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**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5987 (S.C. Ct. App. Filed July 5, 2023)

Lower Court Case Nos. 2014-GS-26-01127, 2018-GS-26-03066

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THE STATE,

RESPONDENT,

V.

TAMMY CAISON MOORER,

PETITIONER.

APPELLATE CASE NO. 2023-001317

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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reasoning Petitioner supposedly failed to comply with Rule 5(e)(1), SCRCrimP, by not notifying the prosecution at least ten days before trial of the names and addresses of her alibi witnesses, particularly where the state was not prejudiced since it was aware of these witnesses, had previously interviewed them, and had the witnesses under subpoena. ....37

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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 July 24, 2023.

### QUESTIONS PRESENTED

1.

Did the Court of Appeals err by holding the trial judge properly denied Petitioner's motion for a directed verdict for the offenses of kidnapping and conspiracy to kidnap when there was no direct evidence or substantial circumstantial evidence to support the charges and the evidence merely raised a suspicion Petitioner was involved in Heather Elvis's disappearance?

2.

Did the Court of Appeals err by holding the trial judge did not abuse his discretion when he admitted extensive evidence of text messages allegedly sent and received by Petitioner that were both sexually explicit and contained references to drug use since this testimony constituted inadmissible bad character evidence where Petitioner had not put her character at issue, in violation of Rule 404, SCRE, and where the probative value of this evidence was also substantially outweighed by its unfair prejudice in violation of Rule 403, SCRE?

3.

Did the Court of Appeals err by holding the trial judge did not abuse his discretion by qualifying Grant Fredericks as an expert in forensic video analysis and by allowing Fredericks to testify that Petitioner's truck was the vehicle seen on surveillance footage driving toward and away from the Peachtree Boat Landing where Heather Elvis was allegedly kidnapped—to the exclusion of *all* other vehicles—when his conclusions were not shown to be reliable?

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5.

Did the Court of Appeals err by holding the trial judge did not abuse his discretion by excluding the testimony of Petitioner's children, Christian Moorer, Nikki Moorer, and Caison Moorer, and her mother, Polly Caison, reasoning the witnesses allegedly violated the sequestration order by viewing the live feed of the trial where the witnesses denied they watched the feed, there was no evidence their testimony was tainted, and such an extreme sanction violated Petitioner's due process right to present a complete defense?

### **STATEMENT OF THE CASE**

Sidney Moorer, Petitioner's husband, and Heather Elvis (hereinafter "Elvis") had an affair for several months from July 2013 until early November 2013. Elvis, who was twenty years old, was a hostess at the Tilted Kilt, a restaurant at Broadway at the Beach in Myrtle Beach. Sidney did maintenance, usually after hours, for various restaurants, including the Tilted Kilt. Elvis and Sidney met through their employment. The affair ended on or about November

2, 2013 when Petitioner discovered the relationship. Communication between Elvis and Sidney ceased within a few days of that date.

Elvis went missing during the early morning hours of December 18, 2013. She has not been seen or heard from since that date. The last person to see her alive was Stephen Schiraldi, who went on a first date with Elvis on the night of December 17, 2013. R. 247, l. 9 – 249, l. 14. Schiraldi dropped Elvis off at her apartment sometime after 1:00 a.m. the following morning, December 18, 2013. R. 249, ll. 15-23.

At 4:00 a.m. on December 18, 2013, Corporal Casey Guskiewicz discovered Elvis's car, a Dodge four door Intrepid, at the Peachtree Boat Landing during his routine patrol. R. 266, l. 12 – 267, l. 14; R. 272, l. 17 – 273, l. 4. Guskiewicz described the boat landing as a small parking lot that could hold approximately ten to twelve cars. R. 273, ll. 7-21. It did not have any lights. R. 274, ll. 2-4. When Guskiewicz arrived at the landing at 4:00 a.m., no one was there. The Intrepid was parked near the entrance to the landing. Guskiewicz asserted, "All the windows were intact. The doors were all secured. The ignition was intact . . . There was nothing that appeared to be mechanically wrong with the car. The tires weren't flat." R. 274, l. 18 – 275, l. 1. He ran the license tag at 4:03 a.m. The car had not been reported stolen. It was registered to an "Elvis subject." R. 275, l. 12 – 276, l. 13.

Guskiewicz used his flashlight to search the landing. He checked the water for people and boats, but did not see any. He checked the swamp next to the landing and the nearby mobile home park. He also did not see anyone in or around the swamp or near the mobile home park. He did not see any keys. He did not see a phone. He did not see anything that would indicate a struggle had occurred at the landing. R. 276, l. 16 – 277, l. 17. Seeing nothing suspicious, Guskiewicz left the landing and continued his patrol. R. 281, ll. 15-20.

Sometime after sunset the next day, December 19, 2013, Lance Corporal Kenneth Canterbury responded to the Peachtree Boat Landing in regard to a suspicious vehicle. R. 332, ll. 13-25. When he arrived, he observed a Dodge Intrepid. The vehicle appeared to be operable. “It was just sitting there locked.” R. 334, ll. 1-18. Canterbury ran the tag and then contacted the registered owner, Terry Elvis, Elvis’s father. Because he did not have a telephone number for Terry, he drove to Terry’s house. Terry had a set of keys for the vehicle. Canterbury drove Terry back to the landing. Terry opened the car and the men briefly looked through the vehicle. Canterbury did not see a purse, identification, phone, or keys. R. 336, l. 9 – 338, l. 25. Terry repeatedly tried to call his daughter, the driver of the car, “with no answer.” R. 350, ll. 1-12. Terry eventually drove the car home. R. 350, ll. 6-16. Later that evening, Terry provided Canterbury with a copy of Elvis’s phone records. R. 339, l. 13 – 340, l. 7.

Corporal Danny Furr went to the Tilted Kilt that night, December 19, 2013, in an effort to locate Elvis. R. 329, l. 20 – 330, l. 1. She was not there. R. 330, ll. 2-3. Based on his visit to the Tilted Kilt, Furr called Sidney Moorner. R. 330, ll. 4-12. Sidney was also the last person Elvis spoke to according to her phone records. R. 341, ll. 1-6. After speaking with Sidney on the phone, Furr instructed Lance Corporal Canterbury to go to the Moorers’ house and speak with Sidney in person. R. 330, l. 11 – 331, l. 5; R. 341, l. 13 – 342, l. 3. Canterbury spoke to Sidney shortly after midnight on December 20, 2013 at the end of his driveway. R. 342, ll. 4-17; R. 344, l. 7 – 345, l. 5. On that date, Sidney and his wife, Petitioner, became suspects in Elvis’s disappearance.

The state alleged at trial that Petitioner and Sidney kidnapped Elvis from the Peachtree Boat Landing. During its investigation, law enforcement discovered that Sidney purchased a pregnancy test from Walmart around 1:15 a.m. on December 18, 2013. R. 2090, ll. 2-18. Shortly thereafter, Elvis received a call from a payphone located at a Kangaroo Express gas

station at 1:35 a.m. Sidney allegedly admitted he called Elvis from the payphone. The call lasted nearly five minutes. After Sidney called Elvis from the payphone, Elvis called her roommate Brianna Warrelmann at 1:44 a.m. The two spoke for just over two minutes. Brianna claimed Elvis sounded “upset and scared.” “She was hysterical.” R. 1478, ll. 14-24. Brianna allegedly told Elvis, “Do not call Sidney back. Don’t do anything rash. Go to sleep and we’ll talk about it tomorrow.” R. 1478, l. 25 – 1479, l. 14.

After talking to Brianna, Elvis called the payphone back nine times. Elvis ultimately called Sidney’s phone number at 3:16 a.m. This call was routed to voicemail. Elvis called Sidney’s number again at 3:17 a.m. The two spoke for a little over four minutes. R. 381, l. 23 – 382, l. 13. During an interview with law enforcement in January 2014, Petitioner admitted she heard Elvis’s voice during this call. However, during her testimony before the jury, Petitioner stated only that she heard a female voice, but that Sidney told her it was Elvis. R. 2115, l. 2 – 2116, l. 1. Elvis called Sidney’s number four more times at 3:38 a.m., 3:39 a.m., 3:40 a.m., and 3:41 a.m. All four of these calls were routed to voicemail. R. 382, l. 14 – 383, l. 8. Location data showed Elvis’s phone was at the Peachtree Boat Landing when she made these last four calls. There was no further activity on Elvis’s phone after 3:41 a.m.

Grant Fredericks, who was qualified as an expert in forensic video analysis over objection, testified that Petitioner and Sidney Moorers’ 2013 Ford Limited F-150 pickup truck was the vehicle captured on surveillance footage driving toward the Peachtree Boat Landing around 3:35 a.m. on the morning of December 18, 2013. Fredericks claimed the Moorers’ truck was then captured driving away from the landing several minutes later around 3:46 a.m. The margin of error was approximately two to four minutes. R. 947, l. 14 – 948, l. 8.

Fredericks also testified that he was “able to synchronize the times” using the location data from Elvis’s phone and the surveillance videos of the vehicle. R. 943, ll. 17-23. He

claimed the vehicle on the videos, which he identified as the Moorers' truck, was moving toward the Peachtree Boat Landing "at the same time that . . . and just after [Elvis's] cell phone is pinging those areas, including the landing area. So they [Elvis's phone and the vehicle] are converging on the same spot, towards the same area," at the same time. R. 944, l. 23 – 945, l. 9.

