

**VOLUME II OF II**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Abbeville County

**S.C. SUPREME COURT**

Honorable L. Casey Manning, Circuit Court Judge

KEITH DENVER TATE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000496

APPENDIX

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Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,



Susan B. Hackett  
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This 22<sup>nd</sup> day of February, 2016.

## CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 22, 2016

  
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

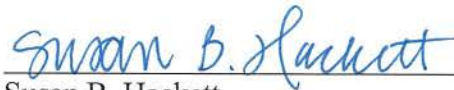
V.

KEITH DENVER TATE,

APPELLANT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Henry Gunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of February, 2016.



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Susan B. Hackett  
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ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 22nd day of February, 2016.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ABBEVILLE COUNTY

Court of General Sessions

Donald B. Hocker, Circuit Court Judge

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Appellate Case No. 2014-001694

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THE STATE,

Respondent,

v.

KEITH DENVER TATE,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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**STATEMENT OF ISSUES ON APPEAL****I.**

The trial judge did not err in denying the defense's motion for a mistrial where the victim's emotional state throughout the trial did not constitute the requisite manifest necessity to warrant the declaration of a mistrial.

**II.**

The trial court did not err in following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts, and following the established procedure did not violate Appellant's constitutional rights to a fair trial and due process of law.

**III.**

The trial judge did not err in refusing to allow Defense Counsel to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals, where the defense was still able to effectively argue that the photographs provided a motive for Victim to fabricate the allegations, the evidence was inadmissible under the Rape Shield Law, and the evidence was inadmissible under Rule 401, SCRE and Rule 403, SCRE, as the evidence was irrelevant and any potential probative value of the evidence was substantially outweighed by the evidence's potential for undue prejudice.

**STATEMENT OF THE CASE**

Keith Tate was indicted at the February 2011 term of the Abbeville County Grand Jury for nine counts of second-degree criminal sexual conduct with a minor (2011-GS-01-45- 2010-GS-01-54). Tate proceeded to a trial by jury from May 27-29, 2014, in Abbeville, South Carolina. At the conclusion of trial, Tate was found guilty of one count of second-degree criminal sexual conduct with a minor (2011-GS-01-46) and acquitted of the remaining counts. He was sentenced by the Honorable Donald B. Hocker to imprisonment for a period of sixteen years.

Following the jury's guilty verdict, Appellant timely filed a motion for a new trial. A hearing on the motion was commenced on July 15, 2014, before Judge Hocker. Judge Hocker denied the motion by written order. Tate timely filed a notice of appeal and subsequently submitted a brief. This brief of Respondent follows.

**STATEMENT OF FACTS**

In July of 2009, Mother moved to Calhoun Falls in Abbeville County with her children and Keith Tate, the appellant in this matter. ROA. p. 13. Appellant was Mother's boyfriend and the father of one of her sons. ROA. p. 14. Mother had three children: Victim, T.R., and T.R. ROA. p. 12. Appellant and Mother dated for three or four years and cohabitated for the entirety of the relationship. ROA. p. 14. Mother suffers from significant health problems including seizures, schizophrenia, bipolar disorder, fibromyalgia, rheumatoid arthritis, and neuropathy. ROA. p. 15. To treat her various illnesses, Mother took around thirty-six pills per day and had prescriptions for Xanax, Geodon, Depakote, Ativan, Seroquel, Lortab, Phenergan, Flexeril, and Zanaflex. ROA. pp. 14-15. As a result of being heavily medicated, Mother slept most of the day. ROA. p. 16. Mother would take the first dose of medication and sleep until 5:00 p.m. or 6:00 p.m., take the second dose and sleep until 9:00 p.m. or 10:00 p.m., then take a third and final dose and sleep through the night. ROA. p. 15. Due to Mother's poor health, Appellant primarily cared for the children. ROA. p. 72.

Rebecca Holland worked at Calhoun Falls Charter School, where Victim was a student, as a substitute teacher, bus supervisor, track coach, band director, and bus driver. ROA. pp. 168-169. Victim was in the color guard in the band during the 2009 season and part of the 2010 season. ROA. p. 169. Holland took Victim home from band practice every day. ROA. p. 170. Holland testified that Victim would cry on the way home and ask her not to take her back to her house. ROA. p. 171. Holland sometimes witnessed Appellant grab Victim by the arm when she would drop Victim off at home. ROA. p. 171. On August 23, 2010, Victim disclosed to Holland that she had been sexually

assaulted. ROA. p. 169. Following Victim's disclosure, pursuant to school policy, Holland reported the incident to Lori Lindler, the school's assistant principal and guidance counselor. ROA. p. 170.

Sometime earlier in 2010, Victim also disclosed the abuse to T.C., her boyfriend at the time. ROA. p. 49. Victim detailed Appellant's abuse to T.C. around five or six months after the abuse had been happening. ROA. p. 52. Victim did not want T.C. to tell anyone about the abuse because it would "mess the family up." After Victim told T.C. the abuse was continuing, he told his mother. T.C. subsequently gave a statement to police on August 26, 2010. ROA. p. 58.

Lori Lindler spoke with Victim regarding her allegations of sexual abuse on August 25, 2010. ROA. p. 184. Lindler testified that Victim came to speak with her after confiding in the parent of a student and Rebecca Holland, who subsequently referred the matter to her. ROA. p. 183. In her conversation with Lindler, Victim recounted Appellant's abuse. ROA. p. 184. Victim identified ten separate occasions where she had been sexually abused by Appellant. ROA. p. 184. Nine of the instances of assault occurred in Abbeville County and one instance took place in Greenville County. ROA. p. 184. Lindler went through a calendar with Victim in an effort to identify the dates of the assaults as closely as possible. ROA. p. 184. They used the school calendar to aid them in selecting dates because Victim could remember when certain assaults occurred based on what school events were happening at the time. ROA. p. 184. Following her conversation with Victim, Lindler contacted the Calhoun Falls Police Department. ROA. p. 185. The officers subsequently obtained a search warrant for the residence and an arrest warrant for Appellant. ROA. p. 201.

On September 28, 2010, Jessica Bell interviewed Victim at The Child's Place. ROA. p. 259. The Child's Place was a children's advocacy center whose role is to make the investigation of child abuse easier on children. ROA. p. 260. The case was referred to The Child's Place by Monique Bell of the Calhoun Falls Police Department. ROA. pp. 260. Jessica Bell testified that she did not ask Victim about specific dates, as children generally only remember things like their age at the time and what events were going on around the time of the abuse. ROA. p. 263. Bell prepared a report following her interview with Victim. ROA. p. 260. Several weeks after the forensic interview, Dr. Lyle Pritchard performed a forensic medical examination on Victim on November 23, 2010. ROA. p. 227. The forensic medical examination took place at The Child's Place. ROA. p. 232. Dr. Pritchard is part of the South Carolina Child Abuse Medical Response System. ROA. p. 226. Dr. Pritchard testified that during his examination of Victim, he noticed a transection of Victim's hymen. ROA. p. 229. A transection of the hymen is an injury that is consistent with something being forced into the vaginal opening. ROA. p. 229. Dr. Pritchard testified there is a delay in disclosure in the vast majority of child sexual abuse cases. ROA. p. 230. Dr. Pritchard also noted that any signs of physical abuse (bruising, lacerations, etc.) would have healed by the time he examined Victim. ROA. pp. 230-231. While at the Child's Place for her physical examination, Victim told a nurse that she never had sexual contact with anyone other than Appellant. ROA. p. 116. On cross examination, Defense Counsel asked Dr. Pritchard if Victim was using contraceptives at the time of the examination. ROA. p. 235. Dr. Pritchard indicated that she was using contraceptives. ROA. p. 235.

At trial, Victim fully recounted the extensive abuse she suffered at the hands of Appellant. Victim was sixteen years old at the time of trial. ROA. p. 67. In August of 2009, Victim was twelve years old. ROA. p. 69. Appellant took care of Victim and her siblings while Mother was sleeping. ROA. p. 72. Victim testified that she referred to Appellant as "Dad." Victim testified that Appellant no longer has her trust because he sexually assaulted her. ROA. p. 73.

Some months after the abuse began occurring, Victim disclosed the abuse to her boyfriend, T.C. ROA. p. 73-74. Victim did not immediately disclose the abuse because she did not know who to tell. ROA. p. 74. Victim did not think anyone would believe her, as it would be her word against Appellant's. ROA. p. 175. Appellant also told Victim that if she told, her mother would have a seizure. ROA. p. 281.

Victim testified that Appellant touched her with his penis. ROA. p. 77. Specifically, Appellant penetrated her vagina with his penis. ROA. p. 78. When she sat down with Lori Lindler to try and ascertain the dates of the assaults, Victim identified ten dates when Appellant sexually assaulted her. ROA. p. 79. On all ten of these occasions, Appellant penetrated Victim's vagina with his penis. ROA. p. 79. Victim also testified that on the last occasion, Appellant put his penis in her mouth. ROA. p. 88. Victim also recalled Appellant penetrating her anus. ROA. p. 88. Victim testified that she bled the first time Appellant penetrated her vagina and on the occasion when he penetrated her anus. ROA. p. 89. Victim bled onto a sheet, which Appellant subsequently took away. ROA. p. 89. The dates of the nine assaults that occurred in Abbeville County were August 26, 2009, October 31, 2009, December 14, 2009, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010. ROA. pp.

79-80. Appellant also sexually assaulted Victim on a tenth occasion in Greenville County on December 26, 2009, at the home of Victim's aunt. ROA. p. 106.

Victim testified the first assault took place at their home in August of 2009. ROA. p. 82. The assault took place on the couch in the living room of the home while Victim's mother and siblings were home. ROA. pp. 82-83. No one else was in the room at the time of the assault. ROA. p. 86. Appellant told Victim he wanted to see what size bra and panties she wore. ROA. p. 83. Appellant then began kissing her neck and rubbing her bottom. ROA. pp. 83-84. Appellant tried to take Victim's shirt off and told her "he was helping her for her bra." ROA. p. 84. Appellant eventually took Victim's clothes off and lay on top of her, telling her "don't act like you don't want it." ROA. p. 87. Appellant then penetrated her with his penis. ROA. p. 87. Victim testified that after the first assault, she was afraid to go home from school. ROA. p. 94. Following the first incident, Victim began writing poetry about her feelings. ROA. p. 94. Following the first incident, Victim's journal read:

So many questions. Should I stay or should I go. Should I walk away from my fears or should I be strong. Should I love him. Should I hate him. Should I keep it to myself. Should I let them know. So many questions. Would she still love me - -would she still love my [sic] for me or hate me for something that wasn't my fault. Will she kick me out because she didn't believe me. Should I run away or should I stay. So many questions that have no answers. Does he know how I feel. Do he know. Do he know. Do he know. So many questions.

ROA. p. 99.

Appellant's second sexual assault of Victim occurred on October 31, 2009. ROA. p. 126. Victim recalled the date because there was a school football game on October 30th. ROA. p. 126. Victim reported to Jessica Bell that on this particular incident, she screamed and Appellant hit her in the face, busting her lip open. ROA. p. 128. Minor's

mother also recalled noticing Victim had a busted lip at some point in time. ROA. p. 20. When Mother asked why Victim's lip was busted, she was told that Victim injured herself while playing. ROA. p. 21. After the assault on October 31st, Victim woke up to an empty house and noticed that her shorts were up, her underwear was down, and her shirt was on a lamp. ROA. p. 131.

During Appellant's final assault of Victim, Appellant put her on the couch and put his penis in her mouth. ROA. p. 145. Victim bit Appellant's penis and he began screaming. ROA. p. 146. Victim then ran down the hallway and barricaded her bedroom door with her dresser. ROA. p. 146. Victim also told T.C. about this incident, disclosing to him that one night when she was asleep, Appellant put his penis in her mouth. ROA. p. 57. Victim told T.C. that Appellant got angry with her and grounded her. ROA. p. 57. Eventually, Victim began sleeping with her mother to get away from Appellant. ROA. p. 127.

## ARGUMENT

### I.

**The trial judge did not err in denying the defense's motion for a mistrial where the victim's emotional state throughout the trial did not constitute the requisite manifest necessity to warrant the declaration of a mistrial.**

#### **Relevant Facts**

During the defense's opening argument, Victim became visibly upset. Defense Counsel briefly paused and told the court, "Your honor, it looks like – it looks like [Victim] is upset and I don't want that to distract the jury." ROA. p. 9. The judge briefly spoke with both lawyers at the bench before Defense Counsel continued her opening arguments. ROA. pp. 9-10. Victim's emotional state came about shortly after Defense Counsel referred to her as a story teller akin to Stephen King or James Patterson. ROA. pp. 8-9. During the next recess, the judge noted for the record that Victim became upset during the Defense's opening statement. ROA. p. 28. The trial judge noted the court "has no problem with that, but if that's still a recurring problem then I think we ought to agree that she needs not to be in the courtroom because of the potential nature it has to be disruptive. So just as a cautionary matter." ROA. p. 28.

On direct examination, Victim became emotional while describing the first instance of sexual assault by Appellant. ROA. p. 84. The Solicitor asked if Victim would like to take a break and she indicated that she would. ROA. p. 84. After the jury exited the courtroom, the Solicitor asked the court how it would like to handle Victim's

testimony during the spells where she became emotional. ROA. pp. 84-85. The trial judge replied:

Well, evidently it's very difficult for her to testify. She's just going to have to - - she's going to have to do the best job she can and, you know, we'll just have to, you know, muddle our way through it. Possibly you could, without discussing her testimony, just maybe talk with her, and she's going to have to, you know, try to - - you know, try not to be emotional. Easy for me to say.

ROA. p. 85.

The judge instructed Victim, "I know this is difficult for you to testify. I understand that. But it's really important that you do the very best that you can and there is a lot to cover in questions that will be asked of you. So you just need to do the very best that you can so we can get through your testimony." ROA. p. 85. Victim was able to get through the remainder of her direct testimony without any more periods where she was visibly emotional.

During the lengthy cross-examination by Defense Counsel, Victim indicated that she did not want to keep talking about the incident. ROA. p. 155. When asked by Defense Counsel whether she could keep going, Victim requested a break. ROA. p. 155. After Victim stepped down from the witness stand, the trial judge told the solicitors, "I realize she's emotional. I understand that. But I don't want this - - and this is - - I'm not commenting on - - but it's being disruptive. Okay? So I want both of you all to go out there and talk to her." ROA. p. 155. After a brief recess, prior to the jury returning to the courtroom, the trial judge stated:

I don't want any perception of anyone to think that I'm not being unsympathetic. But I've got to maintain decorum in this courtroom. And regardless of the nature of the allegations and the emotions involved and everything, I've still got to maintain decorum, and I just can't tolerate the witness storming out of the courtroom in the manner in which she did. I

think the vast majority, if not all of the jurors, were back in the courtroom, or most of them at least were back in there when that took place. But I just - - and I hope both Solicitors have talked with her. And I know this has not been an easy experience for this witness to be testifying. But nonetheless, she's got to be aware that we can't allow that sort of conduct.

ROA. p. 156.

Defense Counsel moved for a mistrial, asserting that it was warranted "because of the pretty extreme display of emotion that was going on while [Victim] was sobbing as the jury left the jury box and while the door back there behind the jury box was still open she started yelling out for her mother . . ." ROA. p. 157. The trial judge denied the defense's motion, ruling:

In light of the fact that we've had a lot of emotion displayed by this witness throughout her testimony, a lot of crying, I think she's gone through a good many Kleenexes. We have had to take a break or two. I think in light of that then I don't see where that necessarily would create the type and amount of prejudice, if any. But certainly not the amount and type of prejudice that would justify a pretty severe remedy of declaring a mistrial. So I'm going to deny it.

ROA. p. 158. The trial judge later noted "[T]his is just inherent in a case like this that there is going to be a lot of emotion." ROA. p. 159. The trial judge further stated, "We may have some other witnesses get very emotional, too, when it's all said and done in this case. I don't know that. But taking everything into consideration I don't think the justification is there to grant a mistrial." ROA. p. 159. Defense counsel did not request a curative instruction at any point in the proceeding.

During her closing argument, Defense Counsel highlighted Victim's emotional state in order to further her assertion that Victim was a "storyteller," stating:

They're calling him a child molester. So yes, he gets to have an advocate who gets up and says that's a story. That is not true. And if it really isn't true, is it worse to be called a storyteller than it is to be called a child molester? The first time you see [Victim's] emotional reaction is when I

was giving you my opening statement and telling you how I was going to be talking about these different versions of her story. And when she knew that was going to happen she got upset. And you can interpret that, I guess one of two ways. She was crying because what happened to her was so horrible and she doesn't like having to go through it again or she's crying because somebody is pointing out the problems with the things she's saying and the reason that you shouldn't believe it, and that - - and that is difficult for her. And there may be other ways to interpret it. I don't know.

ROA. p. 308.

During the State's closing argument, the Solicitor noted the heinous nature of sexual abuse crimes involving the parent of a child and stated, "And I can't imagine the emotional trauma of coming in here and having to talk about it four years later." ROA. p. 320. The Solicitor then told the jury that one of the greatest tasks before them as jurors in these case was to judge credibility. ROA. pp. 320-321. The Solicitor stated:

And the one thing you got is you get to judge the demeanor of the people in the courtroom. Their manner, their body language, how they testified to you. You saw the raw emotion of that young lady. You saw her to say to Ms. Nelson (Defense Counsel), I don't want to think about it. You're making me go back and back through and I don't want to think about it. I don't want to relive it. Don't you understand that. That's what this child said to this lady. Now, I understand as a grown attorney, having done this over and over again, maybe it's not a big deal. To that child, it was a very, very big deal.

ROA. p. 321. The Solicitor later noted "You look at what those witnesses said and you decide if you're convinced this man did penetrate that child. Was that a emotion you watched real. Because if she's made all this up and she's put on that kind of act, she deserves an Academy Award, because that was compelling."

ROA. p. 324.

### **Discussion**

Appellant asserts the trial judge erred in refusing to declare a mistrial due to Victim's shows of emotion during trial. Specifically, Appellant contends the show of

emotion by Victim disrupted the trial and improperly influenced the jury to decide the case on emotion. The State submits this argument is without merit, as the trial judge properly denied the motion for a mistrial where there was no showing of manifest necessity to warrant the declaration of a mistrial.

“The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and quotation marks omitted). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). “A mistrial should only be granted when ‘absolutely necessary,’ and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). “The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

South Carolina Courts have repeatedly found displays of emotion to be insufficient grounds for a mistrial. In State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996), the South Carolina Supreme Court was faced with the question of whether a mistrial was warranted where the victim's sister had an emotional outburst while on the witness stand. Specifically, when asked to identify the defendant in the case, she

addressed the defendant, stating, “Why, Shawn? Why did you do it? ... He didn't have to take her life.” Id. at 90. The judge immediately sent the jury away from the courtroom and called a short recess. Id. at 90-91. The Court found the trial judge did not abuse his discretion in declining to declare a mistrial. The Court stated, “Given that the trial judge was in the best position to assess the degree to which the jury may have been prejudiced by the outburst, he did not abuse his discretion in denying Anderson's mistrial motion.” Id. at 93. The Court emphasized the fact that the judge dismissed the jury and called a recess as soon as the outburst occurred in order to give the witness time to calm down. Id. The Court also opined the jury likely understood the witness's outburst as an expression of grief over the death of her sister. Id. Finally, the Anderson Court noted that a curative instruction was unnecessary in the case and would have actually called the jury's attention to the issue and increased the risk of unfair prejudice to the defendant. Id. at 94.

In reaching its decision that a mistrial was not warranted in the case, the Anderson Court cited the opinion of the South Carolina Supreme Court in State v. Wagstaff, 202 S.C. 443, 25 S.E.2d 484 (1943). In Wagstaff, the mother of a rape victim was testifying at the trial of the alleged rapist. At the conclusion of her testimony, the mother rushed toward the defendant screaming, “I could tear your eyes out.” After noting the general rule that a court should grant a mistrial only when there is “manifest necessity” to do so, the Court stated:

We believe the jury could readily understand that the witness in question might have a hostile attitude toward the accused, because of the natural effect of the circumstances on her emotions, although there was nothing whatever in her testimony tending to show his guilt, and hence her attitude was based solely upon the testimony of others. . . .When all the circumstances of the instant case are considered we believe it is clear that even if a motion for a mistrial had been made the trial Judge would not

have been justified in granting it, in the proper exercise of his discretion. There was certainly no manifest or absolute necessity for such action.

Id. at 453-54.

In State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), the victim's mother and aunt loudly stormed out of the courtroom during the cross examination of the defense medical expert. Id. at 596. The South Carolina Supreme Court found that the trial judge did not abuse his discretion in denying the defense's motion for a mistrial. Id. at 597. The Court referenced Anderson, noting that as in Anderson, the jury was already aware of the mother's feelings about the death of her son and likely understood her outburst as an expression of this grief. Id.

In State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996), this Court dealt with a situation where there was audible crying by spectators during the victim's testimony. The defense moved for a mistrial. Id. at 316. The trial judge stated he did not believe any displays of emotion thus far could have tainted the jurors. Id. However, as a precaution he cleared the courtroom of everyone except the press and the victim's father for the remainder of her testimony. Id. In order to explain to the jury why the courtroom was suddenly emptier, the trial judge informed the jury that the courtroom had been cleared due to the display of emotion by observers. The judge cautioned the jurors that they were not to draw any inferences from this fact and that they were to render their verdict based on the testimony and evidence presented at trial. Id. This Court found that the trial judge did not abuse his discretion in denying the defense motion for a mistrial. Id. at 318. While Jones demonstrates the deference given to trial judges by appellate courts, it is distinguishable from the current case in that the trial judge elected to clear the courtroom and provide a curative instruction. However, a curative instruction was

necessary in the case because the jury undoubtedly had significant questions about why they were returning to a nearly empty courtroom. In the current case, there were no major changes, like the emptying of a courtroom that would necessitate an instruction to the jury.

All of the aforementioned cases demonstrate the view of South Carolina appellate courts that a mistrial is an extreme measure that should only be used in the most grievous situations. The show of emotion by Victim in the current case was not of the extreme nature that would warrant the declaration of a mistrial. Victim's occasional bouts of crying and single instance where she called out for her mother are no more severe than the situations dealt with by the courts in Anderson, Wagstaff, Hughes, and Jones. Furthermore, there was no accompanying testimony like in Anderson and Wagstaff, where the parties who had an emotional outburst directly addressed towards the defendant.

The trial judge also limited any potential prejudicial effect of Victim's emotion. As in Anderson, the trial judge had the foresight to call a recess during both the direct examination and cross-examination of Victim when she began to get emotional in response to questioning. These brief recesses gave the witness time to calm down and limited the amount of crying seen by the jury. Therefore, the three occasions where Minor began crying were simply not enough to justify the declaration of a mistrial. Minor's occasional crying and calling for her mother did not prejudice the defense to the point where there was manifest necessity to terminate the proceeding.<sup>1</sup>

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<sup>1</sup> Appellant's assertion that the Solicitor instructed the jury to decide the case on emotion is simply not correct. Appellant argued that the jury heard from a "wound up" Solicitor in closing that Victim's raw emotion was proof that she was telling the truth. Appellant also attempts to argue that the Solicitor instructed the jury to use the emotion of a witness to form the basis for its verdict. (App. Br. p. 20). The

Appellant repeatedly notes a curative instruction was not given in the case. The State notes that no curative instruction was ever requested by the defense. Furthermore, as in Anderson, a curative instruction was not necessary and arguably would have prejudiced the defense by calling the jury's attention to the issue.

Courts in other states have also found emotional behavior akin to that shown by Victim in this case to be insufficient grounds for a mistrial. While Anderson, Wagstaff, Hughes, and Jones demonstrate great deference by South Carolina appellate courts to the trial judge's finding that a mistrial was unnecessary and an attitude that mistrials are reserved for only the most extreme and prejudicial situations, they do not deal directly with a situation where the victim had an "emotional outburst" while on the witness stand. However, there is overwhelming out-of-state authority where courts have adjudged behavior similar to or more extreme than that shown by Victim to not warrant a mistrial.

In Young v. State, 422 S.E.2d 227, 228 (Ga. Ct. App. 1992), Young contended that the trial court erred in denying his motion for a mistrial after the victim began crying uncontrollably on three separate occasions during her testimony, necessitating breaks in the proceedings. The trial judge denied the mistrial motion, noting that although the victim had become emotional at times, these episodes in their entirety were not of such a

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Solicitor was simply reminding the jury that one of its core functions was to judge the credibility of witnesses. This is consistent with the trial judge's later instruction to the jury, "Necessarily, you must determine the credibility of witnesses who have testified in this case . . . You may also consider the appearance and manner of a witness while on the witness stand." ROA. p. 334. This instruction is fully consistent with the model good character jury instruction contained in the most recent version of the South Carolina Judicial Department's general sessions bench book. See 2015 Suggested General Sessions Jury Instructions, <http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf>. Also, the Solicitor's mention during closing of Victim's "raw emotion" at trial was in response to the defense's closing, where Defense Counsel directly commented on Victim's emotion at trial and told the jury that her emotion could have been a reaction "to somebody is pointing out the problems with the things she's saying and the reasons that you shouldn't believe it." ROA. p. 308. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citing United States v. Nobles, 422 U.S. 225 (1975)). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." United States v. Robinson, 485 U.S. 25, 33 (1988).

consequence that it would deprive appellant of his right to a fair trial. Id. Young also complained that the trial judge did not give a curative instruction. Id. at 228-29. The Georgia Court of Appeals noted the appellant had not requested a curative instruction at trial. Id. at 29. "It is only where the accused would be denied a fair trial in the absence of corrective instructions that such must be given even in the absence of a request or a mistrial declared." Id.

In Paige v. State, 627 S.E.2d 370, 373-374 (Ga. Ct. App. 2006). Paige asserted he received ineffective assistance of counsel where his counsel failed to move for a mistrial or request a curative instruction after the victim cried on the witness stand, requiring a recess to be taken. The victim started crying very hard when asked to identify the clothing she was wearing at the time of her attack. Id. The Georgia Court of Appeals determined the trial judge would not have abused his discretion in refusing to declare a mistrial, noting there was no evidence that she became hysterical or made any prejudicial comments. Id. Furthermore, trial counsel acknowledged that she was more composed after the recess. Id.

In Miller v. Com., 925 S.W. 2d 449, 453 (Ky. 1996) (overruled on other grounds by Garrett v. Com., 48 S.W. 3d 6 (Ky. 2001)), the victim broke into tears while on the witness stand and was unable to continue testifying. A recess was granted during which time the victim left the courtroom in order to compose herself. Id. However, the victim's cries of "I don't want to. I don't want to," could still be heard in the courtroom. Id. The victim eventually returned to the stand where she testified without further difficulty. Id. The Kentucky Supreme Court found that the trial judge did not abuse his discretion in

denying the motion for a mistrial, noting the trial judge was in the best position to ensure a fair trial and determine whether remedial measures were necessary. Id.

In State v. Newman, 283 So.2d 756, 758 (La. 1973), Newman contended the trial judge erred in refusing to grant a mistrial when a thirteen-year-old witness who identified him in a burglary case began hysterically crying while testifying at trial. The trial judge noted that the crying was not unexpected by the jurors in light of the age of the witness and the circumstances, and that in all probability it would happen again should the case be retried. Id. The Louisiana Supreme Court found the trial judge's denial of the mistrial motion to be proper. Id.

All of the above cases reinforce the fact that Victim's shows of emotion at trial were not grounds to warrant a mistrial. The Miller case is nearly identical to the case at hand, as the victim's cries of "I don't want to" are very similar to Victim calling for her mother as the jury exited the courtroom. As the Miller Court noted, the trial judge is in the best position to ensure a fair trial and determine whether any remedial measure are necessary. The trial judge had the best view of the situation and limited any potential prejudice from Victim's crying by calling a recess during her spells of crying while on the witness stand. The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (citing State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981)). The trial judge, thus, did not abuse his discretion in refusing to declare a mistrial, as the periods of emotion demonstrated by Victim were not of the extreme nature necessary to constitute manifest necessity for a mistrial.

## II.

**The trial court did not err in following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts, and following the established procedure did not violate Appellant's constitutional rights to a fair trial and due process of law.**

### Relevant Facts

Prior to closing arguments, Defense Counsel informed the trial court she had a motion about the order of closing. ROA. p. 194. Defense Counsel noted she also had a written motion in support of her argument. ROA. p. 284. In arguing her motion, Defense Counsel argued:

But the only thing I would add is that if this is - - if this is the way it's done in civil cases where you're not dealing with somebody's constitutional rights, and that's the way it's done, then that's the process that needs to be used in criminal cases where the State has the burden of proof beyond a reasonable doubt. The standard of proof is higher. There are constitutional rights implicated, and for all those reasons we think that this practice of allowing it the way it's been done needs to change.

ROA. p. 286. The court denied the defense's motion. ROA. p. 286. Following closing arguments by both the State and the defense and the judge's instructions to the jury, Defense Counsel noted several things in the State's closing argument that she would have responded to had she been able to have the last argument. ROA. p. 340.

### Discussion

Appellant asserts the trial judge erred in declining to deviate from following the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts. Appellant asserts the trial judge's ruling violated his state and

federal constitutional rights to a fair trial and due process of law. The State submits this argument is without merit, as the trial judge did not err in allowing the State to have the last argument as permitted by the established procedure.

The longstanding procedure used in criminal proceedings is reasonable and does not require alteration. Historically, the right to the final closing argument has followed the party with the burden of proof. Stein Closing Arguments § 1:6: Right to open and close; order of argument (2011-2012 ed.) (“Generally, the right to make opening and closing follows the person having the burden of proof.”); Nicole Velasco, Taking the “Sandwich” Off of the Menu: Should Florida Depart from Over 150 years of Its Criminal Procedure and Let Prosecutors Have the Last Word?, 29 Nova L.Rev. 99, 112 (2004) (“At common law, the widely accepted rule in the United States is that the party with the burden of proof has the right to open and conclude final argument before the jury.”).

In criminal trials in South Carolina, a solicitor is entitled to open and close the closing arguments to the jury unless the defendant has not offered any evidence. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977). The initial closing argument must include a discussion of the law if demanded by the defendant; however, the solicitor is not required to open his initial closing with any argument on the facts although he may do so as a matter of discretion. State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971) *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); Rodgers, 269 S.C. at 25, 235 S.E.2d at 809.

However, unlike the vast majority of jurisdictions, current South Carolina practice sets the order of closing arguments in criminal cases according to the evidence received at trial. See State v. Brisbane, 2 Bay 451 (S.C. 1802) (As a matter of practice, when a

criminal defendant calls no witnesses, he has “the **privilege** of concluding to the jury.”) (emphasis added); see also State v. Gellis, 158 S.C. 471, 155 S.E. 849, 855 (1930) (“It is evident from the more recent decisions of this court that the rule is that if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments.”); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, 384 (1972); State v. Mouzon, 321 S.C. 27, 467 S.E.2d 122, 125 (Ct. App. 1995).

In this case, Appellant chose to present three defense witnesses. Therefore, under longstanding state procedure, Appellant was not entitled to have last closing argument to the jury nor was he entitled to require the solicitor to open on both the facts and the law. Appellant cites Rule 43(j), SCRCP, and Proposed Rule 21 as support for his proposition that the State should be required to open fully on the law and the facts and reply in rebuttal. However, the Rules of Civil Procedure are wholly inapplicable to criminal cases, and Proposed Rule 21 has yet to be adopted by the South Carolina Supreme Court. Furthermore, a proposed change in a procedural rule does not indicate that the current version violates anyone’s constitutional rights.

In rejecting an equal protection challenge, the Florida Supreme Court explained the rationale of its rule that is similar to the practice in South Carolina:

In all criminal proceedings, the prosecution takes the offensive at the outset, building through its witnesses a “case” for defendant’s guilt. In most instances, defense counsel is limited to the defensive tactic of cross-examination to show the weakness of the State’s evidence, and to create a reasonable doubt in the minds of the jury. Occasionally the defense will be in a position to take the offensive itself by calling witnesses to build its own case for innocence. In those instances where such an offensive tactic is possible, the defense receives a more balanced exposure before the jury, and is more adequately able to offset the impression created in the minds of the jurors by the prosecution’s presentation. But what of those situations where the circumstances do not give the defendant the option of presenting his own case? In our judgment it was precisely to

counterbalance the weight of the State's offensive in such cases that the Legislature, and later this Court, created an exception to the common law rule that the party with the burden of proof is entitled to the concluding argument before the jury. As we view the Rule, it is intended as an aid to those defendants entitled to avail themselves of it, rather than as a limitation upon those desiring to call defense witnesses.

Preston v. State, 260 So.2d 501, 504 (Fla. 1972).<sup>2</sup>

Totally denying a criminal defendant the opportunity for closing argument constitutes a denial of the defendant's basic right to make his defense. Herring v. New York, 422 U.S. 853, 858-859 (1975). While the right to make a closing argument cannot be circumvented, the order of argument is vastly different, particularly since argument is not evidence. See, e.g., Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649, 653 (2006), quoting S.C. Dep't. of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511, 513 (Ct. App. 2003) (“[A]rguments made by counsel are not evidence”); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22, 24 (1987) (“[T]he solicitor's closing argument is not evidence”). There is no constitutional right to a certain order or scope of argument.

The order of closing arguments is a matter of state procedural rule or practice rather than substantive law. State v. Huckie, 22 S.C. 298, 299 (1885) (alleged error in denying defendant final closing argument was “not a matter of error as to express law, but of practice”). The United States Supreme Court has consistently held the states are free to shape their own rules of procedure. See, e.g., United States v. Scheffer, 523 U.S. 303, 316 (1998), quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (“we thus stressed that the ruling did not ‘signal any diminution in the respect traditionally accorded

<sup>2</sup> In 2007, Florida changed its rules to eliminate a defendant's right to make a final closing argument. See In re Amendments to the Florida Rules of Criminal Procedure—Final Arguments, 957 So.2d 1164 (Fla. 2007). Florida's new rule provides, in pertinent part, as follows: “In all criminal trials, excluding the sentencing phase of a capital case, at the close of all the evidence, the prosecuting attorney shall be entitled to an initial closing argument and a rebuttal closing argument before the jury or the court sitting without a jury.” Id. at 1167.

to the states in the establishment and implementation of their own criminal trial rules and procedures.””).

Significantly, Appellant did not lose his right to make a closing argument; rather, he merely chose to forfeit the opportunity to present his argument last. See Herring, 422 U.S. at 857-64 (finding a *total denial* of the opportunity to present a closing argument to the trier of fact is a denial of the basic right of the accused to make his defense).

The order of closing arguments is a matter of state procedural preference which does not offend equal protection or any other constitutional right. Sheffer. The trial judge and the parties below had the right to rely on well-established precedent and longstanding practice -- a practice that never deprives any defendant of the opportunity to present a closing argument. That practice was followed in Appellant’s case. There was no error.

### III.

**The trial judge did not err in refusing to allow Defense Counsel to elicit testimony that the photographs on Victim’s phone showed T.C.’s genitals, where the defense was still able to effectively argue that the photographs provided a motive for Victim to fabricate the allegations, the evidence was inadmissible under the Rape Shield Law, and the evidence was inadmissible under Rule 401, SCRE and Rule 403, SCRE, as the evidence was irrelevant and any potential probative value of the evidence was substantially outweighed by the evidence’s potential for undue prejudice.**

#### Relevant Facts

Prior to trial, the Solicitor noted that in his Rule 5 disclosures, he accidentally released three photographs that were taken off a cell phone showing the genitals of a minor boy. ROA. p. 3. The Solicitor noted he should not have released them, as they would be improper to disclose, display, or disseminate in any form. ROA. p. 3. Defense

Counsel agreed the photographs should not have been disclosed to her. ROA. p. 86. Defense Counsel then stated, "It would not be my intention to try to introduce that photograph unless - - unless for some reason it - - the fact that they existed on this young lady's phone is disputed." ROA. p. 3. Defense counsel continued, "And then, you know, if there was some way to describe them to the jury short of them seeing the actual images. But I- - you know it wouldn't be my desire to introduce them." ROA. p. 3. The trial judge then stated:

Well, if I understand what you're saying, you don't want to concede 100 percent at this stage that that you would not consider some sort of relevant evidence. And we'll just see how it goes. Quite frankly, I don't see where it would be relevant. But I'm not making any rulings on that . . . And if some reason the Defense feels like they want to have those introduced then we'll deal with that as an evidentiary matter.

ROA. p. 4.

During Mother's testimony, Defense Counsel began to ask whether Mother had discovered photographs of T.C. on Victim's phone. ROA. pp. 34-35. The Solicitor immediately objected and the judge sent the jury out of the courtroom so that the trial court could take up the matter of law. ROA. p. 35. The Solicitor argued:

I'm assuming, and I may have pulled the trigger too quick, the pictures the Defense is getting ready to ask about are the pictures that I advised the court about earlier which would have no relevance to the accusations of this crime, unless they're trying to put it in through some type of third party guilt, which clearly they haven't met the statutory requirements of that, or they're trying to go into some other alleged sexual activity by the child, which would be certainly objected under the Rape Shield law. And I can't imagine what other sense of relevance it may have.

ROA. p. 35.

Defense Counsel argued, "I think those photographs coming in on that phone at the time that they did go to a motive for why [Victim] would be saying these things about

Mr. Tate, because she got in trouble for the pictures being on her phone.” ROA. p. 36. The Solicitor countered that the pictures were completely irrelevant and would certainly be more prejudicial than probative under Rule 403, SCRE. The trial judge asked counsel whether the photographs were received in conjunction with a text message or were the pictures simply in the phone’s photo album. ROA. p. 36. The Solicitor clarified for the judge that the pictures were not received in conjunction with a text and were simply found on the phone. ROA. p. 37. There were no phone records tying the picture to one particular person. ROA. p. 37. The Solicitor disclosed that, from his own investigation, he discerned the pictures came from T.C. ROA. p. 37. The trial judge asked Defense Counsel:

Why do they have to know it’s his private parts? I realize this is - - this is a case involving sexual allegations. I understand that. And that she has made allegations against the Defendant of sexual in nature. I understand that. But why does the jury has to know that there are sexual pictures on her phone giving her the motive to fabricate these allegations?

ROA. p. 38. The Solicitor offered, “To give you a good example, Your Honor, let’s say she was actually caught engaging in intercourse with [T.C.] and that was the basis for some discipline, the Rape Shield still applies. You can’t get into you had sex with [T.C.] and that’s why you got in trouble, isn’t it.” The Solicitor continued, “They couldn’t do that. So why can they go into the fact that there was this picture on the phone?” ROA. p. 39. Defense Counsel maintained that the content of the pictures was relevant because it goes to motive and why the Victim could fabricate the allegations. ROA. p. 39.

