STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals

The Honorable Letitia H. Verdin, Trial Judge

Appellate Case No. 2019-000437

JUSTIN RYAN CONE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Whether the Court of Appeals erred in affirming the trial court's ruling that defense counsel could not cross-examine the complainant about specific punishments she received for lying, because the line of questioning was not relevant, and if relevant, that the questions had a substantial likelihood of confusing the jury, where the lower court did not perform the required on the record Rule 403, SCRE, analysis but only gave a perfunctory ruling that the line of questioning was excluded pursuant to Rule 403, SCRE?

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Did the Court of Appeals correctly find that Petitioner's argument regarding the issue of the solicitor's reference in closing argument to South Carolina Code § 16-3-657 is not preserved for appellate review when Petitioner's initial objection at trial was to the timing of the argument only, when Petitioner's objection was rendered moot, and when Petitioner conceded that the solicitor could make the argument; and when, notwithstanding Petitioner's failure to preserve the issue, it was proper for the solicitor to make a closing argument in reliance upon the statute?

Did the Court of Appeals correctly find that the trial court did not abuse its discretion in barring Petitioner from cross-examining the victim about prior punishments she had received at her father's hands when the questions were not relevant and, even if relevant, were inadmissible under rule 403, SCRE, and when any error in the trial court's ruling was harmless?

STATEMENT OF THE CASE

During its May of 2012 term of court, the Pickens County Grand Jury indicted Petitioner for first-degree criminal sexual conduct with a minor, and later amended the indictment. Steve Wayne Sumner, Esquire, ("trial counsel") represented Petitioner, and Samuel Barton Tooker, then of the Thirteenth Circuit Solicitor's Office, prosecuted the case. On November 17, 2014, through November 19, 2014, Petitioner proceeded to a jury trial with the Honorable Letitia H. Verdin ("the trial court") presiding. The jury found Petitioner guilty as indicted, and the trial court sentenced Petitioner to imprisonment for thirty years. Petitioner did not appeal his conviction or sentence.

Petitioner then filed an application for post-conviction relief on August 1, 2017. Following an evidentiary hearing on the application, the Honorable Alex Kinlaw, Jr. ("the PCR court") found that Petitioner did not knowingly and voluntarily waive his right to direct appellate review of his conviction and sentence and that he was entitled to belated appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). The South Carolina Court of Appeals issued a writ of certiorari and, after considering Petitioner's direct appeal issues pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986), affirmed in a per curiam opinion, and later denied Petitioner's petition for rehearing. The petition for a writ of certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

Petitioner became friends with the Millers, the mother and father of the minor victim, through a mutual appreciation for automobile racing. App. 176-79, 220-222. The victim's father and mother eventually developed a sexual relationship with Petitioner that included sex acts known as threesomes and oral sex in a position known as the "sixty-nine." App. 179-80. The acts occurred over a period of years in the bedroom of the victim's parents or the living room of their home. App. 180, 201-02. The bedrooms in the Millers' home did not have a door, but the doorways of the children's rooms had sheets hung across the frames. App. 180-83. The victim's mother discovered the victim's younger sister inappropriately rubbing a doll and discovered that the victim and the younger sister had been engaging in sexual acts together. App. 183. When questioned about the matter by her mother, the victim disclosed that she had been sexually abused. App. 184-85. The mother shared the information with the victim's father, the victim repeated the same information to him, and he confronted Petitioner about the matter, who denied any abuse. App. 224-226. After the incident was reported to police, a medical exam was conducted on the victim, which did not reveal the presence of any sexually transmitted diseases or changes to her genitalia. App. 209-11, 226. The victim was forensically interviewed, and a video recording of the interview was admitted into evidence and played for the jury at Petitioner's trial. App. 98-104. The victim testified at trial that Petitioner made her perform oral sex on him and that she disclosed the abuse to her mother. App. 84-85.