At the conclusion of its case, the state presented the testimony of Donald Demarino, Petitioner's cousin.<sup>1</sup> R. 1583, ll. 2-13. Demarino, who had pending charges at the time of trial and an extensive criminal record, claimed that after Petitioner and Sidney were released on bond in 2015, he was at a cookout at the Moorers' house. R. 1600, ll. 19-25. He alleged Sidney showed him a photograph of Heather Elvis on a "Boost Mobile flip phone." He claimed it did not appear Elvis could talk, walk, or move in the photograph. R. 1585, l. 12 – 1586, l. 1; R. 1587, ll. 21-24; R. 1610, ll. 6-22. Demarino "believed" the "picture was taken . . . for Tammy Moorer [Petitioner]." R. 1587, l. 25 – 1588, l. 1. After seeing the photograph, he said he did not "expect anybody to hear from Heather Elvis." R. 1588, ll. 7-9. Demarino admitted he first told the state about seeing this alleged photograph when he was incarcerated at the local detention center with pending charges. R. 1597, l. 23 – 1598, l. 16. He also admitted that he told his mother on a recorded jail call that "it's not true." R. 1605, l. 5 – 1606, l. 15. This vague claim about an alleged photograph no one else ever saw was just Demarino talking.

Petitioner testified that she went to work with Sidney on the night of December 17, 2013. Sidney worked into the early morning hours of December 18, 2013. He did maintenance work at LongHorn Steakhouse and the Sticky Fingers Restaurant. R. 2085, ll. 5-25. The couple stopped at Walmart to purchase a pregnancy test for Petitioner. They stopped at a BI-LO and also went to look at Christmas lights. Petitioner was not aware Sidney made a phone call from a payphone and Sidney denied to her that he made the call. R. 2087, l. 1 – 2089, l. 9. Petitioner texted her

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<sup>1</sup> Petitioner's father and Demarino's grandmother were brother and sister. R. 1614, ll. 13-19.

sister, Ashley Caison, at 3:10 a.m. that she was home. This is when Petitioner and Sidney returned home that morning. Ashley, who was watching Petitioner's children, immediately sent the children home. Ashley watched the children walk from her house across the yard to the Moorers' house, which was on the same property. R. 2077, l. 4 – 2079, l. 23. Sidney carried Caison, the youngest child, home because he was sleeping. R. 2081, ll. 1-19. Petitioner and Sidney stayed home for the rest of the morning.

Petitioner's children were homeschooled. Petitioner was awake until 4:00 a.m. getting the children's assignments and writing samples together to mail to their "teachers." R. 2082, l. 18 – 2083, l. 10. Petitioner stayed home until her mother called around noon because she had a flat tire and needed help. Sidney and the children were also home all night. R. 2092, l. 8 – 2095, l. 25. Sidney never left the house except for when he went outside to feed the dogs. R. 2082, ll. 8-17. Petitioner denied going to the Peachtree Boat Landing on December 17, 2013 or December 18, 2013. R. 2050, ll. 14-24. To her knowledge, no one drove her Ford Limited F-150 pickup truck to the landing during the early morning hours of December 18, 2013. R. 2051, ll. 4-7. She denied kidnapping Elvis or knowing who kidnapped her. R. 2123, ll. 9-14.

A Horry County grand jury indicted Petitioner on March 20, 2014 for kidnapping, and on April 25, 2018 for conspiracy to kidnap. R. 2804. On April 18, 2016, a pretrial hearing was held before the Honorable R. Markley Dennis, Jr. concerning the proposed expert testimony of Grant Fredericks. R. 1. A second pretrial hearing was held on September 5, 2018 before the Honorable Benjamin H. Culbertson to address various pretrial motions. R. 133. Petitioner's case was called to trial on October 8, 2018 before Judge Culbertson, and a jury. R. 139. Assistant Solicitors Nancy Livesay and Christopher Helms prosecuted the case. R. 139. Gregory McCollum and Casey Brown represented Petitioner. R. 139. On October 23, 2018, the

jury found Petitioner guilty as indicted. R. 2342, ll. 2-14. Judge Culbertson sentenced her to thirty years' imprisonment on each offense, concurrent. R. 2352, l. 22 – 2353, l. 3.

Petitioner filed a timely notice of appeal. After briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions. State v. Tammy Caison Moorner, Op. No. 5987 (S.C. Ct. App. filed June 7, 2023) (Howard Adv. Sh. No. 22 at 21). On June 22, 2023, Petitioner filed a petition for rehearing. By order filed July 5, 2023, the Court of Appeals denied the petition for rehearing, withdrew its previously filed opinion, and published a substituted opinion revising a single sentence. State v. Tammy Caison Moorner, Op. No. 5987 (S.C. Ct. App. filed July 5, 2023) (Howard Adv. Sh. No. 26 at 10); See State v. Moorner, 439 S.C. 525, 439 S.E.2d 725 (2023). On July 19, 2023, Petitioner filed a second petition for rehearing, which was denied by order filed July 24, 2023. This petition for writ of certiorari to the Court of Appeals follows.

## ARGUMENT

1.

The Court of Appeals erred by holding the trial judge properly denied Petitioner's motion for a directed verdict for the offenses of kidnapping and conspiracy to kidnap when there was no direct evidence or substantial circumstantial evidence to support the charges and the evidence merely raised a suspicion Petitioner was involved in Heather Elvis's disappearance.

### **Relevant Facts**

After the state rested, Petitioner moved for a directed verdict. Defense counsel argued the state failed to present substantial circumstantial evidence to support either offense. R. 1668, ll. 19-24. Counsel argued there was no evidence the Moorers' truck ever went to the Peachtree Boat Landing. R. 1672, ll. 3-6. In fact, the evidence established that Petitioner and Sidney's cell phones were located at their home that morning. R. 1686, ll. 22-24. Counsel emphasized that

there was absolutely no evidence Heather Elvis had ever been inside the Moorers' truck. R. 1672, ll. 23-25; R. 1673, ll. 3-5. An officer who searched the truck testified that the truck "smelled new." There was no evidence the truck had been cleaned. Moreover, there was no evidence Petitioner ever had physical contact with Elvis. R. 1672, l. 25 – 1673, l. 7.

Defense counsel further argued there was no evidence of a struggle. Assuming Elvis got into the truck voluntarily, counsel argued there was no evidence of if or when her freedom was restricted in order to constitute a kidnapping. Counsel stressed that the state had to prove the kidnapping occurred in Horry County and it had not done so. R. 1673, l. 10 – 1674, l. 10.

Lastly, as to kidnapping, counsel argued, "Near proximity to someone else who may have committed a crime doesn't get you there. It is not enough per case law. So even if she [Petitioner] was riding around in the truck with her husband because she's expecting infidelity . . . that doesn't reflect on Tammy, and that is who is on trial today." R. 1686, ll. 8-14.

As to conspiracy to kidnap, defense counsel argued there was no evidence presented "at all of an agreement, an understanding, a conspiracy, a confederation . . . a plan, a scheme to kidnap this woman." R. 1674, ll. 15-24.

Counsel concluded, "Your Honor, the case law . . . is clear. There has to be . . . substantial circumstantial evidence for the jury to consider, and in this case the State has failed. They have not presented evidence that meets the elements in either charge to where a reasonable trier of fact could find these essential elements beyond a reasonable doubt." If the case goes to the jury, the jurors will be "forced to assume and guess." R. 1674, l. 25 – 1675, l. 9.

The assistant solicitor admitted "this is a circumstantial case," but claimed the state had presented substantial circumstantial evidence to survive a directed verdict motion. R. 1675, ll. 22-24. The solicitor outlined the evidence she contended got the state past the directed verdict motion: (1) Petitioner admitted she was in the truck with Sidney all night; (2) Sidney called Elvis

from a payphone; (3) Elvis repeatedly called the payphone number back; (4) when Elvis did not reach anyone on the payphone, she called Sidney; (5) Petitioner admitted she heard Elvis's voice on the phone when Elvis called Sidney; (6) after talking to Sidney on the phone, Elvis left her apartment and drove toward the boat landing; (7) as Elvis was driving to the landing, the Moorers' truck was driving towards the landing at the same time; (8) no one ever saw or heard from Elvis again; (9) Sidney showed Donald Demarino "a picture" of Elvis, in which it appeared Elvis could not walk or talk; (10) Demarino said the picture was for Petitioner and that, based on the picture, he did not expect anyone to hear from Elvis again. R. 1676, l. 20 – 1684, l. 21.

The trial judge ultimately denied the motion for a directed verdict. He merely stated, "I think there is enough evidence to get past a directed verdict; that motion is denied." R. 1687, ll. 9-11. After the defense rested, Petitioner properly renewed her motion for a directed verdict. R. 2227, ll. 19-23. The trial judge again denied the motion. R. 2227, l. 24 – 2228, l. 2.

### **Standard of Review**

"The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). "However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)) (emphasis in original). "On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State." Id. (citing State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001)). "A [trial] judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." Id. (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)). "Suspicion implies a belief or opinion as to guilt based upon facts or

circumstances which do not amount to proof.” State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-405 (2001) (citing Lollis, 343 S.C. at 584, 541 S.E.2d at 256). “When ruling on a motion for a directed verdict, the trial [judge] is concerned with the existence or nonexistence of evidence, not its weight.” State v. Shands, 424 S.C. 106, 135, 817 S.E.2d 524, 539 (Ct. App. 2018) (citing State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)).