The trial judge ruled:

I don’t really see much of a difference in them seeing pictures or being told that there are pictures of his male private parts. I mean, they can - - if it’s male private parts they can envision in their mind what the pictures show. I just don’t - - I think you can certainly ask if there were pictures on

the phone concerning [T.C.] that the mom disapproved of, but if he did, but I don't think we need to tell the jury that they are actually [T.C.'s] private areas. I don't think the jury needs to know that. I don't see where there's any relevance. You can still argue motive, because she got into trouble allegedly over these pictures on the cell phone. . . .But the jury is not going to know that there were pictures of his private area.

ROA. p. 40. The trial judge later continued, "I think motive can be established without the jury knowing that the pictures were of male genitalia. So the question is - - I guess the objection by the State is sustained." ROA. p. 42.

Following a proffer of Mother's testimony by the defense, the judge clarified the scope of what Defense Counsel could ask regarding the pictures, stating, "So the ruling is that nothing can be mentioned to the jury out of what the actual pictures show. Certainly the use of the word inappropriate, if that's the word of choice to describe the pictures. I'll allow that. But they will not be told actually what the pictures show." ROA. p. 44. Defense Counsel subsequently asked Mother "And did there come a time when you saw at least one inappropriate photograph of [T.C.] on [Victim's] phone?" ROA. p. 45. Mother responded that she had seen the photograph and talked to T.C.'s parents about it, who also agreed the picture was inappropriate. ROA. p. 45. Mother later testified that Appellant was the one who made her aware of the inappropriate photographs. ROA. pp. 46-47.

During Defense Counsel's cross-examination of Victim, Victim was asked whether her phone had three inappropriate pictures of T.C. on it. ROA. p. 162. Victim responded that it did. ROA. p. 162. The pictures were subsequently discovered by Appellant and Mother. ROA. pp. 162-163. Defense Counsel asked Appellant whether she got in trouble for the photographs, and Victim replied that she did. ROA. p. 163. Defense Counsel then asked Victim whether her phone had been taken away when Appellant and

Mother found the pictures, and Victim replied that it had been. ROA. p. 163. Defense Counsel also asked Victim whether it was ten days after Appellant's discovery of the pictures when she disclosed Appellant's abuse to Holland and Lindler. ROA. p. 163. Victim did not recall the specific number of days but agreed that the disclosure occurred a short time after the phone incident. ROA. p. 163.

One of the witnesses called by the defense was Bart Cave. ROA. p. 246. Cave works in the computer crime center at SLED. ROA. p. 247. Cave was involved in Appellant's case because SLED received phones that needed to be examined. ROA. p. 248. Defense Counsel asked Cave whether any of the phones contained inappropriate photographs. Cave discovered three inappropriate pictures on one of the phones. ROA. p. 248. Defense Counsel also asked Cave what the dates were of the photographs on the phone. ROA. p. 249. Cave explained that there is a date and time associated with the pictures of when they were on the device. ROA. p. 249. Cave testified photographic files showed dates of August 14, 2010, and August 15, 2010. ROA. p. 249.

During closing argument, in trying to convince the jury Victim fabricated the allegations against Appellant, Defense Counsel cited Victim's relationship with T.C. as the motivation for Victim to lie. ROA. p. 312. Defense Counsel attempted to paint a picture where Victim somehow perceived Appellant as an obstacle to her relationship with T.C. ROA. pp. 312-313. Defense Counsel argued:

And then the culmination of all that is when those inappropriate pictures turn up on the phone on August 14<sup>th</sup> and 15<sup>th</sup>. Mr. Cave told you about. [Victim] - - one of the things she was able to admit to was those pictures on her phone. Her mother admitted to seeing those. Her phone gets taken away. It gets talked about with [T.C.'s] parents. And then, just, what, a week and a half later. The pictures are there the 14<sup>th</sup> and 15<sup>th</sup>, so they've got to be found some time after that while they're at Blue Hole. And then on August 23<sup>rd</sup> all of this starts coming out. And then Keith is gone. The

person who was awake most of the time, who stayed with the kids when [Mother] went to the hospital. . . . But he - - he's out of the picture and the boyfriend problem won't be a problem anymore. And then [Victim] at some point starts using contraceptives, and then in November there's an exam that shows some sort of penetration. So that's the only thing I know of to point to explain to you why this would have started coming up.

ROA. p. 313. When discussing the State's medical evidence during her closing, Defense Counsel also emphasized the fact that Victim was using contraceptives. ROA. p. 309.

### **Discussion**

Appellant contends the trial judge erred in refusing to allow Appellant to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals. Appellant argues the trial judge's ruling is violative of his constitutional rights to present a defense and to confront his accuser. Appellant asserts the content was necessary for the jury to understand Victim's purported motive to fabricate the allegations against Appellant. The State submits that this argument is without merit. The trial judge's limitation of questioning regarding the photographs to whether there were inappropriate pictures of T.C. on Victim's phone allowed the defense ample opportunity to argue Victim's punishment for the photographs motivated her to fabricate the allegations against Appellant. Furthermore, allowing Defense Counsel the opportunity to elicit testimony about the specific content would have violated the Rape Shield Law. Finally, the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any probative value of the evidence was substantially outweighed by the evidence's potential for undue prejudice.

Firstly, the trial judge did not err in refusing to allow Appellant to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals because the defense was still able to effectively argue Victim's punishment stemming from the photographs was

the motive for her to fabricate the allegations against Appellant. The trial judge's limitation on Appellant's questioning did not implicate his constitutional rights to present a defense and to confront his accuser whatsoever. The Confrontation Clause guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right to confront and cross-examine witnesses "is essential to a fair trial in that it promotes reliability in criminal trials, and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." United States v. Owens, 484 U.S. 554, 559 (1988) (citations and internal quotation marks omitted). Appellant was able to fully and vigorously cross-examine all witnesses presented by the State. Appellant's rights of confrontation and right to present a defense were not implicated whatsoever, and the judge's limitation of questioning regarding the photographs on Victim's phone still enabled the defense to argue motive. Defense Counsel was able to ask both Mother and Victim about "inappropriate photographs of T.C." found on Victim's phone. Defense Counsel also asked whether T.C.'s parents were contacted, whether punishment was doled out, and what the time and date of the pictures were. The inappropriate pictures found on Victim's phone were one of the major pieces of evidence relied upon by Defense Counsel in her closing argument. The trial judge's ruling that Defense Counsel not be allowed to question witnesses as to what specifically these "inappropriate pictures" contained did not impugn Appellant's defense whatsoever. The defense could, and did,

argue fully that the inappropriate pictures provided Victim a motive to fabricate the allegations against Appellant. Thus, Appellant's right to confrontation and right to present a defense were not violated. Furthermore, any alleged error in the trial judge's ruling regarding the content of the photographs was harmless, as Appellant suffered no prejudice. Appellant was still able to fully argue that Victim had a motive to fabricate these allegations by asking Victim, Mother, and Cave about the inappropriate pictures found on Victim's phone. Defense Counsel was able to vigorously argue throughout closing argument that Victim was a "storyteller" who had a very strong motive to fabricate the allegations.

Secondly, allowing Appellant to elicit testimony concerning the content of the inappropriate photographs would have been violative of the Rape Shield Statute. S.C. Code Ann. § 16-3-659.1(1) provides, "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656." Allowing Defense Counsel to elicit testimony that Victim had photographs of T.C.'s penis on her phone would enable her to reference specific instances of Victim's sexual conduct. Furthermore, Defense Counsel's statements during closing arguments emphasizing the fact Victim was using contraceptives evinces a clear intent to attempt to point to other specific incidents of Victim's sexual conduct that could explain the transection in her hymen that was discovered during her examination by Dr. Pritchard.

Thirdly, the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any probative value of the evidence was

substantially outweighed by the evidence's potential for undue prejudice. All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE ("'Relevant evidence' means evidence having 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.").

However, 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. State v. Collins,

398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), *rev'd on other grounds*, 409 S.C. 524, 763 S.E.2d 22 (2014). 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).

The content of the photographs on Victim's phone was not relevant whatsoever. The content of the photographs had no bearing on the proceeding, and did not make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without the evidence. The only stated purpose the defense offered for the pictures was that they were relevant to the alleged motive of Victim to fabricate the allegations. The specific content of the pictures was not relevant whatsoever to Victim's alleged motive. The existence of the photographs themselves and Victim's punishment for possessing them are the only relevant evidence that goes towards motive.

Appellant's comparisons of the current case to State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) are inapposite. As noted by Appellant, the Grovenstein Court held that evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct. Id. at 219. However, whether Victim was familiar with the sexual conduct that was alleged was not an issue in the proceeding. In State v. Williams, 409 S.C. 455, 761 S.E.2d 770 (2014), Williams argued the trial court erred in excluding evidence of prior sexual abuse of a victim by the victim's stepbrother. The Court found the situation distinguishable from that in Grovenstein, ruling the evidence Williams sought to admit did not provide an alternate explanation as to how the victims

were familiar with the sexual conduct they alleged Williams to have committed because the allegations against Williams were not similar to the alleged abuse by the victims' stepbrother. *Id.* at 466. The Court emphasized that Williams was accused of digitally penetrating the victims, while the victim's stepbrother allegedly forced the victim to perform oral sex. *Id.* The Court noted that the fact that the victim was previously forced to perform oral sex would not show a source of the victim's ability to testify about the defendant's acts of digital penetration. *Id.* As in Williams, the contents of the photographs were not similar whatsoever to the abuse committed by Appellant. The fact that Appellant had nude photographs of her boyfriend did not show a source of the victim's ability to testify about instances of sexual abuse by Appellant. Furthermore, the issue of whether the evidence was relevant to demonstrate an alternate explanation as to how Victim was familiar with various aspects of sex is not preserved for appellate review. Defense Counsel's stated reason for why the content of the photographs should be admissible all revolved around Victim's motive and credibility. ROA. pp. 36-39, 41. Defense Counsel never argued to the trial judge that the content of the photographs was relevant to establish the child had an alternate source of sexual knowledge. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

Whatever probative value, if any, the evidence had was substantially outweighed by the risk of unfair prejudice and misleading the jury. The admission of the content of the photographs would have had an undue tendency to suggest a decision on an improper

basis. The jury would have placed improper emphasis on the content of the photographs. The jury would not have seen the content of the photographs as proof of motive; instead, the jury would have viewed the photographs and believed T.C. was the likely source of the transection in Victim's hymen. As such, the highly prejudicial nature of the photographs leads to the conclusion that the probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury.

**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 17, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal From Abbeville County  
Donald B. Hocker, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

Respondent,

vs.

KEITH DENVER TATE

Appellant.

\_\_\_\_\_  
**CERTIFICATE OF COUNSEL**  
\_\_\_\_\_

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON  
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V. HENRY GUNTER, JR.  
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ATTORNEYS FOR RESPONDENT

February 16, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Abbeville County  
Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent

vs.

KEITH DENVER TATE

Appellant.

**PROOF OF SERVICE**

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Susan B. Hackett, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 16<sup>TH</sup> day of February, 2016.

  
NORMA BIGBEE  
Legal Assistant

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Keith Denver Tate, Appellant.

Appellate Case No. 2014-001694

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Appeal From Abbeville County  
Donald B. Hocker, Circuit Court Judge

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Unpublished Opinion No. 2016-UP-436  
Submitted September 1, 2016 – Filed October 19, 2016

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**AFFIRMED**

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Appellate Defender Susan Barber Hackett, of Columbia,  
for Appellant.

Attorney General Alan McCrory Wilson, Assistant  
Attorney General Vann Henry Gunter, Jr., both of  
Columbia; and Solicitor David Matthew Stumbo, of  
Greenwood, for Respondent.

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**PER CURIAM:** Keith Denver Tate was convicted of second-degree criminal sexual conduct with a minor and sentenced to imprisonment for sixteen years. On

appeal, Tate contends the trial court erred in (1) failing to declare a mistrial based upon Victim's emotional outbursts, (2) failing to require the State to open in full during closing arguments, and (3) refusing to permit defense counsel to elicit testimony concerning the specific content of three photographs found on Victim's phone. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the circuit court erred in failing to declare a mistrial based on Victim's emotional outbursts: *State v. Anderson*, 322 S.C. 89, 91–92, 470 S.E.2d 103, 105 (1996) ("The decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge and will not be reversed absent an abuse of discretion or manifest prejudice to the complaining party."); *State v. Kirby*, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes."); *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("A mistrial should only be granted when absolutely necessary."); *id.* ("The trial judge is in the best position to determine the credibility of the jurors; therefore, [the appellate court] grants him broad deference on [a motion for mistrial] issue."); *Anderson*, 322 S.C. at 93, 407 S.E.2d at 105–06 ("Given that the trial judge was in the best position to assess the degree to which the jury may have been prejudiced by the [witness's] outburst, he did not abuse his discretion in denying [the appellant's] mistrial motion."); *id.* at 93–94, 407 S.E.2d at 106 (cautioning that in some cases, "a witness's or spectator's outburst may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction," but holding a curative instruction was unnecessary in that case and noting such an instruction "could have focused the jury's attention on the outburst, thus increasing the possibility of improper prejudice to the defendant."); *State v. Perry*, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983) ("Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record.").

2. As to whether the trial court erred in failing to require the State to open in full during closing argument and reply only to the defense's closing argument: *State v. Gellis*, 158 S.C. 471, 487, 155 S.E. 849, 855 (1930) ("[I]f a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments."); *State v. Rodgers*, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) ("The solicitor is entitled to open the closing arguments to the jury unless the defendant has offered no evidence."); *id.* at 25, 235 S.E.2d at

809 ("The solicitor is not required to make an opening argument to the jury on issues of fact, . . . but may do so in his discretion.").

3. As to whether the trial court erred in refusing to permit Tate to elicit testimony concerning the content of three illicit photographs found on Victim's phone: *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011) ("The admission of evidence is within the [trial] court's discretion and will not be reversed on appeal absent an abuse of that discretion."); *State v. Lyles*, 379 S.C. 328, 342–43, 665 S.E.2d 201, 209 (Ct. App. 2008) ("The right to present a defense is not unlimited, 'but must bow to accommodate other legitimate interests in the criminal trial process.' The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." (alteration in original) (citations omitted)); Rule 401, SCRE (providing evidence is relevant if it tends "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."); *State v. Stokes*, 339 S.C. 154, 159, 528 S.E.2d 430, 432 (Ct. App. 2000) ("[E]vidence 'should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate the facts.'" (quoting *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999))); 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."); *State v. Turner*, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007) ("[T]rial courts retain wide latitude, insofar as the Confrontation Clause is concerned, to impose reasonable limits on . . . cross-examination based on concerns about, among other things, prejudice, confusion of the issues, or interrogation that is only marginally relevant."); *Holmes v. South Carolina*, 547 U.S. 319, 324, 326 (2006) (holding a defendant has a constitutional right to present a complete defense, and "the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote," but noting "well-established rules of evidence permit trial [courts] to exclude evidence if its probative value is outweighed by other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury").

**AFFIRMED.<sup>1</sup>**

**HUFF, SHORT, and KONDUROS, JJ., concur.**

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<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

APPELLANT

APPELLATE CASE NO. 2014-001694

---

Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge

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Opinion No. 2016-UP-436

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PETITION FOR REHEARING

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On October 19, 2016, this Court affirmed Appellant's conviction in an unpublished *per curiam* opinion without the benefit of oral argument.<sup>1</sup> State v. Tate, 2016-UP-436 (S.C. Ct. App. filed Oct. 19, 2016). Pursuant to Rule 221, SCACR, Appellant respectfully requests this Court rehear the three issues presented. This Court's opinion overlooked and/or misapprehended multiple significant points of fact and law. Additionally, as will be discussed in greater detail, this Court's conclusion concerning the mistrial issue creates an unsurmountable burden for all appellants by

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<sup>1</sup> Appellant's case was scheduled for oral argument on September 6, 2016, at 10 a.m. On August 31, 2016, this Court cancelled the scheduled argument.

making the review of trial judge's decisions when presented with mistrial motions virtually unreviewable on appeal. Concerning the second issue, this Court ruled on the content of closing arguments without the benefit of guidance from the South Carolina Supreme Court, which entertained oral argument on this precise issue in State v. Beaty, Appellate Case Number 2015-000718, on October 19, 2016. Finally as to the third issue, Appellant respectfully requests greater explanation as to this Court's reasoning in addition to his request for rehearing regarding the facts and law overlooked and/or misapprehended.

### **Motion for Mistrial**

On appeal, Appellant challenged the trial judge's failure to declare a mistrial where the alleged victim engaged in multiple emotional outbursts disrupting the attorneys and the trial because the outbursts improperly influenced the jury to decide the case, which was already emotionally charged, based on emotion instead of the evidence presented in violation of Appellant's state and federal constitutional rights to a fair and impartial trial. This Court's opinion only cited to the standard of review – abuse of discretion – in such cases, and offered no analysis on the subject.

Appellant concedes that the standard of review on appeal when the challenge is to the trial judge's failure to grant a mistrial is "abuse of discretion." However, this standard of review does not mean "no review." This Court's opinion on this issue eliminates appellate review of the decisions of trial judge's on mistrial motions. Although this Court acknowledged that "[t]he decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge" and that reversal was required when the trial judge abused his discretion or when manifest prejudice resulted, this Court failed to consider whether the judge abused his discretion or if manifest prejudice resulted from the repeated outbursts. See State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996). Instead, this Court's sole focus was on the trial judge's presence at

the trial as providing an opportunity for a better perspective than a cold record. If this view prevails, then all appellate issues for which the standard of review is an abuse of discretion must result in no review at all on appeal as the trial judge is always in a position to have a better opportunity for observing the actual trial than a cold record offers.

“The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution.” State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). “[T]he very heart of a ‘fair trial’ embodies a disciplined courtroom wherein an accused’s fate is determined solely through the exercise of calm and informed judgment.” Id. at 303, 295 S.E.2d at 631.

The South Carolina Supreme Court held a mistrial was in order where “spectators filled the courtroom seats to capacity and even stood against the walls,” there were several outbursts of laughter from the spectators requiring an admonition from the judge, a juror reported that one spectator glared at her with “obvious disgust,” and the jurors overheard a spectator making opinionated remarks. Stewart, 278 S.C. at 301-302, 295 S.E.2d at 629-630. The Court held it was error for the trial judge to deny the motion for a mistrial “without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice.” Id. at 302, 295 S.E.2d at 630. Further, the Court held the judge’s reliance on his instructions to the jury to disregard improper spectator conduct was insufficient to assure Stewart received a fair trial. Id. at 304, 295 S.E.2d at 631.

In another case involving disorder in the court, the Court held a defendant was entitled to a new trial where there was “no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled to, a fair, impartial, and legal,

trial.” State v. Gens, 107 S.C. 448, 93 S.E. 139, 140 (1917). In this transporting liquor case, several ladies held large posters condemning liquor traffic before the jury during part of the trial. The ladies sat directly in front of the jury and to the left of the judge. Id. at 448, 93 S.E. 139. The Court held:

The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge.

Id. Despite the jurors indicating they were not influenced in any manner by the posters, the Court held the trial judge should have set aside the verdict. Id.

The trial judge erred in failing to order a mistrial based on Minor’s repeated and extreme emotional outbursts. Although the trial judge was aware of Minor’s disruptive behavior, took repeated breaks for Minor to compose herself, and admonished Minor regarding her behavior, the trial judge never instructed the jury concerning how to consider, if at all, Minor’s behavior. Minor’s sobbing began during defense counsel’s opening statement. Her sobbing continued during her direct examination, which was after several witnesses had testified. Thus, her emotional outbursts were not limited to single event or to the beginning of the trial. Minor’s improper actions culminated in her storming from the witness stand and screaming for her mother within earshot of the jurors. Despite Minor’s conduct, the judge never told the jury not to consider her conduct in their deliberations.

The jury heard from a self-described “wound up” solicitor in closing that Minor’s “raw emotion” was proof that she was telling the truth. According to the solicitor, Minor’s performance was so real and “compelling” that if she were not telling the truth, then she deserved an Academy Award. The solicitor instructed the jury to do exactly what it is not supposed to do – use the emotion of a witness to form the basis for its verdict. Further, in describing his opinion that Minor’s

testimony was compelling as evidenced by her repeated emotional outbursts, the solicitor improperly conveyed to the jury his belief that Minor was telling the truth. See State v. Jennings, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011)(holding that a forensic interviewer's report that each child had provided a "compelling" disclosure of abuse could only be interpreted to mean the forensic interviewer believed the children were being truthful).

The trial court failed to grant a mistrial where the ends of justice required one. Minor's continuous sobbing and repeated emotional outbursts tainted the proceedings. While some emotion is to be expected in these types of cases, Minor's conduct was extreme, even theatrical, as acknowledged by the prosecutor's remark regarding the Academy Awards. Minor's conduct deprived Appellant of the fair trial he deserved and that the Constitution demands. The taint of her performance could be removed in no other way except a mistrial. Appellant respectfully requests this Court rehear the matter where the opinion issued bars appellate review of all mistrial motions and all other legal errors where the standard of review is an abuse of discretion. Further, Appellant respectfully requests this Court rehear the matter in light of the overwhelming evidence that the judge abused his discretion in denying the motion and that the ends of justice required a mistrial due to Minor's repeated emotional and distracting outbursts.

### **Content of Closing Argument**

Prior to closing arguments, defense counsel moved to require the prosecutors to open in full and use their final argument for rebuttal only. R. 284, line 21 – R. 285, line 3. Defense counsel submitted a written motion in support of this position as well. R. 363 – R. 367. The judge denied this request and permitted the state to give two closing arguments – one prior to defense counsel and one after. Appellant challenged this ruling on appeal. In affirming Appellant's conviction, this Court cited State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) for the proposition that

the prosecutor “is entitled to open the closing arguments to the jury unless the defendant has offered no evidence” and that the prosecutor may make an opening argument to the jury on issues of fact. This Court failed to consider the impact upon such a holding on the due process rights of a criminal defendant. Further, the Court rendered its decision without the benefit of guidance from the South Carolina Supreme Court, which entertained oral argument on this precise issue in State v. Beaty, Appellate Case Number 2015-000718, on October 19, 2016.

Closing argument is “an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound.” Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974)(J. Douglas dissenting). The South Carolina Rules of Criminal Procedure are silent on the order of closing arguments. However, the Rules of Civil Procedure provide that

[t]he moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party’s claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply my respond in full but may not introduce any new matter.

Rule 43(j), SCRCPP.

In a 1911 case, the Court explained that a defendant in a criminal case who has the right to reply in argument by reason of not introducing evidence may decline to open in argument and still retain the right to make the closing argument to the jury either upon the case in general or by way of reply to the state’s argument. State v. Garlington, 90 S.C. 138, 72 S.E. 564, 566 (1911). South Carolina required the prosecution to close in full prior to the defense’s closing argument pursuant to court rule – Rule 59 of the Circuit Court. See State v. Atterberry, 129 S.C. 464, 124 S.E. 648, 651 (1924). Subsequently, the rule changed to require the partying having the opening in the argument

to disclose fully the law.<sup>2</sup> Thereafter, the Court held in State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), that the solicitor was no longer required to make an opening argument to the jury on issues of fact. Id. Citing Lee, id., the Rodgers Court held “the solicitor is not required to make an opinion argument to the jury on issues of fact” “but may do so in his discretion.” Rodgers, 269 S.C. at 25, 235 S.E.2d at 809. Thereafter, the custom in South Carolina – with no foundation in any rule of law – permitted the prosecutor to deliver two closing arguments with the content of those arguments virtually unlimited.

The trial judge’s refusal to require the state to open fully denied Appellant’s right to a fair trial and due process of law because it prevented him from responding to specific points made the prosecutor. Several of the points – especially, those mischaracterizing the record and demeaning the defense – could not have been anticipated. There is simply no good reason – other than custom – to adhere to the current status quo. The prosecution should have been made to open fully as to the law and the facts with the Appellant having an opportunity to respond to the argument and close fully on the law and the facts. The prosecution could have refuted any unanticipated arguments by Appellant in a rebuttal. Permitting the order of arguments in this fashion would have ensured the Appellant’s rights to a fair trial and due process of law were not at odds with his right to present a full and complete defense. The current system forces defendants to choose between presenting a defense, which would forfeit last argument, or not to present a defense and keep last argument. No further explanation is needed to demonstrate how this scenario places a defendant on the horns of a dilemma.

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<sup>2</sup> Rule 58 of the Circuit Court Rules provided for the order of closing at the time.

Appellant respectfully requests this Court rehear this issue to consider the dearth of case law and rules supporting the current practice and to allow the Supreme Court to provide guidance as anticipated from its decision in Beaty.

### **Illicit Photographs & A Motive to Lie**

On appeal, Appellant challenged the trial judge's refusal to permit him to question his accuser concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Appellant. In ruling on this issue, this Court noted the standard of review, prior cases limited a defendant's right to present a defense, Rule 401, SCRE, Rule 403, SCRE, and prior cases limiting a defendant's rights under the Confrontation Clause. However, this Court's opinion offers little to explain the reasoning by the affirmance on this issue. Appellant respectfully requests greater explanation of the decision in addition to his request for this Court to rehear the matter based on significant points overlooked and/or misapprehended.

Everyone agreed that Terrance C. was Minor's ex-boyfriend. Everyone also agreed there were three photographs of Terrance's genitalia on Minor's phone. The photographs appeared on Minor's phone on August 14 and August 15 of 2010. Minor made her allegations of sexual assaults against Appellant on August 25, 2010. Appellant and Minor's mother discovered the photographs on Minor's phone and Minor was punished. Appellant wanted to question Minor regarding the contents of those photographs.

The judge found the content of the photographs was not relevant. He ruled that Appellant could "ask if there were pictures on the phone concerning Terrance that the mom disapproved of, if she did, that [Appellant] disapproved of if he did," but he refused to allow Appellant to "tell the jury that they are actually Terrance's private areas." His ruling would permit Appellant to argue motive

because Minor got into trouble over the photographs on the cell phone, but he was adamant that the jury not learn the nature of the photographs. R. 40, lines 7-25. In short, the judge found that Minor's improper motive to make the false allegations could be established without the jury knowing that the pictures were of male genitalia. R. 41, line 23 – R. 42, line 4.

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. “The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness’s demeanor and assess his credibility.” State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff’d as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). “[C]ross-examination is essential to a fair trial as guaranteed by the Sixth Amendment and due process as required by the Fourteenth Amendment.” State v. McCoy, 274 S.C. 70, 72, 261 S.E.2d 159, 160 (1979). This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that “[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” To establish a violation of the Confrontation Clause, Appellant must show that he was prohibited from asking questions designed to show bias on the part of Minor. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

The Rape Shield Statute prohibits “[e]vidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s

sexual conduct ... in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656.” S.C. Code Ann. § 16-3-659.1(1). This statute is completely inapplicable to the instant matter because Appellant was not offering evidence of specific instances of Minor’s sexual conduct, opinion evidence of Minor’s sexual conduct, or reputation evidence of Minor’s sexual conduct. In fact, the photographs could not demonstrate specific instances of Minor’s sexual conduct as the photographs did not depict Minor engaged in any sex acts. Rather, Appellant was offering three sexually explicit photographs on the twelve-year old’s phone from her fifteen-year old boyfriend to show the motivation Minor had to lie about the allegations of sexual abuse.

Having determined the Rape Shield Statute does not bar the evidence, the only remaining question is whether the evidence was relevant. Relevant evidence is any “evidence having 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. Was the fact that Minor had three photographs of her naked boyfriend showing his fully erect penis on her phone relevant to Minor’s credibility?

Deciding an issue similar to the one presented in the instant matter, the Court in State v. Finley, 300 S.C. 196, 199, 387 S.E.2d 88, 89 (1989) noted that relevant evidence “need not be sufficient in itself to establish the whole or any definite portion of a party’s contention.” Finley sought to introduce a tape recording of a conversation with the alleged criminal sexual conduct victim in which the victim agreed to drop the charges in exchange for money. The trial judge refused. On appeal, the Supreme Court found the tape recording was relevant on the issues of whether Finley tried to obstruct justice or whether the alleged victim was trying to extort money. Id.

Additionally, the Court held that Finley should be allowed to present evidence that the alleged victim engaged in sexual intercourse with her neighbor in full view of Finley on the night she claimed Finley assaulted her. *Id.* at 200, 387 S.E.2d at 90. Finley's defense was that the alleged victim fabricated the charges to keep him from telling anyone about her sexual conduct with the neighbor. "The unique facts of this controversy, coupled with [Finley]'s right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness." *Id.* The Court found the evidence was "essential to a full and fair determination of [Finley]'s guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party." *Id.* (citing *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986)); see also *State v. Lang*, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (holding that evidence of victim's sexuality was admissible when offered for a purpose other than to attack the victim's morality).

Although *State v. Grovenstein*, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) principally concerns the Rape Shield Statute, it is instructive for what type of evidence is relevant in criminal sexual conduct cases. In *Grovenstein*, the victims accused the defendant of anally penetrating them with rolled-up paper. *Id.* at 213, 530 S.E.2d at 408. Before the victims knew the defendant, they had been "accused of inserting objects in the vagina and rectum of a young girl." *Id.* This Court held that evidence of these accusations prior to meeting the defendant "should have been admitted because it provided an alternate explanation of how the young victims would be familiar with the sexual conduct they alleged [the defendant] committed." *Id.* at 220, 530 S.E.2d at 412. This Court ruled that the Rape Shield Statute "is not a blanket exclusion of evidence concerning alternative sources of a child victim's sexual knowledge." *Id.* at 219, 530 S.E.2d at 411. Thus, relevant

evidence in a criminal sexual conduct case is evidence that provides an alternate explanation of how young victims would be familiar with sex.

While the photographs showing a naked Terrance with an erect penis did not show that Minor was familiar with all aspects of sex, the photographs certainly demonstrated that Minor had some knowledge of sex outside of the alleged abuse. Thus, under Grovenstein, the photographs were relevant to demonstrate Minor's knowledge of sex from an alternate source. Of course, the photographs served more than this purpose. The photographs were the impetus for Minor to fabricate her fantastical tale of sexual abuse. At twelve-years old, Minor had an older boyfriend and her parents did not approve. In fact, her mother and Appellant had forbidden her to talk to him and would not allow her to visit him. When the two learned that Minor had sexually explicit photographs of Terrance on her phone, the two were outraged and punished her, as all parents would. The content showed just how serious Minor's misbehavior was and just how desperately she was to deflect the punishment. Photographs of Terrance's naked body with a fully erect penis on twelve-year old Minor's phone were a far cry from simply "inappropriate" photographs. The actual content of the photographs demonstrated Minor's knowledge of sex and the outrage her parents felt over her misconduct. The punishment she would suffer would be severe – just as the revenge she would dole out. The jury deserved and needed to know the content of those photographs in order to evaluate Minor's credibility and to learn that Minor had a very big incentive to fabricate the allegations against Appellant.

Appellant respectfully requests this Court rehear this matter to provide greater explanation of this Court's reasoning. Additionally, Appellant respectfully requests this Court rehear this matter to consider the significant facts and case law overlooked and/or misapprehended in arriving at the conclusion that the trial judge's failure to permit the jury to learn of the contents of the photographs

– that Minor had three photographs showing her boyfriend’s genitalia on her phone – violated Appellant’s constitutional rights.

**Conclusion**

Appellant respectfully requests this Court rehear this matter for the significant points overlooked and/or misapprehended in rendering its *per curiam* unpublished opinion on October 19, 2016.

Respectfully Submitted,

  
\_\_\_\_\_  
SUSAN B. HACKETT  
Appellate Defender

This 3<sup>rd</sup> day of November, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

APPELLANT

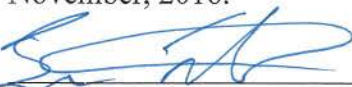
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Keith Denver Tate, #236480, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3<sup>rd</sup> day of November, 2016.



Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day of  
November, 2016.



(L.S)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Keith Denver Tate, Appellant.

Appellate Case No. 2014-001694

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, the attached opinion is substituted for the previous opinion, which is withdrawn.

*Thomas C. Huff*

J.

*Paul E. Short, Jr.*

J.

*U. Ke*

J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Susan Barber Hackett, Esquire

Vann Henry Gunter, Jr., Esquire

**FILED**

*Dec. 14, 2016*

David Matthew Stumbo, Esquire  
The Honorable Donald B. Hocker

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Keith Denver Tate, Appellant

Appellate Case No. 2014-001694

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Appeal From Abbeville County  
Donald B. Hocker, Circuit Court Judge

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Unpublished Opinion No. 2016-UP-436  
Submitted September 1, 2016 – Filed October 19, 2016  
Withdrawn, Substituted and Refiled December 14, 2016

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**AFFIRMED**

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Appellate Defender Susan Barber Hackett, of Columbia,  
for Appellant.

Attorney General Alan McCrory Wilson, Assistant  
Attorney General Vann Henry Gunter, Jr., both of  
Columbia; and Solicitor David Matthew Stumbo, of  
Greenwood, for Respondent.

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**PER CURIAM:** Keith Denver Tate was convicted of second-degree criminal sexual conduct with a minor and sentenced to imprisonment for sixteen years. On appeal, Tate contends the trial court erred in (1) failing to declare a mistrial based upon Victim's emotional outbursts, (2) failing to require the State to open in full during closing arguments, and (3) refusing to permit defense counsel to elicit testimony concerning the specific content of three photographs found on Victim's phone. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the circuit court erred in failing to declare a mistrial based on Victim's emotional outbursts: *State v. Anderson*, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996) ("The decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge and will not be reversed absent an abuse of discretion or manifest prejudice to the complaining party."); *State v. Kirby*, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes."); *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("A mistrial should only be granted when absolutely necessary."); *id.* ("The trial judge is in the best position to determine the credibility of the jurors; therefore, [the appellate court] grants him broad deference on [a motion for mistrial] issue."); *Anderson*, 322 S.C. at 93, 407 S.E.2d at 105-06 ("Given that the trial judge was in the best position to assess the degree to which the jury may have been prejudiced by the [witness's] outburst, he did not abuse his discretion in denying [the appellant's] mistrial motion."); *id.* at 93-94, 407 S.E.2d at 106 (cautioning that in some cases, "a witness's or spectator's outburst may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction," but holding a curative instruction was unnecessary in that case and noting such an instruction "could have focused the jury's attention on the outburst, thus increasing the possibility of improper prejudice to the defendant"); *id.* at 90-91, 93, 407 S.E.2d at 104, 105-06 (finding the trial court did not abuse its discretion in denying the appellant's mistrial motion during trial when the deceased victim's sister directly addressed the appellant while she was on the witness stand saying, "Why, Shawn? Why did you do it? ... He didn't have to take her life" and, after recess, defense counsel asserted the sister, "bawled and screamed" for a period of three to five minutes "at the top of her voice, 'He didn't have to do it. She had so much to live for,'" with such conduct occurring in the area of the courtroom adjacent to the jury room where the jury was very likely to have heard the sister); *State v. Perry*, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983) ("Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases.

This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record.").

2. As to whether the trial court erred in failing to require the State to open in full during closing argument and reply only to the defense's closing argument: *State v. Gellis*, 158 S.C. 471, 487, 155 S.E. 849, 855 (1930) ("[I]f a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments."); *State v. Rodgers*, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) ("The solicitor is entitled to open the closing arguments to the jury unless the defendant has offered no evidence."); *id.* at 25, 235 S.E.2d at 809 ("The solicitor is not required to make an opening argument to the jury on issues of fact, . . . but may do so in his discretion.").

3. As to whether the trial court erred in refusing to permit Tate to elicit testimony concerning the content of three illicit photographs found on Victim's phone: *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011) ("The admission of evidence is within the [trial] court's discretion and will not be reversed on appeal absent an abuse of that discretion."); *State v. Lyles*, 379 S.C. 328, 342, 665 S.E.2d 201, 209 (Ct. App. 2008) ("The right to present a defense is not unlimited, 'but must bow to accommodate other legitimate interests in the criminal trial process.'" (quoting *State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001))); *id.* ("The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." (alteration by court) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996))); *id.* at 343, 665 S.E.2d at 209 ("Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission."); Rule 401, SCRE (providing evidence is relevant if it tends "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"); *State v. Stokes*, 339 S.C. 154, 159, 528 S.E.2d 430, 432 (Ct. App. 2000) ("[E]vidence 'should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate the facts.'" (quoting *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999))); 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."); *State v. Turner*, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007) ("[T]rial courts retain wide

latitude, insofar as the Confrontation Clause is concerned, to impose reasonable limits on . . . cross-examination based on concerns about, among other things, prejudice, confusion of the issues, or interrogation that is only marginally relevant."); *Holmes v. South Carolina*, 547 U.S. 319, 324, 326 (2006) (holding a defendant has a constitutional right to present a complete defense, and "the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote," but noting "well-established rules of evidence permit trial [courts] to exclude evidence if its probative value is outweighed by other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury").

**AFFIRMED.**<sup>1</sup>

**HUFF, SHORT, and KONDUROS, JJ., concur.**

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<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

## STATE OF SOUTH CAROLINA

## IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

APPELLANT

APPELLATE CASE NO 2014-001694

Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge

Opinion No. 2016-UP-436

## PETITION FOR REHEARING

On October 19, 2016, this Court affirmed Appellant's conviction in an unpublished *per curiam* opinion without the benefit of oral argument.<sup>1</sup> State v. Tate, 2016-UP-436 (S.C. Ct. App. filed Oct. 19, 2016). Subsequently, Appellant filed a timely petition for rehearing. On December 14, 2016, this Court denied the petition for rehearing. However, on that same date, this Court withdrew the prior opinion and substituted a new opinion. State v. Tate, 2016-UP-436 (S.C. Ct. App. filed Dec. 14, 2016). It is undersigned counsel's understanding that when a new opinion is filed, it is incumbent upon counsel to file a subsequent petition for rehearing in order to file a

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<sup>1</sup> Appellant's case was scheduled for oral argument on September 6, 2016, at 10 a.m. On August 31, 2016, this Court cancelled the scheduled argument.

petition for writ of certiorari. Therefore, pursuant to Rule 221, SCACR, Appellant respectfully requests this Court rehear the three issues presented. Appellant notes there were very few changes made to the opinion, and, as a result, much of Appellant's argument for rehearing remains the same.

This Court's opinion overlooked and/or misapprehended multiple significant points of fact and law. Additionally, as will be discussed in greater detail, this Court's conclusion concerning the mistrial issue creates an unsurmountable burden for all appellants by making the review of trial judge's decisions when presented with mistrial motions virtually unreviewable on appeal. Concerning the second issue, this Court ruled on the content of closing arguments without the benefit of guidance from the South Carolina Supreme Court, which entertained oral argument on this precise issue in State v. Beaty, Appellate Case Number 2015-000718, on October 19, 2016, and was decided by the Supreme Court today, December 29, 2016. Finally as to the third issue, Appellant respectfully requests greater explanation as to this Court's reasoning in addition to his request for rehearing regarding the facts and law overlooked and/or misapprehended.

