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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

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THE STATE,

Respondent,

vs.

RICHARD KENNETH GALLOWAY,

Petitioner.

Appellate Case No. 2022-000914

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**BRIEF OF RESPONDENT**

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## RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in excluding expert testimony that someone diagnosed with schizoaffective disorder may create false memories because no evidence was provided that Victim suffered from this symptom or any other symptoms of schizoaffective disorder. Petitioner was not prejudiced by the exclusion of the testimony because the expert was allowed to testify someone suffering from schizoaffective disorder may suffer from delusions or hallucinations. Any error was harmless because Petitioner admitted to the abuse to Victim's mother and Victim's testimony was corroborated by her mother's testimony.

II. The trial court did not err in allowing testimony Petitioner was physically violent with Victim's mother because it was proper res gestae evidence to explain why Victim and Mother did not disclose the sexual abuse to law enforcement, and the testimony was cumulative in nature to numerous other bad acts which Petitioner elicited or Petitioner did not object.

III. The trial court did not err in allowing Victim's mother to testify about a letter Petitioner sent her over twenty-five years ago under the best evidence rule, testimony about the letter was not closely related to a controlling issue, and the testimony was cumulative to other evidence to which Petitioner did not interpose an objection.

## STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner Galloway for three counts of criminal sexual conduct with a minor in the first degree and one count of lewd act on a minor for events occurring between 1987 and 1990. Following trial on May 14-16, 2018, the jury convicted Petitioner of one count of criminal sexual conduct in the first degree and lewd act on a minor. The jury acquitted Petitioner of one of the remaining counts of criminal sexual conduct on a minor and returned a hung verdict on the last count of criminal sexual conduct on a minor. The presiding trial judge, the Honorable Perry H. Gravely, sentenced Petitioner to consecutive sentences of thirty years imprisonment for criminal sexual conduct with a minor and ten years imprisonment for lewd act on a minor. Judge Gravely denied Petitioner's subsequent motion to reconsider the sentence.

The Court of Appeals affirmed the convictions by opinion filed April 20, 2022. State v. Galloway, 436 S.C. 453, 872 S.E.2d 646 (Ct. App. 2022). Petitioner petitioned for rehearing and then upon denial, petitioned this Court for a writ of certiorari. This Court granted certiorari for three of the four issues raised by order dated January 12, 2023.

## STATEMENT OF FACTS

Victim, thirty-nine years old at the time of trial, testified to abuse she received before she was eleven. By the time of trial, she lived in Missouri and had not seen Petitioner Galloway in years. R. pp. 70-71. Petitioner was briefly married to Victim's aunt, and was later in a romantic relationship with Victim's mother. R. p. 71; p. 215.

Victim testified the first instance of what became a pattern of abuse occurred while Petitioner babysat Victim and her brother at University Inn where he stayed while Mother worked at a Texaco

gas station one night before Victim started fourth grade. R. p. 79; pp. 85-86. After he put both children to bed, then he got in bed with Victim and reached into her underwear. R. pp. 89-90.

Victim told Mother what happened the next day, and Petitioner did not watch the children again for a long time. R. p. 90. However, Victim, Mother, and Victim's brother later moved into a house to live with Petitioner. While Petitioner and Victim were in Brevard, North Carolina to chop wood, Petitioner fondled Victim as she stood on the tailgate of his pick-up truck. R. pp. 92-94.

While at Petitioner's mother's house in Greenville, Victim woke up to Petitioner removing her pants and performing oral sex on Victim. Petitioner's mother was not home. Victim focused on the Christmas tree in the room to distract herself from the assault. R. p. 97.

Although Victim was capable of showering on her own, Petitioner nonetheless insisted on helping Victim shower. Petitioner fondled Victim's breasts and told Victim if he did not play with her breasts, they would not grow. Petitioner also fondled Victim inside her underwear after she fell asleep. Additionally, he would perform oral sex on Victim in his bedroom. She recalled him rubbing his hands between her labia when she was in fifth grade. R. pp. 107-10.

Mother continued to work at Texaco, and Petitioner often kept Victim out of school to help Petitioner either chop wood, or pick produce for resale at a roadside stand in North Carolina. Victim testified she was encouraged to play in the stream behind the roadside stand and get wet so Petitioner could see through her shirt and so her nipples would get hard. R. pp. 111-12. Petitioner sexually assaulted her at his brother's home in North Carolina. R. p. 113.