## **Discussion**

The Court of Appeals erred by holding the trial judge properly denied Petitioner’s motion for a directed verdict for kidnapping and conspiracy to kidnap since the state failed to present any direct evidence or substantial circumstantial evidence of Petitioner’s guilt. App. 47. At most, the state presented evidence that merely raised a suspicion Petitioner was involved in Elvis’s disappearance. The state conceded at trial that there was no direct evidence of Petitioner’s guilt. Consequently, the question is whether the state presented *substantial* circumstantial evidence to support the offenses.

South Carolina Code Ann. § 16-3-910 defines kidnapping as: “Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away any other person by any means whatsoever without authority of law . . . is guilty of a felony.” “Kidnapping is a continuous offense which ‘commences when one is wrongfully deprived of freedom and continues until freedom is restored.’” State v. East, 353 S.C. 634, 637, 578 S.E.2d 748, 750 (Ct. App. 2003) (quoting State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999)); See State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983). “South Carolina’s kidnapping statute requires proof of an unlawful act taking one of several alternative forms, including seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away.” Id. (citing State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987)); See State v. Berntsen, 295 S.C. 52, 54, 367 S.E.2d 152, 153 (1988). The mens rea

required for the offense of kidnapping is “knowledge.” Tucker, 334 S.C. at 13, 512 S.E.2d at 105 (citing State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994)).

In State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987), a case relied on extensively by the state at trial, this Court held the trial judge properly denied Owens’ motion for a directed verdict as to the offense of kidnapping. Ernest Vereen disappeared from his home between the evening of October 10, 1984 and the morning of October 11, 1984. Id. at 117, 352 S.E.2d at 475. “There was evidence that a slight struggle had occurred in the kitchen.” Id. On the night of October 11, 1984, Vereen’s son received a typewritten ransom demand for \$250,000. Id. Ernest Vereen’s driver’s license was included in the envelope. Id. On October 13, 1984, Vereen’s son delivered \$75,000 to “a location specified by a telephone caller who identified himself as his father’s captor.” Id. “Owens was observed picking up the money and was followed by law enforcement officers to his home. He was arrested and all but \$18 of the \$75,000 was recovered from him.” Id. In addition to this evidence, the state established: (1) Owens rented a typewriter on October 6, 1984 and returned it on October 8, 1984; (2) it was “very possible” the rented typewriter was used to prepare the ransom note; (3) the note stated Vereen was in the author’s custody; (4) pieces of paper with language similar to that in the ransom note were found in Owens’ bedroom, some of which had his fingerprints on them; and (5) on October 13, 1984, Owens contracted to buy a new car telling the salesman he expected to receive a \$200,000 insurance settlement in the near future. Id.

This Court concluded that the “corpus delicti of kidnapping was established circumstantially by the evidence of a struggle in the Vereen home and the fact that Mr. Vereen remained missing at the time of trial.” Id. at 118, 352 S.E.2d at 476. The Court further asserted, “While the State offered no evidence directly connecting Owens with the events at the Vereen home, there is evidence which connects him with the preparation of the ransom note. The note,

in turn, states that Mr. Vereen was in the author's custody . . . Moreover, the driver's license, delivered with the ransom note, provides a direct connection between Owens and Mr. Vereen." Id. at 118-119, 352 S.E.2d at 476. Consequently, the Court held the evidence was sufficient to submit the case to the jury. Id. at 119, 352 S.E.2d at 476.

In this case, there was no evidence Heather Elvis was kidnapped—let alone kidnapped by Petitioner. There was absolutely no evidence of a struggle at the Peachtree Boat Landing, unlike the evidence of a struggle in Owens. There was no evidence of a struggle inside Petitioner's truck. In fact, there was no evidence Elvis had ever been inside Petitioner's truck or had ever had physical contact with Petitioner. The state's case was based solely on the fact that Elvis and Sidney Moorner had an affair months earlier that Petitioner discovered, that Elvis was missing, that her last known communication was allegedly with Sidney, and Grant Fredericks' testimony that the Moorner's truck was the vehicle seen traveling toward and away from the landing around the time Elvis went missing. This circumstantial evidence simply is not sufficient to survive a directed verdict. At most, it raises a suspicion Petitioner was involved in Elvis's disappearance.

The evidence established Petitioner and Sidney were home around the timeframe Elvis disappeared. Petitioner texted her sister, Ashley Caison, that she was home at 3:10 a.m. Ashley testified she saw Petitioner immediately thereafter when she (Ashley) observed the Moorner children, whom she was babysitting, walking home when Petitioner and Sidney returned that morning. The cell phone location evidence established that both Petitioner's phone and Sidney's phone were home for the rest of the morning.

Conspiracy to kidnap is defined in S.C. Code Ann. § 16-3-920 as: "If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of Section 16-3-910 [the statute defining the offense of kidnapping] and any such persons do any overt act towards carrying out such unlawful agreement, confederation, or conspiracy each such person

shall be guilty of a felony.” The state presented zero evidence, direct or circumstantial, of any agreement, confederation, or conspiracy between Petitioner and Sidney to kidnap Elvis. The evidence is simply not there.

Respectfully, this Court should grant certiorari, hold the Court of Appeals erred by affirming the trial judge’s denial of Petitioner’s motion for a directed verdict, and direct a verdict of acquittal as to both offenses.

2.

The Court of Appeals erred by holding the trial judge did not abuse his discretion when he admitted extensive evidence of text messages allegedly sent and received by Petitioner that were both sexually explicit and contained references to drug use since this testimony constituted inadmissible bad character evidence where Petitioner had not put her character at issue, in violation of Rule 404, SCRE, and where the probative value of this evidence was substantially outweighed by its unfair prejudice in violation of Rule 403, SCRE.

### **Relevant Facts**

On December 24, 2013, Will Lynch with the North Myrtle Beach Police Department was contacted by Horry County to conduct a forensic extraction on Petitioner and Sidney Moorers’ cell phones. R. 1259, ll. 14-15; R. 1265, ll. 1-21. The extraction device Lynch used took the raw data from the phones and converted it into a readable report. R. 1261, ll. 16-24. The report showed all incoming and outgoing calls and text messages, including the content of the text messages. R. 1266, ll. 3-25. The report also contained some, but not all, of the content that had been deleted from the phones. R. 1284, ll. 8-24.

Lynch was asked to focus his investigation on the timeframe of November 1, 2013 until December 18, 2013. R. 1268, ll. 8-22. He claimed, based on the content of the text messages on

Sidney's phone and Petitioner's phone, that Petitioner was using both phones from November 2, 2013 until the early morning hours of December 18, 2013, when Elvis went missing. R. 1277, ll. 3-18. During his testimony before the jury, the state had Lynch read aloud numerous text messages sent and received by both phones during that time period.

Lynch testified that there was a text message sent from Petitioner's phone to Christine Johnson, a friend, that said, "OMFG, we just went through border patrol that had drug dogs and cuz left a piece of J in my truck, that was scary." R. 1297, ll. 18-21. There was a subsequent message to Ashley Caison, Petitioner's sister, that said, "Went through border patrol with pot in the toolbox. Dog walked right by. Sidney was fucking nervous." R. 1297, ll. 22-25.

During a break in Lynch's testimony, defense counsel put his objection on the record to the testimony concerning drugs. Counsel explained that *before* Lynch's testimony began, he objected during "a side-bar" to the references of "marijuana crossing the border." He argued the evidence was improper bad character evidence being introduced when Petitioner had not placed her character into evidence. R. 1300, l. 7 – 1301, l. 5. Counsel asserted, "I just want to reiterate that objection . . . we're going through many, many references that tend to put her character into evidence. It is bad evidence . . . of character. . . It sounded even worse . . . from the witness stand than I thought it was going to." R. 1301, ll. 6-14.

The judge acknowledged "there was an objection by the defense to the introduction of these text messages because . . . it was attacking the defendant's character when the defendant's character had not been placed into evidence." R. 1303, ll. 11-16. The judge reasoned, "The state's contention is that the probative value is that it shows the defendant was not pregnant because she wouldn't have had marijuana if she was pregnant . . . Every reference to marijuana by the State has been to show a person wouldn't have marijuana with them if they were pregnant. I don't know that that is true. That's their argument. That's the probative value." R. 1301, l. 19

– 1302, l. 11. The judge said, “I have to make a judgment call of probative value versus prejudicial effect.” He ultimately concluded the evidence concerning marijuana was admissible. R. 1302, l. 21 – 1303, l. 20. However, the judge made clear, “If it gets into character assassination where the defendant has not placed her character into evidence, you are right, that is grounds for reversal.” R. 1301, l. 25 – 1302, l. 2.

After Lynch’s testimony continued, he explained that there were numerous web searches on Petitioner’s phone on the night of December 10, 2013 into the early morning hours concerning “Cougar Life.” He testified, “It starts off: Sign up now, Cougar Life. Search Near the Beach SC Cougar Life.” He continued to read off the searches. Defense counsel immediately renewed his objection, which the trial judge overruled. R. 1305, l. 14 – 1306, l. 10.