### **Motion for Mistrial**

On appeal, Appellant challenged the trial judge's failure to declare a mistrial where the alleged victim engaged in multiple emotional outbursts disrupting the attorneys and the trial because the outbursts improperly influenced the jury to decide the case, which was already emotionally charged, based on emotion instead of the evidence presented in violation of Appellant's state and federal constitutional rights to a fair and impartial trial. This Court's opinion only cited to the standard of review – abuse of discretion – in such cases, and offered no analysis on the subject.

Appellant concedes that the standard of review on appeal when the challenge is to the trial judge's failure to grant a mistrial is "abuse of discretion." However, this standard of review does not mean "no review." This Court's opinion on this issue eliminates appellate review of the

decisions of trial judge's on mistrial motions. Although this Court acknowledged that "[t]he decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge" and that reversal was required when the trial judge abused his discretion or when manifest prejudice resulted, this Court failed to consider whether the judge abused his discretion or if manifest prejudice resulted from the repeated outbursts. See State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996). Instead, this Court's sole focus was on the trial judge's presence at the trial as providing an opportunity for a better perspective than a cold record. If this view prevails, then all appellate issues for which the standard of review is an abuse of discretion must result in no review at all on appeal as the trial judge is always in a position to have a better opportunity for observing the actual trial than a cold record offers.

In the substituted opinion, this Court quoted extensively from Anderson, *supra*. However, what this Court failed to consider was how Appellant's case was distinguishable from Anderson. One of the key factors in affirming the trial judge's denial of a mistrial was the "incident occurred at the beginning of trial and was very limited in time and in scope." Id. at 93, 470 S.E.2d at 105. This contrasted greatly with the numerous and repeated emotional outbursts during Appellant's trial. The complaining witness began her emotional outbursts during defense counsel's opening statement and her histrionics culminated during her testimony when she stormed off the witness stand. Further, the Anderson Court explained the outburst was "an expression of grief over the death of her sister, and the jury likely understood it as just that." Id. Again, in contrast, the complaining witness's outburst during Appellant's trial were not expressions of grief, but were an effort to draw attention to herself, distract the jury from the real issue, and to move the jury based on emotions, not evidence.

“The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution.” State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). “[T]he very heart of a ‘fair trial’ embodies a disciplined courtroom wherein an accused’s fate is determined solely through the exercise of calm and informed judgment.” Id. at 303, 295 S.E.2d at 631.

The South Carolina Supreme Court held a mistrial was in order where “spectators filled the courtroom seats to capacity and even stood against the walls,” there were several outbursts of laughter from the spectators requiring an admonition from the judge, a juror reported that one spectator glared at her with “obvious disgust,” and the jurors overheard a spectator making opinionated remarks. Stewart, 278 S.C. at 301-302, 295 S.E.2d at 629-630. The Court held it was error for the trial judge to deny the motion for a mistrial “without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice.” Id. at 302, 295 S.E.2d at 630. Further, the Court held the judge’s reliance on his instructions to the jury to disregard improper spectator conduct was insufficient to assure Stewart received a fair trial. Id. at 304, 295 S.E.2d at 631.

In another case involving disorder in the court, the Court held a defendant was entitled to a new trial where there was “no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled to, a fair, impartial, and legal, trial.” State v. Gens, 107 S.C. 448, 93 S.E. 139, 140 (1917). In this transporting liquor case, several ladies held large posters condemning liquor traffic before the jury during part of the trial. The ladies sat directly in front of the jury and to the left of the judge. Id. at 448, 93 S.E. 139. The Court held:

The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and

impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge.

Id. Despite the jurors indicating they were not influenced in any manner by the posters, the Court held the trial judge should have set aside the verdict. Id.

The trial judge erred in failing to order a mistrial based on Minor's repeated and extreme emotional outbursts. Although the trial judge was aware of Minor's disruptive behavior, took repeated breaks for Minor to compose herself, and admonished Minor regarding her behavior, the trial judge never instructed the jury concerning how to consider, if at all, Minor's behavior. Minor's sobbing began during defense counsel's opening statement. Her sobbing continued during her direct examination, which was after several witnesses had testified. Thus, her emotional outbursts were not limited to single event or to the beginning of the trial. Minor's improper actions culminated in her storming from the witness stand and screaming for her mother within earshot of the jurors. Despite Minor's conduct, the judge never told the jury not to consider her conduct in their deliberations.

The jury heard from a self-described "wound up" solicitor in closing that Minor's "raw emotion" was proof that she was telling the truth. According to the solicitor, Minor's performance was so real and "compelling" that if she were not telling the truth, then she deserved an Academy Award. The solicitor instructed the jury to do exactly what it is not supposed to do – use the emotion of a witness to form the basis for its verdict. Further, in describing his opinion that Minor's testimony was compelling as evidenced by her repeated emotional outbursts, the solicitor improperly conveyed to the jury his belief that Minor was telling the truth. See State v. Jennings, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011)(holding that a forensic interviewer's report that each

child had provided a “compelling” disclosure of abuse could only be interpreted to mean the forensic interview believed the children were being truthful).

The trial court failed to grant a mistrial where the ends of justice required one. Minor’s continuous sobbing and repeated emotional outbursts tainted the proceedings. While some emotion is to be expected in these types of cases, Minor’s conduct was extreme, even theatrical, as acknowledged by the prosecutor’s remark regarding the Academy Awards. Minor’s conduct deprived Appellant of the fair trial he deserved and that the Constitution demands. The taint of her performance could be removed in no other way except a mistrial. Appellant respectfully requests this Court rehear the matter where the opinion issued bars appellate review of all mistrial motions and all other legal errors where the standard of review is an abuse of discretion. Further, Appellant respectfully requests this Court rehear the matter in light of the overwhelming evidence that the judge abused his discretion in denying the motion and that the ends of justice required a mistrial due to Minor’s repeated emotional and distracting outbursts.

### **Content of Closing Argument**

Prior to closing arguments, defense counsel moved to require the prosecutors to open in full and use their final argument for rebuttal only. R. 284, line 21 – R. 285, line 3. Defense counsel submitted a written motion in support of this position as well. R. 363 – R. 367. The judge denied this request and permitted the state to give two closing arguments – one prior to defense counsel and one after. Appellant challenged this ruling on appeal. In affirming Appellant’s conviction, this Court cited State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) for the proposition that the prosecutor “is entitled to open the closing arguments to the jury unless the defendant has offered no evidence” and that the prosecutor may make an opening argument to the jury on issues of fact. This Court failed to consider the impact upon such a holding on the due process rights of a criminal

defendant. Further, the Court rendered its decision without the benefit of guidance from the South Carolina Supreme Court, which entertained oral argument on this precise issue in State v. Beaty, Appellate Case Number 2015-000718, on October 19, 2016. The Supreme Court issued its opinion in Beaty today.

Closing argument is “an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound.” Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974)(J. Douglas dissenting). The South Carolina Rules of Criminal Procedure are silent on the order of closing arguments. However, the Rules of Civil Procedure provide that

[t]he moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party’s claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter.

Rule 43(j), SCRPC.

In a 1911 case, the Court explained that a defendant in a criminal case who has the right to reply in argument by reason of not introducing evidence may decline to open in argument and still retain the right to make the closing argument to the jury either upon the case in general or by way of reply to the state’s argument. State v. Garlington, 90 S.C. 138, 72 S.E. 564, 566 (1911). South Carolina required the prosecution to close in full prior to the defense’s closing argument pursuant to court rule – Rule 59 of the Circuit Court. See State v. Atterberry, 129 S.C. 464, 124 S.E. 648, 651 (1924). Subsequently, the rule changed to require the partying having the opening in the argument to disclose fully the law.<sup>2</sup> Thereafter, the Court held in State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), that the solicitor was no longer required to make an opening argument to the jury

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<sup>2</sup>Rule 58 of the Circuit Court Rules provided for the order of closing at the time.

on issues of fact. Id. Citing Lee, id., the Rodgers Court held “the solicitor is not required to make an opinion argument to the jury on issues of fact” “but may do so in his discretion.” Rodgers, 269 S.C. at 25, 235 S.E.2d at 809. Thereafter, the custom in South Carolina – with no foundation in any rule of law – permitted the prosecutor to deliver two closing arguments with the content of those arguments virtually unlimited.

Today, the Supreme Court held “that in a criminal trial where the party with the ‘middle’ argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party’s argument but may not raise new matter.” State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016). Thus, it is now settled that when a defendant requests the state “open in full” for closing argument, the state must do so. The trial judge erred in failing to require the state to open fully during Appellant’s trial.

The trial judge’s refusal to require the state to open fully denied Appellant’s right to a fair trial and due process of law because it prevented him from responding to specific points made by the prosecutor. The Supreme Court determined Beaty suffered no prejudice as a result of the trial judge’s ruling that the state would not be required to open fully at his trial. However, Appellant suffered harm as a result of the court’s ruling, and Appellant made clear the harm he suffered during the trial. Several of the points – especially, those mischaracterizing the record and demeaning the defense – could not have been anticipated. There is simply no good reason – other than custom – to adhere to the current status quo. The prosecution should have been made to open fully as to the law and the facts with the Appellant having an opportunity to respond to the argument and close fully on the law and the facts. The prosecution could have refuted any unanticipated arguments by Appellant in a rebuttal. Permitting the order of arguments in this fashion would have ensured the Appellant’s rights to a fair trial and due process of law were not at odds with his right to present a

full and complete defense. The current system forces defendants to choose between presenting a defense, which would forfeit last argument, or not to present a defense and keep last argument. No further explanation is needed to demonstrate how this scenario places a defendant on the horns of a dilemma.

Appellant respectfully requests this Court rehear this issue to consider the dearth of case law and rules supporting the current practice and to consider the Supreme Court's guidance from its recent decision in Beaty.

### **Illicit Photographs & A Motive to Lie**

On appeal, Appellant challenged the trial judge's refusal to permit him to question his accuser concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Appellant. In ruling on this issue, this Court noted the standard of review, prior cases limited a defendant's right to present a defense, Rule 401, SCRE, Rule 403, SCRE, and prior cases limiting a defendant's rights under the Confrontation Clause. However, this Court's opinion offers little to explain the reasoning by the affirmance on this issue. Appellant respectfully requests greater explanation of the decision in addition to his request for this Court to rehear the matter based on significant points overlooked and/or misapprehended.

Everyone agreed that Terrance C. was Minor's ex-boyfriend. Everyone also agreed there were three photographs of Terrance's genitalia on Minor's phone. The photographs appeared on Minor's phone on August 14 and August 15 of 2010. Minor made her allegations of sexual assaults against Appellant on August 25, 2010. Appellant and Minor's mother discovered the photographs on Minor's phone and Minor was punished. Appellant wanted to question Minor regarding the contents of those photographs.

The judge found the content of the photographs was not relevant. He ruled that Appellant could “ask if there were pictures on the phone concerning Terrance that the mom disapproved of, if she did, that [Appellant] disapproved of if he did,” but he refused to allow Appellant to “tell the jury that they are actually Terrance’s private areas.” His ruling would permit Appellant to argue motive because Minor got into trouble over the photographs on the cell phone, but he was adamant that the jury not learn the nature of the photographs. R. 40, lines 7-25. In short, the judge found that Minor’s improper motive to make the false allegations could be established without the jury knowing that the pictures were of male genitalia. R. 41, line 23 – R. 42, line 4.

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. “The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness’s demeanor and assess his credibility.” State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff’d as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). “[C]ross-examination is essential to a fair trial as guaranteed by the Sixth Amendment and due process as required by the Fourteenth Amendment.” State v. McCoy, 274 S.C. 70, 72, 261 S.E.2d 159, 160 (1979). This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that “[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” To establish a violation of the Confrontation Clause, Appellant must show that he was prohibited from asking questions designed to show bias on the part of Minor. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the

error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

The Rape Shield Statute prohibits “[e]vidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct ... in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656.” S.C. Code Ann. § 16-3-659.1(1). This statute is completely inapplicable to the instant matter because Appellant was not offering evidence of specific instances of Minor’s sexual conduct, opinion evidence of Minor’s sexual conduct, or reputation evidence of Minor’s sexual conduct. In fact, the photographs could not demonstrate specific instances of Minor’s sexual conduct as the photographs did not depict Minor engaged in any sex acts. Rather, Appellant was offering three sexually explicit photographs on the twelve-year old’s phone from her fifteen-year old boyfriend to show the motivation Minor had to lie about the allegations of sexual abuse.

Having determined the Rape Shield Statute does not bar the evidence, the only remaining question is whether the evidence was relevant. Relevant evidence is any “evidence having 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. Was the fact that Minor had three photographs of her naked boyfriend showing his fully erect penis on her phone relevant to Minor’s credibility?

Deciding an issue similar to the one presented in the instant matter, the Court in State v. Finley, 300 S.C. 196, 199, 387 S.E.2d 88, 89 (1989) noted that relevant evidence “need not be sufficient in itself to establish the whole or any definite portion of a party’s contention.” Finley sought to introduce a tape recording of a conversation with the alleged criminal sexual conduct victim in which the victim agreed to drop the charges in exchange for money. The trial judge

refused. On appeal, the Supreme Court found the tape recording was relevant on the issues of whether Finley tried to obstruct justice or whether the alleged victim was trying to extort money.

Id.

Additionally, the Court held that Finley should be allowed to present evidence that the alleged victim engaged in sexual intercourse with her neighbor in full view of Finley on the night she claimed Finley assaulted her. Id. at 200, 387 S.E.2d at 90. Finley's defense was that the alleged victim fabricated the charges to keep him from telling anyone about her sexual conduct with the neighbor. "The unique facts of this controversy, coupled with [Finley]'s right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness." Id. The Court found the evidence was "essential to a full and fair determination of [Finley]'s guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party." Id. (citing State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)); see also State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (holding that evidence of victim's sexuality was admissible when offered for a purpose other than to attack the victim's morality).

Although State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) principally concerns the Rape Shield Statute, it is instructive for what type of evidence is relevant in criminal sexual conduct cases. In Grovenstein, the victims accused the defendant of anally penetrating them with rolled-up paper. Id. at 213, 530 S.E.2d at 408. Before the victims knew the defendant, they had been "accused of inserting objects in the vagina and rectum of a young girl." Id. This Court held that evidence of these accusations prior to meeting the defendant "should have been admitted because it provided an alternate explanation of how the young victims would be familiar with the sexual conduct they alleged [the defendant] committed." Id. at 220, 530 S.E.2d at 412. This Court

ruled that the Rape Shield Statute “is not a blanket exclusion of evidence concerning alternative sources of a child victim’s sexual knowledge.” Id. at 219, 530 S.E.2d at 411. Thus, relevant evidence in a criminal sexual conduct case is evidence that provides an alternate explanation of how young victims would be familiar with sex.

While the photographs showing a naked Terrance with an erect penis did not show that Minor was familiar with all aspects of sex, the photographs certainly demonstrated that Minor had some knowledge of sex outside of the alleged abuse. Thus, under Grovenstein, the photographs were relevant to demonstrate Minor’s knowledge of sex from an alternate source. Of course, the photographs served more than this purpose. The photographs were the impetus for Minor to fabricate her fantastical tale of sexual abuse. At twelve-years old, Minor had an older boyfriend and her parents did not approve. In fact, her mother and Appellant had forbidden her to talk to him and would not allow her to visit him. When the two learned that Minor had sexually explicit photographs of Terrance on her phone, the two were outraged and punished her, as all parents would. The content showed just how serious Minor’s misbehavior was and just how desperately she was to deflect the punishment. Photographs of Terrance’s naked body with a fully erect penis on twelve-year old Minor’s phone were a far cry from simply “inappropriate” photographs. The actual content of the photographs demonstrated Minor’s knowledge of sex and the outrage her parents felt over her misconduct. The punishment she would suffer would be severe – just as the revenge she would dole out. The jury deserved and needed to know the content of those photographs in order to evaluate Minor’s credibility and to learn that Minor had a very big incentive to fabricate the allegations against Appellant.

Appellant respectfully requests this Court rehear this matter to provide greater explanation of this Court’s reasoning. In affirming the trial judge’s ruling, this Court relied heavily upon State

v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). Appellant's case is easily distinguished from Dickerson. First, Dickerson involved whether the defense should be permitted to ask the pathologist about the results of a preliminary urinalysis test. Id. at 116, 716, S.E.2d at 903. During a proffer, the pathologist testified the urine screen test was presumptively positive for cocaine, but that the test alone was unreliable. Id. Further, the pathologist testified that no confirmatory testing was done. Id. The trial judge refused to admit the evidence, finding it was inherently unreliable, and as a result would be misleading and confusing to the jury. Id. The Supreme Court held that the relevance of evidence that the deceased actually had cocaine in his system would have been "dubious, at best," based on the facts of the case. Id. at 116, 716 S.E.2d at 903-904. The test did not challenge the pathologist's findings regarding cause of death and "would only have injected irrelevant considerations into the trial." Id. at 117, 716 S.E.2d at 904. Thus, the presumptive test was of little probative value and served only to confuse the jury. Id. This contrasted greatly with the proffered evidence at Appellant's trial. One of the questions for all juries in criminal sexual conduct with minor cases is how does a minor have specific knowledge of sex. The default answer is that the abuse must have occurred unless there is evidence to show the minor acquired the knowledge from some other source.

Additionally, Appellant respectfully requests this Court rehear this matter to consider the significant facts and case law overlooked and/or misapprehended in arriving at the conclusion that the trial judge's failure to permit the jury to learn of the contents of the photographs – that Minor had three photographs showing her boyfriend's genitalia on her phone – violated Appellant's constitutional rights.

## **Conclusion**

Appellant respectfully requests this Court rehear this matter for the significant points overlooked and/or misapprehended in rendering its *per curiam* unpublished opinion on December 14, 2016.

Respectfully Submitted,

  
\_\_\_\_\_  
SUSAN B. HACKETT  
Appellate Defender

This 29th day of December, 2016.

STATE OF SOUTH CAROLINA  
 IN THE COURT OF APPEALS

\_\_\_\_\_  
 Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

APPELLANT

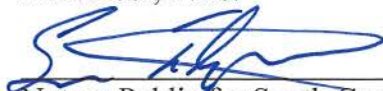
\_\_\_\_\_  
 CERTIFICATE OF SERVICE  
 \_\_\_\_\_

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Keith Denver Tate, #236480, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 29th day of December, 2016.

  
 Susan B. Hackett  
 Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day of  
 December, 2016.

  
 \_\_\_\_\_ (L.S)  
 Notary Public for South Carolina  
 My Commission Expires: October 30, 2022.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Keith Denver Tate, Appellant.

Appellate Case No. 2014-001694

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

*Thomas C. Hoff*

J.

*Paul E. Short, Jr.*

J.

*U. Ke*

J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire  
Susan Barber Hackett, Esquire  
Vann Henry Gunter, Jr., Esquire  
David Matthew Stumbo, Esquire  
The Honorable Donald B. Hocker

FILED

1/10/17

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal from Abbeville County  
Donald B. Hocker, Circuit Court Judge

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Opinion No. 2016-UP-436 (S.C. Ct. App. filed Dec. 14, 2016)

Indictment No. 2011-GS-01-046

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THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

PETITIONER

APPELLATE CASE NO. 2017-000230

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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SUSAN B. HACKETT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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**CERTIFICATE OF COUNSEL**

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 10, 2017. App. 41.

**QUESTIONS PRESENTED**

I. Did the Court of Appeals err in failing to address the applicability of State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016)(Shearouse Adv. Sh. No. 1 at 13-21) to Petitioner's case where the trial judge failed to require the state to open in full during closing argument and reply only to the defense's closing argument, which violated Petitioner's state and federal constitutional rights to a fair trial and due process of law?

II. Violating Petitioner's state and federal constitutional rights to a fair and impartial trial, did the Court of Appeals abdicate its duty to review the trial judge's failure to declare a mistrial based upon the alleged victim's multiple emotional outbursts that disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented?

III. Did the Court of Appeals err in affirming the trial judge's refusal to permit Petitioner to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Petitioner in violation of Petitioner's state and federal constitutional rights to present a defense and confront his accuser?

### STATEMENT OF THE CASE

Petitioner and Minor's mother were involved in a romantic relationship and had a child in common. In 2009 and 2010, Petitioner and Minor's mother lived in an apartment in Calhoun Falls. Minor and her two brothers, one of whom was Petitioner's son, lived in the apartment as well. R. 12, l. 1 – R. 14, l. 16; R. 69, l. 17 – R. 70, l. 2. The apartment had three bedrooms, one bathroom, a living room, and a kitchen. R. 22, ll. 7-17; R. 253, ll. 5-9. There were two doors going in and out of the apartment – one in the front leading to the living room and one in the kitchen. Both doors were visible from the kitchen and living room. R. 22, l. 18 – R. 23, l. 8. The apartment was not carpeted, but had a tile floor. The walls were cinderblock. R. 34, ll. 7-15; R. 253, l. 9; R. 253, l. 19.

On March 23, 2010, twelve-year old Minor began dating fifteen-year old Terrance C. Minor's mother did not approve of the relationship and would not let her talk to him and would not let Minor visit Terrance in his home. R. 34, ll. 16-24; R. 48, l. 15 – R. 49, l. 17; R. 69, ll. 8-11; R. 105, ll. 7-17; R. 161, ll. 18-24. On August 14 and 15, Minor received three photographs of Terrance on her phone. The photographs showed Terrance completely nude and with an erect penis. Shortly thereafter, Petitioner and Minor's mother discovered the photographs on her phone. Unsurprisingly, they were very concerned and punished Minor. Additionally, they informed Terrance's parents of the photographs. R. 36, ll. 9-13; R. 37, l. 11 – R. 41, l. 13; R. 42, l. 11 – R. 45, l. 24; R. 162, l. 10 – R. 163, l. 7; R. 248, l. 11 – R. 249, l. 18; R. 368 – R. 372.

#### ***The Accusation***

Less than ten days later, on August 23, 2010, Minor told her band director, Rebecca Holland, that Petitioner had sexually assaulted her ten times. R. 107, ll. 15-23; R. 163, ll. 13-17; R. 168, ll. 13-24; R. 169, ll. 5-11; R. 169, ll. 19-23. “[B]ecause it was so late in the afternoon, there were no people at the school” for Holland to make a report; therefore, she decided she would

address the matter the following day at school. R. 169, l. 25 – R. 170, l. 5; R. 172, ll. 17-20. Holland took Minor to her home, where Petitioner lived.<sup>1</sup> R. 172, ll. 10-13. Holland took Minor home from school every day. Holland claimed that Minor would cry on the way home, but Holland never inquired as to why. Minor would ask not to go home. Holland also claimed that she would see Petitioner waiting for Minor and he would grab Minor by the arm when she arrived home. R. 170, l. 23 – R. 171, l. 20; R. 172, ll. 14-16. Subsequently on August 25, 2010, Holland informed Lori Lindler, the school's guidance counselor and the assistant principal, about the accusations. R. 107, l. 24 – R. 108, l. 7; R. 171, ll. 21-23; R. 183, ll. 6-16. Lindler contacted the police. R. 108, ll. 8-10; R. 185, ll. 23-24.

At school, Lindler sat down with Minor to review the details of her allegations. During their meeting, the two used a school calendar to arrive at ten dates when the assaults allegedly occurred, including August 26, 2009, October 31, 2009, December 14, 2009, December 26, 2010, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010.<sup>2</sup> R. 78, l. 18 – R. 79, l. 10; R. 79, l. 18 – R. 80, l. 16; R. 101, l. 21-25; R. 164, l. 16 – R. 165, l. 3; R. 184, l. 7 – R. 185, l. 1.<sup>3</sup> Minor's claims to Lindler concerned only sexual abuse; she made no allegations of physical abuse. R. 187, ll. 8-17. The day after Minor talked to the school officials

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<sup>1</sup> The testimony on this point was conflicting. Minor said she talked to Holland at school and talked to Lindler the same day. R. 108, ll. 11-17. However, Holland and Lindler indicated otherwise.

<sup>2</sup> Minor told the nurse that she could remember the dates because she wrote about it in her diary. However, her diary did not contain entries for each of the encounters and did not contain details about the abuse. Instead, the diary contained poetry about her feelings. R. 124, ll. 2-10.

<sup>3</sup> Despite the dates testified to at trial, the warrants and incident report differed to some degree. For example, the first incident was alleged to have occurred on August 29, 2009, not August 26, 2009, and another incident allegedly occurred on February 14, 2010, not February 13, 2010. R. 206, ll. 9-14; R. 209, ll. 15-21. Initially, Minor said that all ten incidents occurred in Calhoun Falls. However, immediately before trial, she changed her story to say the alleged incident on December 26, 2009, occurred in Greenville County. R. 106, ll. 1-14; R. 207, ll. 2-12.

and police officers, her mother took her to the hospital. R. 110, ll. 21-24. Minor also met with a lady at Child's Place on September 28, 2010. R. 111, ll. 6-13; R. 259, ll. 21-25. Months later, in November 2010, Minor was examined by Dr. Lyle Pritchard. R. 112, ll. 7-18; R. 227, ll. 3-11.

Initially, Minor claimed that on each of those occasions, Petitioner penetrated her vagina. R. 79, ll. 14-17. However, later, Minor claimed penetration of her vagina with his penis during every encounter except the last one. On that date, he put his penis in her mouth. R. 88, ll. 10-18. She also changed her story to say that she recalled him putting his penis in her "butt hole." R. 88, ll. 19-21. Minor testified that she bled the first time Petitioner penetrated her vagina and when he penetrated her butt hole. R. 88, l. 24 – R. 89, l. 2.

Concerning the first alleged assault, Minor claimed this occurred at home while her mother and brothers were there. Minor claimed Petitioner assaulted her in the living room on the couch. During her testimony, Minor claimed Petitioner asked to see the sizes of her bra and panties. Then, he started kissing her and rubbing her. Petitioner then removed her clothes and penetrated her vagina with his penis. R. 82, ll. 17-24; R. 83, ll. 4-6; R. 83, l. 10 – R. 84, l. 11; R. 87, ll. 1-8. Minor previously said that during the first alleged encounter, Petitioner threw her on the couch and hit her in the face with his fist. R. 139, ll. 20-25; R. 275, l. 4 – R. 276, l. 7. She also claimed that she screamed during this attack. R. 140, lines 8-10. She claimed there was blood everywhere. R. 140, ll. 11-12.

Regarding the second alleged assault, Minor testified there was a football game on October 30, 2009. R. 126, ll. 22-24; R. 128, ll. 4-8.<sup>4</sup> Minor did not recall saying that Petitioner "stuck it up

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<sup>4</sup> Minor claimed the football game on October 30, 2009, was a home game. However, a school calendar showed the game was away in Twiggs County, Georgia. R. 134, l. 9 – R. 135, l. 1. Then, Minor changed her story to say it may have been after a Junior Varsity football game. R. 135, ll. 11-16.

[her] butt” that time, but she remembered that she screamed and Petitioner hit her busting her lip. R. 128, ll. 9-14. Previously, Minor had stated Petitioner “stuck it up her butt.” R. 276, ll. 19-21. The next morning, Minor woke up on the couch in the living room to an empty house. Her shorts were up, but her underwear was down. Her shirt was on a lamp. R. 131, ll. 1-21; R. 277, ll. 16-24; R. 279, l. 14 – R. 280, l. 3. She admitted that anyone who left the apartment would have had to walk right by her in her disheveled state. R. 132, ll. 23-25. Although the following morning would have been a Saturday based on the date, Minor told the interviewer that she had missed her ride to school that day and her mother had to give her ride. She also told the interviewer that her brothers were gone because their school bus arrived at 7:00 a.m. R. 278, ll. 1-8.

Regarding the last incident, Minor claimed that Petitioner put her on the couch, took out his penis and placed it in her mouth. She bit his penis and he started screaming. She then ran to her room and placed her dresser in front of the door. R. 145, l. 22 – R. 146, l. 16.<sup>5</sup>

Minor’s mother never saw or heard anything that made her suspect any kind of sexual abuse. R. 20, ll. 18-21. Minor’s mother never heard any screaming in the house. R. 21, ll. 22-24

Supposedly, Minor told Terrance that Petitioner had sexually assaulted her months before he told his mother about the alleged abuse on August 26, 2010. Terrance’s mother told the school counselor, Lindler. R. 53, ll. 9-25; R. 58, l. 18 – R. 59, l. 4; R. 73, l. 23 – R. 74, l. 1; R. 78, ll. 5-19; R. 106, ll. 17-23; R. 183, ll. 17-21. According to Terrance, Minor claimed that during the first assault “he went through her anal and she screamed,” then he stopped and “went through the front.” Minor told Terrance that her brother walked in during the assault. When Minor told her brother to

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<sup>5</sup> According to the Executive Director of the South Carolina Housing Authority, the apartment where Minor lived had bedroom doors with locks. R. 253, ll. 13-17. This was according to HUD regulations. R. 254, l. 25 – R. 255, l. 3. The apartments were inspected annually to ensure all remained in line with the regulations. R. 255, ll. 20-24.

get her mother, Petitioner told him no, whipped the brother, and slapped Minor. Thereafter, Minor “passed out and woke up in a tub full of bloody water.” R. 54, l. 4 – R. 55, l. 16.<sup>6</sup> Minor told Terrance that during the most recent assault, Petitioner “walked in her room one night and snatched his pants down and hers.” R. 56, l. 13 – R. 57, l. 2. One night while Petitioner was assaulting Minor, Terrance sent a text message to Minor’s phone. The phone was in the bedroom with Minor’s mother and the text message indication woke Minor’s mother. When this happened, Petitioner stopped the alleged assault. R. 57, ll. 3-13.<sup>7</sup> Minor told Terrance that “one night when she was asleep [Ppetitioner] put his private part in her mouth and she bit it.” Petitioner “got mad and grounded her.” Minor claimed that Petitioner would not stop the abuse even if she were bleeding. She further claimed “that blood was on the sheets, and it was coming out quick, but he wouldn’t stop.” R. 57, l. 17 – R. 58, l. 3.

### ***The Trial***

On February 4, 2011, an Abbeville County Grand Jury indicted Petitioner for nine counts of criminal sexual conduct with a minor in the second degree. R. 2, ll. 15-20; R. 376 - 377. The state, represented by C. Yates Brown and Lance Sheek, called the case for trial before the Honorable Donald B. Hocker and a jury on May 27, 2014. Janna Nelson and Shane Goranson represented Petitioner. R. 1. After a three-day trial, the jury acquitted Petitioner of eight of the charges. However, the jury found Petitioner guilty as to one (2011-GS-01-0046). R. 349, l. 1 – R. 350, l. 7. Thereafter, Judge Hocker sentenced Petitioner to sixteen years’ imprisonment. R. 351, ll. 20-22; R. 392. After the trial, Petitioner filed a timely motion for new trial. R. 368 – R. 372. A hearing on

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<sup>6</sup> Minor denied that her brother ever walked in on one of the alleged sexual assaults. R. 152, ll. 15-19. However, Minor agreed that she passed out and woke up in a tub full of bloody water. R. 152, ll. 20-22; R. 153, ll. 12-20. Minor told Holland that she woke up in bloody water ten times – after each incident. R. 175, ll. 10-18.

<sup>7</sup> Minor denied this occurred. R. 160, ll. 17-24; R. 161, ll. 8-11.

the motion commenced on July 15, 2014, before Judge Hocker. R. 352. Judge Hocker denied the motion by a written order filed on July 23, 2014. R. 373. Petitioner received notice of the order on July 28, 2014.

***The Appeal***

On August 4, 2014, Petitioner served his notice of appeal. Petitioner's appeal was perfected in the Court of Appeals by undersigned counsel, Susan Barber Hackett. On October 19, 2016, the Court of Appeals affirmed Petitioner's conviction and sentenced in an unpublished opinion. App. 1-4. Subsequently, Petitioner filed a petition for rehearing. App. 5-18. On December 14, 2016, the Court of Appeals denied the petition for rehearing, but withdrew the previous opinion and submitted a new opinion. State v. Tate, 2016-UP-436 (S.C. Ct. App. filed Oct. 19, 2016); App. 19-24. On December 29, 2016, Petitioner filed a petition for rehearing concerning the substituted opinion. App. 25-40. On January 10, 2017, the Court of Appeals denied the petition for rehearing.

Petitioner now files this petition for writ of certiorari.

## ARGUMENT

I. The Court of Appeals erred in failing to address the applicability of *State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016)(Shearouse Adv. Sh. No. 1 at 13-21) to Petitioner’s case where the trial judge failed to require the state to open in full during closing argument and reply only to the defense’s closing argument, which violated Petitioner’s state and federal constitutional rights to a fair trial and due process of law.

### **Relevant facts**

Prior to closing arguments, defense counsel moved to require the state to open in full and use their final argument for rebuttal only. R. 284, l. 21 – R. 285, l. 3. Defense counsel submitted a written motion in support of this position as well. R. 363 – R. 367.<sup>8</sup> Petitioner compared the order of closing to that in civil cases. Petitioner argued that in civil cases, the jury is not being asked to determine guilt and the burden of proof is much lower. R. 286, ll. 6-17. Despite Petitioner’s well-reasoned arguments, the judge denied the motion. R. 286, ll. 6-17.

Thereafter, the parties proceeded to closing arguments with the state opening on the law, then defense counsel arguing in full, and the state arguing again. At the conclusion of the arguments and jury instructions, defense counsel noted multiple statements by the prosecutor to which she could not respond due to the order of the closing arguments. First, the prosecutor argued to the jury that “[d]efense counsel wasn’t there and can’t tell you what happened.” The obvious response would be that the prosecutor was not there either. R. 340, ll. 9-12.

Second, the prosecutor related a personal story of when he had traumatic events in his life and that he could not remember what he wore. Defense counsel argued that “[n]one of this case is

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<sup>8</sup> Defense counsel argued this issue in the motion for new trial as well. R. 368 – R. 372.

about clothing. It's about statements, things that were said, things that happened." When the subject of clothing was presented, no questions were asked about the details of the clothing. Further, the questions about the clothing concerned what she stated to police and others around the time of the alleged incident, not at the trial, as the prosecutor implied to the jury. R. 340, ll. 12-22.

Third, defense counsel argued the prosecutor made "just an absolute misrepresentation to the jury about the DNA evidence." Specifically, the prosecutor asked the jury why would the state send Petitioner's cover for DNA testing when it would just show his DNA. This was a misrepresentation because the state did send the cover for DNA testing. The report was that there was no blood on the covers; therefore, the prosecutor's argument was "a total misleading and inaccurate statement." R. 340, l. 22 – R. 341, l. 7.

Fourth, the prosecutor argued there was no dispute about Minor telling her boyfriend about the alleged assaults a month and a half before. However, this was not true because Minor responded that she could not remember when she told her boyfriend about the alleged assaults. R. 341, ll. 7-14.

Fifth, the prosecutor made disparaging remarks comparing prosecutors and defense attorneys. Specifically, the prosecutor told the jury "how glad he was to be on this side and that his ethical obligations were different." Due to the order of arguments, defense counsel could not tell the jury that the prosecutor, who was a former public defender, "defended one of these cases just earlier this year ... and got his guy off, and in a child sex case in another circuit." R. 341, ll. 15-24.

### **Discussion**

On December 14, 2016, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Tate, 2016-UP-436 (S.C. Ct. App. filed Dec. 14, 2016). Concerning this issue, the Court of Appeals stated only:

As to whether the trial court erred in failing to require the state to open in full during closing argument and reply only to the defense's closing argument: State v. Gellis, 158 S.C. 471, 487, 155 S.E. 849, 855 (1930)("[I]f a defendant offers any evidence on trial of the case, the state is not deprived of its general right to opening and concluding arguments."); State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977)("The solicitor is entitled to open the closing arguments to the jury unless the defendant has offered no evidence."); id. at 25, 235 S.E.2d at 809("The solicitor is not required to make an opening argument to the jury on issues of fact, ... but may do so in his discretion.").

Tate, supra; App. 23.

Fifteen days after the Court of Appeals issued its substituted opinion in the instant case, this Court decided State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016)(Shearouse Adv. Sh. No. 1 at 13-21) addressing the content of closing arguments in criminal trials. Although Petitioner asked the Court of Appeals to rehear his case based on the Beaty decision, the Court of Appeals denied the petition for rehearing with no mention of the case. App. 25-41.<sup>9</sup> Petitioner respectfully requests this Court grant certiorari to review this issue because the decision of the Court of Appeals is in conflict with this Court's decision in Beaty. See Rule 242(b)(3), SCACR.

This Court held "that in a criminal trial where the party with the 'middle' argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter." Beaty, supra. Thus, it is now settled that when a defendant requests the state "open in full" for closing argument, the state must do so. The trial judge erred in failing to require the state to open fully during Petitioner's trial.

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<sup>9</sup> As an initial matter, Petitioner benefits from the Beaty ruling as his case was pending on direct review and the issue was preserved for review. See State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009)(citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final), Harris v. State, 543 S.E.2d 716, 717-718 (Ga. 2001)(reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline' – i.e., cases which are pending in direct review or not yet final"))).

Closing argument is “an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound.” Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974)(Douglas, J., dissenting). The South Carolina Rules of Criminal Procedure are silent on the order of closing arguments. However, the Rules of Civil Procedure provide that

[t]he moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party’s claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter.

Rule 43(j), SCRPC.

In a 1911 case, this Court explained that a defendant in a criminal case who has the right to reply in argument by reason of not introducing evidence may decline to open in argument and still retain the right to make the closing argument to the jury either upon the case in general or by way of reply to the state’s argument. State v. Garlington, 90 S.C. 138, 72 S.E. 564, 566 (1911). South Carolina required the prosecution to close in full prior to the defense’s closing argument pursuant to court rule – Rule 59 of the Circuit Court. See State v. Atterberry, 129 S.C. 464, 124 S.E. 648, 651 (1924). Subsequently, the rule changed to require the partying having the opening in the argument to disclose fully the law.<sup>10</sup> Thus, this Court held in State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), that the solicitor was no longer required to make an opening argument to the jury on issues of fact. Id. In Beaty, supra, this Court “restore[d] what had been, largely by court rule, the practice in this state for many years until 1971.” In affirming Petitioner’s conviction and sentence, the Court of Appeals cited a case from 1977 to support its conclusion that the solicitor was not required to open fully on the facts and the law and rebuttal be limited to responding to what the

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<sup>10</sup> Rule 58 of the Circuit Court Rules provided for the order of closing at the time.

defendant argued in closing. App. 23. In doing so, the Court of Appeals made clear that its decision was not in conformity with “the practice in this state for many years until 1971,” which is what this Court restored in Beaty.