Victim testified Petitioner was physically violent with Mother. During one episode of violence, Victim grabbed the phone to call 911 and Petitioner grabbed the phone from her,

threatening to kill Mother if she called. Petitioner also disciplined her with a switch, making her take her clothes off. Petitioner then would hit her with the switch from her shoulders to her knees. This happened frequently when she was in fifth grade. R. pp. 115-16.

Victim left Petitioner's residence with Mother and her brother in sixth grade. They moved to University Inn, but Petitioner found them, kicked in the door, and grabbed Victim's brother. Victim rode with Mother as she chased after Petitioner's vehicle. Victim's brother was subsequently returned. R. pp. 118-21. They moved in with Victim's grandparents, both alcoholics who became more violent. Victim testified Mother considered moving back in with Petitioner, prompting Victim to disclose the sexual abuse to Mother, who immediately left with a gun. The next morning, Mother called her outside to the fence where Petitioner told Victim she needed to forgive him or he would go to hell. Victim responded then she guessed he was going to hell. R. pp. 122-24.

They moved to a duplex. Petitioner drove into their yard and "did doughnuts." He also tried to run Mother and Victim off the road. Another time, Petitioner and two other people pulled Victim's biological father out of the car and beat him up, breaking his ribs. R. pp. 124-27.

After sixth grade, the family left Greenville for California, but later returned to a cabin in North Carolina where she started seventh grade. However, they moved again, to Asheville, after Petitioner found them. R. pp. 127-29. Victim bore a child at fifteen and moved out of the house at sixteen to live her first husband. She dropped out of high school, earned her GED, joined the military, married again in 1999, and was stationed in Germany. When she divorced again and was released from the Army, she moved back to Missouri where she was stationed for some time. Her relationship rekindled with her second ex-husband, but he died in a car accident before they could

remarry. R. pp. 131-34.

Victim later disclosed abuse to a counselor at a domestic violence shelter where she worked. She testified she was diagnosed with post-traumatic stress disorder (PTSD). R. pp. 135-36. She rarely saw her Mother in subsequent years because Mother became involved in another abusive relationship. R. p. 138. In 2016, Victim decided to report Petitioner's abuse to law enforcement in the various jurisdictions where she was abused. R. p. 138.

**Defense counsel** elicited testimony that Victim told Investigator Perry that Petitioner once shot up the Texaco station. R. p. 167. Victim testified on cross-examination she left the Army with a 70% disability rating for PTSD. R. p. 173. Victim verified on cross-examination she told Investigator Perry she was previously diagnosed with schizoaffective disorder and treated at a hospital in 2012, and she suffered a brain injury in a car wreck the next year. R. pp. 185-86. Investigator Perry testified **on cross-examination** that Victim told him Petitioner shot at a Texaco gas station where Mother worked, but Investigator Perry did not research police records or media records to confirm if the event occurred. R. p. 390.

Mother testified she met Petitioner during Petitioner's brief marriage to her sister. They later dated. Petitioner babysat the children at his hotel room. Petitioner preemptively told Mother afterwards he was asleep and groggy and mistook Victim for Mother when he woke up with Victim's leg on him and his arm around Victim. Subsequently Victim told Mother about the sexual assault, and Mother did not let the children stay with Petitioner for a while afterwards. R. pp. 215-17. However, as Mother's relationship with Petitioner progressed, Mother and her children moved in with Petitioner. R. pp. 219-22.

Petitioner stalked the family after they moved out of his house. Mother confirmed Petitioner kidnapped the brother and one time, Petitioner beat up Victim's biological father. She confirmed Victim's account of how they fled to Magistrate Cagle's office and sought a protective order. R. pp. 224-28. Importantly, Mother confirmed Victim's account of how she disclosed Petitioner's sexual abuse when Mother considered moving back in with Petitioner. Victim said, "No Mamma, we can't go back." R. p. 231, line 25 – p. 232, line 4. Mother reacted by bringing a gun to visit Petitioner, demanding if he needed to tell her something. Petitioner replied he needed to ask for forgiveness from Mother and Victim. Mother confirmed Petitioner visited them in the front yard of Victim's grandparents later and asked both Mother and Victim to forgive him for being abusive to them. Victim refused to forgive him, replying she guessed he was going to hell. R. pp. 230-34.