After he completed reading the text messages from Petitioner’s phone, Lynch began reading aloud messages sent and received by Sidney’s phone during that same timeframe. However, Lynch claimed Petitioner was the one using Sidney’s phone during this period. He read messages allegedly exchanged between Petitioner and an individual who is only identified as “Caleb.” It was later discovered that Caleb was eighteen years old or perhaps a minor. These messages were sexually explicit. For example, Lynch testified, “[T]his will be on December 16th right after midnight at 12:09 a.m. . . . there is, *You are amazing*, from the phone. It says, *I love it*. Another message, *I want to feel it inside of me*. Another message, *You are perfect*. And then there’s a message, *Have you fucked a lot of girls?*” R. 1319, ll. 16-24 (emphasis added).

Lynch continued, “Again, on December 16th, talking about 12:14 a.m. there is a message, *Do I get to see more?* Then there is a message from the phone that says, *You are making my pussy wet*. And then there’s a message from the phone, *I cum like 40 times during sex*. And then there’s a message from the phone that says, *Something is wrong or very right with me*.” R. 1320, ll. 14-21 (emphasis added). Lynch continues, “So again, in the early morning of

December 16th, again this is right after midnight, 12:23 a.m. in the morning. There is another message from Sidney's phone that says, *Do you want a dirt pic?* The reply is, *yes, ma'am* . . . And then there is a message . . . from the phone that says, *I'm in a dark spot. Dude, it's not the best.* And then there is another response from the phone that says, *Will that do for now?* . . . Then there is a message, *I want you Caleb.* There is a message, *You don't even know.* There is a message again from the phone, *I want to fuck the hell out of you.*" R. 1321, l. 14 – 1322, l. 5 (emphasis added).

Defense counsel again renewed his objection. R. 1322, ll. 6-7. The judge asked the solicitor to explain the probative value of the testimony. R. 1322, ll. 8-9. The solicitor asserted, "This is Sidney's phone and it is showing at the time that Tammy [Petitioner] had the phone and this is just two days prior to the 18th when Heather [Elvis] goes missing. And the other one shows she also had her own phone during these same dates." R. 1322, ll. 10-14. The judge merely ruled, "Overruled go ahead." R. 1322, l. 15.

Lynch then continued, "The next message from the phone says, *I'm so fucking hot for you.* And then there's a message from the phone that says, *I'm lit. It's not fair. I'm saying all this crazy shit.* And then there's a message again from the phone that says, *I want to fuck the hell out of you.* And then there is a message from the phone that says, *What would you want me to do to you, sweetie?* . . . and then that same person is responding says, *Well, you could start by sucking [my] dick.* . . . And then the phone also says right after that, *I def do that for you, babe.* . . . And then again, there is another message from the phone, *Until you are fucking begging me to stop.* And then the person responds, *Oh, yeah? I don't think I would.*" R. 1323, ll. 4-25 (emphasis added).

Lynch continued, "The message after that from the phone says, *I want to fuck you so bad it hurts.* Then the message from the phone says, *God damn you are one sexy mother fucker.*

Then there is a message after that from the phone that says, *I've been fantasizing about your face for weeks*. There is a message after that that says, *When it's blackout time boys beg to stop. I want you* - - and then there's a message after that that says, *When do you turn 19?* There is another message from the phone after that that says, *I am so wet for him right now.*" R. 1325, ll. 6-17 (emphasis added).

Lynch continued yet again, "Next message from the phone says, *I want to fuck you*. And then there's a message from someone else that says, *That would feel so good*. And then there's a message from the phone that says, *Hell, yes, it would*. And then there's a message from someone that says, *It's hard*. And then there's a message from the phone that says, *You don't even know how bad I want that dick of yours*. . . . There is a message from the phone that says, *I wish it was in me.*" R. 1326, ll. 3-18 (emphasis added).

Finally, the judge instructed the solicitor to move on. He asserted, "I think you made your point on the early morning hours of the 16th." R. 1327, ll. 4-7. Lynch explained that less than twenty-four hours later Sidney's phone received an incoming call on December 16, 2013 at 11:47 p.m. "apparently from Caleb's mother." R. 1327, l. 14 – 1328, l. 8. "[R]ight after that, there is a message from Sidney's phone that says, *Dude I think your mom just called.*" R. 1328, ll. 7-10 (emphasis added). There was a subsequent "message from Sidney's phone that says, *Someone just called from New York and asked why I was calling her **underaged** son.*" R. 1329, ll. 8-17 (emphasis added). After the person confirmed the number who called Sidney's phone was his mother, Lynch testified that there was a message from Sidney's phone that said, "*I don't blame you, but, geeze, don't need a crazy mom hating on me because I think her son is handsome.*" R. 1330, l. 7 – 1331, l. 1.

Defense counsel again renewed his objection. R. 1331, ll. 6-7. The trial judge finally sustained the objection and instructed the solicitor to move on. He asserted, "*You don't need to*

*get into all of the conversations. That deals more with character and has zero probative value. I think you have established what you want to establish, now move on.”* R. 1331, ll. 8-13 (emphasis added).

At the conclusion of Lynch’s direct examination, defense counsel moved for a mistrial based on the “*voluminous* testimony” constituting bad character evidence that was admitted against Petitioner. He asserted, “Your Honor knows evidence of bad character is never admissible against a defendant unless they put their character into evidence. *This is the most blush-worthy language I’ve ever experienced, certainly in a trial . . .* there has been testimony and speculation or evidence that says that the defendant who is on trial here for kidnapping was having this sexually explicit conversation with someone who is 18 years old *or maybe a minor.*” R. 1347, ll. 1-19 (emphasis added). Defense counsel further asked for the testimony to be stricken from the record and for a curative instruction. R. 1348, ll. 5-7. He asserted, “I understand the State’s theory. I understand they want to try to say who is using the phone, . . . but I think *there has got to be a way that they can establish that, or try to establish that, without dumping all of this character evidence in.*” R. 1348, ll. 5-13 (emphasis added).

The assistant solicitor claimed the “messages had nothing to do with her [Petitioner’s] character.” Instead, the messages “were to show that she had control of his [Sidney’s] phone.” R. 1348, ll. 19-21. The judge chastised the solicitor: “*You got into some pretty salty materials that were pretty prejudicial that did get into the defendant’s character, and she has not put her character into question yet. But you said it was to simply show who had possession of the phone, but you went on to ad nauseam on the early morning hours of December 16th . . . Why did you have to get into all the sexual conversation, and then bring out the fact that a mother contacts that phone number saying that the conversation was with an underaged person?*” R. 1348, l. 22 – 1349, l. 9 (emphasis added).

When pressed, the solicitor continued to claim the evidence was probative to show Petitioner was in control of Sidney's phone and also that she was "punishing" Sidney for his affair with Elvis, a twenty year old. R. 1349, ll. 10-19. She argued, "It certainly doesn't show this blissful marriage on the heels of two nights later buying a pregnancy test. It shows at this point that, A, she hates him. I mean, the fact that she's using his phone to send these messages shows where that marriage is at that time, and it does not reflect we're taking pregnancy tests because we're back together and things are so wonderful and I'm trying to have a baby. It says, I hate you. I'm using your phone to absolutely punish you for what you have done to me. This affair has come out with Heather Elvis, and now I'm going to rub it in your face that I'm messing around with some 19-year-old." R. 1349, l. 10 – 1350, l. 7. She added, "[T]hey're charged with conspiracy. It shows that the two of them [Petitioner and Sidney] are so thick in it together that he's okay letting her use his phone to message another man." R. 1350, ll. 11-14.

The judge ultimately denied the motion for a mistrial. "I'll let it stay as is. I'll overrule your objection." R. 1351, ll. 5-7.

The Court of Appeals held that although the messages referencing drug use constituted prior bad act evidence, they were relevant and logically pertinent to the state's attempt to discount Petitioner's testimony that she and Sidney were trying to get pregnant at the time of Elvis's disappearance and that Sidney went to Walmart to purchase a pregnancy test for Petitioner, not for Elvis. Moorer, 439 S.C. at 542, 888 S.E.2d at 733-734; App. 48. The Court of Appeals further held the messages concerning marijuana use were probative as to the state's theory of Petitioner's motive. The court emphasized the state's evidence that Elvis was possibly pregnant with Sidney's child at the time of her disappearance and its theory that Petitioner and Sidney lured Elvis to the Peachtree Boat Landing in order to take a pregnancy test. Id. at 542-543, 888 S.E.2d at 734; App. 48. Finally, while noting the evidence of Petitioner's drug use was

prejudicial, the Court of Appeals held the prejudicial effect of the text messages did not outweigh their probative value as to the state's theory of motive. *Id.* at 543, 888 S.E.2d at 734; App. 48.

The Court of Appeals held Petitioner's internet searches for "Cougar Life" and her sexual text messages to a younger male were character evidence and, because the recipient may have been underage, prior bad act evidence. *Id.*; App. 48-49. However, the court concluded the evidence was relevant and logically pertinent to show Petitioner's motive for kidnapping Elvis, her anger at Sidney for the affair, her desire for revenge against Sidney, and to prove Petitioner had control over Sidney's phone, which was used to lure Elvis to the boat landing. *Id.*; App. 49. The court held that because Petitioner's motive and identity as one of the kidnappers were material issues of fact in this case, the probative value of this evidence was high. *Id.*; App. 49. Lastly, the Court of Appeals found even if the trial judge erred in admitting these messages, the error was harmless given Petitioner's statements—during police interviews and her testimony—that she and Sidney had an open relationship and Petitioner's "gratuitous and vulgar descriptions of sexual acts" during her testimony. *Id.*; App. 49.

