).

Repeatedly, the state argued for the admission of this evidence as necessary to prove "intent." Like the defendant in *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998), a case defense counsel cited in his pre-trial motion, Petitioner's defense in this case was that he did not do it, "making it highly questionable whether the element of intent was a material issue in the case." *Id.* at 12, 722. As this Court held in *Nelson*,

"In the trial of sex offenses, extrinsic evidence of intent is admissible only in those cases where there is no challenge to the occurrence of the physical contact itself, but the intent of the actor is at issue because the nature of the contact is subject to varying interpretations" *Nelson*, 331 S.C. 1, 11 (quoting *People v. Bagarozy*, 132 A.D. 2d 225, 235, 522 N.Y.S. 848, 854 (1987)). *See also State v. Tizard*, 897 S.W.2d 732, 744 (Tenn. Crim. App. 1994) (evidence of sexually explicit videotapes and booklet, found in defendant's home, not probative of intent: "[T]o the extent that the ultimate inference sought to be drawn by the state, *i.e.*, the defendant's intent to commit a sexual battery upon the victim, must be derived from initial inferences about the defendant's character traits circumstantially drawn from the questioned evidence, such evidence's probative value on the ultimate inference is greatly attenuated"). Here, Petitioner testified on his own behalf and adamantly denied he inappropriately touched his grandchildren. This evidence relating to coprophilia was inadmissible to show "intent" and its admission rendered Petitioner's trial fundamentally unfair.

II. The South Carolina Court of Appeals erred in upholding the trial court's decision to allow the state to introduce a picture of Petitioner's girlfriend, naked in a bathtub and covered in feces, since this photograph was irrelevant to the charges against him, unduly prejudicial, and improperly interjected Petitioner's character as an issue in this case.

SCRE, Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of delay, waste of time, or needless presentation of cumulative evidence." "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are…not

necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). Photographs pose a danger of unfair prejudice when they have "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998).

The photograph of Petitioner's naked girlfriend covered in feces in a bathtub lacked any connection with the alleged acts of abuse against the children. Petitioner's sexual proclivities as it relates to feces did not tend to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would have been without the photograph. Instead, it improperly signaled to the jury that Petitioner had strange sexual fetishes, leading a jury to make the improper inference that he, therefore, is capable of pedophilia in violation of SCRE, Rule 404(b). The act portrayed in the photograph was consensual conduct by two adults and did not tend to prove that Petitioner abuses children. It was improper, and the court erred in allowing it to be admitted into evidence.

The state's decision to highlight this evidence contributed to its prejudicial effect in this case. During its cross examination of Petitioner, as discussed earlier, the state kept the photograph on a projector as it grilled Petitioner about acts he has engaged in with consenting adults. The state's cross-examination of Petitioner using

this photograph belies its claims that it needed to introduce the photograph to "educate" the jury or to meet its burden of "proving intent." The state used this photograph during its cross-examination of Petitioner to induce the improper character propensity inference that Petitioner was a sexual deviant and therefore molested his biological grandchildren.

III. The South Carolina Court of Appeals erred in upholding the trial court's decision to allow the state to introduce evidence of computer searches conducted on Petitioner's computer related to his sexual preferences when those searches were irrelevant to the charges against him, unduly prejudicial, and interjected Petitioner's character as an issue in this case.

For the same reasons that the admission of evidence of Petitioner's sexual proclivities and the photograph of a naked woman in a bathtub covered in feces was improper, so too was the admission of computer searches that related to Petitioner's sexual fetishes but did not tend to prove that Petitioner abused his grandchildren. This evidence was irrelevant pursuant to SCRE, Rule 403 and improperly placed Petitioner's character into evidence in violation of SCRE, Rule 404(b). Again, this evidence improperly signaled to the jury that Petitioner had strange sexual fetishes, leading the jury to make the improper inference that he was therefore capable of pedophilia.

The Court of Appeals' Decision

The Court of Appeals decision in this case diverges in material respects from what this Court has established as it relates to the introduction of photographic evidence at criminal trials. Left to stand, this decision removes any guardrails in the

state's admitting into evidence shocking, obscene, and gratuitous photographs to unduly prejudice a defendant.

For example, the court of appeals' opinion failed to address Petitioner's argument questioning why the photograph of Petitioner's naked girlfriend covered in feces in a bathtub was admissible when there were other ways to communicate to the jury facts about Petitioner's sexual fetishes. To the extent the court concluded this evidence was necessary to prove "intent," that does not explain why it approved of the state's admitting this shocking and obscene photograph into evidence in order to make its "intent" argument. Testimony alone would have been sufficient for the state to make this argument had that been its sole intention.

In *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014) this Court found harmless the circuit court's admission of pictures of a child mauled by a dog. In that case, however, the pathologist had never seen an attack by animals of this type and he took the pictures "*for [documentation purposes*" (emphasis added in original). In that case, the nature and the extent of the physical injuries were "in contention by the defense." *Id.* at 27, 533. Other witnesses testified that the dog was not dangerous, had never run at people in an aggressive manner, and had always been given an abundance of food. *Id.* In short, this Court found the photographs were admissible because they assisted in determining a point that was at issue in the case. In Petitioner's case, Petitioner never asserted that he did not have strange sexual fetishes. He openly admitted to these fetishes to the arresting officer. He also testified before the jury about them. This point was never in contention. But the

photograph did not make it any more or less likely that Petitioner sexually abused children. The photograph only served to corroborate that Petitioner has novel sexual fetishes, not that he was a pederast. *See* 409 S.C. at 30, 763 S.E.2d at 539 (Kittredge, J. *concurring)* ("The primary if not sole, purpose of these horrific photographs was to inflame the passions of the jury. The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense.")

The solicitor here should have heeded this Court's admonition to the bench and bar in *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010):

> Although we affirm the admission of the photographs, we take this opportunity to address an area of growing concern to this Court. The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. Moreover, the State also sought to introduce evidence in the form of an autopsy dissection photo at trial, which the trial judge wisely excluded. Today, we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case.

This evidence was irrelevant to the critical issue in contention and unduly prejudicial.

Additionally, the State's argument that this photograph was necessary to prove "intent" is belied by two facts. First, the State admitted that it chose to admit this photograph into evidence instead of having, for example, an expert testify as to the existence of sexual fetishes because "a picture is worth a thousand words." App. 655-56. Implicit in that statement is the state's acknowledgment that it wanted the jury to see this picture, whether it was necessary or not. Surely there was an expert who could have explained sexual fetishes to the jury without necessitating the

introduction of a picture of a naked woman covered in feces in a bathtub.[1] But also, the state's cross-examination of Petitioner, using this photograph, focused exclusively on Petitioner's consensual conduct with other adults. It was not used by the state to show Petitioner's "intent" to engage in pedophilia which, not insignificantly, was never recovered on Petitioner's computers or constituted any of his search terms. The state's use of Petitioner's sexual fetishes, as embodied by the picture of the naked woman covered in feces in the bathtub, was to show that Petitioner was a sexual deviant and therefore was likely to have sexually molested his grandchildren. Lacking any compelling evidence to support its theory, the state decided it would shock and offend the jury into convicting Petitioner.

CONCLUSION

This Court should reverse Petitioner's convictions and remand for a new trial.

Respectfully submitted,

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[1] Although no one argued it at trial, it seems a non-trivial point to note that the woman who was the subject of this photograph likely had a strong privacy interest that should have been considered by the State before her image was shown in a public courtroom.

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