While cross-examining the victim at trial, Petitioner asked her if she had ever told anyone that her father would put her in the shower, at which point the solicitor objected. App. 89. Outside the jury's presence, the solicitor argued that Petitioner should not be allowed to question the victim

about corporal punishment she received from her father, which had resulted in an investigation being conducted by the South Carolina Department of Social Services ("DSS"); the solicitor called for a relevance and Rule 403, SCRE, analysis. App. 89-90. Petitioner did not intend to mention the DSS investigation, but instead wanted to ask if the victim had ever told anyone that her father would make her shower in cold water while wearing clothing when she lied about something, believing the issue to be relevant because the victim may have been too afraid of her father's method of punishment to admit that she had falsely accused Petitioner. App. 90-91. The solicitor agreed that Petitioner should be allowed to ask if the child was afraid she would be punished if she were to be caught lying, but objected to Petitioner's asking about the specific punishment the victim would receive because that testimony could cause unfair prejudice to the prosecution's case. App. 91. Petitioner admitted that there was no evidence of any interaction between the victim and her father regarding the criminal allegations against Petitioner, but argued that he should be allowed to ask the question since the punishment was unusual and the case against Petitioner depended upon the victim's credibility. App. 91-92. Petitioner then questioned the victim in camera, during which time she admitted that her father had put her in a cold shower when he believed she was not telling the truth, and that he had told her to shut her eyes and closer her ears when she was nearby while there was something on the television that he did not want her to see. App. 93. The trial court ruled the question regarding the cold shower was not admissible because it was irrelevant and excluded under Rule 403, SCRE, but that the question about television was relevant and admissible. App. 95. Accordingly, Petitioner asked the victim about the television once the hearing concluded. App. 96.

While the parties and trial court were discussing jury charges, the solicitor requested that the court charge the jury that, according to Section § 16-3-675 ("the statute"), the victim's testimony did not have to be corroborated, and noted that it anticipated arguing the charge in closing argument. App. 309. The trial court was concerned that the appellate courts would take issue with the charge. App. 309. Petitioner objected to the charge on the ground that it would constitute an improper comment on the facts from the bench. App. 309. The court took the matter under advisement and promised to give a ruling on the following morning, but stated that it would not prevent the solicitor from arguing the statute to the jury in closing argument, even if the court declined to give the requested charge. App. 310.

Before the start of closing arguments on the following day, the trial court denied the solicitor's request to charge the jury on the statute, explaining that it believed it was improper to single out a single witness's credibility in jury charges and would instead charge the jury that "[it] may believe one witness against many or many against one. Which is the same thing. It's just a lot shorter and it's not specifically tailored to one particular witness." App. 326-27. The solicitor asked for explicit permission to reference the statute and use its language when opening on the law, and the trial court granted the request, despite Petitioner's objection to the solicitor's opening on that particular point of law. App. 328-29. Petitioner then affirmed that he would not object during the solicitor's closing argument, but noted that he was not waiving his right to appellate review on the issue. App. 328-30.

The solicitor then decided not to open on the law. App. 331. After giving the elements for first-degree criminal sexual conduct with a minor, and stating that the elements were satisfied if

the jury determined that the victim's allegations regarding Petitioner's sexual battery of her were true, the solicitor said this:

> Now, there's another section in our law, Section 16-3-657, criminal sexual conduct, testimony of a victim need not be corroborated. The testimony of the victim need not be corroborated in prosecutions under Section 16-3-652 to 658, which are the sections governing criminal sexual conduct. And I've said this before and I'll say it again, if anything I've misstated, His Honor will correct me. If I've said something wrong about the law, His Honor will correct me. But if I'm not mistaken, he will make plain to you that you can believe one person over many. You can put whatever weight on any piece of testimony you want to put. That's your prerogative. That's what you're permitted to do as jurors. And that's what we expect you to do.

App. 350-51. During its jury charge, the trial court informed the jury that it was time for it to instruct the jury on the law that applied to the case. App. 370. The court charged the jury that it was the sole judge of the facts and the credibility of the witnesses, and that it could believe one witness against many or many against one. App. 370. It informed the jury that it must accept the law as given to it by the court and apply it as given. App. 371. Afterwards, the solicitor renewed his objection to the trial court's refusal to charge the statute and Petitioner, after being prompted by the trial court, "reiterat[ed]" his objection to the solicitor's referencing the statute during its closing argument. App. 379.