The trial judge’s refusal to require the state to open fully denied Petitioner’s right to a fair trial and due process of law because it prevented him from responding to specific points made the prosecutor. This Court determined Beaty suffered no prejudice as a result of the trial judge’s ruling that the state would not be required to open fully at his trial. However, Petitioner suffered harm as a result of the court’s ruling, and after the closing arguments, Petitioner argued to the judge the specific harm he suffered as a result of the erroneous ruling. Several of the points – especially, those mischaracterizing the record and demeaning the defense – could not have been anticipated. The prosecution should have been made to open fully as to the law and the facts with the Petitioner having an opportunity to respond to the argument and close fully on the law and the facts. The prosecution could have refuted any unanticipated arguments by Petitioner in a rebuttal. Permitting the content of arguments in this fashion would have ensured the Petitioner’s rights to a fair trial and due process of law were not at odds with his right to present a full and complete defense. The prior practice governing content of closing arguments forced defendants to choose between presenting a defense, which would forfeit last argument, or not to present a defense and keep last argument. No further explanation is needed to demonstrate how this scenario places a defendant on the horns of a dilemma.

II. Violating Petitioner's state and federal constitutional rights to a fair and impartial trial, the Court of Appeals abdicated its duty to review the trial judge's failure to declare a mistrial based upon the alleged victim's multiple emotional outbursts that disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented.

**Relevant facts**

During defense counsel's opening statement to the jury, Minor was visibly and audibly upset. The outburst was so extreme that defense counsel stopped her remarks to the jury: "Your Honor, it looks like - - it looks like [Minor] is upset and I don't want that to distract the jury." R. 9, ll. 21-24. Thereafter, the judge called the lawyers to the bench, but provided no instruction to the jury. The opening statement continued, followed immediately by the calling of the state's first witness. R. 9, ll. 23-25. When the jury was out of the courtroom during a recess, the judge placed on the record that Minor was emotional during defense counsel's opening statement. Surprisingly, the judge indicated "the court has no problem with that." However, the judge noted that "if that's still a recurring problem then I think we ought to agree that she needs not to be in the courtroom because of the potential nature it has to be disruptive." R. 28, ll. 9-21. Again, no instruction was provided to the jury concerning Minor's emotional outburst.

During the state's direct examination of Minor, the state asked if Minor needed to take a short break, and she responded that she did. The judge agreed to take a break. R. 84, ll. 12-22. Thereafter, the state inquired of the judge regarding how to "handle this." According to the state, it was very difficult for everybody and he did not "want to sit her up there while she's crying in front of the jury." R. 84, l. 23 – R. 85, l. 3. The judge responded that it was evident that Minor was having difficulty testifying, but stated she "was going to have to do the best job that she can." He

further stated that she was “going to have to, you know, try to - - you know, try not to be emotional.” R. 85, ll. 4-10.

The judge then addressed Minor directly: “I know this is difficult for you to testify. I understand that. But it’s really important that you do the very best that you can and there is a lot to cover in questions that will be asked of you. So you just need to do the very best that you can so we can get through your testimony.” R. 86, ll. 18-24. When the jury returned, Minor’s direct examination continued with no instruction for the jury concerning how to consider, if at all, Minor’s emotional outbursts.

Well into the cross-examination, Minor stated she did not “want to keep talking about it.” R. 155, ll. 3. When asked if she could continue, Minor requested a break. R. 155, ll. 4-7. The judge excused the jury and permitted Minor to have a break. R. 155, ll. 8-21. With the jury excused, the judge remarked that he realized Minor was emotional, but he noted “it’s being disruptive.” He instructed the prosecutors to “go out there and talk to her.” R. 155, ll. 22-25. Preempting defense counsel’s motion for a mistrial based upon Minor’s outbursts, the judge noted that while he was “not being unsympathetic,” he had “to maintain decorum in this courtroom.” He could not “tolerate the witness storming out of the courtroom in the manner in which she did.” Concerning the jurors, the judge’s explanation was confusing and contradictory: “I think probably the vast majority, if not all of the jurors, were back in the courtroom, or most of them at least were back in there when that took place.” He continued that he hoped the solicitors had explained to Minor that he could not “allow that sort of conduct.” R. 156, ll. 7-21.

Defense counsel then moved for a mistrial “because of the pretty extreme display of emotion that was going on while [Minor] was sobbing as the jury left the jury box and while the door back there behind the jury box was still open she started yelling out for her mother.” Defense

counsel could not “imagine that even if the jury was right down the hall in their room that they would not have heard that demonstration.” Minor’s repeated and extreme emotional outbursts could be construed only as prejudicial and attempting to influence the outcome of the case based on emotion, not evidence. R. 156, l. 25 – R. 157, l. 12. Defense counsel further noted that Minor’s emotional conduct began during the opening statements and permeated throughout the trial. R. 158, ll. 13-25.

In denying the mistrial motion, the trial judge noted “we’ve had a lot of emotion displayed by this witness throughout her testimony, a lot of crying, I think she’s gone through a good many Kleenexes. We have had to take a break or two.” Nevertheless, the judge determined Minor’s repeated and extreme emotional outbursts were “not the amount and type of prejudice that would justify a pretty severe remedy of declaring a mistrial.” R. 158, ll. 3-12.<sup>11</sup>

During closing argument, defense counsel tried to anticipate the state’s closing argument specifically regarding Minor’s emotional state during her testimony. Defense counsel “thought that maybe one of the things that might be said is that [Minor] has been revictimized or retraumatized by having to come in here and tell you what happened.” Defense counsel informed the jury it was not her intent to do that. She further explained that a defendant has the right to confront his accusers pursuant to the Constitution, which is what defense counsel was doing. R. 307, l. 16 – R. 308, l. 6.

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<sup>11</sup> Petitioner renewed the motion for a mistrial in the written motion for new trial. R. 368 – R. 372. Petitioner argued he was entitled to a new trial based on the trial judge’s failure to grant a mistrial based on Minor’s “several extreme emotional reactions throughout the course of the trial.” Petitioner explained Minor “cried several times while testifying, and broke down sobbing during cross-examination.” Further, Petitioner noted that when the jury was exiting the courtroom, Minor “ran from the courtroom yelling for her mother.” Petitioner argued Minor’s emotional reactions prejudiced the jury. Further, Petitioner argued the judge failed to give the jury a curative instruction to disregard the emotional display and decide the case only on the facts presented. R. 368 – R. 372.

Concerning the emotional outbursts, defense counsel reminded the jury “[t]he first time you see [Minor]’s emotional reaction is when I was giving you my opening statement and telling you how I was going to be talking about these different versions of her story. And when she knew that was going to happen she got upset. And when it happened on the stand she got upset.” The jury could interpret the outbursts, and their timing, “one of two ways.” Either Minor “was crying because what happened to her was so horrible and she doesn’t like having to go through it again or she’s crying because somebody is pointing out the problems with the things she’s saying and the reason you shouldn’t believe it, and that – and that is difficult for her.” R. 308, ll. 16-23.

The prosecutor’s closing argument immediately responded to the argument regarding why the case was being tried: “I’ll never make an apology for that because I’m not ashamed to be doing what I’m doing here today. ... I will prosecute these cases.” R. 315, ll. 14-19. He then said the defense had a different ethical obligation than he because he represented the people, while defense counsel represented the defendant. R. 316, ll. 3-12. After apologizing for getting “a little bit wound up,” the prosecutor explained, “This is what I do. I prosecute crimes where children are victims and I believe it whole heartedly.” R. 316, ll. 12-15. He further preached, “As long as I have breath in my body I will stand up for the victims of these types of crimes and I will never be ashamed of it.” R. 316, ll. 23-25.

When describing how the jury could judge Minor’s credibility, the solicitor asked the jury to remember Minor’s “raw emotion.” Specifically, he focused on when she told defense counsel she did not “want to think about it.” He continued:

You’re making me go back and back through and I don’t want to think about it. I don’t want to relieve it. Don’t you understand that. That’s what that child said to this lady. Now, I understand as a grown attorney, having done this over and over again, maybe it’s not a big deal. To that child, it was a very, very big deal.

R. 321, ll. 6-17. Circling back to Minor's emotional testimony, the prosecutor asked the jury not to get "sidetracked by what a lawyer tells you. You look at what those witnesses said and you decide if you're convinced that this man did penetrate that child. Was that a [*sic*] emotion you watched real. Because if she's made all this up and she's put on that kind of act, she deserves an Academy Award, because that was compelling." R. 324, ll. 18-25.

### **Discussion**

"The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution." State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). "[T]he very heart of a 'fair trial' embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment." Id. at 303, 295 S.E.2d at 631.

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013)(citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). However, this standard of review does not mean "no review." The opinion of the Court of Appeals on this issue eliminates appellate review of the decisions of trial judge's on mistrial motions. Although the Court acknowledged that "[t]he decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge" and that reversal was required when the trial judge abused his discretion or when manifest prejudice resulted, the Court failed to consider whether the judge abused his discretion or if manifest prejudice resulted from the repeated outbursts. See State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996). Instead, the Court's sole focus was on the trial judge's presence at the trial as providing an opportunity for a better perspective than a

cold record. If this view prevails, then all appellate issues for which the standard of review is an abuse of discretion must result in no review at all on appeal as the trial judge is always in a position to have a better opportunity for observing the actual trial than a cold record offers. In light of the Court of Appeals' abdication of its duty and its erroneous application of the standard of review, Petitioner respectfully requests this Court grant certiorari to review the lower court's opinion. Rule 242(b)(3), SCACR. Additionally, substantial constitutional issues are directly involved. Rule 242(b)(4), SCACR.

While a mistrial should be granted only when "absolutely necessary" and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." Id. Another way of describing when a mistrial must be granted is when there is "manifest necessity." State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930). "The less than lucid test is ... whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 32-33, 301 S.E.2d 471, 472 (1983).

This Court held a mistrial was in order where "spectators filled the courtroom seats to capacity and even stood against the walls," there were several outbursts of laughter from the spectators requiring an admonition from the judge, a juror reported that one spectator glared at her with "obvious disgust," and the jurors overheard a spectator making opinionated remarks. Stewart, 278 S.C. at 301-302, 295 S.E.2d at 629-630. This Court held it was error for the trial judge to deny the motion for a mistrial "without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice." Id. at 302, 295 S.E.2d at 630. Further, this Court held the judge's reliance on his instructions to the jury to

disregard improper spectator conduct was insufficient to assure Stewart received a fair trial. Id. at 304, 295 S.E.2d at 631.

In another case involving disorder in the court, this Court held a defendant was entitled to a new trial where there was “no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled to, a fair, impartial, and legal, trial.” State v. Gens, 107 S.C. 448, 93 S.E. 139, 140 (1917). In this transporting liquor case, several ladies held large posters condemning liquor traffic before the jury during part of the trial. The ladies sat directly in front of the jury and to the left of the judge. Id. at 448, 93 S.E. 139. This Court held:

The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge.

Id. Despite the jurors indicating they were not influenced in any manner by the posters, this Court held the trial judge should have set aside the verdict. Id.

On the other hand, in State v. Hughes, 336 S.C. 585, 596-597, 521 S.E.2d 500, 506 (1999), this Court found a trial judge did not abuse his discretion in denying a motion for a mistrial where the deceased’s mother “loudly exited the courtroom” followed by her sister during the cross-examination of a medical expert. The trial judge noted that the mother’s conduct “could be interpreted as a ‘negative comment’ on the defense evidence,” the disruption was short and “the jury already knew how she felt since she had testified as a victim impact witness” in the capital sentencing proceedings. Id. This Court found the jury “likely understood her outburst as an expression of [her] grief,” about which she had already testified. Id.

Similarly, in State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996), the Court of Appeals held that the displays of emotion – audible crying by spectators – in the courtroom during the alleged victim’s testimony did not require a mistrial. When defense counsel moved for a mistrial, the trial judge stated “he did not believe that any displays of emotion so far would have tainted the jury.” To ensure additional emotional outbursts would not prejudice the jury, the judge cleared the courtroom and instructed the jury that the courtroom had been cleared due to the display of emotion by observers. Id. Further, the judge implored the jurors that they were not to draw any inferences from this fact as neither side had done anything improper and reminded the jurors that they were to base their verdict on the testimony and evidence presented, not on emotion. Id.

In another case involving an emotional outburst, this Court held no mistrial was required where the deceased’s sister had a minor outburst while testifying when asked to identify the defendant. State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996). This Court held the emotional outburst was ameliorated by the trial judge dismissing the jury and calling a recess as soon as the outburst occurred to give the witness an opportunity to calm down. Id. at 93, 470 S.E.2d at 105. Further, this Court was persuaded that the outburst had little effect on the jury because it occurred at the beginning of the trial and was “very limited in time and in scope.” Id. As in Hughes, this Court surmised that the sister’s outburst was an expression of grief and the jury likely understood that. Id. While finding the curative measures here sufficient, this Court warned that some cases involving a witness’s or spectator’s outburst “may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction.” Id. at 93, 470 S.E.2d at 106.

In the substituted opinion, the Court quoted extensively from Anderson, supra. However, what the Court failed to consider was how Petitioner’s case was distinguishable from Anderson. One of the key factors in affirming the trial judge’s denial of a mistrial was the “incident occurred at

the beginning of trial and was very limited in time and in scope.” Id. at 93, 470 S.E.2d at 105. This contrasted greatly with the numerous and repeated emotional outbursts during Petitioner’s trial. The complaining witness began her emotional outbursts during defense counsel’s opening statement and her histrionics culminated during her testimony when she stormed off the witness stand. Further, the Anderson Court explained the outburst was “an expression of grief over the death of her sister, and the jury likely understood it as just that.” Id. Again, in contrast, the complaining witness’s outburst during Petitioner’s trial were not expressions of grief, but were an effort to draw attention to herself, distract the jury from the real issue, and to move the jury based on emotions, not evidence.

The trial judge erred in failing to order a mistrial based on Minor’s repeated and extreme emotional outbursts, and the Court of Appeals compounded this error by abdicating his duty to review the decision of the trial judge for an abuse of discretion. Although the trial judge was aware of Minor’s disruptive behavior, took repeated breaks for Minor to compose herself, and admonished Minor regarding her behavior, the trial judge never instructed the jury concerning how to consider, if at all, Minor’s behavior. Minor’s sobbing began during defense counsel’s opening statement. Her sobbing continued during her direct examination, which was after several witnesses had testified. Thus, her emotional outbursts were not limited to single event or to the beginning of the trial. Minor’s improper actions culminated in her storming from the witness stand and screaming for her mother within earshot of the jurors. Despite Minor’s conduct, the judge never told the jury not to consider her conduct in their deliberations. Minor’s constant sobbing, storming from the witness stand, and screaming for her mother were a far cry from the deceased’s mother “loudly” exiting the courtroom in Hughes, supra. The conduct on display at Petitioner’s trial was not limited to crying by spectators as in Jones, supra, where the judge cleared the courtroom and instructed the

jury not to draw an adverse inference from clearing the courtroom and to decide the case based only on the evidence presented. Despite the Court warning in Anderson, *supra*, that in some cases, a witness's or spectator's outburst "may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction," no instructions were given here. See Anderson, 322 S.C. at 93, 470 S.E.2d at 106.

Instead, the jury heard from a "wound up" solicitor in closing that Minor's "raw emotion" was proof that she was telling the truth. According to the solicitor, Minor's performance was so real and "compelling" that if she were not telling the truth, then she deserved an Academy Award. The solicitor instructed the jury to do exactly what it is *not* supposed to do – use the emotion of a witness to form the basis for its verdict. Further, in describing his opinion that Minor's testimony was "compelling" "as evidenced by her repeated emotional outbursts, the solicitor improperly conveyed to the jury his belief that Minor was telling the truth. See State v. Jennings, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011)(holding that a forensic interviewer's report that each child had provided a "compelling" disclosure of abuse could only be interpreted to mean the forensic interview believed the children were being truthful).

The trial court failed to grant a mistrial where the ends of justice required one. Minor's continuous sobbing and repeated emotional outbursts tainted the proceedings. While some emotion is to be expected in these types of cases, Minor's conduct was extreme, even theatrical, as acknowledged by the prosecutor's remark regarding the Academy Awards. Minor's conduct deprived Petitioner of the fair trial he deserved and that the Constitution demands. The taint of her performance could be removed in no other way except a mistrial.

III. Violating Petitioner's state and federal constitutional rights to present a defense and confront his accuser, the Court of Appeals affirmed the trial judge's erroneous ruling that Petitioner not be permitted to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Petitioner.

#### **Relevant facts**

During the cross-examination of Minor's mother, Petitioner asked her about finding some photographs of Terrance C., Minor's ex-boyfriend, on Minor's phone. R. 34, l. 25 – R. 35, l. 1. The state agreed there were three photographs of Terrance's genitalia on Minor's phone. R. 37, ll. 11-20. The state objected that the photographs were not relevant and questions regarding the photographs were prohibited by the Rape Shield Law. R. 35, ll. 11-21. The state also argued the photographs were more prejudicial than probative as well. R. 36, ll. 14-19. Petitioner argued that the photographs were important to establish a motive for why Minor would make up the allegations against Petitioner. R. 36, ll. 3-13. To this, the state proposed to limit the questioning to whether the phone was being used in an improper manner and whether Minor got into trouble for using the phone in such a manner. R. 36, ll. 14-19.

Petitioner explained that the photographs appeared on Minor's phone on August 14 and August 15 of 2010. Petitioner made her allegations of sexual assaults on August 25, 2010. Petitioner and Minor's mother discovered the photographs on Minor's phone and Minor was punished. Petitioner argued that the jury learning that Minor had pictures of Terrance on her phone was not enough information to support the motive to fabricate the allegations. R. 38, lines 3-14. The jury would not appreciate why someone would tell this story without knowing the contents of the photographs. R. 41, ll. 8-12. To the judge's questioning regarding relevancy, Petitioner

explained the content of the photographs were relevant to explain fully Minor's motive to fabricate and went to her credibility. Petitioner explained explaining the motive was part of the defense to which Petitioner had a constitutional right to present. Petitioner made clear there would be no questioning of any witness regarding whether Minor and Terrance were having sex, which would keep the evidence in compliance with the Rape Shield Statute. Further, Petitioner made clear the line of questioning regarding the content of the photographs would not include a request that the jury see the photographs. R. 39, l. 9 – R. 40, l. 6; R. 41, ll. 12-13.

The judge found the content of the photographs was not relevant. He ruled that Petitioner could "ask if there were pictures on the phone concerning Terrance that the mom disapproved of, if she did, that [Petitioner] disapproved of if he did," but he refused to allow Petitioner to "tell the jury that they are actually Terrance's private areas." His ruling would permit Petitioner to argue motive because Minor got into trouble over the photographs on the cell phone, but he was adamant that the jury not learn the nature of the photographs. R. 40, ll. 7-25. In short, the judge found that Minor's improper motive to make the false allegations could be established without the jury knowing that the pictures were of male genitalia. R. 41, l. 23 – R. 42, l. 4.

To support Petitioner's argument that the content of the photographs were necessary for the jury to understand Minor's motive, which was part and parcel of Petitioner's right to present a defense, and not in violation of the Rape Shield Statute as argued by the state, Petitioner cited State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989) and State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991). Petitioner noted that Minor told the interviewer that she had never had sex with someone else and the content of the photographs would attack her credibility in this regard.<sup>12</sup>

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<sup>12</sup> Minor testified that she had never had any sexual contact with anybody other than Petitioner. R. 116, ll. 14-18.

Petitioner assured the judge the photographs were not an attempt to make Minor look bad, but were to attack her credibility and establish a motive for making up the allegations. R. 61, l. 19 – R. 63, l. 25.<sup>13</sup>

Thereafter, Petitioner proffered the testimony of Minor's mother on this point. Minor's mother admitted Petitioner found photographs of a naked Terrance on Minor's phone. Petitioner showed the photographs to her. She thought the photographs were inappropriate so she had a discussion with Minor and Terrance's parents. She clarified that the photographs showed a young man's penis, but she could not remember if the penis were erect. R. 42, l. 11 – R. 44, l. 4.

After the proffer, the judge remained steadfast that the jury would not learn what the photographs actually showed. He also refused to allow the jury to learn that the photographs showed Terrance was naked. R. 44, ll. 5-14.

Before the jury, Minor's mother testified that twelve-year old Minor had a fifteen-year old boyfriend named Terrance C. at the time the allegations of sexual misconduct were made. R. 44, l. 23 – R. 45, l. 24. Minor's mother saw at least one inappropriate photograph of Terrance on Minor's phone. R. 45, ll. 2-5.

According to Minor, when Terrance became her boyfriend on March 23, 2010, her mother found out she had a boyfriend and refused to allow her to speak to him or allow Terrance to visit. R. 161, ll. 15-24. Minor admitted her phone had three inappropriate pictures of Terrance on it. R. 162, ll. 17-19. Her mother and Petitioner found the pictures and disciplined her, including taking

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<sup>13</sup> Petitioner renewed the motion to present the content of the photographs to the jury in the motion for new trial. As explained in the motion, there was no attempt to show the photographs to the jury due to the age of the young man in the photographs, but there was an attempt to inform the jury that the photographs showed the young man naked and with a fully-erect penis. Petitioner argued that his right to present a defense and his rights to a fair trial and due process were denied as a result of the trial judge's erroneous ruling. R. 368 – R. 372.

her phone away. R. 162, l. 24 – R. 163, l. 7; R. 163, ll. 10-11. Not long after that, Minor made allegations of sexual assault against Petitioner and he was arrested. R. 163, ll. 8-9; R. 163, ll. 13-17.

Bart Cave, an expert in the field of forensic phone analysis, analyzed Minor's cell phone as part of state's investigation. Cave found three inappropriate photographs on the phone. R. 248, ll. 1-25. Cave determined the dates and times of the photographs appearing on the phone: two arrived at 12:36 a.m. on August 15, 2010, and one arrived at 11:59 a.m. on August 14, 2010. R. 249, ll. 1-18.

### **Discussion**

In ruling on this issue, the Court of Appeals noted the standard of review, prior cases limited a defendant's right to present a defense, Rule 401, SCRE, Rule 403, SCRE, and prior cases limiting a defendant's rights under the Confrontation Clause. App. 23-24. However, the Court's opinion offered little to explain the reasoning by the affirmance on this issue. In light of the substantial constitutional issues directly involved, discussed more fully *infra*, Petitioner respectfully requests this Court grant certiorari to review the decision of the Court of Appeals. See Rule 242(b)(4), SCACR.

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. "The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility." State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). "[C]ross-examination is essential to a fair trial as guaranteed by the Sixth Amendment and due process as required by the Fourteenth Amendment." State v. McCoy, 274 S.C. 70, 72, 261 S.E.2d 159, 160 (1979). This guarantee ensures a defendant has the opportunity to cross-examine a witness

concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that “[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” To establish a violation of the Confrontation Clause, Petitioner must show that he was prohibited from asking questions designed to show bias on the part of Minor. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

The Rape Shield Statute prohibits “[e]vidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct ... in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656.” S.C. Code Ann. § 16-3-659.1(1). This statute is completely inapplicable to the instant matter because Petitioner was not offering evidence of specific instances of Minor’s sexual conduct, opinion evidence of Minor’s sexual conduct, or reputation evidence of Minor’s sexual conduct. In fact, the photographs could not demonstrate specific instances of Minor’s sexual conduct as the photographs did not depict Minor engaged in any sex acts. Rather, Petitioner was offering three sexually explicit photographs on the twelve-year old’s phone from her fifteen-year old boyfriend to show the motivation Minor had to lie about the allegations of sexual abuse.

Having determined the Rape Shield Statute does not bar the evidence, the only remaining question is whether the evidence was relevant. Relevant evidence is any “evidence having 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.

Was the fact that Minor had three photographs of her naked boyfriend showing his fully erect penis on her phone relevant to Minor's credibility?

Deciding an issue similar to the one presented in the instant matter, this Court in State v. Finley, 300 S.C. 196, 199, 387 S.E.2d 88, 89 (1989) noted that relevant evidence "need not be sufficient in itself to establish the whole or any definite portion of a party's contention." Finley sought to introduce a tape recording of a conversation with the alleged criminal sexual conduct victim in which the victim agreed to drop the charges in exchange for money. The trial judge refused. On appeal, this Court found the tape recording was relevant on the issues of whether Finley tried to obstruct justice or whether the alleged victim was trying to extort money. Id.

Additionally, this Court held that Finley should be allowed to present evidence that the alleged victim engaged in sexual intercourse with her neighbor in full view of Finley on the night she claimed Finley assaulted her. Id. at 200, 387 S.E.2d at 90. Finley's defense was that the alleged victim fabricated the charges to keep him from telling anyone about her sexual conduct with the neighbor. "The unique facts of this controversy, coupled with [Finley]'s right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness." Id. This Court found the evidence was "essential to a full and fair determination of [Finley]'s guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party." Id. (citing State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)); see also State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (holding that evidence of victim's sexuality was admissible when offered for a purpose other than to attack the victim's morality).

Although State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) principally concerns the Rape Shield Statute, it is instructive for what type of evidence is relevant in criminal

sexual conduct cases. In Grovenstein, the victims accused the defendant of anally penetrating them with rolled-up paper. Id. at 213, 530 S.E.2d at 408. Before the victims knew the defendant, they had been “accused of inserting objects in the vagina and rectum of a young girl.” Id. The Court held that evidence of these accusations prior to meeting the defendant “should have been admitted because it provided an alternate explanation of how the young victims would be familiar with the sexual conduct they alleged [the defendant] committed.” Id. at 220, 530 S.E.2d at 412. The Court ruled that the Rape Shield Statute “is not a blanket exclusion of evidence concerning alternative sources of a child victim’s sexual knowledge.” Id. at 219, 530 S.E.2d at 411. Thus, relevant evidence in a criminal sexual conduct case is evidence that provides an alternate explanation of how young victims would be familiar with sex.

In affirming the trial judge’s erroneous ruling, the Court of Appeals relied heavily upon State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). Petitioner’s case is easily distinguished from Dickerson. First, Dickerson involved whether the defense should be permitted to ask the pathologist about the results of a preliminary urinalysis test. Id. at 116, 716, S.E.2d at 903. During a proffer, the pathologist testified the urine screen test was presumptively positive for cocaine, but that the test alone was unreliable. Id. Further, the pathologist testified that no confirmatory testing was done. Id. The trial judge refused to admit the evidence, finding it was inherently unreliable, and as a result would be misleading and confusing to the jury. Id. This Court held that the relevance of evidence that the deceased actually had cocaine in his system would have been “dubious, at best,” based on the facts of the case. Id. at 116, 716 S.E.2d at 903-904. The test did not challenge the pathologist’s findings regarding cause of death and “would only have injected irrelevant considerations into the trial.” Id. at 117, 716 S.E.2d at 904. Thus, the presumptive test was of little probative value and served only to confuse the jury. Id. This contrasted greatly with

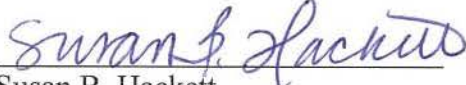
the proffered evidence at Petitioner's trial. One of the questions for all juries in criminal sexual conduct with minor cases is how does a minor have specific knowledge of sex. The default answer is that the abuse must have occurred unless there is evidence to show the minor acquired the knowledge from some other source.

While the photographs showing a naked Terrance with an erect penis did not show that Minor was familiar with all aspects of sex, the photographs certainly demonstrated that Minor had some knowledge of sex outside of the alleged abuse. Thus, under Grovenstein, the photographs were relevant to demonstrate Minor's knowledge of sex from an alternate source. Of course, the photographs served more than this purpose. The photographs were the impetus for Minor to fabricate her fantastical tale of sexual abuse. At twelve-years old, Minor had an older boyfriend and her parents did not approve. In fact, her mother and Petitioner had forbidden her to talk to him and would not allow her to visit him. When the two learned that Minor had sexually explicit photographs of Terrance on her phone, the two were outraged and punished her, as all parents would. The content showed just how serious Minor's misbehavior was and just how desperately she was to deflect the punishment. Photographs of Terrance's naked body with a fully erect penis on twelve-year old Minor's phone were a far cry from simply "inappropriate" photographs. The actual content of the photographs demonstrated Minor's knowledge of sex and the outrage her parents felt over her misconduct. The punishment she would suffer would be severe – just as the revenge she would dole out. The jury deserved and needed to know the content of those photographs in order to evaluate Minor's credibility and to learn that Minor had a very big incentive to fabricate the allegations against Petitioner.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing to review the Court of Appeals' decision in this case. If this Court decides to grant the petition and dispense with further briefing, Petitioner respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully Submitted,

  
\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal from Abbeville County  
Donald B. Hocker, Circuit Court Judge

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Opinion No. 2016-UP-436 (S.C. Ct. App. filed Dec. 14, 2016)  
Indictment No. 2011-GS-01-046

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THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,


PETITIONER

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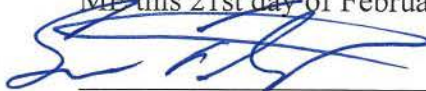
CERTIFICATE OF SERVICE

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I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Keith Denver Tate, #236480, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of February, 2017.

  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE  
ME this 21st day of February, 2017.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA  
In The Supreme Court

On Writ of Certiorari to the Court of Appeals  
Appeal from Abbeville County  
Court of General Sessions

The Honorable Donald B. Hocker, Circuit Court Judge

Opinion No. 2016-UP-436 (S.C. Ct. App. filed 12/23/15)  
Appellate Case No. 2017-000230

THE STATE,

RESPONDENT,

v.

KEITH DENVER TATE,

PETITIONER.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON APPEAL

- I. The Court of Appeals properly declined to apply State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13-21) in Petitioner's case because Beaty expressly states it applies only to cases tried after the opinion. Further, the trial judge's decision to follow the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts did not violate Petitioner's constitutional rights to a fair trial and due process of law.
- II. The Court of Appeals properly found the trial judge did not err in denying the defense's motion for a mistrial where the victim's emotional state throughout the trial did not constitute the requisite manifest necessity to warrant the declaration of a mistrial.
- III. The Court of Appeals properly found the trial judge did not err in refusing to allow Defense Counsel to elicit testimony that Victim had photographs of her boyfriend's genitals on her phone where Petitioner was still able to effectively argue that the photographs provided a motive for Victim to fabricate the allegations, the evidence was inadmissible under the Rape Shield Law, and the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any potential probative value of the evidence was substantially outweighed by the evidence's potential for unfair prejudice.

## STATEMENT OF THE CASE

### **Legal History**

Petitioner was indicted at the February 2011 term of the Abbeville County Grand Jury for nine counts of second-degree criminal sexual conduct with a minor (2011-GS-01-45-2011-GS-47; 2011-GS-01-49-2011-GS-01-54). Petitioner proceeded to a trial by jury from May 27-29, 2014, in Abbeville, South Carolina. At the conclusion of trial, Petitioner was found guilty of one count of second-degree criminal sexual conduct with a minor (2011-GS-01-46) and acquitted of the remaining counts. He was sentenced by the Honorable Donald B. Hocker to imprisonment for a period of sixteen years.

On October 19, 2016, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Tate, Op. No. 2016-UP-436 (S.C. Ct. App. filed October 19, 2016). Petitioner petitioned for rehearing on November 3, 2016. On December 14, 2016, the Court of Appeals denied the petition for rehearing and attached a substituted opinion that affirmed Petitioner's conviction and sentence. Petitioner filed a second petition for rehearing on December 29, 2016. Petitioner's second request for rehearing was denied on January 10, 2017. Petitioner timely submitted a Petition for Writ of Certiorari, and this Return follows.

### **Factual History**

The State hereby incorporates by reference the Statement of Facts from the Final Brief of Respondent.

## ARGUMENT

- I. **The Court of Appeals properly declined to apply State v. Beaty, Op No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13-21) in Petitioner’s case because Beaty expressly states it applies only to cases tried after the opinion. Further, the trial judge’s decision to follow the established procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts did not violate Petitioner’s constitutional rights to a fair trial and due process of law.**

### **Relevant Facts**

Prior to closing arguments, Defense Counsel informed the trial judge she had a motion about the order of closing. ROA. p. 194. Defense Counsel noted she also had a written motion in support of her argument. ROA. p. 284. In presenting her motion, Defense Counsel argued:

But the only thing I would add is that if this is - - if this is the way it’s done in civil cases where you’re not dealing with somebody’s constitutional rights, and that’s the way it’s done, then that’s the process that needs to be used in criminal cases where the State has the burden of proof beyond a reasonable doubt. The standard of proof is higher. There are constitutional rights implicated, and for all those reasons we think that this practice of allowing it the way it’s been done needs to change.

ROA. p. 286. The trial judge denied the defense’s motion. ROA. p. 286. Following closing arguments by both the State and the defense and the judge’s instructions to the jury, Defense Counsel noted several things in the State’s closing argument that she claimed she would have responded to had she been able to have the last argument. ROA. p. 340.

### **Discussion**

Petitioner contends the Court of Appeals erred in failing to address the applicability of State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13-21), to Petitioner’s case. Specifically, Petitioner asserts this Court should grant certiorari to review this issue because the decision of the Court of Appeals is in conflict with the Beaty decision. Petitioner identified several comments made by the State during closing argument he

wanted to respond to and avers that his inability to respond to the Solicitor's comments constitute a deprivation of his right to a fair trial and due process of law. Petitioner thus contends the order of closing arguments was not harmless, as it was found to be in Beaty. To the contrary, the Court of Appeals properly declined to apply Beaty because the Beaty opinion expressly states the rule applies only to cases tried "after this opinion becomes final." As of the date of the State's Return, the State's petition for rehearing is still pending in Beaty, thus Beaty is not even final. The trial judge's decision to follow the decades-long procedure of allowing the prosecution to open its closing argument on the law and argue last on the facts did not violate Petitioner's constitutional rights to a fair trial and due process of law.

In State v. Beaty, Beaty argued the trial judge erred in failing to require the State to open fully on the law and facts in its closing argument, and to limit the State's reply to matters raised in Beaty's "middle" closing argument. Beaty asserted without such a rule, his procedural due process rights were violated. This Court found that "in a criminal trial where the party with the right to middle argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter." The Court subsequently held that after reviewing the State's arguments, any error in the trial judge's denial of the motion was harmless in Beaty's case. This Court concluded by stating:

Further, we hold that in criminal cases tried **after this opinion becomes final**, if requested by the party with the right to second argument, the party with the right to open and close will be required to open in full on the law and the facts, and be limited in reply to addressing the other party's argument and not permitted to raise new matters.

(emphasis added).

Accordingly, since Beaty plainly confines its holding to cases tried after it, Petitioner's assertion that the decision of the Court of Appeals in this case conflicts with Beaty is simply incorrect. The trial in this case was years before the Beaty decision, and as of the date of this Return, the State's petition for rehearing in Beaty has not been denied, thus the Beaty decision has not yet become final. Since the Beaty opinion is applicable only to cases tried after the opinion becomes final, the Court of Appeals did not err in declining to apply it to Petitioner's case.

Moreover, even if Beaty and its analysis applied in Petitioner's case, the Court should similarly conclude that any error in the trial judge denying his motion to require the State to open in full was harmless. In order for the trial judge's decision to follow the then-established order of closing arguments to be prejudicial, it must have made a difference in the jury's verdict. See Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (holding that in order to demonstrate prejudice, there must be a "reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). Petitioner can make no such showing in this case. Petitioner points to five specific statements by the Solicitor as proof he suffered harm as a result of the Court's ruling. At trial, Petitioner proffered what response he would have made to those five statements if given the opportunity.

First, Petitioner takes issue with the Solicitor's statement to the jury that, "Defense Counsel wasn't there and can't tell you what happened." ROA p. 340. Petitioner states "The obvious response would be that the prosecutor was not there either." Pet. for Writ of Certiorari p. 9. Second, Petitioner takes issue with a personal story relayed by the Solicitor where he discussed forgetting details like what clothing he wore during a traumatic event. ROA. P. 340. Petitioner would have liked to argue that the case was not about clothing and that clothing paid

almost no role in the evidentiary presentation in the case. Third, Petitioner argues the Solicitor made an “absolute misrepresentation to the jury about the DNA evidence.” ROA. p. 340. Fourth, Petitioner contends the Solicitor made a misrepresentation when stating there was no dispute about Victim telling her boyfriend about the assaults a month and a half before, but Victim earlier testified she could not remember when she told her boyfriend about the assaults. ROA. p. 341. Fifth, Petitioner avers he was prejudiced when the Solicitor stated during his closing “how glad he was to be on this side and that his ethical obligations were different.” ROA. p. 341. Defense Counsel wanted the chance to tell the jury he defended a child sexual abuse case in the Eighth Circuit earlier this year and got an acquittal, and also defended a child sexual abuse case in another circuit.

These five statements do not present the kind of prejudice that would influence the jury’s verdict. All of the complained of comments either deal with factual discrepancies or a desire for petty sniping between Defense Counsel and the Solicitor. None of the comments garner sufficient prejudice to deny Petitioner any constitutional right. The allegations that the Solicitor mischaracterized or misstated evidence is further harmless because the trial judge, as is done in all criminal cases, repeatedly instructed the jury that they were the fact finders in the case. The jury also understood that arguments made by counsel were not evidence because the trial judge further instructed them that “You are to consider only the testimony which has been presented from the witness stand any exhibits which have been made a part of the record in this case and any stipulations of counsel.” ROA p. 330. Therefore any alleged error in this case, as it was in Beaty, is clearly harmless. This Court should deny certiorari.

- II. **The Court of Appeals properly found the trial judge did not err in denying the defense's motion for a mistrial where the victim's emotional state during the trial did not constitute the requisite manifest necessity to warrant the declaration of a mistrial.**

### **Relevant Facts**

During the defense's opening argument, Victim became visibly upset. Defense Counsel briefly paused and told the court, "Your honor, it looks like – it looks like [Victim] is upset and I don't want that to distract the jury." ROA. p. 9. The judge briefly spoke with both lawyers at the bench before Defense Counsel continued her opening arguments. ROA. pp. 9-10. Victim's emotional state came about shortly after Defense Counsel referred to her as a story teller akin to Stephen King or James Patterson. ROA. pp. 8-9. During the next recess, the judge noted for the record that Victim became upset during the Defense's opening statement. ROA. p. 28. The trial judge noted the court "has no problem with that, but if that's still a recurring problem then I think we ought to agree that she needs not to be in the courtroom because of the potential nature it has to be disruptive. So just as a cautionary matter." ROA. p. 28.