Galloway-Williams testified as an expert in child abuse dynamics. She testified delayed disclosure of sexual abuse was common. The most common reason a child does not disclose abuse is fear. She explained disclosure is commonly delayed if the perpetrator is in a position of authority. Children may also not disclose because they do not believe they will be heard. R. pp. 326-29. Galloway-Williams further testified if the child sees the perpetrator violent towards other people, the child would internalize the violence and be less likely to report the sexual abuse. R. pp. 332-38.

The only witness for the defense was a psychologist, Dr. David Price who admitted he never met or interviewed Victim. Dr. Price testified about PTSD, noting typically someone with PTSD does not want to talk about the traumatic events causing the disorder. Dr. Price also explained schizoaffective disorder. Symptoms of the disorder may include the presence of delusions, hallucinations, and anhedonia. Dr. Price testified that delusions and hallucinations are not

uncommon symptoms of schizoaffective disorder. R. pp. 443-47. Dr. Price admitted he does not actively work in the field of dynamics of child abuse. R. pp. 476-77. Dr. Price admitted someone suffering from PTSD may have their memory of the traumatic events distorted or the memories may remain accurate, it just varies from individual to individual. R. pp. 449-51. Dr. Price testified most people diagnosed with schizoaffective disorder are diagnosed with the disorder between the ages of eighteen to twenty-eight. R. p. 456. On redirect examination, Dr. Price admitted that flashbacks may be recounted exactly or the flashbacks may be an inaccurate recollection of events. R. p. 462.

## STANDARD OF REVIEW

All three issues on certiorari concern either the admission or exclusion of evidence. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." (emphasis added)).

## ARGUMENT

**I. The trial court did not err in excluding expert testimony that someone diagnosed with schizoaffective disorder may create false memories because no evidence was provided that Victim suffered from this symptom or any other symptoms of schizoaffective disorder. Petitioner was not prejudiced by the exclusion of the testimony because the blind expert was allowed to testify someone suffering from schizoaffective disorder may suffer from delusions or hallucinations. Any error was harmless because Petitioner admitted to the abuse to Victim's mother and Victim's testimony was corroborated by her mother's testimony.**

Petitioner complains the trial court erred in limiting Dr. Price's testimony that a symptom of schizoaffective disorder is the creation of false memories. However, no evidence was presented Victim suffered any symptoms of schizoaffective disorder, including the creation of any false memories. Also, no evidence was presented Victim suffered from any mental health issues during her childhood when she was sexually abused, at the time she reported abuse in 2016, or when she testified in 2018. Without proof Victim suffered false memories or other symptoms of schizoaffective disorder at any time, the jury would need to speculate in the absence of evidence to consider Dr. Price's excluded blind-expert testimony. His testimony was neither relevant nor probative.

Dr. Price was qualified as an expert on schizoaffective disorder and post-traumatic stress disorder. The trial court did not allow Dr. Price to testify people with schizoaffective disorder may produce false memories. Dr. Price was permitted to testify before the jury that possible symptoms of schizoaffective disorder may include delusions or hallucinations, and was further permitted to testify someone suffering from PTSD may have distorted memories. Tr. pp. 477-79.

The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). The fair opportunity to present a defense does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586, 594 (Ct. App. 2001) (exclusion of expert testimony about defendant's antisocial personality disorder not error) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Under Rule 702, SCRE:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Before admitting expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011). Even if the trial court determines proposed expert testimony meets the criteria of Rule 702, SCRE, it still may be excludable if it is not relevant or is unduly prejudicial. See State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (noting both expert testimony and fact testimony about trauma resulting from sexual abuse is admissible if its probative value is not outweighed by the danger of unfair prejudice). Under 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." Under 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, . . . ."