ARGUMENT

The Court of Appeals correctly found that Petitioner's argument regarding the issue of the solicitor's reference in closing argument to South Carolina Code § 16-3-657 is not preserved for appellate review because Petitioner's initial objection at trial was to the timing of the argument only, when Petitioner's objection was rendered moot, and when Petitioner conceded that the solicitor could make the argument; and when, notwithstanding Petitioner's failure to preserve the issue, it was proper for the solicitor to make a closing argument in reliance upon the statute.

The trial court asked if the parties were requesting that she charge the jury using the language of the statute that the victim's testimony did not need to be corroborated. App. 308-09. The solicitor requested that the charge be given and stated its intention to argue the matter during its closing argument. App. 309. The trial court said that the use of the statute in closing argument had already been affirmed by an appellate opinion, but denied the solicitor's request for the charge. App. 309-10, 327-28. The solicitor asked for permission to reference the language of the statute while opening on the law during closing argument, and Petitioner conceded that the solicitor could argue using the statute's language, but objected at that time only to the solicitor's doing so while opening on the law; the trial court overruled Petitioner's objection. App. 328-30. The solicitor then waived opening on the law. App. 331.

In closing, Petitioner argued that there was "not one piece, not one shred of independent corroboration [of the allegations against him] of any type," but conceded that "[t]he law doesn't require it." App. 340. The solicitor argued that the statute provides that "[t]he testimony of the victim need not be corroborated," and noted that the trial court would charge the jury that it could weigh witness credibility however it saw fit. App. 351. After the trial court charged the jury, Petitioner—for the first time—objected to the solicitor's referencing the statute during its closing argument, but framed his objection as a renewed objection. App. 379.

First, the Court of Appeals was correct to find that the issue was unpreserved because Petitioner did not object contemporaneously to the solicitor's closing argument. *See Webb v. CSX Transp.*, Inc., 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (finding that CSX's argument that the plaintiff's closing argument erroneously allowed the jury to focus on CSX's net worth was not preserved for appellate review because CSX did not make a contemporaneous objection). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). This Court should not consider Petitioner's argument because he did not raise the issue contemporaneously at trial. Second, the objection that Petitioner initially made was to the timing of the solicitor's argument, which is different than Petitioner's current argument that it was improper for the solicitor to refer to the statute in his closing argument at all. A party cannot argue one ground before the trial court and then an alternate ground on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). This Court should not consider Petitioner's argument now because it is different than what he argued contemporaneously at trial. Third, Petitioner's initial objection at trial to the solicitor's arguing the statute while opening on the law was rendered moot when the solicitor ultimately waived his opening on the law. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (2006) (finding the litigation was moot when, among other things, Friends of Hunley, Inc. provided all documents requested by Sloan in accordance with the Freedom of Information Act and holding that "[a] justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract."); *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) (finding the Department's appeal from the

trial court's order directing the Department to revoke its suspension of Mathis's driver's license was moot when Mathis became entitled to the return of his driver's license before the Supreme Court issued its opinion and holding that "[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for reviewing Court to grant effectual relief."). Finally, this Court should reject Petitioner's argument now because he conceded at trial that law allowed for the solicitor to cite the statue in his closing argument. When a party concedes an issue below, it may not raise the issue on appeal. *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998); *State v. Benton*, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000).

Notwithstanding these aforementioned issues, the trial court did not abuse its discretion in allowing the solicitor to argue that the victim's testimony did not need to be corroborated because the argument was proper. In criminal cases, appellate courts sit to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "The trial court has broad discretion when dealing with the propriety of the solicitor's argument . . . ." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An appellate court will not overturn the discretion of the trial court absent a showing it abused its discretion amounting to an error of law that prejudices a defendant. *Copeland* at 324, 468 S.E.2d at 624. "[T]he appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record. The Petitioner has the burden of proving she did not receive a fair trial because of the alleged improper argument." *Id.* at 324, S.E.2d at 624-25.