### **Standard of Review**

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012) (quoting *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

### **Discussion**

The Court of Appeals erred by holding the trial judge did not abuse his discretion by admitting evidence of text messages allegedly sent and received by Petitioner that were both

sexually explicit and contained references to marijuana use since this testimony constituted bad character evidence when Petitioner had not placed her character into evidence in violation of Rule 404, SCRE, and since any probative value of the evidence was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE. App. 48-49. The admission of this evidence constituted “character assassination,” which, as the trial judge warned, is “grounds for reversal.” See R. 1301, l. 25 – 1302, l. 2.

“In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue.” State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998) (citing Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989)); See Rule 404(a), SCRE. “In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity.” Id. (citing State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)); See Rule 404(b), SCRE. “Both rules are grounded on the policy that character evidence is not admissible ‘for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.’” Id. at 6, 501 S.E.2d at 718-719 (quoting State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990)); See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (holding “evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person.”).

“The evidence of the prior bad acts must be clear and convincing to be admissible.” King, 334 S.C. at 512, 514 S.E.2d at 582 (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). “The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused.” Id. (citing Adams, 322 S.C. 114, 470 S.E.2d 366; State v.

Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)). “Further, even though the evidence is clear and convincing and falls within a Lyle<sup>2</sup> exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” Id. (citing Rule 403, SCRE, and Adams, 322 S.C. 114, 470 S.E.2d 366).

The Court of Appeals properly recognized that evidence of Petitioner’s drug use constituted prior bad act evidence. See Moorer, 439 S.C. at 542, 888 S.E.2d at 733-34. In holding the trial judge properly admitted the evidence, the only exception to Rule 404(b) the Court of Appeals relied on was motive. Respectfully, whether Petitioner used or possessed marijuana in the weeks preceding Elvis’s disappearance had absolutely no logical relevance to a material fact at issue nor was it probative as to Petitioner’s alleged motive. The state’s only argument related to the admissibility of the messages referencing drug use, which the trial judge and this Court erroneously accepted, was that the messages were proof Petitioner was not pregnant or trying to become pregnant, thereby refuting Petitioner’s statements that Sidney purchased the pregnancy test during the early morning hours of December 18, 2013 for Petitioner and not for Elvis as the state theorized. However, just because a woman used or possessed marijuana does not mean she is not pregnant or trying to become pregnant, a fact the judge at trial recognized. See R. 1301, l. 19 – 1302, l. 11. Many women continue to drink alcohol or ingest drugs before they discover they are pregnant or even after they know they are pregnant. Therefore, the messages concerning Petitioner’s drug use had no probative value. Moreover, even if the messages did have probative value as the Court of Appeals concluded, it was outweighed by the unfair prejudice to Petitioner as the evidence reflected poorly on Petitioner’s character and demonstrated she had a criminal propensity.

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<sup>2</sup> State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)

Additionally, the Court of Appeals concluded Petitioner's "internet searches for 'Cougar Life' and her sexual text messages to a younger male were character evidence and, because the recipient may have been underage, prior bad act evidence." Id. at 543, 888 S.E.2d at 734. However, the court held the evidence was "logically pertinent to show" Petitioner's motive for kidnapping Elvis, her anger at Sidney for the affair, her desire for revenge against Sidney, and to prove she had control over Sidney's phone, which was used to lure Elvis to the Landing. Id. In short, the messages were evidence of Petitioner's motive and identity as one of the kidnapers, which the Court of Appeals found were material issues of fact in the case. Id.

While the Court of Appeals asserted the sexually explicit messages showed Petitioner had control over Sidney's phone, the sexually graphic messages published to the jury did little to support this conclusion. Further, there was certainly less prejudicial evidence the state could and *did* use to establish this allegation if that was the state's real intent. While it appeared the messages to the possibly underage male were sent by a female and not Sidney, the state offered no proof they were sent by Petitioner. Moreover, the state introduced evidence that Petitioner's children were texting Petitioner on Sidney's phone. For example, Will Lynch, the state's witness through whom the messages were admitted, read a message received by Sidney's phone on November 6, 2013 that read, "*Mom, are you on Instagram on Dad's phone? . . . Liking my pictures and videos?*" R. 1318, ll. 10-18 (emphasis added). The child then asked, "Can I have it then when you get home?" A text from Sidney's phone responded, "No, it's for Christmas." The child then said, "*Mom, please.*" R. 1318, ll. 19-23 (emphasis added). There are subsequent messages of a similar nature, which Lynch read into the record, that showed Petitioner was using Sidney's phone to exchange messages with one of her children. See R. 1318, l. 24 – 1319, l. 9. Lynch also described text messages sent from Petitioner's phone on December 8, 2013 to three

different people that state her “battery is dying” and instructing them to “text [her] other phone (843) 385-3175.” This was Sidney’s number. R. 1298, l. 12 – 1299, l. 3.

The Court of Appeals also concluded the sexually explicit messages were relevant to show Petitioner’s anger at Sidney for the affair and her desire for revenge against Sidney. Even if it were true that Petitioner was angry at Sidney and sought revenge, it does not logically follow that Petitioner and Sidney conspired to kidnap Elvis and subsequently did kidnap Elvis. Consequently, the probative value of the sexually explicit messages, if any, was minimal. Instead, the evidence made Petitioner appear to be a bad person which was its real import.

On the other hand, the unfair prejudice to Petitioner was tremendous as the evidence was extremely damning to her character. Petitioner testified in her own defense and her character and credibility were crucial. The state introduced the evidence to not only to attack Petitioner’s character and demonstrate that she was a bad person, but also to show Petitioner had the propensity to conspire to kidnap and did kidnap Elvis. The evidence should have been excluded.

Lastly, the Court of Appeals held that even if the trial judge erred in admitting the text messages, the error was harmless given Appellant’s statements during police interviews and her testimony that she and Sidney had an open relationship. Moorer, 439 S.C. at 543, 888 S.E.2d at 734; App. 49. Respectfully, it is difficult to comprehend the logic of how evidence Petitioner and Sidney had an open relationship made the error in admitting Petitioner’s sexually graphic text messages to a possibly underage boy harmless. “The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (quoting State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993)) (internal quotation marks omitted); See Chapman v. California, 386 U.S. 18, 24 (1967). Our state’s jurisprudence requires the appellate court “not to question whether the State proved

its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.” *Id.* at 389-90, 728 S.E.2d at 94 (citing *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (harmless error jurisprudence requires that the error not contribute to the verdict obtained)). The state’s evidence against Petitioner was extremely weak. It conceded there was no direct evidence of her guilt and that its case was entirely circumstantial. Because of the lack of evidence against Petitioner, the state attempted throughout the course of the trial to paint Petitioner as a bad person who had the criminal propensity to conspire to and kidnap Elvis. The sexually explicit messages were very damning to Petitioner’s character and credibility, which were crucial, particularly given that Petitioner testified before the jury. It is impossible to reliably conclude beyond a reasonable doubt that this erroneously admitted evidence did not contribute to the verdict.

Respectfully, this Court should grant certiorari and hold the Court of Appeals erred by finding the trial judge did not abuse his discretion by admitting this extremely prejudicial bad act and bad character evidence.

3.

The Court of Appeals erred by holding the trial judge did not abuse his discretion by qualifying Grant Fredericks as an expert in forensic video analysis and by allowing Fredericks to testify that Petitioner’s truck was the vehicle seen on surveillance footage driving toward and away from the Peachtree Boat Landing where Heather Elvis was allegedly kidnapped—to the exclusion of *all* other vehicles—when his conclusions were not shown to be reliable.

### **Relevant Facts**

During its investigation, the state obtained surveillance footage from a private residence on Highway 814 and from D&S Siteworks, a business on Mill Pond Road. Both locations are

along the route from the Moorers' house on Highway 814 to the Peachtree Boat Landing, the last known location of Elvis before she disappeared based on her cell phone records, and her car being abandoned there. The footage from both locations show a vehicle driving in the direction of the boat landing during the early morning hours of December 18, 2013. What appears to be the same vehicle is seen driving away from the boat landing several minutes later. In an effort to identify the vehicle, the state retained Grant Fredericks, a forensic video analyst. R. 10, l. 10. Fredericks identified the vehicle in the footage as the Moorers' 2013 Limited Edition Ford F-150 pickup truck *to the exclusion of all other vehicles*. His opinion was based almost exclusively on his analysis of the "headlight spread pattern" of the unknown vehicle seen in the footage.

Petitioner moved pretrial to exclude or limit Fredericks' testimony. A pretrial hearing on this issue was held on April 18, 2016 before Judge Dennis. A written motion to suppress was filed by counsel for Petitioner's codefendant, Sidney Moorer. R. 132. Petitioner's request to join in the motion was granted by Judge Dennis during the hearing. R. 5, l. 5 – 8, l. 9. The state proffered Fredericks' testimony during this hearing, and the defense presented the testimony of Bruce Koenig to counter Fredericks' opinion.

At the time of his testimony, Fredericks worked at Forensic Video Solutions, a company that assists in the examination of video evidence, primarily for litigation. R. 865, ll. 1-6. In this case, Fredericks used photographic video comparison and reverse projection photogrammetry, which are both subdisciplines of forensic video analysis, to identify the unknown vehicle seen on surveillance footage from the residence on Highway 814 and D&S Siteworks. R. 22, ll. 5-20. Photographic video comparison is the "process of comparing images of questioned objects or persons to known objects or persons . . . and *making an assessment of the correspondence between features in these images*" in order to render "an opinion regarding identification or elimination." R. 60, l. 21 – 61, l. 7 (emphasis added). Reverse projection is the "process of

overlaying contemporary images of a scene with historic images of a scene in order to make . . . observations or to obtain measurements.” R. 31, l. 23 – 32, l. 11.