The evidence Victim suffered from schizoaffective disorder presented at trial was limited to Victim's admission on cross-examination she told the detective she was diagnosed with schizoaffective disorder and her admission she was hospitalized for schizoaffective disorder in 2012. Tr. pp. 213-14. Defense counsel did not ask Victim about any of the symptoms Victim might have suffered from her schizoaffective disorder. The defense did not produce medical records or any testimony about the circumstances of her hospitalization. The defense did not present any evidence

as to any symptoms of schizoaffective disorder Victim might have exhibited. Therefore, it is speculative Victim produced false memories as a result of her suffering from schizoaffective disorder. Accordingly, the trial court did not err in excluding this testimony because insufficient foundation was presented to make Dr. Price's testimony relevant. The jury would need to rankly speculate, without evidence, that Victim suffered these symptoms in order to believe the memories of sexual abuse were fabricated as a result of her mental condition.

The Court of Appeals responded to Petitioner's claim that the trial court did not noted that the trial court did not give due consideration as the gatekeeper to the third element of Rule 702 by pointing out:

> Although Dr. Price indicated schizoaffective disorder could result in false memories, he also acknowledged false memories could occur in the absence of the disorder, which cast doubt on a causal link. Furthermore, Dr. Price stated he would need to evaluate Victim, or at least review her records, to opine on whether Victim's memories of the alleged abuse were false.

State v. Galloway, 436 S.C. 453, 462-63, 872 S.E.2d 646, 651-52 (Ct. App. 2022).

The Court of Appeals further found that the trial court properly exercised its discretion in accordance with Rule 403, explaining:

> [B]ecause of the absence of any evidence that Victim fabricated or otherwise imagined her recollection of her past abuse, its probative value would have been substantially outweighed by the possibility that it would confuse the issues or mislead the jury. Under these circumstances, we find the restriction on Dr. Price's testimony was within the trial court's discretion.

Id. at 463, 872 S.E.2d at 652.

The Court of Appeals' ruling is correct because the blind expert testimony is not reliable for

the purpose of examining whether Victim's illness could potentially affect her credibility, but instead leaves it to rank speculation that because some – but hardly all – people suffering from the disorder might create false memories, that Victim created false memories of extensive abuse. Rule 403 and the gatekeeper function of Rule 702 are both designed to prevent exactly this kind of testimony being allowed for the purpose of the fact-finder to engage in speculation to decide if the diagnosis and nothing more affected a witness's credibility.

In State v. Turner, 373 S.C. 121, 129-30, 644 S.E.2d 693, 698 (2007), Turner argued the trial court erred by not allowing him to question the victim regarding her diagnosis of schizophrenia and the names of the medications she was taking. During the in camera proceedings, the trial court observed, "There would be very little that would assist the jury in evaluating her ability to recall what happened or her credibility. The court felt it would require speculation on the jury's part to connect the medical testimony to her ability to testify truthfully." Id. at 130, 644 S.E.2d at 698. This Court found no error, opining: "Because the victim was taking her medication at the time of the robbery and at the time of the trial, her schizophrenia diagnosis and the types of medications she was taking were irrelevant to her ability to truthfully recall the events. Further, appellant has not shown why the specific information was needed or any nexus between the medications the victim was taking and any alleged misidentification of appellant." Id. at 131, 644 S.E.2d at 698. Further, this Court found Turner failed to show he was unfairly prejudiced by the limitation because the victim testified on direct examination that she took medication and was taking the medication on the day of the robbery; and on cross-examination, Turner elicited testimony that if she does not take medication, over a period of time, she becomes confused, forgetful and may hear voices. Id. In the instant case,

Petitioner does not attempt to distinguish Turner, despite Turner being controlling.

In the present case, as in Turner, no evidence connects Dr. Price's excluded testimony with the fact testimony presented. There was no evidence Victim incurred false memories as a result of schizoaffective disorder. No testimony was presented Victim suffered from schizoaffective disorder during her childhood in 1987 to 1990, or at any time prior to 2012. Moreover, no evidence was presented she suffered from symptoms of the disorder when she reported the sexual assaults in 2016. No evidence was presented that her treatment for the disorder in 2012 was unsuccessful or medication and treatment failed to contain any symptoms Victim might have otherwise suffered.

Petitioner was not prejudiced by the exclusion of the testimony. Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). In the instant case, Dr. Price was allowed to testify that someone suffering from schizoaffective disorder may suffer delusions or hallucinations. Additionally, Dr. Price testified someone suffering from PTSD may suffer flashbacks that are not accurate memories. Therefore, essentially the same information was provided to the jury. When other properly admitted testimony reveals essentially the same information, the improper exclusion of admissible evidence is harmless. State v. Brown, 344 S.C. 302, 543 S.E.2d 568 (Ct. App. 2001) *overruled on other grounds by* State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011).