It was proper for the solicitor to argue the victim's testimony did not need to be corroborated because this Court has held that the statute should not be used as a jury charge,

without prohibiting the solicitor from arguing according to the substance of the statute. *State v. Stukes*, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016). In *Stukes*, this Court explained that a jury charge incorporating the statute is confusing and violates the constitutional prohibition against trial courts' commenting upon the facts of a case. *Id.* at 499, 787 S.E.2d at 483. Recognizing the propriety of the charge at the time, the trial court here in this case allowed the solicitor to refer to the statute explicitly in its closing argument, although it declined to instruct the jury regarding the statute in its jury charges. Accordingly, the solicitor argued the victim's testimony did not need to be corroborated. The solicitor argued that the jury could make its own credibility determinations, even if that meant believing one witness over many or weighing different pieces of evidence different. App. 351. The solicitor said that the trial court would supply the applicable law and instructed the jury to defer to the trial court's statements of law rather than his own. App. 351, 367. The solicitor correctly informed the jury that the prosecution had the burden of proving Petitioner's guilt beyond a reasonable doubt and that proof beyond a reasonable doubt constitutes proof that leaves the jury firmly convinced of guilt. App. 351-52. Rather than charging the jury on the law, the solicitor's closing was an argument that Petitioner was guilty based upon the facts presented during trial.

Not only was it proper for the solicitor to argue that the victim's testimony did not need to be corroborated, but it would also have been proper for the trial court to charge the jury on that statement of law as well in light of the controlling opinion in effect at that time. This Court held in *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006), that the trial court did not err in charging the jury that the victim's testimony did not need to be corroborated by quoting the statute. *Id.* at 115-16, 631 S.E.2d at 249, *overruled by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). The

statute provides that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 . . . ," which includes the offense for which Petitioner was tried and convicted. S.C. Code Ann. § 16-3-675. The Court in *Rayfield* held that a trial court was not required to charge the statute to the jury, and that a court that does so should not unduly emphasize the single charge and should ensure that the jury instructions as a whole comport with the law. *Id.* at 117-18, 631 S.E.2d at 250. The trial court in *Rayfield* instructed the jury that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of the case, and that the jury could "believe one witness as against several witnesses or several witnesses as against one witness . . . ." *Id.* at 116-17, 631 S.E.2d at 249-50. In that case, this Court found the trial court had not erred in charging the jury on the statute because the trial court thoroughly and fully instructed the jury on the State's burden of proof, the jury's obligation to be the fact-finder and judge the credibility of the witnesses at trial. *Id.* at 118, 631 S.E.2d at 250. At the time of Petitioner's trial in 2014, though, *Rayfield* was in effect and had not yet been overruled by *Stukes*. Although it declined to do so, it would have been proper for the trial court to include a reference to the statute in its jury charges, provided it also followed the guidance of *Rayfield*.

This Court should deny the petition for a writ of certiorari because Petitioner's arguments are not preserved for appellate review and because Petitioner's initial objection below was rendered moot; nevertheless, Petitioner's arguments fail on the merits because the solicitor's closing argument was appropriate.

The Court of Appeals correctly found that the trial court did not abuse its discretion in barring Petitioner from cross-examining the victim about prior punishments she had received at her father's hands because the questions were not relevant and, even if relevant, were inadmissible under rule 403, SCRE; furthermore, any error in the trial court's ruling was harmless.

When Petitioner cross-examined the victim, the first question that he tried to ask her was whether she had told anyone that her father would make her take a cold shower while clothed if he caught her lying. App. 88-90. The solicitor objected to the question, arguing that Petitioner's questions on that topic should be prohibited as irrelevant and violative of Rule 403, SCRE. Petitioner argued that the issue was a proper subject of cross-examination because the victim's credibility was central to the case. App. 90-91. The solicitor countered that Petitioner should not be able to ask about "particular punishments" because there was too great a danger of unfair prejudice. App. 91. The trial court then asked if there was any evidence of interaction between the victim and her father regarding the child's sexual abuse allegations against Petitioner. App. 91. The trial court allowed Petitioner to examine the victim outside of the jury's presence and said that, afterwards, he would instruct the parties "what they [could] and [could not] do . . . ." App. 93. After considering the proffered testimony, the trial court ruled as follows:

> All right. The question about her being pushed in the shower and put under cold water, the [c]ourt finds that not relevant. If it is relevant, it's excluded under 403. Now, I could see how it could become relevant, but based on the proffer that was given, I do not see that it is. The part about the television is relevant and it's admissible.