Fredericks maintained that “headlight spread pattern analysis” is a feature of reverse projection. It is “the examination of the reflection of light off an object.” R. 33, ll. 10-14. He explained, “In this case, there was an illumination of light in front of the car that could be contrasted and compared, so I described that as headlight spread pattern.” R. 33, l. 23 – 34, l. 2.

Fredericks had been qualified as an expert at least one hundred and fifty times during the course of his thirty year career. R. 11, ll. 2-5; R. 868, l. 25 – 869, l. 23. However, he has only provided expert testimony on the comparison of headlight spread pattern about “a half a dozen times.” R. 39, ll. 19-24. In some of those cases he opined the questioned vehicle was consistent with the make and model of the known vehicle (it could not be eliminated) while in others he opined the questioned vehicle was the known vehicle. R. 39, l. 25 – 40, l. 10.

Forensic video analysts employ a methodology referred to as ACE-V, which is also used by fingerprint, footwear, and DNA analysts and other identification based analysts. It stands for “analyze, compare, evaluate, and verify.” Forensic video analysts add an R for report (ACE-VR) because a visual report is necessary in their field for peer review. Verification is purportedly the aspect that covers quality control to ensure the reliability of their testing. R. 54, ll. 2-16.

During the pretrial hearing, before hearing any argument, Judge Dennis found the subject of Fredericks’ testimony is “beyond ordinary knowledge” and that Fredericks “demonstrated a knowledge of training, background, and experience sufficient to render an opinion.” R. 41, ll. 8-14. However, Judge Dennis withheld ruling on the extent of the opinion Fredericks would be permitted to render until he heard further testimony. R. 41, ll. 14-21.

Based on his testing, Fredericks said he was able to determine that the vehicle on the surveillance footage was a dark in color four door pickup truck with a toolbox in the bed of the

truck. R. 50, l. 15 – 51, l. 16. He further determined that the truck had “HID headlights.” R. 51, ll. 17-24. He then examined the headlight spread pattern using the same methods he used to determine the other characteristics of the truck. R. 51, l. 21 – 52, l. 23. Fredericks ultimately opined during the pretrial hearing that the vehicle seen on the surveillance footage from the residence on Highway 814 and D&S Siteworks during the early morning hours of December 18, 2013 was the 2013 Limited Edition Ford F-150 that belonged to Sidney and Tammy Moorer, “eliminating all others of the same class.” R. 75, ll. 1-19.

Fredericks said his report was “peer reviewed” by George Reis, who is certified as a forensic video examiner by the International Association for Identification (IAI). R. 65, ll. 2-23. Reis “agreed with the methodology that was employed and with the results.” He found Fredericks’ headlight spread pattern analysis was “an appropriate process.” R. 67, ll. 15-21. Reis emailed his findings to Fredericks *the night before the pretrial hearing*. R. 71, ll. 6- 23. The email specifically stated, “The premise of the uniqueness of headlight spread patterns is well stated and illustrated.” R. 2386 (State’s Exhibit No. 7).

During the pretrial hearing, the defense called Bruce Koenig to counter the reliability of Fredericks’ opinion. Judge Dennis qualified Koenig as an expert in forensic video analysis. R. 85, ll. 22-23; R. 107, ll. 3-7. Koenig testified that photographic video comparison and reverse projection are a “legitimate technique” as long as one has a “stable camera position.” R. 105, ll. 15-21. He asserted that such methods have been used for a long time, including by the FBI. R. 107, ll. 12-19.

Koenig was hired by the defense to review Fredericks’ report. Koenig testified that Fredericks “did a very thorough job in the rear projection and . . . in his comparisons.” R. 108, ll. 1-22. Koenig agreed with Fredericks’ opinion that the unknown vehicle on the surveillance footage was consistent with a certain class of vehicle. R. 109, ll. 1-6; R. 109, l. 23 – 110, l. 1.

He asserted, "I believe he is absolutely correct that he tested X amount of vehicles and of those vehicles, the questioned vehicle, as we used to call it, matches by far one of those types of vehicles." R. 109, ll. 2-10. However, Koenig disagreed with Fredericks' "final decision that, in fact, it must be this vehicle *and no other*." He asserted that "even under great . . . video conditions, it would be difficult to say "*this is the only vehicle in the entire world that could be it*" "unless it has a special dent or something." R. 109, ll. 6-15 (emphasis added).

In Fredericks' report, he stated, "No two vehicles share the same headlight pattern." Koenig testified that this assertion is not a "scientific principle." R. 110, ll. 7-11. No research in the forensic field or peer reviewed articles support the uniqueness of headlight spread pattern to each vehicle. R. 111, l. 13 – 112, l. 2; R. 113, ll. 1-5; R. 116, ll. 14-18. Koenig explained, "I would expect people have tested 5 to 600 of those to say, yeah, every one of those under low quality video, I can make a comparison and say, this is the only vehicle it could've been. And I think even under really high quality [video], I can't believe you're gonna get thousands of vehicles and they're all gonna look different." R. 111, ll. 3-11.

Koenig concluded that while headlight spread pattern analysis is an accepted scientific method to determine the class of a vehicle, it is not accepted "for uniqueness." R. 117, ll. 17-23. He asserted, "What he [Fredericks] did produces a class decision *not a unique or identification kind of decision*." R. 123, ll. 15-19 (emphasis added).

During the pretrial hearing, Kirk Truslow, counsel for Sidney Moorer, stated he had no objection to Fredericks' opinion as to the class or characteristics of the questioned vehicle. His objection was to Fredericks' opinion concerning the uniqueness of headlight spread patterns. R. 73, ll. 15-18. He asserted, "The premise set forth, based on his [Fredericks'] experience, not [on] science, is that every, every single vehicle has a unique spread pattern of lights, just like a fingerprint to a person . . . That is a principle that is not based on science. It's never been

researched, never been tested, and it's never been peer reviewed." R. 126, l. 15 – 127, l. 6. Truslow requested Judge Dennis limit Fredericks' testimony to his opinion that the vehicle in the surveillance footage is consistent with the make and model of the Moorers' truck. R. 127, ll. 18-22. Truslow emphasized that Fredericks only tested one other vehicle that was the same make and model as the Moorers' truck. R. 128, ll. 5-10. He concluded, "What I'm saying is that the Court, in my opinion, should find that it is not an accepted scientific principle, that no two vehicles have the same headlight spread pattern, just like a fingerprint. It's just not founded in science and it's not [an] accepted or reliable scientific principle." R. 128, ll. 10-15.

During the pretrial hearing, Judge Dennis ruled he would "allow the testimony." He reasoned that Fredericks stated "in his experience." The judge asserted, "He's saying in his experience and . . . that's the distinction here. He's testifying from his personal experience in analyzing, he's never encountered that." R. 129, ll. 15-17. According to the judge, if Fredericks had stated the uniqueness of headlight spread pattern was "a standard in the industry" that would be a different matter. R. 129, ll. 19-22. He found it was "a recognized science" and "a recognized standard for identification." R. 130, l. 5 – 131, l. 12.

During trial, Petitioner renewed her objection to Fredericks' qualification as an expert. While defense counsel agreed Fredericks was qualified to examine video and give an opinion as to the identify of, for example, a specific make or model of a vehicle, he objected to Fredericks being permitted to identify a certain vehicle as the unknown vehicle captured on the videos to the exclusion of all other vehicles. R. 890, ll. 2-22. Counsel asserted, "What we object to is him being qualified as an expert to say that he can look at a video . . . or two videos very brief in time and then come back and say that is a specific truck and it doesn't match any other F-150 in the world. That is a specific truck. It's like DNA." R. 890, ll. 6-12. Judge Culbertson, the trial

judge, ultimately qualified Fredericks as an expert in video forensic analysis over objection. R. 890, ll. 23-24; R. 893, ll. 2-5.

Fredericks told the jury that the footage from the two cameras at the residence on Highway 814 showed a vehicle passing by going southbound, which is towards the Peachtree Boat Landing, at approximately 3:35 a.m. on December 18, 2013.<sup>3</sup> R. 906, l. 2 – 907, l. 12; R. 910, l. 18 – 911, l. 1. The footage from the two cameras at D&S Siteworks on Mill Pond Road showed a vehicle passing by also moving southbound towards the landing at 3:39 a.m. R. 907, l. 13 – 909, l. 2. The same vehicle is then seen on the footage from D&S Siteworks going northbound, away from the Peachtree Boat Landing, at 3:46 a.m. R. 909, l. 7 – 910, l. 2. The vehicle is again seen on the footage from the residence on Highway 814 going northbound at 3:45 a.m.<sup>4</sup> R. 910, ll. 3-13; R. 911, ll. 16-24. Fredericks maintained the vehicle was out of view of the residential cameras on Highway 814 for about ten minutes and out of view of the cameras as D&S Siteworks for about seven minutes. He “could easily drive that area within that three minute period of time, so it was consistent in that way.” R. 913, ll. 7-17.