Additionally, any error was harmless because Mother corroborated many of the events Victim described. In a surprising departure from many other trials for sex crimes, Petitioner, the perpetrator, first disclosed the first occurrence of sexual abuse, telling Mother something occurred while he babysat, but claiming it was a mistake because he thought Victim was Mother when he woke up with

his arm around Victim. Tr. p. 244, line 18 – p. 245, line 9. Further, Mother confronted Petitioner after Victim later disclosed the longstanding sexual abuse to Mother. Petitioner sought forgiveness rather than deny the abuse. Tr. pp. 258-62. Therefore, evidence guaranteed the jury would not believe the allegations of abuse were driven by schizoaffective disorder-induced false memories. Given this level of corroboration and the lack of evidence Victim suffered any of the described symptoms of schizoaffective disorder, any error was harmless and Petitioner was not prejudiced by the limitation on Dr. Price's irrelevant testimony. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

**II. The trial court did not err in allowing testimony Petitioner was physically violent with Victim's mother because it was proper res gestae evidence to explain why Victim and Mother did not disclose the sexual abuse to law enforcement, and the testimony was cumulative in nature to numerous other bad acts which Petitioner elicited or Petitioner did not object.**

Petitioner contends the trial court erred in overruling Petitioner's objection to testimony that Petitioner was physically violent with Mother. The testimony was probative to help explain why Victim and Mother did not disclose Petitioner's sexual abuse to law enforcement. It also is not prejudicial because the prosecution elicited testimony on a number of other bad acts Petitioner committed plus Petitioner's counsel elicited some further violent events in a clear exercise of strategy. The essence of Petitioner's argument is both error and prejudice occurred because Petitioner should have been able to cherry pick which of the bad acts he wanted the jury to hear. So Petitioner's argument is it was okay for the jury to hear that he assaulted both Victim's biological father and Mother's boss, that he forced Mother's vehicle off the road, that he shot at both a gas

station and a duplex, that he stalked the family, and that he kidnapped Victim's brother; but the additional act of assaulting Mother rendered the trial unfair. This argument is an untenable claim for reversible error.

**How the issue arose**

Victim testified Petitioner's relationship with Mother started out okay, but then things "got bad fast," with physical fights. Tr. p. 142, line 19 – p. 143, line 2. At this point, Petitioner interposed an objection, arguing it was inadmissible under Rule 404(b), SCRE. The prosecution answered it was relevant evidence, but then asked to approach to present further argument. However, the trial court declined further argument and ruled it would allow the testimony, so the prosecution did not complete its discussion about the purpose of admitting the testimony. Tr. p. 143, lines 3-14.

Victim continued to testify that when Petitioner was angry, he was violent. She testified he had physical altercations with Mother and one in particular was really bad. She did not describe the episode though – instead the prosecution interjected a question as to whether she ever called 911. Victim replied she tried once to call 911 and Petitioner grabbed the phone and asked her what she was doing. She said she would call the police and he responded that if she did, he would kill Mother. Tr. p. 143, line 16 – p. 144, line 1.

Asked if the physical abuse occurred regularly, Victim answered,

> There would be an outburst and there would be – there would be a violent event, then there would be some like quiet anger in the house, then everything would be okay for a while. Then it would – something else would happen, then it would be another violent outburst. Sometimes we would leave and go stay somewhere else for a day or two, but we came back.

Tr. p. 144, lines 2-10.

In addition to testimony about the domestic violence visited upon Mother, Victim testified Petitioner disciplined her harshly for things like biting her nails or not making her bed neatly enough by being made to pick a switch from a tree, take her clothes off, and proceed to be beaten with the switch by Petitioner from shoulders to knees to the extent sometimes that blood was drawn. Tr. pp. 144-45. **Counsel did not object to this testimony.**

Victim testified, **without an on-record objection**, that Mother and the children stayed at University Inn where Petitioner broke in, kicked in the door, and kidnapped Victim's younger brother. Tr. pp. 148-49.