App. 95.

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); *see State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230

(2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); *State v. Kelley*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); *see also State v. Bixby*, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Trial judges have "particularly wide discretion" in ruling on the comparative probative value and potential prejudicial effect of evidence. *State v. Collins*, 398 S.C. 197, 209, 727 S.E.2d 751, 757 (Ct. App. 2012), *rev'd on other grounds*, *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014). A trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. *State v. Lyles*, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Id.* at 358, 543 S.E.2d at 594.

The Court of Appeals was correct that Petitioner's questions were not relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "[E]vidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *State v. Lyles*, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008) (quotations omitted). "Evidence which is not relevant is not admissible." Rule 402, SCRE. The allegation that the victim's father would make her take a cold shower if she lied had no direct bearing upon whether Petitioner sexually abused her. If anything, if the cold shower allegation were true, the victim's alleged fear of the shower would have deterred her from making any sort of false allegation against Petitioner in the first place.

The Court of Appeals was also correct that, even if Petitioner's questions were relevant, they were not admissible under Rule 403. Even if relevant, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); *see* Rule 403, SCRE ("Although 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 undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case.

Collins, 398 S.C. at 202, 727 S.E.2d at 754. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. *State v. Dickerson*, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

In this case, the probative value of the victim's testimony that her father had made her take a cold shower if she lied was not significant when compared to the substantial danger of unfair prejudice to the prosecution's case. Petitioner argued at trial he should be allowed to ask the victim about the shower incident, of which he learned through the victim's recounting the practice to a DSS agent, because the victim's credibility was central to the case and the specific punishment was unusual. App. 92. The implication of Petitioner's argument was he intended to produce evidence that the victim was afraid to admit that she had falsely accused Petitioner because she feared being punished by her father for advancing the lie in the first place. While being questioned on direct examination, Petitioner admitted that the victim's father "seemed very upset" when he confronted Petitioner about Petitioner's molesting the victim. App. 294-95. In light of the close and sexual nature of Petitioner's relationship with the victim's parents, the victim's allegations that Petitioner sexually abused her are particularly disturbing, and likely were more disturbing to her parents than anyone else. Petitioner's affirmation as to the disposition of the victim's father following the child's disclosure indicates the father was highly distressed at the allegations, a fact that would lend support to Petitioner's argument that the father would have been disturbed if the victim admitted to making up the whole story.

However, Petitioner then advanced a second and contradictory theory for the victim's making and maintain allegations that Petitioner argued were false. The victim's mother testified at trial that her husband and Petitioner were close friends, akin to brothers. App. 178. She testified she, the victim's father, and Petitioner engaged in sexual activity in threesomes on a frequent basis.

App. 179. The mother admitted she had had an extensive number of sexual encounters with Petitioner. App. 196, 201. Petitioner testified he had had sexual encounters with the victim's father and mother collectively and with the mother in the father's absence. App. 286, 293. The victim's father testified under questioning from Petitioner that he had discovered that his wife and Petitioner were engaged in sexual acts outside of his presence. App. 229. Confirming the implication of the question was that the father had a grudge against Petitioner due to his wife's sexual encounters with Petitioner on the side, the solicitor asked the father if he told the victim to falsely accuse Petitioner out of a desire to seek revenge, and the father answered, "Absolutely not." App. 229. Petitioner questioned the prosecution's blind expert in child sexual abuse dynamics about the potential for children to experience false memories, and the witness confirmed that forensic interviewers are concerned about children repeating false accusations that another has told them to make. App. 271-73. In his closing argument, Petitioner argued the forensic interviewer and others who interviewed the victim over the course of the investigation did not adequately screen for the possibility that victim's memories of abuse were false memories, implanted by another. App. 345-46.