On direct examination, Victim became emotional while describing the first instance of sexual assault by Petitioner. ROA. p. 84. The Solicitor asked if Victim would like to take a break and she indicated that she would. ROA. p. 84. After the jury exited the courtroom, the Solicitor asked the court how it would like to handle Victim's testimony during the spells where she became emotional. ROA. pp. 84-85. The trial judge replied:

Well, evidently it's very difficult for her to testify. She's just going to have to - - she's going to have to do the best job she can and, you know, we'll just have to, you know, muddle our way through it. Possibly you could, without discussing her testimony, just maybe talk with her, and she's going to have to, you know, try to - - you know, try not to be emotional. Easy for me to say.

ROA. p. 85.

The judge instructed Victim, “I know this is difficult for you to testify. I understand that. But it’s really important that you do the very best that you can and there is a lot to cover in questions that will be asked of you. So you just need to do the very best that you can so we can get through your testimony.” ROA. p. 85. Victim was able to get through the remainder of her direct testimony without any more periods where she was visibly emotional.

During the lengthy cross-examination by Defense Counsel, Victim indicated that she did not want to keep talking about the incident. ROA. p. 155. When asked by Defense Counsel whether she could keep going, Victim requested a break. ROA. p. 155. After Victim stepped down from the witness stand, the trial judge told the solicitors, “I realize she’s emotional. I understand that. But I don’t want this - - and this is - - I’m not commenting on - - but it’s being disruptive. Okay? So I want both of you all to go out there and talk to her.” ROA. p. 155. After a brief recess, prior to the jury returning to the courtroom, the trial judge stated:

I don’t want any perception of anyone to think that I’m not being unsympathetic. But I’ve got to maintain decorum in this courtroom. And regardless of the nature of the allegations and the emotions involved and everything, I’ve still got to maintain decorum, and I just can’t tolerate the witness storming out of the courtroom in the manner in which she did. I think the vast majority, if not all of the jurors, were back in the courtroom, or most of them at least were back in there when that took place. But I just - - and I hope both Solicitors have talked with her. And I know this has not been an easy experience for this witness to be testifying. But nonetheless, she’s got to be aware that we can’t allow that sort of conduct.

ROA. p. 156.

Defense Counsel moved for a mistrial, asserting that it was warranted “because of the pretty extreme display of emotion that was going on while [Victim] was sobbing as the jury left the jury box and while the door back there behind the jury box was still open she started yelling out for her mother . . .” ROA. p. 157. The trial judge denied the defense’s motion, ruling:

In light of the fact that we've had a lot of emotion displayed by this witness throughout her testimony, a lot of crying, I think she's gone through a good many Kleenexes. We have had to take a break or two. I think in light of that then I don't see where that necessarily would create the type and amount of prejudice, if any. But certainly not the amount and type of prejudice that would justify a pretty severe remedy of declaring a mistrial. So I'm going to deny it.

ROA. p. 158. The trial judge later noted "[T]his is just inherent in a case like this that there is going to be a lot of emotion." ROA. p. 159. The trial judge further stated, "We may have some other witnesses get very emotional, too, when it's all said and done in this case. I don't know that. But taking everything into consideration I don't think the justification is there to grant a mistrial." ROA. p. 159. Defense counsel did not request a curative instruction at any point in the proceeding.

During her closing argument, Defense Counsel highlighted Victim's emotional state in order to further her assertion that Victim was a "storyteller," stating:

They're calling him a child molester. So yes, he gets to have an advocate who gets up and says that's a story. That is not true. And if it really isn't true, is it worse to be called a storyteller than it is to be called a child molester? The first time you see [Victim's] emotional reaction is when I was giving you my opening statement and telling you how I was going to be talking about these different versions of her story. And when she knew that was going to happen she got upset. And you can interpret that, I guess one of two ways. She was crying because what happened to her was so horrible and she doesn't like having to go through it again or she's crying because somebody is pointing out the problems with the things she's saying and the reason that you shouldn't believe it, and that - - and that is difficult for her. And there may be other ways to interpret it. I don't know.

ROA. p. 308.

During the State's closing argument, the Solicitor noted the heinous nature of sexual abuse crimes involving the parent of a child and stated, "And I can't imagine the emotional trauma of coming in here and having to talk about it four years later." ROA. p. 320. The Solicitor

then told the jury that one of the greatest tasks before them as jurors in these case was to judge credibility. ROA. pp. 320-321. The Solicitor stated:

And the one thing you got is you get to judge the demeanor of the people in the courtroom. Their manner, their body language, how they testified to you. You saw the raw emotion of that young lady. You saw her to say to Ms. Nelson (Defense Counsel), I don't want to think about it. You're making me go back and back through and I don't want to think about it. I don't want to relive it. Don't you understand that. That's what this child said to this lady. Now, I understand as a grown attorney, having done this over and over again, maybe it's not a big deal. To that child, it was a very, very big deal.

ROA. p. 321. The Solicitor later noted "You look at what those witnesses said and you decide if you're convinced this man did penetrate that child. Was that a emotion you watched real. Because if she's made all this up and she's put on that kind of act, she deserves an Academy Award, because that was compelling." ROA. p. 324.

### **Discussion**

Petitioner asserts the trial judge erred in refusing to declare a mistrial due to Victim's shows of emotion during trial. Specifically, Petitioner contends the show of emotion by Victim disrupted the trial and improperly influenced the jury to decide the case on emotion. The State submits this argument is without merit, as the trial judge properly denied the motion for a mistrial where there was no showing of manifest necessity to warrant the declaration of a mistrial.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and quotation marks omitted). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case.

State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). “A mistrial should only be granted when ‘absolutely necessary,’ and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). “The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

South Carolina Courts have repeatedly found displays of emotion to be insufficient grounds for a mistrial. In State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996), the South Carolina Supreme Court was faced with the question of whether a mistrial was warranted where the victim’s sister had an emotional outburst while on the witness stand. Specifically, when asked to identify the defendant in the case, she addressed the defendant, stating, “Why, Shawn? Why did you do it? ... He didn't have to take her life.” Id. at 90. The judge immediately sent the jury away from the courtroom and called a short recess. Id. at 90-91. The Court found the trial judge did not abuse his discretion in declining to declare a mistrial. The Court stated, “Given that the trial judge was in the best position to assess the degree to which the jury may have been prejudiced by the outburst, he did not abuse his discretion in denying Anderson's mistrial motion.” Id. at 93. The Court emphasized the fact that the judge dismissed the jury and called a recess as soon as the outburst occurred in order to give the witness time to calm down. Id. The Court also opined the jury likely understood the witness’s outburst as an expression of grief over the death of her sister. Id. Finally, the Anderson Court noted that a

curative instruction was unnecessary in the case and would have actually called the jury's attention to the issue and increased the risk of unfair prejudice to the defendant. Id. at 94.

In reaching its decision that a mistrial was not warranted in the case, the Anderson Court cited the opinion of the South Carolina Supreme Court in State v. Wagstaff, 202 S.C. 443, 25 S.E.2d 484 (1943). In Wagstaff, the mother of a rape victim was testifying at the trial of the alleged rapist. At the conclusion of her testimony, the mother rushed toward the defendant screaming, "I could tear your eyes out." After noting the general rule that a court should grant a mistrial only when there is "manifest necessity" to do so, the Court stated:

We believe the jury could readily understand that the witness in question might have a hostile attitude toward the accused, because of the natural effect of the circumstances on her emotions, although there was nothing whatever in her testimony tending to show his guilt, and hence her attitude was based solely upon the testimony of others. . . . When all the circumstances of the instant case are considered we believe it is clear that even if a motion for a mistrial had been made the trial Judge would not have been justified in granting it, in the proper exercise of his discretion. There was certainly no manifest or absolute necessity for such action.

Id. at 453-54.

In State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), the victim's mother and aunt loudly stormed out of the courtroom during the cross examination of the defense medical expert. Id. at 596. The South Carolina Supreme Court found that the trial judge did not abuse his discretion in denying the defense's motion for a mistrial. Id. at 597. The Court referenced Anderson, noting that as in Anderson, the jury was already aware of the mother's feelings about the death of her son and likely understood her outburst as an expression of this grief. Id.

In State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996), this Court dealt with a situation where there was audible crying by spectators during the victim's testimony. The

defense moved for a mistrial. Id. at 316. The trial judge stated he did not believe any displays of emotion thus far could have tainted the jurors. Id. However, as a precaution he cleared the courtroom of everyone except the press and the victim's father for the remainder of her testimony. Id. In order to explain to the jury why the courtroom was suddenly emptier, the trial judge informed the jury that the courtroom had been cleared due to the display of emotion by observers. The judge cautioned the jurors that they were not to draw any inferences from this fact and that they were to render their verdict based on the testimony and evidence presented at trial. Id. This Court found that the trial judge did not abuse his discretion in denying the defense motion for a mistrial. Id. at 318. While Jones demonstrates the deference given to trial judges by appellate courts, it is distinguishable from the current case in that the trial judge elected to clear the courtroom and provide a curative instruction. However, a curative instruction was necessary in the case because the jury undoubtedly had significant questions about why they were returning to a nearly empty courtroom. In the current case, there were no major changes, like the emptying of a courtroom that would necessitate an instruction to the jury.

All of the aforementioned cases demonstrate the view of South Carolina appellate courts that a mistrial is an extreme measure that should only be used in the most grievous situations. The show of emotion by Victim in the current case was not of the extreme nature that would warrant the declaration of a mistrial. Victim's occasional bouts of crying and single instance where she called out for her mother are no more severe than the situations dealt with by the courts in Anderson, Wagstaff, Hughes, and Jones. Furthermore, there was no accompanying testimony like in Anderson and Wagstaff, where the parties who had an emotional outburst directly addressed towards the defendant.

The trial judge also limited any potential prejudicial effect of Victim's emotion. As in Anderson, the trial judge called a recess during both the direct examination and cross-examination of Victim when she began to get emotional in response to questioning. These brief recesses gave the witness time to calm down and limited the amount of crying seen by the jury. Therefore, the three occasions where Minor began crying were simply not enough to justify the declaration of a mistrial. Minor's occasional crying and calling for her mother did not prejudice the defense to the point where there was manifest necessity to terminate the proceeding.<sup>1</sup>

Petitioner repeatedly notes a curative instruction was not given in the case; however no curative instruction was ever requested by the defense. Furthermore, as in Anderson, a curative instruction was not necessary and arguably would have prejudiced the defense by calling the jury's attention to the issue.

Courts in other states have also found emotional behavior akin to that shown by Victim in this case to be insufficient grounds for a mistrial. While Anderson, Wagstaff, Hughes, and Jones demonstrate great deference by South Carolina appellate courts to the trial judge's finding that a mistrial was unnecessary and an attitude that mistrials are reserved for only the most extreme and prejudicial situations, they do not deal directly with a situation where the victim had an

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<sup>1</sup> Petitioner's assertion that the Solicitor instructed the jury to decide the case on emotion is simply not correct. Petitioner argued that the jury heard from a "wound up" Solicitor in closing that Victim's raw emotion was proof that she was telling the truth. Petitioner also attempts to argue that the Solicitor instructed the jury to use the emotion of a witness to form the basis for its verdict. Pet. for Writ of Certiorari p. 23. The Solicitor was simply reminding the jury that one of its core functions was to judge the credibility of witnesses. This is consistent with the trial judge's later instruction to the jury, "Necessarily, you must determine the credibility of witnesses who have testified in this case . . . You may also consider the appearance and manner of a witness while on the witness stand." ROA. p. 334. This instruction is fully consistent with the model good character jury instruction contained in the most recent version of the South Carolina Judicial Department's general sessions bench book. See 2015 Suggested General Sessions Jury Instructions, <http://www.sccourts.org/juryCharges/GSInstructions.2015.pdf>. Also, the Solicitor's mention during closing of Victim's "raw emotion" at trial was in response to Petitioner's closing, where Defense Counsel directly commented on Victim's emotion at trial and told the jury that her emotion could have been a reaction "to somebody is pointing out the problems with the things she's saying and the reasons that you shouldn't believe it." ROA. p. 308.

“emotional outburst” while on the witness stand. However, there is overwhelming out-of-state authority where courts have adjudged behavior similar to or more extreme than that shown by Victim to not warrant a mistrial.

In Young v. State, 422 S.E.2d 227, 228 (Ga. Ct. App. 1992), Young contended that the trial court erred in denying his motion for a mistrial after the victim began crying uncontrollably on three separate occasions during her testimony, necessitating breaks in the proceedings. The trial judge denied the mistrial motion, noting that although the victim had become emotional at times, these episodes in their entirety were not of such a consequence that it would deprive appellant of his right to a fair trial. Id. Young also complained that the trial judge did not give a curative instruction. Id. at 228-29. The Georgia Court of Appeals noted the appellant had not requested a curative instruction at trial. Id. at 29. “It is only where the accused would be denied a fair trial in the absence of corrective instructions that such must be given even in the absence of a request or a mistrial declared.” Id.

In Paige v. State, 627 S.E.2d 370, 373-374 (Ga. Ct. App. 2006). Paige asserted he received ineffective assistance of counsel where his counsel failed to move for a mistrial or request a curative instruction after the victim cried on the witness stand, requiring a recess to be taken. The victim started crying very hard when asked to identify the clothing she was wearing at the time of her attack. Id. The Georgia Court of Appeals determined the trial judge would not have abused his discretion in refusing to declare a mistrial, noting there was no evidence that she became hysterical or made any prejudicial comments. Id. Furthermore, trial counsel acknowledged that she was more composed after the recess. Id.

In Miller v. Com., 925 S.W. 2d 449, 453 (Ky. 1996) (overruled on other grounds by Garrett v. Com., 48 S.W. 3d 6 (Ky. 2001)), the victim broke into tears while on the witness stand

and was unable to continue testifying. A recess was granted during which time the victim left the courtroom in order to compose herself. Id. However, the victim's cries of "I don't want to. I don't want to," could still be heard in the courtroom. Id. The victim eventually returned to the stand where she testified without further difficulty. Id. The Kentucky Supreme Court found that the trial judge did not abuse his discretion in denying the motion for a mistrial, noting the trial judge was in the best position to ensure a fair trial and determine whether remedial measures were necessary. Id.

In State v. Newman, 283 So.2d 756, 758 (La. 1973), Newman contended the trial judge erred in refusing to grant a mistrial when a thirteen-year-old witness who identified him in a burglary case began hysterically crying while testifying at trial. The trial judge noted that the crying was not unexpected by the jurors in light of the age of the witness and the circumstances, and that in all probability it would happen again should the case be retried. Id. The Louisiana Supreme Court found the trial judge's denial of the mistrial motion to be proper. Id.

All of the above cases reinforce the trial judge's conclusion that Victim's shows of emotion at trial were not grounds to warrant a mistrial. The Miller case is nearly identical to the case at hand, as the victim's cries of "I don't want to" are very similar to Victim calling for her mother as the jury exited the courtroom. As the Miller Court noted, the trial judge is in the best position to ensure a fair trial and determine whether any remedial measure are necessary. The trial judge had the best view of the situation and limited any potential prejudice from Victim's crying by calling a recess during her spells of crying while on the witness stand. The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (citing State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981)). The trial judge, thus, did not abuse his discretion in refusing to declare

a mistrial, as the periods of emotion demonstrated by Victim were not of the extreme nature necessary to constitute manifest necessity for a mistrial. This Court should deny certiorari.

**III. The Court of Appeals properly found the trial judge did not err in refusing to allow Defense Counsel to elicit testimony that Victim had photographs of her boyfriend's genitals on her phone where Petitioner was still able to effectively argue that the photographs provided a motive for Victim to fabricate the allegations, the evidence was inadmissible under the Rape Shield Law, and the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any potential probative value of the evidence was substantially outweighed by the evidence's potential for unfair prejudice.**

### **Relevant Facts**

Prior to trial, the Solicitor noted that in his Rule 5 disclosures, he accidentally released three photographs that were taken off a cell phone showing the genitals of a minor boy. ROA. p. 3. The Solicitor noted he should not have released them, as they would be improper to disclose, display, or disseminate in any form. ROA. p. 3. Defense Counsel agreed the photographs should not have been disclosed to her. ROA. p. 86. Defense Counsel then stated, "It would not be my intention to try to introduce that photograph unless - - unless for some reason it - - the fact that they existed on this young lady's phone is disputed." ROA. p. 3. Defense Counsel continued, "And then, you know, if there was some way to describe them to the jury short of them seeing the actual images. But I- - you know it wouldn't be my desire to introduce them." ROA. p. 3.

The trial judge then stated:

Well, if I understand what you're saying, you don't want to concede 100 percent at this stage that that you would not consider some sort of relevant evidence. And we'll just see how it goes. Quite frankly, I don't see where it would be relevant. But I'm not making any rulings on that . . . And if some reason the Defense feels like they want to have those introduced then we'll deal with that as an evidentiary matter.

ROA. p. 4.

During Mother's testimony, Defense Counsel began to ask whether Mother had discovered photographs of T.C. on Victim's phone. ROA. pp. 34-35. The Solicitor immediately objected and the judge sent the jury out of the courtroom so that the trial court could take up the matter of law. ROA. p. 35. The Solicitor argued:

I'm assuming, and I may have pulled the trigger too quick, the pictures the Defense is getting ready to ask about are the pictures that I advised the court about earlier which would have no relevance to the accusations of this crime, unless they're trying to put it in through some type of third party guilt, which clearly they haven't met the statutory requirements of that, or they're trying to go into some other alleged sexual activity by the child, which would be certainly objected under the Rape Shield law. And I can't imagine what other sense of relevance it may have.

ROA. p. 35.

Defense Counsel argued, "I think those photographs coming in on that phone at the time that they did go to a motive for why [Victim] would be saying these things about [Petitioner], because she got in trouble for the pictures being on her phone." ROA. p. 36. The Solicitor countered that the pictures were completely irrelevant and would certainly be more prejudicial than probative under Rule 403, SCRE. The trial judge asked counsel whether the photographs were received in conjunction with a text message or were the pictures simply in the phone's photo album. ROA. p. 36. The Solicitor clarified for the judge that the pictures were not received in conjunction with a text and were simply found on the phone. ROA. p. 37. There were no phone records tying the picture to one particular person. ROA. p. 37. The Solicitor disclosed that, from his own investigation, he discerned the pictures came from T.C. ROA. p. 37. The trial judge asked Defense Counsel:

Why do they have to know it's his private parts? I realize this is - - this is a case involving sexual allegations. I understand that. And that she has made allegations against the Defendant of sexual in nature. I understand that. But why does the jury

has to know that there are sexual pictures on her phone giving her the motive to fabricate these allegations?

ROA. p. 38. The Solicitor offered, "To give you a good example, Your Honor, let's say she was actually caught engaging in intercourse with [T.C.] and that was the basis for some discipline, the Rape Shield still applies. You can't get into you had sex with [T.C.] and that's why you got in trouble, isn't it." The Solicitor continued, "They couldn't do that. So why can they go into the fact that there was this picture on the phone?" ROA. p. 39. Defense Counsel maintained that the content of the pictures was relevant because it goes to motive and why the Victim could fabricate the allegations. ROA. p. 39.

The trial judge ruled:

I don't really see much of a difference in them seeing pictures or being told that there are pictures of his male private parts. I mean, they can - - if it's male private parts they can envision in their mind what the pictures show. I just don't - - I think you can certainly ask if there were pictures on the phone concerning [T.C.] that the mom disapproved of, but if he did, but I don't think we need to tell the jury that they are actually [T.C.'s] private areas. I don't think the jury needs to know that. I don't see where there's any relevance. You can still argue motive, because she got into trouble allegedly over these pictures on the cell phone. . . .But the jury is not going to know that there were pictures of his private area.

ROA. p. 40. The trial judge later continued, "I think motive can be established without the jury knowing that the pictures were of male genitalia. So the question is - - I guess the objection by the State is sustained." ROA. p. 42.

Following a proffer of Mother's testimony by the defense, the judge clarified the scope of what Defense Counsel could ask regarding the pictures, stating, "So the ruling is that nothing can be mentioned to the jury out of what the actual pictures show. Certainly the use of the word inappropriate, if that's the word of choice to describe the pictures. I'll allow that. But they will not be told actually what the pictures show." ROA. p. 44. Defense Counsel subsequently asked

Mother “And did there come a time when you saw at least one inappropriate photograph of [T.C.] on [Victim’s] phone?” ROA. p. 45. Mother responded that she had seen the photograph and talked to T.C.’s parents about it, who also agreed the picture was inappropriate. ROA. p. 45. Mother later testified that Petitioner was the one who made her aware of the inappropriate photographs. ROA. pp. 46-47.

During Defense Counsel’s cross-examination of Victim, Victim was asked whether her phone had three inappropriate pictures of T.C. on it and Victim responded that it did. ROA. p. 162. The pictures were subsequently discovered by Petitioner and Mother. ROA. pp. 162-163. Defense Counsel asked Petitioner whether she got in trouble for the photographs, and Victim replied in the affirmative. ROA. p. 163. Defense Counsel then asked Victim whether her phone had been taken away when Petitioner and Mother found the pictures, and Victim replied that it had been. ROA. p. 163. Defense Counsel also asked Victim whether it was ten days after Petitioner’s discovery of the pictures when she disclosed Petitioner’s abuse to Holland and Lindler. ROA. p. 163. Victim did not recall the specific number of days but agreed that the disclosure occurred a short time after the phone incident. ROA. p. 163.

One of the witnesses called by the defense was Bart Cave. ROA. p. 246. Cave works in the computer crime center at SLED. ROA. p. 247. Cave was involved in Petitioner’s case because SLED received phones that needed to be examined. ROA. p. 248. Defense Counsel asked Cave whether any of the phones contained inappropriate photographs. Cave discovered three inappropriate pictures on one of the phones. ROA. p. 248. Defense Counsel also asked Cave what the dates were of the photographs on the phone. ROA. p. 249. Cave explained that there is a date and time associated with the pictures of when they were on the device. ROA. p.

249. Cave testified photographic files showed dates of August 14, 2010, and August 15, 2010. ROA. p. 249.

During closing argument, in trying to convince the jury Victim fabricated the allegations against Petitioner, Defense Counsel cited Victim's relationship with T.C. as the motivation for Victim to lie. ROA. p. 312. Defense Counsel attempted to paint a picture where Victim somehow perceived Petitioner as an obstacle to her relationship with T.C. ROA. pp. 312-313. Defense Counsel argued:

And then the culmination of all that is when those inappropriate pictures turn up on the phone on August 14<sup>th</sup> and 15<sup>th</sup>. Mr. Cave told you about. [Victim] - - one of the things she was able to admit to was those pictures on her phone. Her mother admitted to seeing those. Her phone gets taken away. It gets talked about with [T.C.'s] parents. And then, just, what, a week and a half later. The pictures are there the 14<sup>th</sup> and 15<sup>th</sup>, so they've got to be found some time after that while they're at Blue Hole. And then on August 23<sup>rd</sup> all of this starts coming out. And then Keith is gone. The person who was awake most of the time, who stayed with the kids when [Mother] went to the hospital. . . . But he - - he's out of the picture and the boyfriend problem won't be a problem anymore. And then [Victim] at some point starts using contraceptives, and then in November there's an exam that shows some sort of penetration. So that's the only thing I know of to point to explain to you why this would have started coming up.

ROA. p. 313. When discussing the State's medical evidence during her closing, Defense Counsel also emphasized the fact that Victim was using contraceptives. ROA. p. 309.

### **Discussion**

Petitioner contends the trial judge erred in refusing to allow him to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals. Petitioner argues the trial judge's ruling is violative of his constitutional rights to present a defense and to confront his accuser. Petitioner asserts the content was necessary for the jury to understand Victim's purported motive to fabricate the allegations against Petitioner. This argument lacks merit. The trial judge's limitation of questioning regarding the photographs to whether there were inappropriate pictures

of T.C. on Victim's phone allowed the defense ample opportunity to argue Victim's punishment for the photographs motivated her to fabricate the allegations against Petitioner. Furthermore, allowing Defense Counsel the opportunity to elicit testimony about the specific content would have violated the Rape Shield Law. Finally, the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any probative value of the evidence was substantially outweighed by the evidence's potential for undue prejudice.

First, the trial judge did not err in refusing to allow Petitioner to elicit testimony that the photographs on Victim's phone showed T.C.'s genitals because the defense was still able to effectively argue Victim's punishment stemming from the photographs was the motive for her to fabricate the allegations against Petitioner. The trial judge's limitation on Petitioner's questioning did not implicate his constitutional rights to present a defense and to confront his accuser whatsoever.

The Confrontation Clause guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right to confront and cross-examine witnesses "is essential to a fair trial in that it promotes reliability in criminal trials, and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." United States v. Owens, 484 U.S. 554, 559 (1988) (citations and internal quotation marks omitted).

Petitioner was able to fully and vigorously cross-examine all witnesses presented by the State. Petitioner's rights of confrontation and right to present a defense were not implicated

whatsoever, and the judge's limitation of questioning regarding the photographs on Victim's phone still enabled the defense to argue motive. Defense Counsel was able to ask both Mother and Victim about "inappropriate photographs of T.C." found on Victim's phone. Defense Counsel also asked whether T.C.'s parents were contacted, whether punishment was doled out, and what the time and date of the pictures were. The inappropriate pictures found on Victim's phone were one of the major pieces of evidence relied upon by Defense Counsel in her closing argument. The trial judge's ruling that Petitioner not be allowed to question witnesses as to what specifically these "inappropriate pictures" contained did not impugn Petitioner's defense whatsoever. Petitioner could, and did, argue fully that the inappropriate pictures provided Victim a motive to fabricate the allegations against Petitioner. Thus, Petitioner's right to confrontation and right to present a defense were not violated. Furthermore, any alleged error in the trial judge's ruling regarding the content of the photographs was harmless, as Petitioner suffered no prejudice. Petitioner was still able to fully argue that Victim had a motive to fabricate these allegations by asking Victim, Mother, and Cave about the inappropriate pictures found on Victim's phone. Defense Counsel was able to vigorously argue throughout closing argument that Victim was a "storyteller" who had a very strong motive to fabricate the allegations.

Second, allowing Petitioner to elicit testimony concerning the content of the inappropriate photographs would have been violative of the Rape Shield Statute. S.C. Code Ann. § 16-3-659.1(1) provides, "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656." Allowing Defense Counsel to elicit testimony that Victim had photographs of T.C.'s penis on her phone would enable her to reference specific instances of Victim's sexual conduct. While Petitioner

contends the photographs were not “sexual conduct” because they did not depict Victim engaged in sexual acts, this contention is simply incompatible with the purpose and intent of the Rape Shield Statute. The presence of nude photographs of Victim’s boyfriend on her phone is certainly a “specific instance of sexual conduct” within the meaning of the statute.<sup>2</sup> Furthermore, Defense Counsel’s statements during closing arguments emphasizing the fact Victim was using contraceptives belies Petitioner’s argument that he did not intend to admit the photographs for any improper purpose, as it evinces a clear intent to attempt to point to other specific incidents of Victim’s sexual conduct that could explain the transection in her hymen that was discovered during her medical examination.

Third, the evidence was inadmissible under Rule 401, SCRE, and Rule 403, SCRE, as the evidence was irrelevant and any probative value of the evidence was substantially outweighed by the evidence’s potential for undue prejudice. All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.”). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact

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<sup>2</sup> It appears that the nude photographs of T.C. were taken with the cell phone’s camera and were not received in conjunction with a text or picture message. See ROA pp. 36-37. This makes the situation even more an “instance of sexual conduct,” as the obvious inference is that Victim took the naked photographs of T.C.

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

However, 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. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), *rev’d on other grounds*, 409 S.C. 524, 763 S.E.2d 22 (2014). 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).

The content of the photographs on Victim’s phone was not relevant whatsoever. The content of the photographs had no bearing on the proceeding, and did not make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without the evidence. The only stated purpose the defense offered for the pictures was that they were relevant to the alleged motive of Victim to fabricate the allegations. The specific content of the pictures was not relevant whatsoever to Victim’s alleged

motive. The existence of the photographs themselves and Victim's punishment for possessing them are the only relevant evidence that goes towards motive.

The current case is immediately distinguishable from State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989), which is relied upon greatly by Petitioner to further his argument the evidence was relevant. In Finley, the defendant sought to introduce evidence of specific instances of the victim's sexual conduct. Id. at 200. Finley's defense was that he observed the victim having sexual intercourse with her neighbor and that the charges were fabricated to silence him about the victim's sexual conduct with the neighbor and to extort money from him. Id. The trial judge denied Finley's motion, ruling that the evidence violated the Rape Shield Statute. The South Carolina Supreme Court found:

We hold that exclusion of the proffered evidence constitutes prejudicial error. Appellant's defense was that he did not commit the assault, that the charges were fabricated to silence him about the complainant's sexual conduct with her neighbor, and to extort money from him. The unique facts of this controversy, coupled with the appellant's right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness. Since the proffered evidence is essential to a full and fair determination of appellant's guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party, we conclude that such evidence does not come within the purview of the Rape Shield Statute.

Id. Notably, the Finley Court reaffirmed the holding that the State's interest in protecting criminal sexual conduct victims is stronger than the right of a defendant to attack such a victim's character in a manner that has limited or no relevance to the question of guilt. Finley is immediately distinguishable from Petitioner's case because Victim was cross-examined about her purported motive to fabricate the allegations against Petitioner, while Finley was completely barred from asking any questions that could aid his motive defense. Petitioner was able to ask

Victim whether she had inappropriate pictures of T.C. on her phone that she was punished for. Petitioner pushed that alleged motive as proof that Victim was a “storyteller.” The content of the photographs themselves was not needed whatsoever in order for Petitioner to argue his theory of the case that Victim fabricated rape allegations because she was caught with inappropriate pictures on her phone. The trial judge’s ruling struck a careful balance between protecting Petitioner’s rights to present a defense and confront his accuser while still protecting Victim’s character from assault on matters that have limited or no relevance to the question of guilt.

Similarly, Petitioner’s comparisons of the current case to State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) are inapposite. As noted by Petitioner, the Grovenstein Court held that evidence of a child victim’s prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim’s ability to testify about alleged sexual conduct. Id. at 219. However, whether Victim was familiar with the sexual conduct that was alleged here was not an issue in the proceeding. In State v. Williams, 409 S.C. 455, 761 S.E.2d 770 (2014), Williams argued the trial court erred in excluding evidence of prior sexual abuse of a victim by the victim’s stepbrother. The Court found the situation distinguishable from that in Grovenstein, ruling the evidence Williams sought to admit did not provide an alternate explanation as to how the victims were familiar with the sexual conduct they alleged Williams to have committed because the allegations against Williams were not similar to the alleged abuse by the victims’ stepbrother. Id. at 466. The Court emphasized that Williams was accused of digitally penetrating the victims, while the victim’s stepbrother allegedly forced the victim to perform oral sex. Id. The Court noted that the fact that the victim was previously forced to perform oral sex would not show a source of the victim’s ability to testify about the defendant’s acts of digital penetration. Id. As in Williams, the contents of the photographs were not similar

whatsoever to the abuse committed by Petitioner. The fact that Petitioner had nude photographs of her boyfriend did not show a source of the victim's ability to testify about instances of sexual abuse. Furthermore, the issue of whether the evidence was relevant to demonstrate an alternate explanation as to how Victim was familiar with various aspects of sex is not preserved for appellate review. Defense Counsel's stated reason for why the content of the photographs should be admissible all revolved around Victim's motive and credibility. ROA. pp. 36-39, 41. Defense Counsel never argued to the trial judge that the content of the photographs was relevant to establish the child had an alternate source of sexual knowledge. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

Whatever probative value, if any, the evidence had was substantially outweighed by the risk of unfair prejudice and misleading the jury. The admission of the content of the photographs would have had an undue tendency to suggest a decision on an improper basis. The jury would have placed improper emphasis on the content of the photographs. The jury would not have seen the content of the photographs as proof of motive; instead, the jury would have viewed the photographs and believed T.C. was the likely source of the transection in Victim's hymen. As such, the highly prejudicial nature of the photographs leads to the conclusion that the probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury. For all these reasons, this Court should deny certiorari.

CONCLUSION

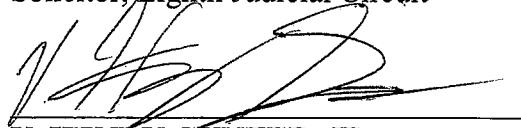
For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON  
Attorney General

V. HENRY GUNTER, JR.  
Assistant Attorney General

DAVID M. STUMBO  
Solicitor, Eighth Judicial Circuit



**V. HENRY GUNTER, JR.**  
**S.C. Bar No. 102259**

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3727

**ATTORNEYS FOR RESPONDENT**

March 23, 2017

STATE OF SOUTH CAROLINA  
In The Supreme Court

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On Writ Of Certiorari To The Court Of Appeals  
Appeal From Abbeville County  
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No: 2017-000230

---

THE STATE,

Respondent,

v.

KEITH DENVER TATE,

Petitioner.

---

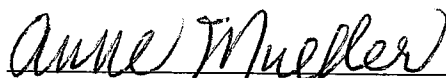
**PROOF OF SERVICE**

---

I, Anne Mueller, certify that I have served the Return to the Petition for Writ of Certiorari on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Susan B. Hackett, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 23<sup>rd</sup> day of March, 2017.



Anne A. Mueller  
Legal Assistant  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

# The Supreme Court of South Carolina

The State, Respondent,

v.

Keith Denver Tate, Petitioner.

Appellate Case No. 2017-000230


Lower Court Case No. 2011-GS-01-00046

---

ORDER

---

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT  
BY   
CLERK

Columbia, South Carolina

October 19, 2017

cc:

Susan Barber Hackett, Esquire  
Alan McCrory Wilson, Esquire  
Vann Henry Gunter, Jr., Esquire  
David Matthew Stumbo, Esquire  
The Honorable Emily Yeargin McMahan  
The Honorable Jenny Abbott Kitchings

**RECEIVED**  
OCT 19 2017  
APPELLATE DEFENSE

FORM 5

STATE OF SOUTH CAROLINA )  
County of ABBEVILLE )  
KEITH DENVER TATE # 236480 )  
Full name and prison number (if any) of Applicant )

IN THE COURT OF COMMON PLEAS  
2018-CP-01-064

v.

State of South Carolina )

APPLICATION FOR  
POST-CONVICTION RELIEF

2018 FEB 28 AM 9:45  
CLERK OF COURT  
STATE OF SOUTH CAROLINA  
COUNTY OF ABBEVILLE

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention MCCORMICK CORRECTIONAL INSTITUTION  
386 REDEMPTION WAY, MCCORMICK, S.C. 29899
2. Name and location of Court which imposed sentence GENERAL SESSIONS COURT,  
COUNTY OF ABBEVILLE, STATE OF SOUTH CAROLINA
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_  
NO CO-DEFENDANT(S)
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2011-GS-01-0045-2011-GS-01-0047
  - (b) 2011-GS-01-0049-2011-GS-01-0054

**TRUE COPY**  
BY M. Kennedy  
ABBEVILLE COUNTY CLERK OF COURT

(c) \_\_\_\_\_

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) MAY 29, 2014, Committed to the STATE Dept of Corr.
- (b) FOR A PERIOD OF 16 YEARS, ALL OTHER INDICTMENTS
- (c) WAS FOUND NOT GUILTY.

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty AFTER A PLEA OF NOT GUILTY
- (c) after a plea of nolo contendere \_\_\_\_\_

7. Did you appeal from the judgment of conviction or the imposition of sentence?

YES, THE JUDGMENT OF CONVICTION.

8. If you answered "yes" to (7), list:

- (a) the name of each Court to which you appealed:
  - i. S.C. COURT OF APPEALS FOR THE INITIAL BRIEF FOR DIRECT APPEAL
  - ii. S.C. COURT OF APPEALS FOR PETITION FOR REHEARING
  - iii. S.C. SUPREME COURT FOR WRIT OF CERTIORARI
- (b) the result in each such Court to which you appealed:
  - i. DENIED
  - ii. DENIED
  - iii. DENIED
- (c) the date of each such result:
  - i. AUG. 4, 2014 FOR DIRECT APPEAL
  - ii. JAN. 10, 2017 FOR PETITION FOR REHEARING
  - iii. OCT. 19, 2017 FOR WRIT OF CERTIORARI

Substituted and received DEC. 14, 2016  
(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_

(c) \_\_\_\_\_

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) TRIAL COUNSEL FAILED TO CONVEY PLEA OFFER.

(b) TRIAL COUNSEL FAILED TO OBJECT TO THE TESTIMONY OF STATE WITNESS.

(c) TRIAL JUDGE ERRORED IN HIS RULING OF CHAIN OF CUSTODY.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(b) the name and location of the Court in which each was filed:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(c) the disposition thereof:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(d) the date of each such disposition:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

\_\_\_\_\_ *No* \_\_\_\_\_

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) \_\_\_\_\_  
 (b) \_\_\_\_\_  
 (c) \_\_\_\_\_

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES  
 (b) your trial, if any? YES  
 (c) your sentencing? YES  
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES  
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?  
NO

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:  
 i. CHARLES E. GROSE JR., Suite 208, PARK PLAZA 600  
MONUMENT STREET, Box P-133 GREENWOOD, S.C. 29646  
 ii. JANNA A. NELSON, Suite 208, PARK PLAZA 600  
MONUMENT STREET, Box P-133 GREENWOOD, S.C. 29646  
 iii. \_\_\_\_\_  
 \_\_\_\_\_  
 (b) the proceedings at which each such attorney represented you:  
 i. ARRAIGNMENT AND PLEA  
 \_\_\_\_\_  
 ii. TRIAL  
 \_\_\_\_\_  
 iii. DIRECT APPEAL, REHEARING, AND WRIT CERTIORARI  
 \_\_\_\_\_

19. State clearly the relief you seek in filing this application:

RE-SENTENCING IN REFERENCE OF PLEA OFFER, AND NEW TRIAL IN REFERENCE OF OTHER ISSUES.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA )  
County of ABBEVILLE )

VERIFICATION

I, Keith D. Jate, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Keith D. Jate

SWORN to and subscribed before me this 26 day of February, 2018.

J. C. Jamiller - (L.S.)  
Notary Public

My Commission Expires: 12-16-2019

**APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF**

I, Keith D. Tate, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Keith D. Tate  
*Applicant*

SWORN or affirmed to and subscribed before me this  
26 day of February, 2018.

J Frankle  
*Notary/Public*

My Commission Expires: 12-16-2019

STATE OF SOUTH CAROLINA  
COUNTY OF ABBEVILLE

KEITH D. TATE # 236480  
Applicant,

v.

THE STATE OF SOUTH CAROLINA  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE EIGHTH JUDICIAL CIRCUIT

%A No.: 2017-000230

2018-CP-01-064

NOTICE OF MOTION TO AMEND  
PCR APPLICATION

NOW COMES THE APPLICANT, MOVING THE COURT TO ALLOW  
APPLICANT TO AMEND PCR APPLICATION WITH ANY ISSUES  
FOUNDED AFTER BEING APPOINTED COUNSEL, OR PROCEEDING  
PRO SE. PURSUANT TO THE SOUTH CAROLINA RULES OF  
CIVIL PROCEDURE, RULE 71.1(d) AND THE SOUTH CAROLINA  
POST-CONVICTION RELIEF ACT.