Victim testified after she moved into a nearby duplex with Mother and her brother, Petitioner would drive his truck through the back yard, "doing doughnuts." Tr. p. 152, lines 10-21. Petitioner also would tailgate Mother's car and try to run her car off the road. Tr. p. 152, line 24- p. 153, line 3. Victim testified another time, Petitioner chased their car, and Mother drove to the Magistrate's Office to seek protection. Tr. pp. 153-54. **Defense counsel did not object to any of this testimony.**

Victim testified one time, Petitioner and his sister pulled Victim's biological father out of his truck and hit and kicked him. Victim testified the father suffered broken ribs and a busted face. Tr. pp. 154-55. **Defense counsel did not object to any of this testimony.**

**Petitioner's defense counsel elicited testimony from Victim on cross-examination that Petitioner shot at the Texaco station and exhorted, "But you didn't tell us anything about that yesterday." Tr. p. 195, lines 8-18.** Therefore, contrarily, defense counsel was complaining Victim did not testify about prior bad acts. Defense counsel also elicited testimony that Petitioner shot at

Victim's grandparent's house and had a fight with Victim's uncle. Tr. p. 196.

Mother confirmed these bad acts occurred, and added additional events: She confirmed Petitioner drove into the yard of the duplex and did "doughnuts." She added that he shot at their duplex, and told the prosecutor, "I mean, a lot of stuff happened at the duplex. Let me know how much you want to hear." Tr. p. 251, lines 8-15. Mother confirmed Petitioner kidnapped Victim's brother. Tr. p. 253. Mother also confirmed Petitioner tried to run Mother's car off the road and she fled with her children to the Magistrate's Office to seek protection. Tr. pp. 254-55. Mother confirmed Petitioner beat Victim's father severely, and she needed to take the father to the hospital that night. Tr. pp. 255-56. Mother testified Petitioner harassed her at the Texaco station and he beat up her boss. Officers responded to that incident. Tr. pp. 256-57. Mother further testified, without objection, that the gun she used to confront Petitioner after Victim disclosed was "a handgun a customer gave me at work, you know, for protection. It wasn't store protection, it was protection from [Petitioner], you know." Tr. p. 259, lines 2-9.

The testimony about the physical confrontations between Petitioner were probative because the testimony explains a reason why Victim would be reluctant to disclose the sexual abuse visited upon her by Petitioner. "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Res gestae evidence is admissible so long as the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014); Rule 403, SCRE.

In the instant case, Victim and Mother delayed disclosure of the sexual abuse to law enforcement for roughly twenty-five years. The violent nature within the household explains this. Note Galloway-Williams provided expert testimony that not only threats directly to a child, but also a child's observation of a perpetrator's violence on others, will inhibit the child from disclosing sexual abuse. Tr. pp. 365-66.

Further, Petitioner was not prejudiced by the admission of Victim's testimony about violence against Mother because it was cumulative in nature to evidence of other violent acts such as (1) testimony Petitioner made Victim strip and he whipped her with a switch until she bled; (2) Petitioner hit and kicked Victim's biological father; (3) Petitioner attempted to force Mother's vehicle off the road; (4) Petitioner assaulted Mother's boss at the Texaco and law enforcement was called; (5) Petitioner shot at the duplex; (6) Petitioner shot at the Texaco station; (7) Petitioner stalked the family; and (8) Petitioner kidnapped Victim's brother.

The Court of Appeals held, "[A]lthough we agree with the trial court's admission of the evidence because we find it was relevant to Victim's delayed disclosure, we find the trial court erroneously failed to conduct a balancing test." Galloway, 436 S.C. at 467, 872 S.C. 646, 651-52 (Ct. App. 2022). However, the Court of Appeals found the error was harmless "[b]ecause so many other instances of Galloway's violence were admitted without objection, . . . ." Id. This holding is truly unassailable – any danger of unfair prejudice from the objected-to evidence due to portrayal of Petitioner's violent character or the propensity evidence derive the testimony evaporates from the abundance of evidence not objected to showing his violent nature and the evidence elicited by Petitioner's counsel showing the same.

The introduction of allegedly inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008); State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968) ("Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point."). Therefore, this Court should affirm the conviction and sentence.