And lastly, in another explanation for the victim's false allegations, Petitioner simply argued that the victim was a liar. When being cross-examined by Petitioner, the victim's mother admitted that she had experienced a problem with victim telling the truth. App. 198. The following exchange then occurred when the solicitor questioned the mother on redirect:

> Q: Now, you said that [the victim] had been known to lie before?
> A: Yes.
> Q: Did she ever lie about anything like this?
> A: No.
> Q: Did she ever lie about anybody committing crimes?
> A: No.

Q: Okay. What kind of stuff would she lie about?
A: Just little things, you know. She wasn't the one that went and broke something or anything like that. But it would not be anything this significant, at all.

App. 199-200. In his closing argument Petitioner argued that the recording of the forensic interview of the victim indicated that her allegations therein were not credible. App. 344-45. Petitioner reminded the jury that the victim had a history of lying. App. 346.

Of the three contradictory explanations for the victim's making and maintain allegations against Petitioner, Petitioner emphasized the theories that the victim was a liar and that her father had convinced her lie to make up the accusations. As these two theories were those advanced by Petitioner, and due to the fact that they contradicted the theory that the victim was afraid to admit to her father that her allegations against Petitioner were false, the probative value of evidence that the father had made the victim take a cold shower for lying would have been quite limited.

On the other hand, the danger of unfair prejudice to the case against Petitioner if the jury had heard the testimony from the victim would have substantially outweighed the probative value of the testimony. Petitioner admitted that the specific punishment was unusual. Petitioner's counsel stated that he personally would not employ the same punishment when dealing with his own children. When considered in the context of the other evidence at trial of the father's unusual behavior, the evidence about the father's employing cold showers as a punishment could have encouraged the jury to determine Petitioner's guilt or innocence based on a dislike of the victim's father.

Finally, the other evidence of Petitioner's guilt admitted at trial supports the finding that any error in the exclusion of a single question and answer about a cold shower was harmless. The jury watched the video recording of the forensic examination of the victim, heard the victim's own testimony, heard testimony from the victim's mother regarding the victim's engaging in sexual

activity with her sister and the victim's disclosure of sexual abuse, heard testimony from the forensic interviewer regarding the technique employed in the interview, heard testimony from the blind expert in child sex abuse dynamics about the behavior of children who have been sexually abused, heard testimony from the victim's father about the victim's disclosure of sexual abuse, and heard testimony from the victim's grandmother that Petitioner had made statements that he intended to marry the victim and that he would wait for her.

As to Petitioner's argument that the Court of Appeals erred in finding, in reliance upon *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002), that the record indicates that the trial court was cognizant of Rule 403 when conducting its analysis of the parties' arguments, it is apparent from the record that the trial court considered whether the probative value of the minor victim's testimony was substantially outweighed by the danger of unfair prejudice. The trial court found that the evidence was not relevant and then found that, even if it was relevant, it was prohibited under Rule 403. The trial court's juxtaposition between Rules 401 and 403 shows that it considered Rule 403. Obviously, the trial court determined that the evidence fell short of the requirement of Rule 401 and, as a consequence, any probative value that it had, would necessarily be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Respondent.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari to the Court of Appeals has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Jessica M. Saxon, Esquire

jsaxon@sccid.sc.gov

This 13th day of December, 2022.

s/Taylor Zane Smith
Taylor Zane Smith
Assistant Attorney General
SC Bar No.: 103282
Office of the Attorney General Post Office
Box 11549 Columbia, SC 29211
(803) 734-3737
tsmith@scag.gov

ALAN WILSON
ATTORNEY GENERAL

December 13, 2022

The Honorable Patricia A. Howard
Clerk – South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211
By email only to supctfilings@sccourts.org

Re: ***Justin Ryan Cone v. State of South Carolina***
Appellate Case No. 2019-000437

Dear Ms. Howard:

Enclosed with this letter is the State's return to Justin Ryan Cone's petition for a writ of certiorari to the Court of Appeals. I am submitting it electronically for filing. Please let me know if I can provide any other information. Thank you for your help.

Sincerely,

s/Taylor Zane Smith
Taylor Z. Smith
Assistant Attorney General
S.C. Bar#103282

cc: Jessica Saxon, Esquire (by email only)