RESPECTFULLY SUBMITTED

/s/ Keith D. Tate

**TRUE COPY**  
BY *A Kennedy*  
ABBEVILLE COUNTY CLERK OF COURT

STATE OF SOUTH CAROLINA  
EIGHTH JUDICIAL CIRCUIT  
2018 FEB 23 AM 9:45  
CLERK OF COURT

STATE OF SOUTH CAROLINA  
COUNTY OF ABBEVILLE

KEITH D. TATE #236480  
APPLICANT,

v.

THE STATE OF SOUTH CAROLINA  
RESPONDENT.

IN THE COURT OF COMMON PLEAS  
FOR THE EIGHTH JUDICIAL COURT

c/a No.: 2017-000230  
2018-CP-01-064

PROOF OF SERVICE

I KEITH D. TATE (APPLICANT), CERTIFY THAT I HAVE THIS DAY SERVED APPLICATION FOR POST CONVICTION RELIEF UPON ABBEVILLE COUNTY CLERK OF COURT'S OFFICE ALONG WITH A MOTION TO AMEND LATER ANY ISSUES DEEM NECESSARY AFTER RECEIVING COUNSEL OR PROCEEDING PRO SE. BY DEPOSITING ONE ORIGINAL OF PCR APPLICATION AND MOTION TO AMEND OF THE SAME IN THE UNITED STATES MAIL (BY AND THROUGH THE MCCORMICK CORRECTIONAL INSTITUTION LEGAL MAIL SYSTEM).

THE ABOVE HAS BEEN SERVED ON THE BELOW ADDRESSE:

EMILY Y. McMahan  
ABBEVILLE COUNTY CLERK OF COURT  
POST OFFICE BOX 99  
ABBEVILLE, SC 29620

RESPECTFULLY  
/s/ Keith D. Tate

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS 26 DAY OF FEBRUARY 2018

NOTARY J. Franklin

EXP.: 12/2019

**TRUE COPY**  
BY McMahan  
ABBEVILLE COUNTY CLERK OF COURT

STATE OF SOUTH CAROLINA  
COUNTY OF ABBEVILLE  
2018 FEB 23 AM 9:45  
CLERK OF COURT

665

Keith D. TATE # 236480  
McCORMICK CORR. INST.  
386 REDEMPTION WAY  
McCORMICK, SC 29899

FEB. 24 2018

Emily Y. McMahan  
ABBEVILLE COUNTY CLERK OF COURT  
POST OFFICE BOX 99  
ABBEVILLE, S.C. 29620

RE: KEITH TATE V. STATE  
CASE No.: 2014-001694

DEAR CLERK:

PLEASE FIND ENCLOSED APPLICANT'S NOTICE OF MOTION TO AMEND HIS PCR APPLICATION, AND PROOF OF SERVICE. ALSO ENCLOSED IS A PRE-PAID SELF-ADDRESSED ENVELOPE FOR THE RETURN OF THE EXTRA COPY HERE WITH. PLEASE CLOCK STAMP FILE THE SAME AND RETURN IT. THANK YOU IN ADVANCE.

RESPECTFULLY

/s/ Keith D. Tate

STATE OF SOUTH CAROLINA  
COUNTY OF ABERDEEN  
2018 FEB 28 AM 9:45  
EMILY Y. McMAHAN  
CLERK OF COURT

STATE OF SOUTH CAROLINA, )  
 ) IN THE COURT OF COMMON PLEAS.  
 COUNTY OF ABBEVILLE. )


Keith Denver Tate, #236480, )  
 )  
 Applicant, )  
 )  
 v. ) CERTIFICATE OF SERVICE BY MAIL  
 )  
 State of South Carolina, ) 18-CP-01-064  
 )  
 )  
 )

The undersigned, an employee of the Abbeville County Clerk of Court’s Office, does hereby certify that a copy of Application for Post-Conviction Relief, Notice of Motion to Amend, and Proof of Service in the above-referenced matter was made upon the following persons by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 28th day of February, 2018, addressed as follows:

Justin J. Hunter, Esq.  
 Office of the Attorney General  
 Habeas Corpus  
 Post Office Box 11549  
 Columbia, SC 29211-1549

Solicitor’s Office (hand delivered)  
 ATTN: Yates Brown/Micah Black  
 P.O. Box 516  
 Greenwood, SC 29648

Keith Denver Tate, #236480, F 3-A-277  
 McCormick Correctional Institute  
 386 Redemption Way  
 McCormick, SC 29899

  
 \_\_\_\_\_  
 Melinda Kennedy, Common Pleas Clerk

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	FOR THE EIGHTH JUDICIAL CIRCUIT
	)	
Keith Denver Tate, #236480,	)	2018-CP-01-0064
	)	
Applicant,	)	
	)	
v.	)	<b>RETURN</b>
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

---

The State (Respondent), making its return to the application for post-conviction relief (PCR) filed February 28, 2018, would respectfully show this Court:

#### **I. Procedural History**

Keith Denver Tate (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. During its February 2011 term, the Abbeville County Grand Jury indicted Applicant for nine counts of Criminal Sexual Conduct with a Minor in the Second Degree (2011-GS-01-45. -46, -47. -49. -50. -51. -52. -53. -54). Public Defender Janna Nelson and Assistant Public Defender Shane Goranson represented Applicant. Assistant Solicitors C. Yates Brown and Lance Sheek prosecuted the case.

On May 27-29, 2014, Applicant proceeded to jury trial before the Honorable Donald B. Hocker, circuit court judge. On May 29, 2014, the jury convicted Applicant of one count of Criminal Sexual Conduct with a Minor in the Second Degree (2011-GS-01-0046) and acquitted Applicant of eight remaining counts. Judge Hocker sentenced Applicant to a sixteen year term of imprisonment.

Applicant filed a timely Notice of Appeal and the appeal was perfected by Appellate Defender Susan B. Hackett of the South Carolina Commission of Indigent Defense-Division of Indigent Defense. On appeal, Applicant raised the following issues:

I. Did the trial judge's failure to declare a mistrial based upon the alleged victim's multiple emotional outbursts that disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented violate Applicant's state and federal constitutional rights to a fair and impartial jury trial?

II. Did the trial judge's failure to require the state to open in full during closing argument and reply only to the defense's closing argument violate Applicant's state and federal constitutional rights to a fair trial and due process of law?

III. Did the trial judge's refusal to permit Applicant to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Applicant violate Applicant's state and federal constitutional rights to present a defense and confront his accuser?

(FBOA).

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence on October 19, 2016. State v. Tate, Op. No. 2016-UP-436 (S.C. Ct. App. filed October 19, 2016). Applicant petitioned for rehearing on November 3, 2016. On December 14, 2016, the Court of Appeals denied the petition for rehearing and attached a substituted opinion that affirmed Applicant's conviction and sentence. Applicant filed a second petition for rehearing on December 29, 2016. Applicant's second request for rehearing was denied on January 10,

2017. Applicant timely submitted a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was subsequently denied. The remittitur was issued on October 25, 2017.

## **II. Summary of Facts Adduced at Trial**

In July of 2009, Mother moved to Calhoun Falls in Abbeville County with her children and Applicant. Tr. p. 73. Applicant was Mother's boyfriend and the father of one of her sons. Tr. p. 74. Mother had three children: Victim, T.R., and T.R. Tr. p. 72. Applicant and Mother dated for three or four years and cohabitated for the entirety of the relationship. Tr. p. 74. Mother suffers from significant health problems including seizures, schizophrenia, bipolar disorder, fibromyalgia, rheumatoid arthritis, and neuropathy. Tr. p. 75. To treat her various illnesses, Mother took around thirty-six pills per day and had prescriptions for Xanax, Geodon, Depakote, Ativan, Seroquel, Lortab, Phenergan, Flexeril, and Zanaflex. Tr. pp. 74-75. As a result of being heavily medicated, Mother slept most of the day. Tr. p. 76. Mother would take the first dose of medication and sleep until 5:00 p.m. or 6:00 p.m., take the second dose and sleep until 9:00 p.m. or 10:00 p.m., then take a third and final dose and sleep through the night. Tr. p. 75. Due to Mother's poor health, Applicant primarily cared for the children. Tr. p. 135.

Rebecca Holland worked at Calhoun Falls Charter School, where Victim was a student, as a substitute teacher, bus supervisor, track coach, band director, and bus driver. Tr. pp. 232-233. Victim was in the color guard in the band during the 2009 season and part of the 2010 season. Tr. p. 233. Holland took Victim home from band practice every day. Tr. p. 234. Holland testified that Victim would cry on the way home and ask her not to take her back to her house. Tr. p. 235. Holland sometimes witnessed Applicant grab Victim by the arm when she would drop Victim off at home. Tr. p. 235. On August 23, 2010, Victim disclosed to Holland that she had been sexually assaulted. Tr. p. 233. Following Victim's disclosure, pursuant to school policy,

Holland reported the incident to Lori Lindler, the school's assistant principal and guidance counselor. Tr. p. 234.

Sometime earlier in 2010, Victim also disclosed the abuse to T.C., her boyfriend at the time. Tr. p. 112. Victim detailed Applicant's abuse to T.C. around five or six months after the abuse had been happening. Tr. p. 115. Victim did not want T.C. to tell anyone about the abuse because it would "mess the family up." After Victim told T.C. the abuse was continuing, he told his mother. T.C. subsequently gave a statement to police on August 26, 2010. Tr. p. 121.

Lori Lindler spoke with Victim regarding her allegations of sexual abuse on August 25, 2010. Tr. p. 248. Lindler testified that Victim came to speak with her after confiding in the parent of a student and Rebecca Holland, who subsequently referred the matter to her. Tr. p. 247. In her conversation with Lindler, Victim recounted Applicant's abuse. Tr. p. 248. Victim identified ten separate occasions where she had been sexually abused by Applicant. Tr. p. 248. Nine of the instances of assault occurred in Abbeville County and one instance took place in Greenville County. Tr. p. 248. Lindler went through a calendar with Victim in an effort to identify the dates of the assaults as closely as possible. Tr. p. 248. They used the school calendar to aid them in selecting dates because Victim could remember when certain assaults occurred based on what school events were happening at the time. Tr. p. 248. Following her conversation with Victim, Lindler contacted the Calhoun Falls Police Department. Tr. p. 249. The officers subsequently obtained a search warrant for the residence and an arrest warrant for Applicant. Tr. p. 265.

On September 28, 2010, Jessica Bell interviewed Victim at The Child's Place. Tr. p. 328. The Child's Place was a children's advocacy center whose role is to make the investigation of child abuse easier on children. Tr. p. 329. The case was referred to The Child's Place by Monique Bell of the Calhoun Falls Police Department. Tr. pp. 329. Jessica Bell testified that she

did not ask Victim about specific dates, as children generally only remember things like their age at the time and what events were going on around the time of the abuse. Tr. p. 332. Bell prepared a report following her interview with Victim. Tr. p. 329. Several weeks after the forensic interview, Dr. Lyle Pritchard performed a forensic medical examination on Victim on November 23, 2010. Tr. p. 291. The forensic medical examination took place at The Child's Place. Tr. p. 296. Dr. Pritchard is part of the South Carolina Child Abuse Medical Response System. Tr. p. 290. Dr. Pritchard testified that during his examination of Victim, he noticed a transection of Victim's hymen. Tr. p. 293. A transection of the hymen is an injury that is consistent with something being forced into the vaginal opening. Tr. p. 293. Dr. Pritchard testified there is a delay in disclosure in the vast majority of child sexual abuse cases. Tr. p. 294. Dr. Pritchard also noted that any signs of physical abuse (bruising, lacerations, etc.) would have healed by the time he examined Victim. Tr. pp. 294-295. While at the Child's Place for her physical examination, Victim told a nurse that she never had sexual contact with anyone other than Applicant. Tr. p. 179. On cross examination, Defense Counsel asked Dr. Pritchard if Victim was using contraceptives at the time of the examination. Tr. p. 299. Dr. Pritchard indicated that she was using contraceptives. Tr. p. 299.

At trial, Victim fully recounted the extensive abuse she suffered at the hands of Applicant. Victim was sixteen years old at the time of trial. Tr. p. 130. In August of 2009, Victim was twelve years old. Tr. p. 132. Applicant took care of Victim and her siblings while Mother was sleeping. Tr. p. 135. Victim testified that she referred to Applicant as "Dad." Victim testified that Applicant no longer has her trust because he sexually assaulted her. Tr. p. 136.

Some months after the abuse began occurring, Victim disclosed the abuse to her boyfriend, T.C. Tr. p. 136-137. Victim did not immediately disclose the abuse because she did not know who to

tell. Tr. p. 137. Victim did not think anyone would believe her, as it would be her word against Applicant's. Tr. p. 138. Applicant also told Victim that if she told, her mother would have a seizure. Tr. p. 350.

Victim testified that Applicant touched her with his penis. Tr. p. 140. Specifically, Applicant penetrated her vagina with his penis. Tr. p. 141. When she sat down with Lori Lindler to try and ascertain the dates of the assaults, Victim identified ten dates when Applicant sexually assaulted her. Tr. p. 142. On all ten of these occasions, Applicant penetrated Victim's vagina with his penis. Tr. p. 142. Victim also testified that on the last occasion, Applicant put his penis in her mouth. Tr. p. 151. Victim also recalled Applicant penetrating her anus. Tr. p. 151. Victim testified that she bled the first time Applicant penetrated her vagina and on the occasion when he penetrated her anus. Tr. p. 152. Victim bled onto a sheet, which Applicant subsequently took away. Tr. p. 152. The dates of the nine assaults that occurred in Abbeville County were August 26, 2009, October 31, 2009, December 14, 2009, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010. Tr. pp. 142-143. Applicant also sexually assaulted Victim on a tenth occasion in Greenville County on December 26, 2009, at the home of Victim's aunt. Tr. p. 169.

Victim testified the first assault took place at their home in August of 2009. Tr. p. 145. The assault took place on the couch in the living room of the home while Victim's mother and siblings were home. Tr. pp. 145-146. No one else was in the room at the time of the assault. Tr. p. 149. Applicant told Victim he wanted to see what size bra and panties she wore. Tr. p. 146. Applicant then began kissing her neck and rubbing her bottom. Tr. pp. 146-147. Applicant tried to take Victim's shirt off and told her "he was helping her for her bra." Tr. p. 147. Applicant eventually took Victim's clothes off and lay on top of her, telling her "don't act like you don't

want it.” Tr. p. 150. Applicant then penetrated her with his penis. Tr. p. 150. Victim testified that after the first assault, she was afraid to go home from school. Tr. p. 157. Following the first incident, Victim began writing poetry about her feelings. Tr. p. 157. Following the first incident, Victim’s journal read:

So many questions. Should I stay or should I go. Should I walk away from my fears or should I be strong. Should I love him. Should I hate him. Should I keep it to myself. Should I let them know. So many questions. Would she still love me - - would she still love my [sic] for me or hate me for something that wasn’t my fault. Will she kick me out because she didn’t believe me. Should I run away or should I stay. So many questions that have no answers. Does he know how I feel. Do he know. Do he know. Do he know. So many questions.

Tr. p. 162.

Applicant’s second sexual assault of Victim occurred on October 31, 2009. Tr. p. 189. Victim recalled the date because there was a school football game on October 30th. Tr. p. 189. Victim reported to Jessica Bell that on this particular incident, she screamed and Applicant hit her in the face, busting her lip open. Tr. p. 191. Minor’s mother also recalled noticing Victim had a busted lip at some point in time. Tr. p. 80. When Mother asked why Victim’s lip was busted, she was told that Victim injured herself while playing. Tr. p. 81. After the assault on October 31st, Victim woke up to an empty house and noticed that her shorts were up, her underwear was down, and her shirt was on a lamp. Tr. p. 194.

During Applicant’s final assault of Victim, Applicant put her on the couch and put his penis in her mouth. Tr. p. 208. Victim bit Applicant’s penis and he began screaming. Tr. p. 209. Victim then ran down the hallway and barricaded her bedroom door with her dresser. Tr. p. 209. Victim also told T.C. about this incident, disclosing to him that one night when she was asleep, Applicant put his penis in her mouth. Tr. p. 120. Victim told T.C. that Applicant got angry with

her and grounded her. Tr. p. 120. Eventually, Victim began sleeping with her mother to get away from Applicant. Tr. p. 190.

### **III. Allegations Raised in the Application and Relief Sought**

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Trial counsel failed to convey plea offer.
  - b. Trail counsel failed to object to the testimony of state witness.
  - c. Trial judge erred in his ruling of chain of custody.

As requested relief, Applicant requests “resentencing in reference of plea offer, and new trial in reference of other issues.”

Attached herewith and incorporated herein are the records of the Abbeville County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, appellate records, and the trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

### **IV. Response to Allegations of Ineffective Assistance of Counsel**

Applicant has alleged various allegations of ineffective assistance of counsel, including failure to convey a plea offer, failure to object to the testimony of witnesses, and failure to adequately argue for suppression based on the chain of custody. Respondent asserts Applicant’s allegations that his attorney was ineffective are without merit. Respondent asserts Applicant’s attorney rendered effective assistance well within the standard of “reasonableness within professional norms” for a defense attorney.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S.

668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that

the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### **V. Any Future Amendments**

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

#### **VI. Response to Any and All Other Allegations**

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

**VII. Request for an Evidentiary Hearing**


Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

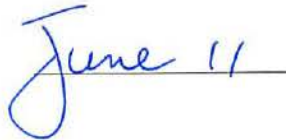
Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

By:   
ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211

, 2018

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF ABBEVILLE )  
 )  
 KEITH DENVER TATE, #236480 )  
 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent, )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

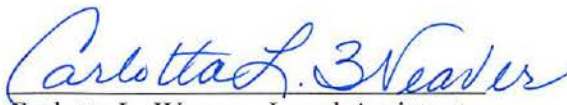
2018-CP-01-0064

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Ashley A. McMahan, Esquire**  
**Mac | Vance Attorneys, LLC**  
**Post Office Box 5501**  
**West Columbia, South Carolina 29171**

DATED this the 11th day of June, 2018.

  
 Carlotta L. Weaver, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOR THE 8 <sup>th</sup> JUDICIAL CIRCUIT
COUNTY OF ABBEVILLE	)	Case No.: 2018-CP-01-00064
Keith Denver Tate, #236480,	)	
	)	
Applicant,	)	<b>AMENDED POST-CONVICTION</b>
	)	<b>RELIEF APPLICATION</b>
v.	)	
	)	
State of South Carolina.	)	
<hr/>		

The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on February 28, 2018, to add the following:

1. Ineffective assistance of counsel by Charles Grose – failure to convey a plea offer. Once plea offer was discovered by Ms. Nelson, the solicitor refused to honor it.
2. Ineffective assistance of counsel by Janna Nelson and Shane Goranson – Failure to properly object to the lack of jury instructions on sexual battery to be proven beyond a reasonable doubt.

Furthermore, Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



ASHLEY A. MCMAHAN, ESQUIRE

MCMAHAN & TAYLOR, ATTORNEYS, PC

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West Columbia, SC 29171

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SC Bar No. 71676

ATTORNEY FOR APPLICANT

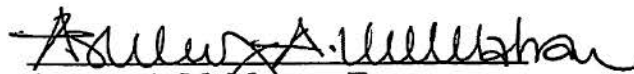
September 27, 2019

### CERTIFICATE OF SERVICE

I certify that I have served this document via email to:

Janell H. Gregory  
Assistant Attorney General  
jgregory@scag.gov

This 27<sup>th</sup> Day of September, 2019.



ASHLEY A. MCMAHAN, ESQUIRE

Attorney for Applicant

1 STATE OF SOUTH CAROLINA )  
2 COUNTY OF ABBEVILLE ) COURT OF COMMON PLEAS NONJURY

3  
4 KEITH DENVER TATE, ) TRANSCRIPT  
5 APPLICANT, ) OF  
6 vs. ) RECORD  
7 STATE OF SOUTH CAROLINA, ) 2018-CP-01-00064  
8 RESPONDENT. )

9  
10 October 14<sup>th</sup>, 2019  
11 Greenwood, South Carolina

12 B E F O R E:

13 THE HONORABLE L. CASEY MANNING, Judge.

14 A P P E A R A N C E S:

15 ASHLEY A. McMAHAN  
16 ESQ.  
17 Attorney for the Applicant

18 JANELL H. GREGORY  
19 ASSISTANT ATTORNEY GENERAL  
20 Attorney for the State

21  
22 MICHAEL R. WATTS  
23 Circuit Court Reporter

24  
25 Transcribed by Pamela E. Green, Circuit Court Reporter

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E X H I B I T S

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Plaintiff's Exhibits</u>		
P-1	Email	8	9

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Defendant's Exhibits</u>		
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4	D-1	Email	35 36
5	D-2	Email	38 39
6	D-3	Email	39 39
7	D-4	Email	39 39
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THE COURT: Yes, ma'am.

MS. GREGORY: Next we have Keith Tate. That's  
CP Number 2018-CP-01-0064.

Applicant was indicted at the February, 2011 term of Abbeville County Grand Jury for 10 counts of second degree criminal sexual conduct with a minor. On May 27<sup>th</sup>, 2014, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, and, on May 29<sup>th</sup>, 2014, the jury convicted Applicant of only one count of second degree CSC with a minor, which was under Indictment 11-GS-01-0046, and acquitted Applicant on remaining nine charges or eight charges. Judge Hocker sentenced Applicant to 16 years imprisonment.

Applicant filed a timely Notice of Appeal. His appeal was perfected by the Appellate Defender Susan B. Hackett of, of the South Carolina Commission of Indigent Defense. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence on October 19<sup>th</sup>, 2016. Applicant petitioned for a rehearing on November 3<sup>rd</sup>, 2016, and, on December 14<sup>th</sup>, 2016, the Court of Appeals denied the Petition for Rehearing, and attached a substituted opinion that affirmed Applicant's conviction and sentence.

1 Applicant filed a -- for a second petition for  
2 rehearing on December 29<sup>th</sup>, 2016, which was also denied on  
3 January 10<sup>th</sup>, 2017. Applicant then submitted a timely  
4 Writ of Certiorari to the South Carolina Supreme Court,  
5 which was subsequently denied. The Remittitur was issued on  
6 October 25<sup>th</sup>, 2017. Thereafter, Applicant filed a timely  
7 Application for Post-Conviction Relief on February 28<sup>th</sup>,  
8 2018, alleging ineffective assistance of counsel.

9 Applicant then issued an Amended Application for  
10 Post-Conviction Relief on September 17<sup>th</sup>, 2019, alleging  
11 ineffective assistance of counsel by Charles Grose, failure  
12 to convey a plea offer. Once the plea offer was discovered  
13 by Ms. Nelson, who is now Ms. Gregory, the Solicitor refused  
14 to honor it, and the second allegation is ineffective  
15 assistance of counsel by Janna Gregory and Shane Goranson,  
16 failure to properly object to the lack of jury instruction  
17 on sexual battery to be proven beyond reasonable doubt. It  
18 is my understanding Applicant is going forward on those two  
19 allegations, and he is represented by Ms. McMahan.

20 THE COURT: All right. Ms. McMahan.

21 MS. McMAHAN: Your Honor, at this time the Applicant  
22 calls Charles Grose.

23 THE COURT: All right.

24 CHARLES GROSE, being first duly  
25 sworn, testified as follows:

1 DIRECT EXAMINATION

2 BY MS. McMAHAN:

3 Q Would you please state your full name for the record?

4 A My full name is Ernest Charles Grose, Junior.

5 Q And now, back in 2011, what was -- what were you doing?

6 A In 2011 I was the Circuit Defender for the Eighth

7 Judicial Circuit.

8 Q And when did you leave that position?

9 A On August 16, 2012. That was my last day. So --.

10 Q Okay. That was the exact last day, August the

11 16<sup>th</sup>---

12 A It was.

13 Q ---2012?

14 A Yeah.

15 Q And then -- and what did you do after that, go into  
16 private practice?

17 A I've been in private practice ever since.

18 Q And did you represent Mr. Tate for a moment on this, on  
19 this case?

20 A For moments kind of day. That would of been a little  
21 bit more than a moment.

22 Q Moments?

23 A From whenever the charges arose, and he asked for a  
24 public defender, I believe there's a letter in the file  
25 where we acknowledge the representation, and send to the

1 jail. So, I would of represented him from then until I left  
2 the Public Defender's Office.

3 Q Okay. And you had a -- did you have a chance to look  
4 through the file briefly?

5 A I, I have, yes.

6 Q And---

7 A There's, there's a lot of stuff in it, but I have had a  
8 chance to look through it.

9 (WHEREUPON, an email was marked as Plaintiff's Exhibit  
10 No. 1 for identification purposes only at this time.)

11 Q And one of the issues that he has is that there was a,  
12 a plea offer relayed to your -- you that he did not know  
13 about. So, I'm gonna show you what's marked as State's,  
14 excuse me, Plaintiff's Exhibit 1.

15 A Hard to change our vocabulary.

16 Q Yeah.

17 Do you, do you recognize that?

18 A I, I do with the caveat that, you know, until you  
19 showed it to me, I don't -- wouldn't -- didn't have any  
20 recollection of it, but I do, yes.

21 Q And why -- what is that?

22 A This is an exchange of emails between me and Patricia  
23 Boland on February 9 of 2011. At the time she was the  
24 Assistant Solicitor handling the case.

25 Q And do you -- would this be something that you would

1 keep in the normal course of business, an email printed out  
2 in the file?

3 A Yes, I mean some emails get printed out and some don't.  
4 Obviously, this one, this one did. So --.

5 Q This one made the cut --

6 A Yeah.

7 Q -- to get in front of -- at this time I'd like to enter  
8 this as Applicant's 1.

9 MS. GREGORY: No objection, Your Honor.

10 THE COURT: All right.

11 (WHEREUPON, Plaintiff's Exhibit No. 1 was received into  
12 evidence at this time.)

13 Q And, and what is the, the -- what is this email---

14 THE COURT: Do you have a copy?

15 MS. McMAHAN: Do you have a -- and what is the email in  
16 reference to?

17 A It's in reference to -- well, it just says in reference  
18 to Tate, but it would be in reference to Mr. Tate's case,  
19 and Ms. Boland is telling me that "I can offer him a cap of  
20 six years" and I responded to her I will not be in a  
21 position to discuss resolving this case until we get the  
22 evidence examined.

23 Q Did you have to have a discovery hearing in Mr. Tate's  
24 case?

25 A Yes. Well, it's been a long time. Looking through the

1 file, I don't, I don't know that I saw all the motions that  
2 would of been filed. But I saw some references to orders  
3 for discovery that we were looking for initially.

4 There was some emails between me and Ms. Boland  
5 regarding discovery. I don't know if we had a contested  
6 hearing or if that resulted in a, a hearing where we entered  
7 into a consent order because a lot of -- if -- in these  
8 types of cases, a lot of the records that you're looking for  
9 are protected by, you know, privacy laws, and you need a  
10 Court order even if you're in agreement that, that they need  
11 to be disclosed.

12 And after Ms. Boland left the public -- I mean the  
13 Solicitor's Office, and went into private practice,  
14 Elizabeth White, who's now Elizabeth Taylor, took over the  
15 case, and my recollection is, is that we had a hearing and  
16 that was on their motion for a DNA sample if I remember  
17 correctly.

18 Q So, was there a Schmerber hearing I guess?

19 A There was, yes.

20 Q And so the offer for six years, do you have any  
21 specific recollection if you discussed that with him or not?

22 A I have no recollection one way or the other.

23 Q Do you have any written notes or anything on this that  
24 you -- says that you might of discussed it with him?

25 A All right. So, I, I do not, and, and to expand on that

691 Charles Grose - Direct examination  
By Ms. McMahan

1 a little bit, when I was looking through the file materials,  
2 I was looking for either a written note where I had to, you  
3 know, noted that I had discussed it with him. I was looking  
4 for a letter that it might have been conveyed to him or I  
5 was looking for communications with the Solicitor's Office  
6 that would of indicated that, that we had discussed it, and  
7 taken a position, and I did not find any of those.

8 Q I have no further questions. Answer any questions Ms.  
9 Gregory would have.

10 MS. GREGORY: Thank you.

11 CROSS-EXAMINATION

12 BY MS. GREGORY:

13 Q Mr. Grose, how long have you been practicing law?

14 A Since 1993.

15 Q And how much of that's been in criminal defense?

16 A From 1996 until now it's either been exclusively or  
17 almost exclusively criminal defense.

18 Q Okay. And at the time that you were Mr. Tate's  
19 attorney, you were the head public defender for the Eighth  
20 Circuit.

21 Is that right?

22 A That's correct.

23 Q And you recall getting the email from Ms. Boland, but  
24 the response that you gave, does that indicate that you did  
25 not communicate it to him?

1 A No, it didn't -- it doesn't indicate that, and, and,  
2 again, I'm -- until she showed me this I didn't remember any  
3 of this. But what, what I told her was that, that the email  
4 was addressed to her and not to Mr. Tate. So, that email  
5 from me to her does not rule out that Mr. Tate and I had  
6 some discussions.

7 Q Right.

8 A You know, it was -- and I, I don't remember the dates  
9 on some of the other emails, but---

10 Q Sure.

11 A ---you know, it was during this timeframe that we were  
12 also having kind of some fairly detailed exchanges of emails  
13 about, you know, trying to figure -- trying to figure and  
14 determine what the evidence was in the case --

15 Q Uh-huh. (Affirmative).

16 A -- and where it might be. I think, in the process, we  
17 discovered that the police department in Calhoun Falls does  
18 not have a very, or at the time, didn't have a very good  
19 system of, of keeping up with their evidence, and, and that  
20 was I think a concern for, for everybody.

21 Q Okay. Is it your typical practice to communicate plea  
22 offers with your clients?

23 A It is. It's also my typical practice that they be  
24 recorded somehow.

25 Q Okay.

1 A Particularly in that timeframe.

2 Q And you noted, and during direct examination, that  
3 sometimes those get printed out, and sometimes they don't.

4 Is it possible that you did note it, and it just wasn't  
5 printed out, and put in the file?

6 A I -- it's, it's, it's possible. What I do know from  
7 looking at the file is I did see, you know, relevant emails  
8 from this particular period of time. And so it, it looks  
9 like we were, we were printing out the significant emails in  
10 this case.

11 Q But it's possible that it did not make it into the file  
12 many years later?

13 A It is -- it's, it's possible.

14 Q Okay.

15 A It's, it's also -- I mean it -- if -- that's just  
16 speculation though.

17 Q Sure.

18 No further questions.

19 MS. McMAHAN: Just briefly.

20 REDIRECT EXAMINATION

21 BY MS. McMAHAN:

22 Q So, in regards to the email where you said essentially  
23 that you would like to have all the discovery before you  
24 would discuss any plea offers, is that normal for you to  
25 have all the discovery before you wanted to get into plea

1 negotiations with your clients?

2 A It, it is fairly normal, and, you know, a, a lot of  
3 times I'll send an email or something that, particularly in  
4 this period of time, that was worded, you know, maybe  
5 differently than this, but something to the effect of until  
6 I receive all the discovery, I'm not in a position to be  
7 able to evaluate the case because you don't really know, you  
8 know, what you're, what you're dealing with until you get  
9 all of that. And there was also a, you know, a memorandum  
10 that went to all the solicitors from Former Chief Justice  
11 Toal sort of cautioning everybody not to condition offers on  
12 waiving discovery because that potentially would create  
13 problems like we're here today on as well as problems under  
14 the Rules of Ethics.

15 MS. McMAHAN: All right. I have no further questions,  
16 Your Honor.

17 THE COURT: Yes, ma'am.

18 RE CROSS EXAMINATION

19 BY MS. GREGORY:

20 Q But as a head public defender for the Eighth Circuit,  
21 it was your typical practice to negotiate -- to talk about  
22 the plea offers that were extended from the State with your  
23 clients?

24 A As was my typical practice to record that it had been  
25 done, and the absence of that is concerning to me.

1 Q But it doesn't indicate that you did not communicate  
2 it, right?

3 A It, it doesn't indicate that I did not. It doesn't  
4 indicate that I did.

5 Q Right.

6 A As I told both of you, I have no recollection of this  
7 one way or the other, and that I would have to go based upon  
8 what was in the file, and, and that's what I'm trying to do  
9 to the best of my ability.

10 Q Okay. Thank you.

11 No further questions.

12 MS. McMAHAN: I have no further questions, Your Honor.  
13 I ask that Mr. Grose be excused.

14 THE BAILIFF: Watch your step.

15 THE WITNESS: Thank you.

16 THE BAILIFF: Yes, sir.

17 THE COURT: Go ahead please.

18 MS. McMAHAN: Applicant, Applicant calls Mr. Tate.

19 THE COURT: Come around, Mr. Tate.

20 KEITH TATE, being first duly  
21 sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MS. McMAHAN:

24 Q Are you Keith Denver Tate?

25 A Yes, I am.

1 Q And did you file this PCR Application?

2 A Yes, ma'am.

3 Q And, and obviously you heard Mr. Grose's testimony.

4 Tell me about how you discovered that plea offer  
5 from -- that Mr. Grose had gotten.

6 A Through Ms. Nelson, the other public defender, Janna  
7 Nelson, when I was getting ready to be tried.

8 Q Okay.

9 A She asked them to -- would they -- she found it on the  
10 computer, and she said that she asked them to honor it, and  
11 they said no.

12 Q Well, well, let's back up a little bit.

13 So, you initially had Mr. Grose as your attorney?

14 A Yes, ma'am.

15 Q Were you in the detention center or out on bond?

16 A I was in the detention center last -- and I talked to  
17 Mr. Grose that one time, and he said he was trying to get me  
18 a, a bond reduction.

19 Q Okay. And then -- so, the whole time this case was  
20 pending, you were in the detention center?

21 A No, ma'am, I got -- Mr. Grose got me a bond reduction.

22 Q Okay. And then you got out on bond?

23 A And when I -- the day that I got out on bond I asked  
24 Mr. Grose when was my Court date.

25 Q Uh-huh. (Affirmative).

1 A And he told me, if I don't hear from him, don't worry  
2 about it because they didn't really have anything against  
3 me -- any evidence against me.

4 Q Okay.

5 A And I never heard from Mr. Grose anymore until almost  
6 five years later when I was about to be tried. I called Mr.  
7 -- I applied for a job and they said I had a red flag that I  
8 needed to get something straight on my record. So, I called  
9 the Public Defender's Office, and Mr. Grose -- that's when I  
10 found out Mr. Grose had went into private practice, and  
11 Ms. Nelson was the head public defender.

12 Q Had you moved -- were you still living in the same  
13 place this whole time?

14 A Yes, ma'am.

15 Q And so you -- at that point, you realized that the  
16 charges were still pending.

17 Is that correct?

18 A Yes, ma'am, I thought the charges was dropped, and I  
19 found out they was still pending. And I was on the docket  
20 to go in Court in two weeks.

21 Q So, you went and met with Ms. Nelson at that point?

22 A I called her and she set up an appointment and  
23 everything, and had a, had to put -- the case put off for a  
24 while so we could get familiar with it -- she could get  
25 familiar with it.

1 Q And then when you were going through the file, that's  
2 when the two of you saw this email with the, the plea offer  
3 for six years?

4 A Yes, ma'am, Ms. Nelson recognized it, and she asked me  
5 about it, and I told her I didn't know anything about it.

6 Q So, you, you had never talked to Mr. Grose about that  
7 six years?

8 A No, ma'am.

9 Q Okay. And during your trial -- so, you were, you were  
10 only found guilty on one charge, correct?

11 A Yes, ma'am.

12 Q And then -- so during your trial, were -- did you see  
13 any other issues with your trial, absent the plea offer,  
14 that you want to discuss today with the Court?

15 MS. GREGORY: Objection, Your Honor. Those have not  
16 been pled.

17 THE COURT: What now?

18 MS. GREGORY: Those have not been pled in the  
19 Application. He has two allegations that he decided to go  
20 forward on.

21 THE COURT: I'm gonna allow it anyway.

22 Go ahead, ma'am.

23 Q Did---

24 A Yes, ma'am, I, I did, and there was the time that  
25 Ms. Nelson -- there was quite a few different things Nelson

1 objected to, and, you know --

2 Q Okay.

3 A -- (indiscernible) and stuff.

4 Q Okay. So, she did object to some things for you?

5 A Yes, ma'am.

6 Q Is that correct?

7 A She did.

8 Q Do you, do you remember the jury instructions?

9 Do, do you remember if she objected to those?

10 A I don't -- I don't know. The judge, he was -- the  
11 judge that I had, he was, he was denying everything. I  
12 don't remember whether she objected to them or not.

13 Q Okay. Answer any questions Ms. Gregory has.

14 A Yes, ma'am.

15 CROSS-EXAMINATION

16 BY MS. GREGORY:

17 Q Morning, Mr. Tate.

18 A How you doing?

19 Q So you were not incarcerated the entire time.

20 Do you know about how long you were out of custody when  
21 your case was pending cause your case was pending for a  
22 while?

23 A Almost five years.

24 Q Almost five years.

25 Okay. And how many times did you meet with Mr. Grose?

1 A I didn't meet with him at all.

2 Q You didn't meet with him at all.

3 A This was -- Mr. Grose didn't contact me. He told me  
4 not to contact him. He say he would contact me if, if we  
5 was going forward with the case. He never contacted me. I  
6 thought the charges was dropped.

7 Q So, when you started reviewing your discovery, who was  
8 that with, when you started reviewing the evidence against  
9 you and so forth?

10 A Everything I went through---

11 Q Was with Ms.---

12 A Ms. Nelson.

13 Q ---Nelson?

14 Okay.

15 A And then Mr., Mr. Gor -- Grayson (sic).

16 Q Okay. And at what point did Ms. Nelson, who's now  
17 Janna Gregory, at what point did she become involved in your  
18 case?

19 Do you remember?

20 Like how close to trial?

21 A I was on the docket for---

22 Q You were on the docket.

23 A ---two weeks be---

24 Q Okay.

25 A ---before trial.

1 Q And how many times did you meet with her prior to  
2 trial?

3 A Maybe four or five. She came to my house and I came  
4 over here a few times.

5 Q Okay. So, they were all in person?  
6 No phone calls or anything like that?

7 A We had a couple of phone calls but most of them was in  
8 person.

9 Q Okay. In addition to a couple of phone calls.  
10 Okay. And did you discuss plea offers with Ms. Nelson?

11 A Shoot, if I had of had -- I, I would like to have had  
12 one. I was facing 200 years.

13 Q Right.  
14 And---

15 A Yeah.

16 Q ---did you discuss pleas at all with her?

17 A Yes. And she went to whoever and they, they said they  
18 was taking it to trial.

19 Q Okay. Did she discuss with you what an Alford plea  
20 was?

21 A I, I know what an offered plea is.  
22 What do you -- you mean when the solicitor and them  
23 offer you something?