**III. The trial court did not err in allowing Victim's mother to testify about a letter Petitioner sent her over twenty-five years ago under the best evidence rule, testimony about the letter was not closely related to a controlling issue, and the testimony was cumulative to other evidence to which Petitioner did not interpose an objection.**

Mother testified she confronted Petitioner after Victim disclosed Petitioner was sexually abusing her. A couple of days after confronting Petitioner, Petitioner came to her parents' house where Mother and Victim stayed. Mother and Victim approached Petitioner at the fence in the front of the yard. Tr. pp. 260-61. The prosecutor asked a compound question asking what happened when they came down to the fence and "[d]id he catch your attention in any way?" Tr. p. 261, lines 9-10. Mother then testified Petitioner pulled his big truck in the driveway and added, "And plus, it was right after that letter that he had wrote to me and wanted me to come back." Tr. p. 261, lines 11-14.

The prosecutor asked what the letter talked about and Mother testified, "He just talked to me about he was sorry that he's been abusive – ". At that point, Petitioner objected based on hearsay and the best evidence rule. Tr. p. 261. The trial court asked if the letter was available and the prosecutor asked, "Your Honor, there is no letter, so there's no way to have better evidence." Tr. pp. 261-62. The trial court ruled, "Well, I'm going to allow it, I think based on state of mind." Tr. p. 262, lines 7-8. Mother testified Petitioner "apologized for being mean to us and he said he wouldn't

do it anymore and he really wanted us to come back." Tr. p. 262, lines 11-14.

The question of whether to admit evidence under the best evidence rule is addressed to the discretion of the trial court. State v. Halcomb, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009). The preliminary question is whether "there has been sufficient evidence to prove loss, destruction or unavailability of an original document so as to justify the admission of secondary evidence . . . ." The question of the adequacy of this showing is also within the discretion of the trial court. Id. at 443, 676 S.E.2d at 154-55. Rule 1002, SCRE, requires that to prove the content of a writing, the original writing is required. However, under Rule 1004, SCRE:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if –
>
> (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
>
> . . .
>
> (4) The writing, recording, or photograph is not closely related to a controlling issue.

In the instant case, the prosecutor proffered the letter was unavailable and given that the letter was from roughly twenty-five years ago, this would be expected. Therefore, the trial court did not abuse its discretion in accepting the prosecutor's proffer that the letter was not obtainable under Rule 1004(1) and (2). Additionally, the writing was not closely related to a controlling issue under Rule 1004(4) because Petitioner was not charged for any of the physical assaults on Mother or Victim and the specific content of the letter was not at issue – Mother's testimony about the letter was admissible to show Petitioner's conciliatory demeanor and attrition at that point in time.

Accordingly, the trial court did not abuse its discretion. See Jackson v. Crews, 873 F.2d 1105, 1110 (8th Cir. 1989) (finding witness' testimony he received a flyer describing plaintiff's arrest by defendant and asking for any witnesses to contact plaintiff was allowed because the testimony was not trying to prove the contents of the writing under Rule 1002, FRE, and "even if [plaintiff was] trying to prove the content of the flyer, he would have been exempted from producing the flyer because the issue was collateral to the principal issue in the trial" under Rule 1004(4)FRE).

In the instant case, the Court of Appeals found the original letter was not required because it referenced a collateral matter under Rule 1004(4) and the error was harmless. Galloway, 436 S.C. at 467-68, 872 S.E.2d at 654. It certainly was collateral. The letter was an apology for violence directed at Mother and Victim. Other evidence established Petitioner was abusive to Mother and Victim.

Further, the Court of Appeals correctly determined Petitioner was not prejudiced by Mother's testimony about the letter. It was an apology and the other bad acts that were elicited evidenced a lot of things which might compel Petitioner to apologize. Further, the apology in the letter is cumulative to Mother's testimony that when she confronted Petitioner, Petitioner asked forgiveness from her and from Victim. As discussed in Issue III, Petitioner did not object to other evidence of Petitioner's violent acts, which included physically assaulting three other men (Victim's uncle, Victim's biological father, and Mother's boss), shooting at buildings, whipping Victim's naked body with a switch until she bled, and attempting to run Mother's vehicle off the road. Accordingly, the letter is merely cumulative to other evidence of bad acts to which Petitioner did not object. The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence

presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008); State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968) ("Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point.").

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the conviction and sentence should be affirmed.

Respectfully submitted,

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