In order to determine the identity of the unknown vehicle that appears in the footage, Fredericks suggested conducting a photographic video comparison, which includes a reverse projection examination. R. 948, ll. 8-15. He explained, “That examination requires going to the scene, examining the video system and then placing the known vehicle [the Moorers’ truck] into a . . . series of positions that are depicted as the same positions of the questioned vehicle [the vehicle on the surveillance footage]. I also recommended that in order to test this process, that

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<sup>3</sup> Fredericks testified that there is a margin of error of at least two minutes on the footage from the residence on Highway 814. R. 911, ll. 2-10.

<sup>4</sup> Again, Fredericks testified that there is a margin of error of at least two minutes on the footage from the residence on Highway 814. This explains why the vehicle was seen passing D&S Siteworks at 3:46 a.m. and the residence at 3:45 a.m. even though the residence is past D&S Siteworks. R. 911, ll. 2-10; R. 913, l. 25 – 915, l. 7.

the methodology would be to bring in other vehicles of the same and similar class to demonstrate and test how they would appear. And it is my experience that vehicles of a different class will be distinguishable, and vehicles of a same class will be distinguishable if they have unique characteristics, such as different headlight spread pattern or different features of the vehicle, like dents or other after market additions.” R. 894, l. 15 – 895, l. 3; See R. 47, l. 11 – 48, l. 4.

He continued, “So I suggested that we do an extensive examination bringing in multiple vehicles that would appear by simple eyeballing . . . to perhaps be the same, but once we overlay the historic images of the questioned vehicle [the vehicle that appears in the surveillance footage] with the new images of each of these test vehicles in the same position, their distinguishing characteristics should be visible and testable and perhaps even measurable.” R. 895, ll. 4-11.

Fredericks went to the residence on Highway 814 and D&S Siteworks on Mill Pond Road and “reproduced the visual experience of the cameras” by placing the test vehicles in the same position as the “questioned vehicle” in the footage and ensuring the lighting levels were the same. R. 895, l. 12 – 896, l. 24; See R. 45, l. 4 – 46, l. 8. He conducted his testing during the early morning hours around the same time the original videos were recorded. R. 46, ll. 19-21. He also used the same cameras that were used to record the original videos. R. 46, ll. 15-18. He then compared the videos of the unknown vehicle with the videos of the test vehicles.

Fredericks tested eleven other vehicles, some of a different class, some of the same class but different color, and then some in the same class, same color, and same make, model, and year as the Moorers’ truck. R. 923, ll. 17-21. Specifically, he tested two different colored Chevrolet Silverados, a Dodge Ram 1500, a Dodge Ram Laramie, a GMC Denali, a Ford F-150 Four-by-Four, a Ford F-150 King Ranch, two different colored Ford F-150 Lariats, a Ford F-150 Platinum, and a Ford F-150 Limited. R. 923, ll. 10-16. Fredericks claimed that he was able to eliminate all of these test vehicles from being the unknown vehicle in the footage based on either

the style of headlights, the physical position of the lights on the vehicles, or the headlight spread pattern, essentially the manner in which the headlights reflected light off the roadway. R. 923, l. 22 – 940, l. 6. Significantly, Fredericks only tested one other Ford F-150 Limited, which was the same make, model, and year as the Moorers’ truck. R. 950, l. 10 – 951, l. 2.

Fredericks concluded that the Moorers’ 2013 Ford F-150 Limited black pickup truck was the unknown vehicle seen in the footage from the residence on Highway 814 and D&S Siteworks on Mill Pond Road during the early morning hours of December 18, 2013 *to the exclusion of all other vehicles*. R. 947, l. 14 – 948, l. 8. He asserted, “[T]he questioned vehicle and the known vehicle are one in the same.” R. 948, ll. 4-5.

Lastly, Fredericks testified he was “able to synchronize the times” using the location data from Elvis’s phone and the videos of the unknown vehicle. R. 943, ll. 17-23. He claimed, “[T]he vehicle that we’ve seen on the video is moving towards the landing area at the same time that . . . and just after [Elvis’s] cell phone is pinging those areas, including the landing area. So they [Elvis’s phone and the unknown vehicle] are converging on the same spot, towards the same area,” at the same time. R. 944, l. 23 – 945, l. 9.

### **Standard of Review**

“The decision to admit or exclude testimony from an expert witness is within trial court’s sound discretion.” State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (internal citations omitted). “The trial court’s decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion.” Id. “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting State v. Douglas, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006)). “A trial court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary,

unreasonable, or unfair.” State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)). “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or the lack thereof.” Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (internal citations omitted).

### **Discussion**

The Court of Appeals erred by holding the trial judge did not abuse his discretion by qualifying Grant Fredericks as an expert in forensic video analysis and by allowing Fredericks to testify that Petitioner’s Ford F-150 Limited pickup truck was the vehicle seen on surveillance footage driving toward and away from the Peachtree Boat Landing where Elvis was allegedly kidnapped to the exclusion of *all* other vehicles when his conclusions were unreliable and not based on science. App. 51-52.

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

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.

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

“[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony.” Id.

at 446, 699 S.E.2d at 175. “First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” Id. (citing State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009)). “Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Id. (citing Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)). “Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.” Id. (citing State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)).

“Expert testimony is not admissible unless it satisfies *all* three requirements with respect to subject matter, expert qualifications, and reliability.” Id. (emphasis added). “Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate.” Id. at 446-447, 699 S.E.2d at 175 (citing State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009)).

While Fredericks may have been qualified to give an opinion as to the class of the unknown vehicle seen in the surveillance footage, his overall conclusion that the unknown vehicle was the Moorers’ truck to the exclusion of all other vehicles based on the premise of the uniqueness of headlight spread pattern was simply not reliable and not based on science. He claimed *in his experience* no two vehicles have the same headlight spread pattern but he only tested one other Ford F-150 Limited, respectfully a fact the Court of Appeals ignored. As Bruce Koenig asserted during the pretrial hearing, this assertion is not a “scientific principle.” R. 110, ll. 7-11. Despite what the Court of Appeals determined, no research in the forensic field or peer reviewed articles support the uniqueness of headlight spread pattern to each vehicle. R. 111, l.

13 – 112, l. 2; R. 113, ll. 1-5; R. 116, ll. 14-18. While headlight spread pattern analysis is an accepted scientific method to determine the class of a vehicle, it is not accepted “for uniqueness.” R. 117, ll. 17-23. Consequently, the trial judge should have limited Fredericks’ opinion and only permitted him to testify that the unknown vehicle was consistent with the class or make and model of the Moorers’ truck.

This Court should grant certiorari and hold the Court of Appeals erred by finding the trial judge did not abuse his discretion by qualifying Fredericks as an expert in forensic video analysis and allowing him to testify about the “uniqueness” of the Moorers’ truck to the exclusion of every other vehicle. Given the importance of this inadmissible opinion to the state’s case, this Court should respectfully reverse Petitioner’s convictions and remand for a new trial.

4.

The Court of Appeals erred by holding the trial judge did not abuse his discretion by excluding the testimony of Petitioner’s children, Christian Moorero and Nikki Moorero, her sister, Ashley Caison, and her mother, Polly Caison, who would have testified Petitioner was home during the timeframe of the alleged kidnapping, reasoning Petitioner supposedly failed to comply with Rule 5(e)(1), SCRCrimP, by not notifying the prosecution at least ten days before trial of the names and addresses of her alibi witnesses, particularly where the state was not prejudiced since it was aware of these witnesses, had previously interviewed them, and had the witnesses under subpoena.

#### **Relevant Facts**

The state moved pretrial to exclude the testimony of Petitioner’s alibi witnesses, including her children, Christian Moorero and Nikki Moorero, her sister, Ashley Caison, and her mother, Polly Caison, because Petitioner allegedly failed to comply with Rule 5, SCRCrimP.

The assistant solicitor said the defense first notified the state of a potential alibi defense on Friday, September 28, 2018. The defense sent the solicitor an email at 7:31 p.m. that read, “Hi Nancy, I’m sending you this email to give you Notice of Alibi Defense in the case of State vs. Tammy Moorner. Ms. Moorner may want to use her children during her trial as her alibi that she was home the night of the incident.” R. 150, l. 13 – 151, l. 21. A follow up email was sent eight minutes later that provided the names of the children. R. 2354.

The solicitor responded on Monday, October 1, 2018 requesting the full names and addresses of the alibi witnesses and the specific place and address Petitioner claimed to have been during the alleged offense. R. 151, l. 22 – 152, l. 1; R. 2354. Defense counsel replied that same day providing the names, addresses, and phone numbers for Petitioner’s two oldest children, her sister, and her mother, along with the address for her home where she was during the time of the alleged kidnapping. R. 158, ll. 5-12; R. 2354.

The solicitor argued the state was prejudiced by the late disclosure because it did not have an opportunity prior to trial to interview the potential alibi witnesses, which was the purpose of the rule. R. 152, ll. 1-10. Defense counsel admitted he did not provide the contact information for the witnesses until October 1, 2018, seven days before trial. R. 158, ll. 5-12. However, he noted law enforcement knew of the children and actually interviewed the children during the initial investigation. He further asserted that Petitioner had a fundamental right to present a defense “beyond the specific rule.” In support of his argument, counsel cited to State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980), Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013), and Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). R. 159, l. 1 – 160, l. 13.