24 Q No, I'm sorry. It's when you plead basically like no  
25 contest. You're not admitting guilt, but you're able to

1 resolve your case without admitting guilt.

2 Did you discuss that with her?

3 A Yes, I did.

4 Q You did.

5 Okay. And what was the -- what were those discussions?

6 Do you recall what she told you about that?

7 A No, ma'am, I don't.

8 Q Okay.

9 A I don't recall.

10 Q Do you recall wanting to do that, wanting to take an  
11 Alford plea in your case, wanting to resolve the case  
12 without admitting guilt?

13 A Yes, ma'am.

14 Q You did.

15 Okay. Would you have entertained a plea offer that did  
16 not -- that was not an Alford plea?

17 Would you have entertained pleading guilty to your  
18 cases?

19 A At the time I, I would have.

20 Q At the time you would have?

21 A Yes, ma'am.

22 Q Do you recall, during the sentencing portion of your  
23 trial, indicating that you were innocent?

24 A Yes, ma'am.

25 Q Okay. But you still would of entertained a guilty plea

1 while your case was pending?

2 A Yes, if they had of offered me the six years from the  
3 beginning or offered me a plea deal period from the  
4 beginning, I would of accepted it.

5 Q You would of accepted it.

6 Okay. And you became aware of the six year plea offer  
7 at what point?

8 A Right before I got ready to go to trial.

9 Q Okay. And did -- was there ever another plea offer  
10 extended to you other than the six years that you're aware  
11 of?

12 A No, ma'am.

13 Q Okay. And what was your -- so, your response to Ms.  
14 Nelson at the time that you heard about the six year offer  
15 was I would take it, is that right, even though it's  
16 requiring you to admit guilt?

17 A Well, she didn't -- when she told me about it, she said  
18 that she asked them and they said that they was going to  
19 trial. They didn't -- the plea wasn't still on the table.

20 Q Okay. Had the plea been on the table though, your  
21 response to Ms. Nelson was that you wanted that six years?

22 A Yeah, I would of took the six years.

23 Q Okay. And your discussion with her regarding the  
24 Alford pleas, would you have rather had an Alford plea  
25 like -- there was some plea discussions with the State

1 requesting an Alford plea on your behalf.

2 Are you aware of that?

3 A No.

4 Q Okay.

5 All right. No further questions, Your Honor.

6 THE COURT: Anything further?

7 MS. McMAHAN: I have nothing further, Your Honor.

8 THE COURT: You may step down, Mr. Tate.

9 MS. McMAHAN: The Applicant would call Mr. Goranson.

10 THE BAILIFF: Watch your step.

11 THE COURT: Beg your pardon?

12 MS. McMAHAN: The Applicant calls Mr. Goranson.

13 THE COURT: All right.

14 SHANE GORANSON, being first  
15 duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MS. McMAHAN:

18 Q Mr. Goranson, will you spell your last name for the  
19 record?

20 A G-O-R-A-N-S-O-N.

21 Q And what is your current position?

22 A Public Defender in Greenwood County.

23 Q Do you handle cases in Abbeville too?

24 A I have.

25 Q Do you typically hang around Greenwood though?

1 A Yes.

2 Q But you go where you're needed really?

3 A Correct.

4 Q And did you represent Mr. Tate in conjunction with  
5 Ms. Nelson?

6 A I did.

7 Q Excuse me. Who's Ms. Gregory now.

8 Did you have any involvement with the plea offers in  
9 this case?

10 A I -- no, I don't think so. I think what happened was  
11 that Ms. Nelson took over the case, and then, when it looked  
12 like it was going to trial, she asked me to, you know, for  
13 another set of eyes and ears in the courtroom.

14 Q So, your -- you were kind of second chairing for trial  
15 and kind of assisting in the---

16 A Correct.

17 Q Did you ever have any conversations with Mr. Tate about  
18 any plea offers?

19 A No, I don't think so.

20 Q Did you see any issue with any of the jury instructions  
21 about the definition of sexual battery or anything like  
22 that?

23 A My main problem with the jury instructions or the  
24 verdict form was that it did not require a particular type  
25 of sexual battery to be found beyond a reasonable doubt.

1 There were multiple different types of sexual batteries that  
2 were alleged in the case, and it seemed like people could of  
3 been believing, you know, half the jury one type, half the  
4 jury another type. At that point I don't think that amounts  
5 to a conviction. So, that was an issue that I saw that  
6 bothered me.

7 Q So, the definition of sexual battery didn't include  
8 specific definitions for each type of sexual battery?

9 A The verdict form did not say what type of sexual  
10 battery occurred on each indictment. So, the jury was not  
11 asked to find beyond a reasonable doubt what type of sexual  
12 battery it was.

13 MS. GREGORY: Objection, Your Honor. The allegation is  
14 that there was not reasonable doubt in the jury instruction.  
15 Not that the sexual battery was not defined.

16 MS. McMAHAN: This is all analogous, Your Honor.

17 THE COURT: Beg your pardon?

18 MS. McMAHAN: I believe this is all analogous, Your  
19 Honor.

20 THE COURT: This, this is an -- even if I agree with  
21 your objection, she has the right to proffer his testimony.  
22 You may do so.

23 MS. McMAHAN: Thank you.

24 So, the form could of found him guilty for all -- one  
25 sexual battery or a bunch of sexual batteries. They just

1 weren't finding a specific one or excluding others.

2 A Correct. So there's a sense that nobody knows what --  
3 the jury actually found any proof beyond a reasonable doubt.

4 Q Do you recall if you guys objected to that form?

5 A I was looking through my notes, and I think we -- I  
6 think we submitted a form. I looked through my notes and I  
7 have written down judge refused to use our form.

8 Q So, you submitted your own form -- your own written  
9 form?

10 A I think we did.

11 Q Well, answer any questions Ms. Gregory may have for  
12 you.

13 A Thank you.

14 CROSS-EXAMINATION

15 BY MS. GREGORY:

16 Q The only indictment he was found guilty on was  
17 11-GS-01-0046.

18 Is that right?

19 Okay.

20 A I have---

21 Q It's the one where the incident is to have alleged to  
22 have occurred on Halloween 2009.

23 A Yes.

24 Q October.

25 Okay. During that timeframe, what is the sexual

1 battery that is alleged to have occurred?

2 Do you remember?

3 A I thought it was vaginal intercourse. Penis and  
4 vagina.

5 Q Okay.

6 A Are -- you said earlier that it was an anal---

7 Q Correct.

8 A ---intercourse.

9 Q Yes, it was anal intercourse.

10 Was there a second -- was there any other type of  
11 sexual battery alleged on Halloween 2009?

12 A I think that was just one.

13 Q Okay.

14 A That was the---

15 Q So, would your verdict form have made a difference in  
16 this case?

17 A Yes, I think it would because---

18 Q How is that?

19 A There was no evidence other -- of a sexual battery  
20 other than the testimony of the child.

21 Q Right.

22 A And so there was no corroborating evidence. I think  
23 that her credibility was an issue at the trial, and no way  
24 she described what happened.

25 Q But if the verdict form is only to make sure that the

1 jury is unanimous in deciding what type of sexual battery  
2 there is, there was only one type alleged on that date,  
3 right?

4 A There was a, a bunch throughout the whole trial.

5 Q Sure.

6 But the one that he's talking about---

7 THE COURT: Now, the only thing he was convicted of is  
8 what you're pointing out---

9 MS. GREGORY: Correct.

10 THE COURT: ---is sexual battery involving anal  
11 intercourse.

12 MS. GREGORY: Right.

13 THE COURT: Is that correct?

14 MS. GREGORY: That's correct.

15 THE COURT: That's correct.

16 The other 20 some indictments, however many there were,  
17 he was acquitted on that.

18 Is that correct?

19 MS. GREGORY: Correct.

20 THE COURT: I'm sorry.

21 MS. McMAHAN: That's correct.

22 So, the verdict form indicated that they found  
23 unanimously that he had been found guilty of anal  
24 intercourse, is that correct, cause he was found guilty on  
25 this one indictment?

1 A I, I don't know what the jury---

2 Q Okay.

3 A ---believed.

4 Q Okay.

5 A I can't, I can't say because the conversation with the  
6 juror afterwards and --

7 Q Sure.

8 A -- I was led to believe something else. So --.

9 Q Okay. No further questions.

10 THE COURT: Anything further?

11 MS. McMAHAN: Nothing further, Your Honor.

12 THE COURT: You may step down, sir.

13 THE WITNESS: Thank you.

14 MS. McMAHAN: I ask that Mr. Goranson be excused, Your  
15 Honor.

16 THE COURT: I'm sure without objection.

17 MS. GREGORY: Without objection.

18 THE COURT: All right.

19 MS. McMAHAN: Your Honor, at this time the Applicant  
20 calls Ms. Janna Nelson Gregory.

21 JANNA NELSON GREGORY, being first  
22 duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MS. McMAHAN:

25 Q Good morning.

711 Janna Gregory - Direct examination  
By Ms. McMahan

1           Would you prefer me to call you Ms. Nelson or Janna  
2 since we also have another Ms. Gregory here?

3 A     You can call me Janna.

4 Q     Okay.

5 A     You can call me Nelson, whatever you, whatever you  
6 want. I answer to any of that.

7 Q     Hey lady.

8           So, Ms. Nelson, did you represent Mr. Tate?

9 A     I did.

10 Q     And you heard his testimony about him contacting you  
11 because he didn't know it was still pending.

12           Is that -- was that your understanding?

13 A     The, the note that I took in the file was that I got a  
14 call from him about the charges causing him a problem with  
15 getting work, and that he wanted to get them resolved. And  
16 I let him know that, according to my note, I let him know  
17 that the earliest possible trial date would be the week  
18 of -- the -- a week in April of 2014 and that I would, you  
19 know, take steps to try to get it resolved one way or the  
20 other.

21 Q     In Applicant's 1 -- have you had a chance to view that?

22 A     Did you show it to me?

23           Is that the email from Patricia?

24 Q     Yes.

25 A     Yes, ma'am.

1 Q And when you were reviewing the file with Mr. Tate, did  
2 you see that email in there?

3 A I believe I saw it before I reviewed the file with Mr.  
4 Tate.

5 Q So, before Mr. Tate even met with you, you'd already  
6 looked through the file and saw it in there?

7 A Well, sure. I would of looked through the file before  
8 I met with him.

9 Q And did he indicate to you that he had been given that  
10 plea offer?

11 A He, he did not indicate to me that he had been given  
12 that plea offer, no, ma'am.

13 Q And, at that point, were you trying to resurrect this  
14 plea or how did that -- what happened after that?

15 A What I believe happened was that I brought that to  
16 Mr. Lance Sheek's attention. He was -- Patricia Boland was  
17 no longer with the Solicitor's Office. Mr. Sheek was  
18 prosecuting the case, and I believe I raised it in emails to  
19 him that I had found that offer in the file, and I believe  
20 that I asked if he would honor that offer.

21 Q Did he honor the offer?

22 A No, ma'am.

23 Q And what transpired after that as far as possible plea  
24 offers?

25 Do you recall?

1 A I, I didn't recall until I was shown some emails this  
2 morning between myself and Mr. Sheek. I didn't remember off  
3 the top of my head, but those emails indicated that his  
4 response to my -- I, I think what I said to him was that I  
5 did not know if Mr. Tate would be willing to take a cap of  
6 six, but that I had found that offer, and asked if he would,  
7 you know, still hold that offer out to us. His response, I  
8 think, was something to the effect that he would try to talk  
9 the alleged victim's family into taking 10, a plea for 10  
10 years.

11 And within a very short time after that email, before I  
12 could -- like within an hour and 15 or an hour and a half  
13 before I could even respond to that, I got an email back  
14 from Mr. Sheek or another email from Ms. Sheek saying that  
15 he had discussed the case with the solicitor, and that they  
16 could drop all but one charge, and he could plead straight  
17 up to the one charge. Then we had some discussions about  
18 whether that plea could be an Alford plea, and I believe he  
19 was not -- he didn't have an opposition to it being an  
20 Alford plea if the judge would take it.

21 Q Who's he the -- Mr. Sheek or---

22 A Mr. Sheek.

23 Q ---Mr. Tate?

24 What did Mr. Tate say about pleading straight up to one  
25 charge?

1 A I don't remember precisely, but given that he could of  
2 gotten up to 20 years on a straight up plea to one charge, I  
3 do not believe that that was something that Keith was  
4 interested in at that time.

5 MS. McMAHAN: Court's indulgence, Your Honor.

6 THE COURT: Yes, ma'am.

7 (Pause.)

8 Q What, what was the conversations you had about deciding  
9 to go to trial?

10 A A lot of it revolved around the fact that Keith told me  
11 he didn't do these things --

12 Q Okay.

13 A -- and I didn't believe he did. And I, I don't  
14 remember specifics about our -- about what kind of plea he  
15 might have been willing to take. I raised the issue of it  
16 potentially being an Alford plea with Mr. Sheek because I  
17 knew that Keith's position was, was pretty adamant that he  
18 was not guilty of any of these charges. And so I thought  
19 that was the only way a potential plea could even, could  
20 even fly.

21 Q And that was because the six years also was, at this  
22 point, now totally off the table cause Mr. Sheek wouldn't  
23 resurrect that from Ms. Boland?

24 A I'm not sure I understand---

25 Q So, you said that---

Janna Gregory - Direct examination  
By Ms. McMahan

1 A ---that was because---

2 Q So, it was either take this plea straight up to  
3 something facing 20 years or go to trial?

4 A Yes, ma'am.

5 Q And is -- and Mr. Tate decided well, between the 20  
6 years and trial, he indicated to you he just wanted to go to  
7 trial then?

8 A Yes, ma'am.

9 Q I'm sorry I wasn't very clear.

10 A That's okay.

11 Q Do you recall how many times you met with him prior to  
12 going to trial?

13 A I don't. It was -- we, we worked pretty hard on it in  
14 that, in that time between the end of February and the time  
15 it went to trial. I, I mean Keith and I talked several  
16 times. I went to his home, but I don't remember -- I don't  
17 know the number of times. He would probably remember that  
18 better than I do.

19 Q Answer any questions Ms. Gregory -- other Gregory has.

20 CROSS-EXAMINATION

21 BY MS. GREGORY:

22 Q You referenced some of the emails.

23 May I approach, Your Honor?

24 THE COURT: Yes, ma'am.

25 (WHEREUPON, an email was marked as Defendant's Exhibit

1 No. 1 for identification purposes only at this time.)

2 Q I'm gonna show you Defendant's 1.

3 Do you recognize that email?

4 THE COURT: Let me see a copy of it please?

5 MS. GREGORY: I---

6 THE COURT: I'll get it -- excuse me.

7 A I saw it this morning, yes, ma'am.

8 Q Do you recognize it?

9 Is that an accurate representation of the email?

10 A I believe it is.

11 Q Okay.

12 MS. GREGORY: Your Honor, at this---

13 A I probably printed that out for y'all from, from my own  
14 files.

15 Q Okay.

16 A So --.

17 MS. GREGORY: Your Honor, at this time we'd like for  
18 that to be entered into evidence.

19 MS. McMAHAN: No objection.

20 THE COURT: Without objection.

21 That's State's No. --?

22 MS. GREGORY: Defendant's 1.

23 THE COURT: Defendant's 1.

24 MS. GREGORY: Yes. Yes, sir.

25 (WHEREUPON, Defendant's Exhibit No. 1 was received into

1 evidence at this time.)

2 Q Can you read the last paragraph on that one?

3 A Also I'm not sure if I ever got a definite answer on  
4 whether you'd accept a plea to one count with a negotiated  
5 six year cap. It would have to be an Alford plea, which I  
6 don't think Judge Hocker would have a problem taking. I  
7 can't swear that Mr. Tate would take that, but the last time  
8 we talked he did ask me if that was on the table. So, I  
9 just want to make sure I ask about it.

10 Q Okay. What were your discussions with Mr. Tate?

11 Do you recall anything regarding that, and is that an  
12 acceptance of Patricia Boland's six year offer?

13 A I, I don't think it could be construed as an acceptance  
14 because I---

15 THE COURT: I'm sorry.

16 A Because I put in there that I'm not -- I mean one of  
17 the things I said was I can't swear that Mr. Tate would take  
18 that.

19 Q Correct.

20 And would it be construed but as a counteroffer since  
21 you're requiring it to be an Alford plea cause that was not  
22 the original offer from the State?

23 A However---

24 Q Right?

25 A ---you want to characterize it. I was asking him if he

1 would accept the negotiated six year cap that previously had  
2 been offered---

3 Q Sure.

4 A ---and I---

5 Q But it would have to be an Alford plea, correct?

6 A Yes, ma'am.

7 Q Okay. And how long did you represent Mr. Tate prior to  
8 trial?

9 Was it---

10 A I would of inherited the case from Mr. Grose in---

11 Q Okay.

12 A ---August of 2012.

13 (WHEREUPON, an email was marked as Defendant's Exhibit  
14 No. 2 for identification purposes only at this time.)

15 Q Okay. I'm going to show you Defendant's Exhibit 2.

16 May I approach, Your Honor?

17 THE COURT: Yes, ma'am.

18 Q If you could give the date on Defendant's Exhibit 1,  
19 and look at Defendant's Exhibit 2.

20 A September --.

21 Q Oh, I'm sorry. That's a forwarding. So, it, it will  
22 be the date below that.

23 A Right. May 14<sup>th</sup> of 2014.

24 Q Correct.

25 A And then this one is May 20<sup>th</sup> of 2014 from Lance to

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1 me saying he would be willing to encourage the victims to  
2 accept a 10 year plea if my client was amenable. But he was  
3 not -- it wasn't a firm offer cause he had not run that by  
4 the victims yet.

5 Q Okay. Is that an accurate representation of that  
6 email?

7 A I believe so.

8 MS. GREGORY: Okay. Your Honor, we would ask for that  
9 one to be admitted into evidence as well.

10 MS. McMAHAN: No objection.

11 THE COURT: Without objection.

12 (WHEREUPON, Defendant's Exhibit No. 2 was received into  
13 evidence at this time. Two more emails were marked as  
14 Defendant's Exhibit Nos. 3 and 4 for identification purposes  
15 only at this time.)

16 Q Just to prevent me from coming here a couple more  
17 times, I'm gonna give you Defendant's 3 and 4, and they are  
18 in that particular order. If you could review those and  
19 tell me if they are accurate representations of those---

20 A I believe they are, yes, ma'am.

21 MS. GREGORY: Okay. Your Honor, we would like to --  
22 Defendant's 3 and 4 be entered into evidence.

23 MS. McMAHAN: No objection.

24 THE COURT: Without objection.

25 (WHEREUPON, Defendant's Exhibit No. 3 and 4 were

1 received into evidence at this time.)

2 Q If you could provide -- those emails are from whom?

3 There's---

4 A Okay.

5 Q Sorry.

6 A Defendant's, Defendant's 3 is from Mr. Sheek to me. It  
7 had a few -- he had his investigator and Mr. Brown, who's  
8 also -- who was and is with the Solicitor's Office, emailing  
9 me. This was very shortly after Defendant's 3. Like about  
10 an hour and 20 minutes or so later.

11 Q Uh-huh. (Affirmative).

12 A He offered to dismiss nine counts in return for a plea  
13 to one count straight up, and then No. 4 is me responding  
14 about 15 minutes later that I would communicate the offer  
15 and reiterating it would need to be an Alford plea, and  
16 asking Lance if he would give me a hard time about that if  
17 Mr. Tate chose to take the plea. And Mr. Sheek responded,  
18 about an hour later, we can do an Alford since he's getting  
19 a benefit from the plea.

20 Q Okay. And do you recall your discussions with Mr. Tate  
21 regarding the Alford plea for the one count?

22 A Not, not in any --

23 Q Okay.

24 A -- particularity, no, ma'am.

25 Q Okay.

1 A Not at all.

2 Q And every time that you reached out to the State  
3 regarding a plea offer, it would prior -- it was required to  
4 be an Alford plea.

5 Is that right?

6 A I mean based on my discussions with Keith, I did not  
7 think that this was something he could admit guilt to  
8 because he was -- he, he didn't do it. He was telling me he  
9 didn't do it.

10 Q Correct.

11 A He was very firm about that. So, that was the only way  
12 I could see a plea going forward that a judge could actually  
13 accept --

14 Q Okay.

15 A -- cause I didn't think he was going to---

16 Q Okay.

17 A ---be able to get up there and lie.

18 Q Okay. And you communicated that offer to Mr. Tate?

19 A I, I can't imagine that I did not.

20 Q Okay. You said in your email I'll communicate it.

21 Is that correct?

22 A Yes, ma'am.

23 Q Okay. And you've answered some of my questions. So,  
24 I'm just gonna jump around here.

25 How many times did you say that you met with him?

1 A I didn't say---

2 Q Oh.

3 A ---because I don't remember.

4 Q Okay. You don't remember.

5 Okay. Were you in a trial posture the whole time?

6 I received a ton of discovery in this case, and we have  
7 copious amount of notes regarding your investigation.

8 Were you in a full trial posture the whole time?

9 A Yes, ma'am. I mean we were -- from the time I had that  
10 conversation with Keith at the end of February about him  
11 needing to get the case resolved cause it was causing him  
12 problem with work, we were preparing for trial---

13 Q Okay.

14 A ---from that point on.

15 Q Did Mr. Tate ever indicate to you he was more  
16 interested in pleading guilty or taking an Alford plea or  
17 anything?

18 Was he ever indicating to you he did not want to go to  
19 trial?

20 A I, I do not. I don't recall him ever telling me I  
21 don't want to go to trial, but I don't -- I honestly do not  
22 remember specifics. My, my feeling about the case is that  
23 it would of had to have been a good offer for him to be able  
24 to consider taking a plea, and, and that we didn't feel that  
25 straight up zero to 20 was necessarily any worse than he was

1 gonna get if he went to trial and he---

2 Q He---

3 A ---risked the conviction.

4 Q He said he was facing 200 years.

5 Does that sound right?

6 A He had originally 10 counts of I believe CSC with a  
7 minor second degrees. So, that's 200.

8 Q Okay. So---

9 A If they're running consecutively.

10 Q A plea straight up to one count potentially was a  
11 benefit?

12 A I didn't see it as a benefit. I mean after -- I, I  
13 didn't see him getting 200 years at trial. I mean I suppose  
14 a judge could of run something consecutively. I've had that  
15 happen once after a trial in my recollection out of all the  
16 cases I've tried. I believe I've had one consecutive  
17 sentence.

18 Q Okay.

19 A So, I kind of -- my opinion on it was that he was  
20 risking a -- essentially up to 20 if he went to trial. I  
21 understand you add it all together --

22 Q Right. Sure.

23 A -- 200 -- 20 is less than 200.

24 Q Sure.

25 A Sure. But I didn't see a straight up plea to one count

1 being a huge benefit to him.

2 Q Okay. And looking at the second allegation, you  
3 reviewed the jury instructions briefly before the hearing.

4 Did you see any issues with the jury instructions?

5 A I, I didn't, but if I didn't -- if the judge didn't  
6 instruct the jury to find him guilty beyond a reasonable  
7 doubt, and I didn't object to that, then obviously---

8 Q Would you---

9 A ---I should of objected to that. What I---

10 Q Would you like to review?

11 A What I read I thought that he did instruct -- give them  
12 that instruction.

13 Q Okay. And do you recall---

14 THE COURT: I'm sorry. This relates to the unanimous  
15 verdict.

16 Is that right?

17 MS. GREGORY: Yes, sir.

18 THE COURT: Was that on the verdict form?

19 MS. GREGORY: I'm sorry?

20 THE COURT: Was it you must find that -- unanimously  
21 find on the verdict form?

22 The verdict must be unanimous.

23 MS. GREGORY: Right. It was instructed that way. I  
24 don't have a copy of the verdict form, Your Honor.

25 THE WITNESS: I don't believe that was on the verdict

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1 form, and it, and it certainly wasn't on the verdict form  
2 that the jury had to specify what type of sexual battery.

3 Q But they were -- they were instructed to find, on each  
4 indictment, is that correct, a unanimous verdict?

5 A If, if that is what the transcript says, then yes,  
6 ma'am.

7 MS. GREGORY: Okay. Your Honor, for your reference,  
8 it's Page 440 -- 414 to 415 of the transcript.

9 THE COURT: And this---

10 MS. GREGORY: I'm sorry?

11 THE COURT: Never mind.

12 Go ahead.

13 414?

14 MS. GREGORY: To 415, yes, sir.

15 May I approach, Your Honor?

16 THE COURT: Yes, ma'am.

17 MS. GREGORY: It's the highlighted portions on this  
18 side.

19 A At the top of 415, it says the State must prove, beyond  
20 a reasonable doubt, that the defendant engaged in a sexual  
21 battery with victim, and it does say, about the middle of  
22 that page, the State must prove, beyond a reasonable doubt,  
23 all the elements of this offense that is stated in each of  
24 the nine indictments.

25 Q Okay. And at the very bottom it says each indictment

1 must be found unanimously.

2 Is that correct?

3 A In the time -- at Lines 16 through 18 --

4 Q Okay.

5 A -- it says your verdict must be unanimous as to each of  
6 the nine indictments.

7 Q Thank you.

8 I don't have any further questions, Your Honor.

9 THE COURT: Anything further?

10 MS. McMAHAN: I have no further questions, Your Honor.

11 THE COURT: You may step down.

12 THE WITNESS: Thank you.

13 MS. McMAHAN: Your Honor, at this time the Applicant  
14 rests.

15 Oh, I'm sorry. I would ask that Ms. Nelson be excused  
16 as well.

17 THE COURT: Any objection?

18 MS. GREGORY: No. No objection.

19 THE COURT: You may be excused.

20 Did you say you were gonna call another witness or is  
21 this -- you rest?

22 MS. McMAHAN: We, we rest. We rest, Your Honor.

23 THE COURT: Yes, ma'am.

24 MS. GREGORY: The State would call Lance Sheek.

25 LANCE SHEEK, being first duly

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1 sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. GREGORY:

4 Q Morning, Mr. Sheek.

5 How long have you been practicing law?

6 A Since 1992. Twenty-seven years.

7 Q And how much of that's been in criminal law?

8 A It's, it's all been in the area of criminal. I started  
9 in 1992 with the Solicitor's Office, and, over a period of  
10 years, left and came back. Served as the city prosecutor  
11 for the City of Greenwood for a number of years, and then,  
12 in my private practice, I've always had criminal defense.

13 Q Okay. And where are you currently employed?

14 A At West End Law Group in Greenville, South Carolina.

15 Q Okay. And where were you employed in 2014?

16 A At the Eighth Judicial Circuit Solicitor's Office.

17 Q And how long were you there?

18 A I was there from 2013 until February of 2017.

19 Q Okay. How did you get involved in Mr. Tate's case?

20 A When I came back to the Solicitor's Office in 2013, I  
21 took the position of prosecutor for cases of sexual assault  
22 against women and children. And so I traveled the four  
23 counties in the Eighth Judicial Circuit which are Greenwood,  
24 Laurens, Newberry, and Abbeville, and handled cases in each  
25 of those counties.

1 Q Uh-huh. (Affirmative).

2 A And so, at that time, I inherited Mr. Tate's case,  
3 which was pending in Abbeville County.

4 Q Okay. And when you were assigned the case, were you  
5 aware of the six year plea offer extended by Ms. Boland?

6 A When I initially was assigned the case, I was not  
7 because I hadn't looked into that, that deeply. I became  
8 aware of that later.

9 Q Okay. And how did you become aware of it?

10 A I believe it was in the discussion with Ms. Nelson when  
11 she, she asked about that six year offer. We, we looked  
12 into it to see who made the offer, and when it was made,  
13 things of that nature.

14 Q Okay. And how do you typically handle plea offers that  
15 are extended by previously present solicitors by former  
16 solicitors?

17 A When we took over those cases, and, and Mr. Stumbo, the  
18 current solicitor, was elected after this case was pending,  
19 our, our practice was that we would reevaluate the cases,  
20 and we would extend or make offers as we deemed appropriate.  
21 And there was no policy that prior offers were, were binding  
22 upon us at all. If a prior offer had been made, obviously I  
23 would look at it and see why and, and was the victim  
24 involved and things of that nature.

25 We had a number of cases, and I'm not referring to Ms.

1 Boland specifically, but we had a number of cases where  
2 offers were extended where victims were not a part of the  
3 process. And so we were, we were reevaluating everything to  
4 make sure that any offers we made were made based on  
5 victim's input, and our evaluation of the evidence, and the  
6 accusation -- accusations.

7 Q Okay. And did you receive an email, I believe it's  
8 still up there if I'm not mistaken, it should be Defendant's  
9 Exhibit 1?

10 A Yes, I, I did. It -- Defendant's Exhibit 1 was an  
11 email that was to me. It was copied I believe to Mr. Yates  
12 Brown who was the deputy solicitor in charge of Abbeville  
13 County as well as Ms. Chappel who was an investigator for  
14 these type cases at our office.

15 Q Okay. And regarding that email, what did you do?

16 A I was actually in trial, if my memory serves me, at  
17 that time in Laurens County. Ms. Chappel would of been with  
18 me. So, I, I believe we looked into the case on our  
19 computer system, and then made arrangements to reach out to  
20 the victim.

21 Q Okay.

22 A And ultimately responded to Ms. Nelson in the emails  
23 that have been previously testified to.

24 Q Okay. And did you take that email as an acceptance of  
25 the six year offer that Ms. Boland had extended?

1 A I, I did not.

2 Q Okay. What did you take that email to mean?

3 A Well, it, it appeared to me to be a counteroffer, for,  
4 for lack of a better term. Ms. Nelson was asking would you  
5 be willing to do the six year cap as an Alford plea, and,  
6 and she indicated that she didn't have a -- it wasn't an  
7 offer for her. She hadn't run this by her client, that she  
8 was simply asking was that still an option.

9 Q Okay. Which -- so, as a counteroffer, what did you  
10 respond back?

11 There should be Defendant's 2, 3, and 4 up there I  
12 believe.

13 A Yes, ma'am, there, there were a number of emails that  
14 went back and forth in May of 2014. I told her initially  
15 that I would encourage the victims to accept a 10 year plea  
16 offer if the client was agreeable, and the reason I said  
17 that was I didn't want to bring in this, this young girl,  
18 who was the victim in the case, and try to get her to the  
19 point of agreeing to anything if the client was not willing  
20 to plea.

21 Q Okay.

22 A He, he had always indicated, in my discussions with  
23 Ms. Nelson, it, it appeared he always indicated he was not  
24 guilty, and he wasn't gonna plead to it.

25 Q Okay.

1 A So, I said we would encourage them to a 10 year offer  
2 if he was agreeable.

3 Q Okay.

4 A I wanted something firm from her on that before I went  
5 to the victim with it.

6 Q Okay. And then, shortly thereafter, what did you  
7 communicate to her?

8 A I told her that I had spoken with the solicitor, David  
9 Stumbo, and that we were able to dismiss all but one count  
10 of the CSC second in return for a plea to one count straight  
11 up.

12 Q Okay. And there was nothing in the file that you saw  
13 that indicated Mr. Tate was interested in that six year plea  
14 prior to your involvement from Ms.---

15 A No.

16 Q ---Boland?

17 A No. As a matter of fact, we had called the case  
18 previously to trial I think in February.

19 Q Okay.

20 A I'm not positive about that date. The defense had  
21 moved for a continuance, and the Court had granted a  
22 continuance. So---

23 Q Okay.

24 A ---the subsequent trial was actually our second time  
25 up.

1 Q Okay.

2 A And at no time was I ever advised that Mr. Tate wanted  
3 to accept an offer.

4 Q Okay. And regarding the plea offers extended to you in  
5 negotiations with Ms. Nelson, did every single one have to  
6 be an Alford plea that she extended?

7 A To my recollection, and, and I can't find any records  
8 otherwise, it was always that it would have to be an Alford  
9 plea, that her client could not stand up and say he was  
10 guilty. He maintained he was not guilty.

11 Q Okay. Did he also say that during the trial or at --  
12 before sentencing?

13 Did he say he was innocent?

14 A Yes, he always maintained that fact.

15 Q Looking at the second allegation, I have the transcript  
16 here. I can -- may I approach, Your Honor?

17 THE COURT: Yes, ma'am.

18 Q And it's Page 414, 415.

19 Looking at the jury instructions regarding the sexual  
20 battery, did you recall anything objectionable regarding the  
21 jury instructions?

22 A I did not. The judge charged on the burden of proof  
23 being on the State. He charged on the presumption of  
24 innocence, innocence, that each and every element had to be  
25 proven beyond a reasonable doubt.

1 Q Okay.

2 A And then used what was the standard reasonable doubt  
3 definition.

4 Q Okay. And is this the first CSC case that you've  
5 handled?

6 A No.

7 Q Is this the typical charge you see in CSC trials?

8 A It was. As a matter of fact, we had requested, I  
9 believe, some charges that he, he denied. So, it---

10 Q Okay.

11 A ---it was standard.

12 Q Okay.

13 A Yes, ma'am.

14 Q And if you turn to Page 360?

15 A (Witness complies.)

16 Q There was a motion regarding a special -- the specific  
17 verdict form which they've brought up in their case.

18 Do you recall that special verdict form?

19 A I, I do.

20 Q Okay. And did you object to that or make argument  
21 against that?

22 A We did. It was our position that what they were  
23 requesting the jury was not what the law required, and  
24 unnecessary, and unduly burdensome, and could potentially be  
25 confusing.

1 Q Okay. And what did the Court rule?

2 A The Court denied their motion for a special verdict  
3 form.

4 Q Okay. And do you recall that Mr. Tate was only found  
5 guilty on one indictment?

6 A Yes, I do recall that.

7 MS. GREGORY: Okay. And may I approach, Your Honor?

8 THE COURT: Yes, ma'am.

9 Q Is this the indictment that he was found guilty of?

10 A Yes, ma'am, that---

11 Q Okay.

12 A That is the indictment. It is 2011-GS-01-0046.

13 Q Okay. And if you turn to Page 379 of the transcript?

14 A (Witness complies.)

15 Q I believe I've highlighted a section.

16 If you could just explain, on 10/31/2009, what type of  
17 sexual battery is alleged to have occurred?

18 A The, the indictment in question was just identified on  
19 October 31<sup>st</sup> of 2009, alleged anal intercourse, penile  
20 penetration.

21 Q Okay. And is that the only sexual battery that  
22 occurred on that date?

23 A On that particular day, that was all that was alleged.

24 Q So, does that, does that verdict indicate that they  
25 unanimously found anal intercourse occurred on that date?

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By Ms. Gregory

1 A Yes, ma'am, it does.

2 Q Okay. Was the jury also properly instructed as to the  
3 State's burden of proof?

4 A Yes, ma'am, they were. They were charged that all the  
5 burden rested on the State, that the defendant -- the, the  
6 terms they actually used was the defendant has no duty to  
7 prove anything.

8 MS. GREGORY: Okay. No further questions, Your Honor.

9 THE COURT: Anything further?

10 A Oh.

11 CROSS-EXAMINATION

12 BY MS. McMAHAN:

13 Q Mr. Sheek, you said, and correct me if I'm wrong cause  
14 I'm sitting back there, and I'm having a hard time hearing a  
15 little bit, what was the situation with prior plea  
16 officers -- plea offers by solicitors is that you weren't  
17 bound by them, but you guys were reevaluating some of them?

18 A Yes. We didn't -- a plea offer like this, it was --  
19 that was open ended, there was no expiration date, it was  
20 three years later. It was not something that would of been  
21 binding on us as a office policy. It would of been our  
22 right to reevaluate it, make what offers we felt  
23 appropriate.

24 Q So, if the attorney had indicated to you that hey, I  
25 never extended this offer to my client, which I don't know

1 if you're aware, I mean there's the Daby case out there that  
2 says that the trial attorney has to extend the offer.

3 Would you have any office policy about that?

4 A I don't recall a specific office policy about that. I  
5 mean that would of been something we would of addressed on a  
6 case by case basis.

7 Q So, does Ms. Nelson ever specifically tell you that  
8 Mr. Tate had never been given that six year offer?

9 A I can't recall that. Ms. Nelson and I, in addition to  
10 the emails, I know spoke about this in the -- in person,  
11 and, and I couldn't, with great confidence, tell you whether  
12 she told me that or not. If you've got something in  
13 writing, I'd be happy to look at it, but I'm not gonna deny  
14 she did. I, I don't know.

15 Q I mean she asked you if the offer was still on the  
16 table.

17 Is that correct?

18 A Yes. In that email, she asked me if that was still on  
19 the table.

20 Q Okay. And so then you extended an offer at some point  
21 I guess for like the ten years after, and you said, said  
22 that you were trying to pin Mr. Tate down for something.

23 Is that correct?

24 A Yeah. We had -- we extended an offer for a plea one  
25 count straight up, and then said we would do a 10 year plea,

1 and agreed that we would let him do it as an Alford plea.  
2 Our general policy was we did not allow Alford pleas in  
3 sexual assault cases.

4 Q Okay.

5 A But, in this case, we were willing to.

6 Q And then an hour and a half later you wrote back and  
7 said no, never mind, I'll give you straight up to one count,  
8 and we'll dismiss the others?

9 A Let me see if that's how it -- yes, my initial comment  
10 was I would encourage the victim. I, I didn't say we could  
11 take that offer. I said I would encourage the victim to  
12 agree to that, and then wrote back and said we could go  
13 straight up.

14 Q So, the 10 years, you would not characterize that as an  
15 offer?

16 A No.

17 Q That was on -- what would you characterize that as?

18 A The, the, the discussion of 10 years?

19 Q Yeah.

20 A That was a discussion with Ms. Nelson where I said if  
21 your client's willing to do a 10 year plea, I'll be happy to  
22 go to the victims and see if I can make that offer.

23 Q But you only gave her an hour and a half to respond  
24 before you wrote back and said no, never mind?

25 A Well, it, it, it wasn't that I was limiting her time to

1 respond. It's that, after further discussions when I had an  
2 opportunity, and I felt like that wasn't something I was  
3 gonna make happen, I was letting her know. I didn't want  
4 her to go to her client and try to sell a 10 year deal, and  
5 then me say yeah, well, I checked on it, that can't happen.  
6 So, as soon as I knew that wasn't something we were gonna be  
7 able to do, I reached out to her.

8 Q And then just stepping back a little bit more with the  
9 six year offer.

10 If Ms. Nelson had said specifically hey, Mr. Tate never  
11 got this offer from Charles, is it still on the table,  
12 what -- how would that have changed things?

13 A I can't say necessarily that it would of. I, I, I mean  
14 I, I would find that surprising. I'm well familiar with Mr.  
15 Grose's work ethic, and know how thorough he is. So, I'm  
16 not surprised that he would take the position that I can't  
17 recommend anything to my client till I have all the  
18 evidence. I mean I think that's an appropriate position for  
19 him to take.

20 Q Well, my question is if Charles or Janet had come to  
21 you and said hey, I never gave this offer to my client, my  
22 bad, is it still on the table -- would that offer still be  
23 on the table, given the fact that we have case law that says  
24 that the attorney has to give the client the offer, would  
25 that offer still have been on the table?

1 THE WITNESS: You'll have to pardon me a second, Judge.  
2 I have to think through that.

3 THE COURT: Well, take your time.

4 A If they had come to me and said we failed to do  
5 something we're suppose to do, our bad to use your language,  
6 I would of certainly considered it. I mean it would not  
7 have been my desire to, to put an attorney in a bad  
8 decision. My understanding was Mr. Grose's position had  
9 been I need further evidence. It -- I'll, I'll likely --  
10 the answer I can tell you is it may of made a difference to  
11 me. I don't know.

12 Q Did you feel like Ms. Nelson's email to you saying hey,  
13 is this still on the table, that was not -- that was just  
14 asking if you would resurrect an offer that you thought had  
15 already been given to Mr. Tate?

16 A That -- that's what I thought, and I mean Ms.,  
17 Ms. Nelson's coming in as the second defense attorney just  
18 like I'm not the first prosecutor. So, I took it as I've  
19 looked through the file, I see this, is this something that  
20 I should go talk to my client about.

21 Q Had Ms. Boland printed that email out and left it in  
22 the file or was the only way that you found out about it  
23 from Ms. Nelson or do you even recall?

24 A Well, it, it would of been in our system. I don't  
25 recall that it was printed out and put into the file, but

1 there's copies of the emails in our case management system.

2 Q So, would it have been saved electronically somewhere  
3 in there?

4 A Yes.

5 MS. McMAHAN: One second, Your Honor.

6 (Pause.)

7 MS. McMAHAN: I have no further questions, Your Honor.

8 THE COURT: Anything further?

9 MS. GREGORY: Yes, sir.

10 REDIRECT EXAMINATION

11 BY MS. GREGORY:

12 Q If you would look at that email again from Ms. --?

13 THE COURT: Which exhibit?

14 MS. GREGORY: Janna Nelson -- at the -- Defendant's 1.

15 A Yes, ma'am.

16 Q The bottom paragraph, would you read that please?

17 A Bottom paragraph from Ms. Nelson to me. Says also I'm  
18 not sure if I ever got a definite answer on whether you  
19 would accept a plea to one count with a negotiated six year  
20 cap. It would have to be an Alford plea, which I don't  
21 think Judge Hocker would have a problem taking. I can't  
22 swear that Mr. Tate would take that, but the last time we  
23 talked he did ask me if that was on the table. So, I just  
24 wanted to make sure I asked about it.

25 Q Okay. She didn't say is that still on the table, did

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1 she?

2 She didn't indicate --?

3 A No, she indicated---

4 Q Okay.

5 A ---she didn't have a definite answer---

6 Q Okay.

7 A ---on whether or not we would accept it.

8 Q Okay. And any offer that she made on behalf of her  
9 client indicated that it had to be an Alford plea.

10 Is that right?

11 A Correct.

12 Q So, there was never an acceptance or even a mention of  
13 the six year cap without it being an Alford plea.

14 Is that right?

15 A There's nothing in the file in writing to indicate  
16 that. I have no recollection of that occurring.

17 Q Okay.

18 All right. No further questions, Your Honor.

19 THE COURT: Anything further?

20 MS. McMAHAN: Nothing.

21 THE COURT: Mr. Sheek, on this, there never was a  
22 meeting of the minds?

23 THE WITNESS: Yes, Judge. That's what it appears, yes,  
24 sir.

25 THE COURT: Yes, sir.

1 MS. GREGORY: The State rests, Your Honor.

2 THE COURT: Anything further?

3 MS. McMAHAN: Yes.

4 May I recall the Applicant?

5 THE COURT: You may recall him.

6 MS. McMAHAN: Your Honor, we'd call Mr. Tate.

7 THE COURT: Yes. Come up -- come around again, Mr.  
8 Tate, and you're still under oath, sir.

9 KEITH TATE, having been previously  
10 sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. McMAHAN:

13 Q Mr. Tate, did Mr. Grose ever tell you that the  
14 solicitor had given you a six year plea offer?

15 A No, ma'am. I wish they had of told me. I could of had  
16 time to decide my fate instead of the jury.

17 Q And when you -- did you find out about the six year  
18 plea offer when you met with Ms. Nelson years later trying  
19 to get your case resolved?

20 A Yes, ma'am, it was almost five years later, and  
21 everybody was -- the offers going back and forth between the  
22 solicitors and the attorneys -- attorney. I was never -- I  
23 mean they should of been brought to my attention, I feel  
24 like, so I could of had the chance to decide on that.

25 Q So, everything that you've heard today, this was all

Keith Tate - Direct examination  
By Ms. Gregory

1 the first time you've heard anything about it?

2 A Yes, ma'am.

3 MS. McMAHAN: I have nothing further, Your Honor.

4 THE COURT: Anything further?

5 MS. GREGORY: Yes, sir.

6 CROSS-EXAMINATION

7 BY MS. GREGORY:

8 Q You're saying that Ms. Nelson never communicated any  
9 plea offers to you either?

10 A Nothing but that she was trying to get the six years  
11 deal and they said no. As far as the 10 years and all of  
12 that, of that, no.

13 MS. GREGORY: Okay. Nothing further, Your Honor.

14 MS. McMAHAN: Nothing further, Your Honor.

15 THE COURT: You may step down, Mr. Tate.

16 THE BAILIFF: Watch your step, sir.

17 MS. McMAHAN: Nothing further from the Applicant.

18 MS. GREGORY: Nothing further from the State, Your  
19 Honor.

20 THE COURT: Well, thank you for your presentation.  
21 I'll take everything into account I heard here today, the  
22 testimony, things that are in the file, and I'll let you  
23 know my decision.

24 Thank you, officer.

25 MS. McMAHAN: Thank you.

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\* \* \*END OF REQUESTED TRANSCRIPT OF RECORD\* \* \*

## C E R T I F I C A T E

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I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Abbeville County, South Carolina, on the 14<sup>th</sup> day of October, 2019.

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May 29<sup>th</sup>, 2020



PAMELA E. GREEN, Court Reporter

**Charles Grose**

---

**From:** Charles Grose [cgrose@pdgreenwood.com]  
**Sent:** Wednesday, February 09, 2011 10:10 AM  
**To:** 'Patricia Bolen'  
**Subject:** RE: Tate

I will not be in a position to discuss resolving this case until we get all the evidence examined.

E. Charles Grose, Jr.  
 Circuit Defender, Eighth Judicial Circuit  
 Suite 208, Park Plaza  
 600 Monument Street, Box P-133  
 Greenwood, SC 29646  
 864.229.9505  
 864.227.1104 (fax)  
 E-mail: [cgrose@pdgreenwood.com](mailto:cgrose@pdgreenwood.com)

FILED  
 2019 OCT 18 AM 10:30  
 CLERK OF COURT

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**From:** Patricia Bolen [<mailto:pbolen@greenwoodsc.gov>]  
**Sent:** Wednesday, February 09, 2011 10:08 AM  
**To:** Charles Grose  
**Subject:** Tate

I can offer him a cap of 6.

Patricia Bolen, Assistant Solicitor  
 8th Judicial Circuit Solicitor's Office  
 600 Monument Street, Suite 203  
 Greenwood, SC 29646  
 864-942-8829  
 964-377-1080 (cell)



STATE OF SOUTH CAROLINA )  
 COUNTY OF ABBEVILLE )  
 Keith Denver Tate, #236480, )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE EIGHTH JUDICIAL CIRCUIT

2018-CP-01-064

**ORDER OF DISMISSAL**

FILED  
 STATE OF SOUTH CAROLINA  
 2020 MAR 16 AM 8:07  
 EMILY W. COLEMAN  
 CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed on February 28, 2018, by Keith Denver Tate (Applicant). The State (Respondent) filed a Return on June 13, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on October 14, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General’s Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Public Defender Janna Nelson Gregory (Nelson) of the Eighth Circuit Public Defender’s Office, Assistant Public Defender Shane E. Goranson (Goranson) of the Eighth Circuit Public Defender’s Office, E. Charles Grose, Jr. (Grose), Esquire, and Christopher Lance Sheek (Sheek), Esquire also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies and dismisses this application with prejudice.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. During its February 2011 term, the Abbeville County Grand Jury indicted Applicant for nine counts of criminal sexual conduct

with a minor, second degree (2011-GS-01-45, -46, -47, -49, -50, -51, -52, -53, -54). Nelson and Goranson represented Applicant. Assistant Solicitors C. Yates Brown and Sheek prosecuted the case.

On May 27-29, 2014, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, circuit court judge. On May 29, 2014, the jury convicted Applicant of one count of criminal sexual conduct with a minor in the second degree (2011-GS-01-0046) and acquitted Applicant of the eight remaining counts. Judge Hocker sentenced Applicant to a sixteen year term of imprisonment.

Applicant filed a timely notice of appeal and the appeal was perfected by Appellate Defender Susan B. Hackett of the South Carolina Commission of Indigent Defense – Division of Indigent Defense. On appeal, Applicant raised the following issues:

- I. Did the trial judge's failure to declare a mistrial based upon the alleged victim's multiple emotion outbursts that disrupted the trial and improperly influence the jury to decide the case on emotion instead of the evidence presented violate Applicant's state and federal constitutional rights to a fair and impartial jury?
- II. Did the trial judge's failure to require the state to open in full during closing argument and reply only to the defense's closing argument violate Applicant's state and federal constitutional rights to a fair trial and due process of law?
- III. Did the trial judge's refusal to permit Applicant to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Applicant violate Applicant's state and federal constitutional rights to present a defense and confront his accuser?

(FBOA).

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence on October 19, 2016. State v. Tate, Op. No. 2016-UP-436 (S.C. Ct. App. Filed October 19, 2016). Applicant petitioned for rehearing on November 3, 2016. On December 14, 2016, the Court of Appeals denied the petition for rehearing and attached a substituted opinion that

affirmed Applicant's conviction and sentence. Applicant filed a second petition for rehearing on December 29, 2016. Applicant's second request for rehearing was denied on January 10, 2017. Applicant timely submitted a Petitioner for Writ of Certiorari to the South Carolina Supreme Court, which was subsequently denied. The remittitur was issued on October 25, 2017.

### **SUMMARY OF FACTS**

In July of 2009, Mother moved to Calhoun Falls in Abbeville County with her children and Applicant. (Tr. p. 73.) Applicant was Mother's boyfriend and the father of one of her sons. (Tr. p. 74.) Mother had three children: Victim, T.R., and T.R. (Tr. p. 72.) Applicant and Mother dated for three or four years and cohabitated for the entirety of the relationship. (Tr. p. 74.) Mother suffers from significant health problems including seizures, schizophrenia, bipolar disorder, fibromyalgia, rheumatoid arthritis, and neuropathy. (Tr. p. 75.) To treat her various illnesses, Mother took approximately thirty-six pills per day and had prescriptions for Xanax, Geodon, Depakote, Ativan, Seroquel, Lortab, Phenergan, Flexeril, and Zanaflex. (Tr. pp. 74-75.) As a result of being heavily medicated, Mother slept most of the day. (Tr. p. 76.) Mother would take the first dose of medication and sleep until 5:00 p.m. or 6:00 p.m., take the second dose and sleep until 9:00 p.m. or 10:00 p.m., then take a third and final dose and sleep through the night. (Tr. p. 75.) Due to Mother's poor health, Applicant primarily cared for the children. (Tr. p. 135.)

Rebecca Holland worked at Calhoun Falls Charter School, where Victim was a student, as a substitute teacher, bus supervisor, track coach, band director, and bus driver. (Tr. pp. 232-233.) Victim was in the color guard in the band during the 2009 season and part of the 2010 season. (Tr. p. 233.) Holland took Victim home from band practice every day. (Tr. p. 234.) Holland testified that Victim would cry on the way home and ask her not to take her back to her house. (Tr. p. 235.) Holland sometimes witnessed Applicant grab Victim by the arm when she would drop Victim off

at home. (Tr. p. 235.) On August 23, 2010, Victim disclosed to Holland that she had been sexually assaulted. (Tr. p. 233.) Following Victim's disclosure, pursuant to school policy, Holland reported the incident to Lori Lindler, the school's assistant principal and guidance counselor. (Tr. p. 234.) Sometime earlier in 2010, Victim also disclosed the abuse to T.C., her boyfriend at the time. (Tr. p. 112.) Victim detailed Applicant's abuse to T.C. around five or six months after the abuse had been happening. (Tr. p. 115.) Victim did not want T.C. to tell anyone about the abuse because it would "mess the family up." After Victim told T.C. the abuse was continuing, he told his mother. T.C. subsequently gave a statement to police on August 26, 2010. (Tr. p. 121.) Lori Lindler spoke with Victim regarding her allegations of sexual abuse on August 25, 2010. (Tr. p. 248.) Lindler testified that Victim came to speak with her after confiding in the parent of a student and Rebecca Holland, who subsequently referred the matter to her. (Tr. p. 247.) In her conversation with Lindler, Victim recounted Applicant's abuse. (Tr. p. 248.) Victim identified ten separate occasions where she had been sexually abused by Applicant. (Tr. p. 248.) Nine of the instances of assault occurred in Abbeville County and one instance took place in Greenville County. (Tr. p. 248.) Lindler went through a calendar with Victim in an effort to identify the dates of the assaults as closely as possible. (Tr. p. 248.) They used the school calendar to aid them in selecting dates because Victim could remember when certain assaults occurred based on what school events were happening at the time. (Tr. p. 248.) Following her conversation with Victim, Lindler contacted the Calhoun Falls Police Department. (Tr. p. 249.) The officers subsequently obtained a search warrant for the residence and an arrest warrant for Applicant. (Tr. p. 265.)

On September 28, 2010, Jessica Bell interviewed Victim at The Child's Place. (Tr. p. 328.) The Child's Place was a children's advocacy center whose role is to make the investigation of child abuse easier on children. (Tr. p. 329.) The case was referred to The Child's Place by Monique Bell

of the Calhoun Falls Police Department. (Tr. pp. 329.) Jessica Bell testified that she did not ask Victim about specific dates, as children generally only remember things like their age at the time and what events were going on around the time of the abuse. (Tr. p. 332.) Bell prepared a report following her interview with Victim. (Tr. p. 329.) Several weeks after the forensic interview, Dr. Lyle Pritchard performed a forensic medical examination on Victim on November 23, 2010. (Tr. p. 291.) The forensic medical examination took place at The Child's Place. (Tr. p. 296.) Dr. Pritchard is part of the South Carolina Child Abuse Medical Response System. (Tr. p. 290.) Dr. Pritchard testified that during his examination of Victim, he noticed a transection of Victim's hymen. (Tr. p. 293.) A transection of the hymen is an injury that is consistent with something being forced into the vaginal opening. (Tr. p. 293.) Dr. Pritchard testified there is a delay in disclosure in the vast majority of child sexual abuse cases. (Tr. p. 294.) Dr. Pritchard also noted that any signs of physical abuse (bruising, lacerations, etc.) would have healed by the time he examined Victim. (Tr. pp. 294-295.) While at the Child's Place for her physical examination, Victim told a nurse that she never had sexual contact with anyone other than Applicant. (Tr. p. 179.) On cross examination, Defense Counsel asked Dr. Pritchard if Victim was using contraceptives at the time of the examination. (Tr. p. 299.) Dr. Pritchard indicated that she was using contraceptives. (Tr. p. 299.)

At trial, Victim fully recounted the extensive abuse she suffered at the hands of Applicant. Victim was sixteen years old at the time of trial. (Tr. p. 130.) In August of 2009, Victim was twelve years old. (Tr. p. 132.) Applicant took care of Victim and her siblings while Mother was sleeping. (Tr. p. 135.) Victim testified that she referred to Applicant as "Dad." Victim testified that Applicant no longer has her trust because he sexually assaulted her. (Tr. p. 136.)

Some months after the abuse began occurring, Victim disclosed the abuse to her boyfriend, T.C. (Tr. p. 136-137.) Victim did not immediately disclose the abuse because she did not know

who to tell. (Tr. p. 137.) Victim did not think anyone would believe her, as it would be her word against Applicant's. (Tr. p. 138.) Applicant also told Victim that if she told, her mother would have a seizure. (Tr. p. 350.)

Victim testified that Applicant touched her with his penis. (Tr. p. 140.) Specifically, Applicant penetrated her vagina with his penis. (Tr. p. 141.) When she sat down with Lori Lindler to try and ascertain the dates of the assaults, Victim identified ten dates when Applicant sexually assaulted her. (Tr. p. 142.) On all ten of these occasions, Applicant penetrated Victim's vagina with his penis. (Tr. p. 142.) Victim also testified that on the last occasion, Applicant put his penis in her mouth. (Tr. p. 151.) Victim also recalled Applicant penetrating her anus. (Tr. p. 151.) Victim testified that she bled the first time Applicant penetrated her vagina and on the occasion when he penetrated her anus. (Tr. p. 152.) Victim bled onto a sheet, which Applicant subsequently took away. (Tr. p. 152.) The dates of the nine assaults that occurred in Abbeville County were August 26, 2009, October 31, 2009, December 14, 2009, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010. (Tr. pp. 142-143.) Applicant also sexually assaulted Victim on a tenth occasion in Greenville County on December 26, 2009, at the home of Victim's aunt. (Tr. p. 169.)

Victim testified the first assault took place at their home in August of 2009. (Tr. p. 145.) The assault took place on the couch in the living room of the home while Victim's mother and siblings were home. (Tr. pp. 145-146.) No one else was in the room at the time of the assault. (Tr. p. 149.) Applicant told Victim he wanted to see what size bra and panties she wore. (Tr. p. 146.) Applicant then began kissing her neck and rubbing her bottom. (Tr. pp. 146-147.) Applicant tried to take Victim's shirt off and told her "he was helping her for her bra." (Tr. p. 147.) Applicant eventually took Victim's clothes off and lay on top of her, telling her "don't act like you don't want

it." (Tr. p. 150.) Applicant then penetrated her with his penis. (Tr. p. 150.) Victim testified that after the first assault, she was afraid to go home from school. (Tr. p. 157.) Following the first incident, Victim began writing poetry about her feelings. (Tr. p. 157.) Following the first incident.

Victim's journal read:

So many questions. Should I stay or should I go. Should I walk away from my fears or should I be strong. Should I love him. Should I hate him. Should I keep it to myself. Should I let them know. So many questions. Would she still love me - -would she still love my [sic] for me or hate me for something that wasn't my fault. Will she kick me out because she didn't believe me. Should I run away or should I stay. So many questions that have no answers. Does he know how I feel. Do he know. Do he know. Do he know. So many questions.

(Tr. p. 162.)

Applicant's second sexual assault of Victim occurred on October 31, 2009. (Tr. p. 189.)

Victim recalled the date because there was a school football game on October 30th. (Tr. p. 189.)

Victim reported to Jessica Bell that on this particular incident, she screamed and Applicant hit her in the face, busting her lip open. (Tr. p. 191.) Minor's mother also recalled noticing Victim had a busted lip at some point in time. (Tr. p. 80.) When Mother asked why Victim's lip was busted, she was told that Victim injured herself while playing. (Tr. p. 81.) After the assault on October 31st, Victim woke up to an empty house and noticed that her shorts were up, her underwear was down, and her shirt was on a lamp. (Tr. p. 194.) During Applicant's final assault of Victim, Applicant put her on the couch and put his penis in her mouth. (Tr. p. 208.) Victim bit Applicant's penis and he began screaming. (Tr. p. 209.) Victim then ran down the hallway and barricaded her bedroom door with her dresser. (Tr. p. 209.) Victim also told T.C. about this incident, disclosing to him that one night when she was asleep, Applicant put his penis in her mouth. (Tr. p. 120.) Victim told T.C. that Applicant got angry with her and grounded her. (Tr. p. 120.) Eventually, Victim began sleeping with her mother to get away from Applicant. (Tr. p. 190.)

### ALLEGATIONS RAISED

In Applicant's post-conviction relief application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:

- a. Trial counsel failed to convey a plea offer;
- b. Trial counsel failed to object to the testimony of state witness;
- c. Trial judge erred in his ruling of chain of custody.

On October 1, 2019, Applicant filed an amended application alleging:

- d. Ineffective assistance of counsel Grose – failure to convey a plea offer. Once plea offer was discovered by Ms. Nelson, the solicitor refused to honor it.
- e. Ineffective assistance of counsel by Nelson and Goranson – failure to properly object to the lack of jury instructions on sexual battery to be proven beyond a reasonable doubt.

At the evidentiary hearing, Applicant stated he was going forward on the allegations set forth in his amended application.

### APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

#### **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, the application for post-conviction relief, the amended application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### **Ineffective Assistance of Counsel**

*Grose was provided ineffective assistance of counsel because he failed to convey a plea offer. Once plea offer was discovered by Nelson, the solicitor refused to honor it.*

Applicant alleges Grose failed to convey a five year plea offer to him from the State during his representation of Applicant. Applicant further alleges, once the five year plea offer was discovered by Nelson, the State refused to honor the plea offer.

Applicant testified he talked to Grose one time and that was for a bond reduction. Applicant testified he applied for a job and there was a "red flag" regarding his pending charges

and he reached out to Grose and found out he had gone into private practice. Applicant testified he thought his charges had been dropped and did not realize they were still pending because until he applied for the job. Applicant testified Nelson started representing him at that time. Applicant testified Nelson told him about a six year plea offer and Applicant told her he did not know anything about it. Applicant testified Nelson never communicated any plea offers to him during her representation.

On cross-examination, Applicant testified he was out of custody for five years prior to his trial. Applicant testified he never met with Grose in person. Applicant testified Grose told him not to contact him. Applicant testified he met with Nelson in person and had a couple of phone calls with her during her representation. Applicant testified he discussed plea offers with Nelson and they discussed the definition of an Alford plea. Applicant testified he does not recall the content of those discussions. Applicant testified he recalled wanting to take an Alford plea. Applicant testified he would have taken a plea prior to trial even if it was not an Alford plea. Applicant testified he recalled telling the court prior to his sentencing that he was innocent. Applicant testified he was not aware of any Alford plea discussions.

Grose testified he left his office as the Public Defender for the Eighth Circuit on August 16, 2012. Grose does not have a recollection one way or another regarding this offer of six years. Grose identified an email sent to him from Assistant Solicitor Patricia Bolen (Bolen) extending an offer to Applicant that was a cap of six years. Grose testified, according to his email response, he told Bolen he needed to have the evidence examined. Grose does not have notes from Applicant's case. Grose testified he looked through file materials and he did not find any notes or letters regarding the plea offer. Grose testified he wants all discovery before he discusses plea offers.

On cross-examination, Grose testified he was the head Public Defender for the Eighth Circuit at the time he represented Applicant. Grose testified he cannot rule out that he told Applicant about the six year cap plea offer. Grose testified it is his typical practice to communicate plea offers, and it is also his typical practice to record those communications. Grose testified it is possible that he made a note and discussed the cap of six year offer with Applicant and the note is just not in the file, but that is just speculation.

Nelson testified she represented Applicant prior to trial. Nelson testified Applicant reached out to her after his pending charges caused him a problem with obtaining a job. Nelson testified she informed Applicant the earliest possible trial date would be April of 2014 and that she would take steps to try to get his case resolved. Nelson testified she would have looked through the file when she met with Applicant. Nelson testified she found the offer of a six year cap in the file and brought that to Sheek's attention. Nelson testified she asked Sheek if he would let Applicant plea to the cap of six years under Alford and Sheek said no. Nelson testified her email to Sheek was something to the effect of "I don't know if [Applicant] would be willing to accept a cap of six years." Nelson testified she does not recall Applicant being interested to pleading to the charges straight-up because he could receive twenty years on one charge. Nelson testified their discussions about proceeding to trial revolved a lot around Applicant maintaining his innocence. Nelson does not recall specifics about what pleas he was willing to take, but did not believe Applicant would even consider a plea unless it was an Alford plea because he was maintaining his innocence.

On cross-examination, Nelson identified an email she sent to Sheek on Wednesday, May 14, 2014. Nelson read the relevant portion during the evidentiary hearing, which stated:

. . . I'm not sure if I ever got a definite answer on whether you'd accept a plea to one count with a negotiated 6-year cap. It would have to be an Alford plea, which I don't think Judge Hocker would have a problem taking. I can't swear that [Applicant] would take

that, but the last time we talked, he did ask me if that was on the table so I just want to make sure I ask about it.

(Defense exhibit #1.) Nelson testified her email cannot be construed as an acceptance of Bolen's cap of six year offer.

Nelson testified she received an email from Sheek on May 20, 2014, indicating he would be willing to encourage the victims to accept a ten year plea, but it was not an affirmative offer because he had not checked with the victim yet. Nelson testified she received a subsequent email from Sheek offering to have Applicant plead straight up to one count of criminal sexual conduct with a minor in the second degree and the State would dismiss the remaining charges. Nelson testified Sheek sent a follow up email indicating that a straight up plea to one charge could be an Alford plea. Nelson testified she cannot imagine she would not have communicated that to Applicant and her email response indicates she communicated that offer to Applicant. Nelson testified Applicant was very firm in saying he was not guilty. Nelson testified she believed it would have been good for Applicant to consider taking a plea in his case, but does not remember specifics. Nelson testified she did not see the plea offer of one count straight up as a benefit to Applicant since she did not believe he would get consecutive time from the court if he was found guilty on all of his charges.

Goranson testified he did not have any involvement in the plea offers in Applicant's case.

Sheek testified he was the prosecutor assigned to Applicant's case in 2014. Sheek testified he became aware of Bolen's cap of six year plea offer during his discussion with Nelson. Sheek testified there was no policy in the solicitor's office that made Bolen's previous offer to Applicant binding on him when he took over Applicant's case. Sheek testified his practice as to reevaluate cases to see what offer would be proper.

Sheek testified he took Nelson's email (defense exhibit #1) to be a counter-offer since Nelson's email indicated the offer would have to be an Alford plea, which was not in the original offer extended by Bolen. Sheek testified every offer he discussed with Nelson, she indicated it had to be an Alford plea since Applicant was maintaining his innocence. Sheek testified he ultimately offered to dismiss all charges except one and allow Applicant to plead under Alford straight up to one charge. Sheek testified Applicant chose to proceed to trial.

On cross-examination, Sheek testified he does not recall Nelson telling him Applicant never received the cap of six year plea offer. Sheek testified the general policy of the solicitor's office was that they do not allow Alford pleas in CSC cases. Sheek testified he did extend a potential offer to Nelson of ten years on May 20, 2014 at 9:19AM and, prior to her responding, he emailed her again the same morning at 10:43AM providing Nelson with an official offer for Applicant to plead to one count straight up under Alford. Sheek testified he Grose had come to him and said he had never provided the original plea offer from Bolen to Applicant, it may have made a difference since there is case law that states attorneys have to give their clients plea offers.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frve, 566 U.S. 134, 145 (2012); see also Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance"). When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant "must demonstrate a reasonable probability that: (1) he would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel; (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it; and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge

or a sentence of less prison time.” Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed”). If an applicant is able to meet the requirements set forth above, the appropriate relief is to require the State to re-extend the previous plea offer to Applicant. Lafler, 566 U.S. at 174. (“The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.”).

Here, Nelson’s email to Sheek (defense exhibit #1) and Nelson’s testimony show Applicant would not have accepted Bolen’s initial offer of a cap of six years since it was not an Alford plea. Nelson and Sheek both testified Applicant was maintaining his innocence and was not interested in any plea offer that was not an Alford plea. Further, Sheek testified he believed Nelson’s email asking if the six year cap offer was still on the table was a counter-offer since she further stated the six year cap would have to be an Alford plea, which was not part of Bolen’s original offer.

Accordingly, this Court finds the testimony of Grose, Nelson, and Sheek very credible as to this allegation and Applicant’s testimony not credible. This Court finds Applicant has failed to meet his burden to show he would have accepted the original cap of six year offer from Bolen as it was not an Alford plea and the credible testimony of Nelson and Sheek show Applicant was only interested in an Alford plea as he was adamant about maintaining his innocence. Therefore, this

Court finds Applicant has failed meet his requisite burden of establishing Grose or Nelson were constitutionally ineffective and this allegation is denied and dismissed with prejudice.

***Ineffective assistance of counsel by Nelson and Goranson -- failure to properly object to the lack of jury instructions on sexual battery to be proven beyond a reasonable doubt.***

Applicant alleges Nelson and Goranson should have objected to the lack of instruction that sexual battery must be proven beyond a reasonable doubt. However, during Goranson's testimony, Applicant modified this allegation to allege Goranson and Nelson were ineffective for failing to require the jury be instructed to find a specific type of sexual battery that occurred for any guilty verdict.

Goranson testified his issue with the jury instructions was that it did not require the jury to find a particular type of sexual battery was committed by Applicant for them to find Applicant guilty beyond a reasonable doubt. Goranson testified the verdict form did not require the jury to say what type of sexual battery occurred on each indictment. Goranson testified they submitted a verdict form to the trial court that would have required the jury to find the type of sexual battery for any indictment Applicant was found guilty of, but the trial court did not use their proposed form.

On cross-examination, Goranson testified Applicant was found guilty of only one indictment and that indictment alleged Applicant sexually assault Victim on October 31, 2009. After being shown that indictment, Goranson testified only one type of sexual abuse was alleged to have occurred on October 31, 2009.

The jury instructions provided to the jury by the trial court regarding second degree criminal sexual conduct with a minor was as follows:

... the Defendant is charged with second degree criminal sexual conduct with a minor. The State must prove beyond a reasonable doubt that the Defendant engaged in a sexual battery with the victim.

Now a sexual battery is defined in this state as sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight of any part of a person's body or of any object into the genital or anal openings of another person's body, except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes. The State must prove beyond a reasonable doubt all of the elements of this offense that is stated in each of the nine indictment and also must prove beyond a reasonable doubt that the victim was at least 11-years-old but not more than 14 years-old at the time of the sexual battery.

(Tr. 414-415.)

This Court finds the trial court's instruction properly instructed the jury on the State's burden to prove the allegations of sexual assault beyond a reasonable doubt. Further, the trial court provided the jury with an instruction on the "beyond a reasonable doubt" burden and reiterated the State's burden appropriately throughout the instruction. This Court finds Applicant has failed to meet his burden to show any deficiency on behalf of Nelson and Goranson for failure to object to the trial court's instruction. Further, Applicant has failed to show any resulting prejudice from the alleged deficiency as the trial court's instructions to the jury were proper.

As to Applicant's allegation that Nelson and Goranson were constitutionally ineffective for failing to have the trial court provide a special verdict form to the jury, this Court finds Applicant has failed to meet his burden to show how Nelson and Goranson were deficient as Nelson created the special verdict form and presented it along with argument to the trial court in support of using the special verdict form in Applicant's trial. (Tr. 361-363.) The trial court did not agree with Nelson, despite her efforts.

As to this allegation, Applicant has failed to meet his burden to show any resulting prejudice from the alleged deficiency. Applicant has failed to show this Court how the outcome of his trial would have been different had the jury used Nelson's proposed verdict form. As Goranson testified, Applicant was found guilty on only one of the nine indictments. The

indictment Applicant was convicted on alleged only one type of sexual assault, so the verdict form requiring the jury to find what specific type of sexual battery occurred on that one date would not have changed the outcome of his trial. As such, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Nelson and Goranson were constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

**CONCLUSION**


Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is to remain in the custody of the Respondent.

AND IT IS SO ORDERED this 31 day of January, 2020.

  
 L. CASEY MANNING  
 Presiding Judge  
 Eighth Judicial Circuit

 South Carolina

**WITNESSES**

Roger Hunnicutt  
Calhoun Falls Police Department

**WARRANT NUMBER**

I790870

Foreman of the Grand Jury

Date: FEB - 4 2011

**TRUE BILL**

**VERDICT**

not guilty

Ben H. Newton

Foreman

5-29-14

**THE STATE OF SOUTH CAROLINA**

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011

Indictment # 11GS01-0045

**THE STATE**

vs.

Keith Denver Tate

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

16-03-0655(B)

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 26th day of August, 2009 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: one victim date of birth: 1997, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

  
Solicitor

**WITNESSES**

Roger Hunnicutt  
Calhoun Falls Police Department

**WARRANT NUMBER**

I790878

*Allen C. Brown*

Foreman of the Grand Jury

**FEB - 4 2011**

Date:

**TRUE BILL**

**VERDICT**

*Guilty*

*Bill H. Newton*

Foreman

*5-29-14*

**THE STATE OF SOUTH CAROLINA**

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011

Indictment # 11GS01-*0046*

**THE STATE**

vs.

Keith Denver Tate

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 31st day of October, 2009 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: one victim [REDACTED] date of birth: [REDACTED] 1997, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



Solicitor

**WITNESSES**

Roger Hunnicutt  
Calhoun Falls Police Department

**WARRANT NUMBER**

I790871

*Allen C. Brown*

Foreman of the Grand Jury

Date: Feb - 4 2011

**TRUE BILL**

**VERDICT**

*not guilty*

*Brian H. Newton*

Foreman 5-29-14

**THE STATE OF SOUTH CAROLINA**

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011

Indictment # 11GS01- *0047*

**THE STATE**

vs.

Keith Denver Tate

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 14th day of December, 2009 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: one victim [REDACTED] date of birth: [REDACTED] 1997, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

  
Solicitor

**WITNESSES**

Roger Hunnicutt  
Calhoun Falls Police Department

**WARRANT NUMBER**

I790876

*Allen C. Brown*

Foreman of the Grand Jury

Date: **FC3 - 4 2011**

**TRUE BILL**

**VERDICT**

*Not guilty*

*Beth H. Newton*

Foreman *5-29-14*

**THE STATE OF SOUTH CAROLINA**

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011

Indictment # 11GS01- *0049*

**THE STATE**

vs.

Keith Denver Tate

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

FILED  
FEB 11 2011  
CLERK OF COURT

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 6th day of February, 2010 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: one victim date of birth: 1997, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

  
Solicitor

**WITNESSES**

Roger Hunnicutt  
Calhoun Falls Police Department

**WARRANT NUMBER**

I790877

*Allen C. Blow*

Foreman of the Grand Jury

Date: **FC3 - 4 2011**

**TRUE BILL**

**VERDICT**

*not guilty*

*Beck H. Newton*

Foreman *5-29-14*

**THE STATE OF SOUTH CAROLINA**

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011

Indictment # 11GS01- *0050*

**THE STATE**

vs.

Keith Denver Tate

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 13th day of February, 2010 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: one victim [REDACTED] date of birth: [REDACTED] 1997, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

  
Solicitor

**WITNESSES**

Roger Hunnicutt  
Calhoun Falls Police Department

**WARRANT NUMBER**

I790873

*Allen C. Ben*

Foreman of the Grand Jury

Date: **FC2 - 4 2011**

**TRUE BILL**

**VERDICT**

*not guilty*

*Ben H. Newton*

Foreman

5-29-14

**THE STATE OF SOUTH CAROLINA**

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011

Indictment # 11GS01-0051

**THE STATE**

vs.

Keith Denver Tate

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 3rd day of March, 2010 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: one victim [REDACTED] date of birth: [REDACTED] 1997, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

  
Solicitor

**WITNESSES**

Roger Hunnicutt  
Calhoun Falls Police Department

**WARRANT NUMBER**

I790874

*Allen C. Brown*

Foreman of the Grand Jury

Date: **FC3 - 4 2011**

**TRUE BILL**

**VERDICT**

*not guilty*

*Beck H. Newton*

Foreman *5-29-14*

**THE STATE OF SOUTH CAROLINA**

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011

Indictment # 11GS01- *0052*

**THE STATE**

vs.

Keith Denver Tate

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 14th day of March, 2010 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: one **victim** date of birth: **1997**, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

**Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.**

  
Solicitor

**WITNESSES**

**THE STATE OF SOUTH CAROLINA**

Roger Hunnicutt  
Calhoun Falls Police Department

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011  
Indictment # 11GS01-0053

**WARRANT NUMBER**

I790875

**THE STATE**

vs.

Keith Denver Tate

*Allen C. Brown*

Foreman of the Grand Jury

FE3 - 4 2011

Date:

**TRUE BILL**

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

**VERDICT**

*not guilty*

*Beth H. Newton*

Foreman

5-29-14

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 15th day of March, 2010 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: one victim [REDACTED] date of birth: [REDACTED] 1997, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

  
Solicitor

**WITNESSES**

Roger Hunnicutt  
Calhoun Falls Police Department

**WARRANT NUMBER**

I790872

*Allen C. Bern*

Foreman of the Grand Jury

**FC3 - 4 2011**

Date:

**TRUE BILL**

**VERDICT**

*not guilty*

*Beck H. Newton*

Foreman

5-29-14

**THE STATE OF SOUTH CAROLINA**

COUNTY OF ABBEVILLE

**COURT OF GENERAL SESSIONS**

February Term, 2011

Indictment # 11GS01-*0054*

**THE STATE**

vs.

Keith Denver Tate

**INDICTMENT FOR**

**CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)**

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

INDICTMENT FOR  
CRIMINAL SEXUAL  
CONDUCT WITH A MINOR  
16-03-0655(B)

At a Court of General Sessions, convened on the 4th day of February, 2011 the Grand Jurors of Abbeville County present upon their oath:

That Keith Denver Tate, did in Abbeville County, state aforesaid, on or about the 18th day of March, 2010 being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but no older than the age of fourteen (14) years, to wit: victim [REDACTED] date of birth: [REDACTED] 1997, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

  
Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF 783 Abbeville
STATE VS. Keith Denver Tate

INDICTMENT/CASE#: 11GS01-0046
A/W#: 1790878
Date of Offense: 10/31/2009
S.C. Code §: 16-03-0655
CDR Code #: 0396

AKA:
Race: Sex: M Age: 53
DOB: SS#:
Address: Pendleton Street
City, State, Zip: Calhoun Falls, SC 29645
DL#: SID#:

SENTENCE SHEET

\*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS
TO: Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive

in violation of § 16-03-0655 of the S.C. Code of Laws, bearing CDR Code # 0396
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Sheek, C. Lance 65376 SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 16 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 181 Days Credit
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Recipient:
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ca, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$3.90, TOTAL \$133.90

Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk Family McMahon
Court Reporter: Tara Scott
SCCA/217 (03/2011)

Presiding Judge [Signature]
Judge Code: 2167
Sentence Date: 5/29/14