The trial judge granted the state’s motion to suppress the testimony of Petitioner’s alibi witnesses because the defense did not properly comply with Rule 5 since it did not provide the state with ten days’ notice. R. 158, ll. 13-14. The judge asserted, “[T]he rule is pretty clear what

you have to do, and you have to do it ten days prior to trial, and you didn't do it ten days prior. You may have given them the places where the defendant claimed to be, but you didn't give them the contact information for the supporting witnesses." R. 158, ll. 17-23. The judge made clear that Petitioner would not be permitted "to call witnesses to say the defendant could not have done this because she was with me at this place . . . because they [the state] are entitled to ten days' notice to investigate and check with those witnesses." He further maintained, "I think a good deal, if you are saying that she wasn't there, is going to be brought out by cross-examining the State's witnesses, number one, or if she takes the stand. I don't know that this will prohibit her from testifying that way, but you are not going to be able to just ambush the State by calling another witness when you haven't given them adequate notice." R. 160, l. 14 – 161, l. 8.

Immediately thereafter, the judge granted Petitioner's motion to sequester the witnesses. During the discussion on sequestering the witnesses, defense counsel emphasized that Petitioner's alibi witnesses were subpoenaed by the state. R. 162, ll. 15-17.

After the state rested its case, the solicitor requested the judge remind the defense of the judge's ruling granting the state's motion to suppress Petitioner's alibi witnesses "for procedural reasons." The solicitor brought up the issue "preemptively . . . because you can't unring the bell." R. 1690, l. 19 – 1691, l. 7. The judge reaffirmed his pretrial ruling. He stated, "[C]ertainly the defendant can take the stand and say she wasn't there or was somewhere else, or whatever she wants to do. But the purpose behind the rule of notifying the State of an alibi defense is so that the State can investigate the witnesses who claim that she was somewhere else, so I sustained the State's objection to allow her to call any other witnesses that would place her somewhere else at the time the State says the crime was committed." R. 1691, ll. 8-17.

Defense counsel again emphasized that the state had subpoenaed Petitioner's children, it knew who they were, it knew their addresses, and it had already interrogated them. R. 1792, ll.

19-25. However, the trial judge was firm that the defense “had a time limit to give it to them, and you didn’t give it to them, so it doesn’t come in.” R. 1693, ll. 3-5.

### **Standard of Review**

“The decision by the trial judge to exclude evidence for failure to comply with disclosure rules will not be reversed absent an abuse of discretion.” State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) (citing State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct.App.1998)); See State v. Davis, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) (“Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion.”). “An abuse of discretion occurs when the decision by the trial judge is based on an error of law.” Id. at 136, 623 S.E.2d at 867-868 (citing State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000)).

### **Discussion**

The Court of Appeals erred by holding the trial judge did not abuse his discretion by excluding the testimony of Petitioner’s minor children, Christian Moorer and Nikki Moorer, her sister, Ashley Caison, and her mother, Polly Caison, who would have testified Petitioner was home during the timeframe of the alleged kidnapping, because Petitioner supposedly failed to comply with Rule 5(e)(1), SCRCrimP, by not notifying the prosecution at least ten days before trial of the names and addresses of her alibi witnesses. App. 54. Despite the state’s claim otherwise, it was not prejudiced by the late disclosure since it was aware of these witnesses, had previously interviewed them, knew what they would say regarding alibi, could have interviewed them again before they ultimately testified, and even had the witnesses under subpoena.

### **Rule 5, SCRCrimP**

Rule 5(e) states in relevant part: “(1) Notice of Alibi By Defendant. Upon written request of the prosecution stating the date and place at which the alleged offense occurred, the defendant

shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and address of the witnesses upon whom he intends to rely to establish such alibi.” If either party fails to comply with the requirements of Rule 5(e), the trial judge “may exclude the testimony of any undisclosed witness offered by either party.” Rule 5(e)(4), SCRCrimP.

Petitioner notified the state ten days before trial that she intended to call her children as alibi witnesses. Seven days before the trial started, Petitioner specifically informed the state that she intended to call Christian Moorner, Nikki Moorner, Ashley Caison, and Polly Caison as alibi witnesses and provided their contact information. The state was undisputedly aware of these witnesses before trial and was in no way prejudiced by the alleged late disclosure. Polly Caison, Petitioner’s mother, and Ashley Caison, Petitioner’s sister had lived in the same residence since the investigation began. Consequently, the state was well aware of where to contact them. Moreover, the state had previously interviewed all of these witnesses during its investigation and had them under subpoena for the trial.

There was also adequate time for the state to *reinterview* these witnesses before the defense presented its case. (The trial judge acknowledged “the purpose behind the rule of notifying the State of an alibi defense is so that the State can investigate the witnesses who claim that she [Petitioner] was somewhere else.” See R. 1691, ll. 8-17). The state had an entire week before the trial even started. Pretrial matters and the state’s presentation of its case in chief lasted eight days plus a weekend. There is no doubt that during this seventeen day period, someone from the state could have *reinterviewed* these witnesses if necessary.

Because there was absolutely no prejudice to the state as a result of the supposed late disclosure, the trial judge abused his discretion by excluding Petitioner’s four alibi witnesses

from testifying in her defense. See State v. Kerr, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998) (Assuming the state did fail to properly produce photographs pursuant to Rule 5, SCRCrimP, the trial judge did not abuse his discretion by admitting the photographs when there was no prejudice to the appellant).

### **Due Process Right to Present Complete Defense**

“The United States Constitution guarantees a criminal defendant the right ‘to present a complete defense.’” State v. Burgess, 391 S.C. 15, 21, 703 S.E.2d 512, 515 (Ct. App. 2010) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). “This right is also guaranteed by our State constitution: ‘Any person charged with an offense shall enjoy the right ... to be fully heard in his defense....’” Burgess, 391 S.C. at 21-22, 703 S.E.2d 512, 515-516 (quoting S.C. Const. art. I, § 14 (2009)); See S.C. Code Ann. § 17-2-60 (2003) (“Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....”); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). Furthermore, in Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the United States Supreme Court emphasized that “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” See Burgess, 391 S.C. at 22, 703 S.E.2d at 516.

The solicitor acknowledged at trial that the judge excluded Petitioner’s alibi witnesses “for procedural reasons.” R. 1690, l. 19 – 1691, l. 5. However, as defense counsel argued at trial, Petitioner had a fundamental right to present a defense “beyond the specific rule.” R. 160, ll. 1-13. The judge’s exclusion of Petitioner’s alibi witnesses because she only provided the state with their contact information seven days before trial instead of ten eviscerated her defense and violated her constitutional and statutory right to present witnesses in her favor. The exclusion of these witnesses as a sanction was disproportionate to the supposed violation and the purpose of the rule, particularly when the state was not prejudiced.

In a footnote, the Court of Appeals held the trial judge's exclusion of alibi testimony from Petitioner's mother, sister, and children was not prejudicial because (1) Petitioner's sister testified she saw Petitioner arrive at her home at 3:10 a.m.; (2) Petitioner's mother and children were excluded from testifying for violating the sequestration order; and (3) the state did not need to prove Petitioner was at the Landing when Elvis disappeared to prove Petitioner lured Elvis to the Landing or conspired with Sidney to lure Elvis to the Landing. Moorer, 439 S.C. at 548 n.1, 888 S.E.2d at 736 n.1; App. 53.

Despite the judge's improper refusal to allow Petitioner to proffer the testimony of her alibi witnesses, the prejudicial effect of the exclusion of their testimony is obvious. These witnesses would have testified that Petitioner was home during the timeframe of the alleged kidnapping and about her actions during that time period. While Petitioner's sister testified Petitioner and Sidney returned home at 3:10 a.m. on the morning Elvis disappeared, the state's theory was that Elvis was kidnapped from the Landing sometime between 3:41 a.m. and approximately 3:46 a.m., given Elvis's cell phone data and the surveillance footage of a vehicle traveling toward and away from the location of the Landing. Since Petitioner's house was a short drive from the Landing, Ashley Caison's testimony that Petitioner arrived home at 3:10 a.m. did not cure the prejudice Petitioner suffered by the erroneous exclusion of the alibi testimony that she was home the rest of the morning.

Respectfully, this Court should grant certiorari and hold the trial judge abused his discretion by excluding the alibi testimony of Christian Moorner, Nikki Moorner, Polly Caison, and Ashley Caison based on the alleged violation of Rule 5(e), SCRCrimP, and Petitioner's right to present a complete defense.

The Court of Appeals erred by holding the trial judge did not abuse his discretion by excluding the testimony of Petitioner's children, Christian Moorer, Nikki Moorer, and Caison Moorer, and her mother, Polly Caison, reasoning the witnesses allegedly violated the sequestration order by viewing the live feed of the trial where the witnesses denied they watched the feed, there was no evidence their testimony was tainted, and such an extreme sanction violated Petitioner's due process right to present a complete defense.

### **Relevant Facts**

On the morning of October 18, 2018, after the trial judge reaffirmed his ruling that Petitioner could not present evidence of alibi because she failed to give the state ten days' notice, Petitioner called her oldest son, Christian Moorer, as her first witness. Before Christian took the stand, the state indicated it had a matter of law and the jury was excused. The assistant solicitor maintained that certain defense witnesses had violated the sequestration order by viewing a live feed of the trial. R. 1694, l. 12 – 1696, l. 6. He identified the witnesses as Christian Moorer, Nikki Moorer, and Caison Moorer, who are Petitioner's three children, and Polly Caison, who is Petitioner's mother. R. 1697, ll. 20-23.

The state called Jade Pike, a deputy with the Horry County Sheriff's Office, in support of its contention that these witnesses had violated the sequestration order. Pike testified that Christian, Nikki, Caison, and Polly were all sequestered in a side room off the courtroom. When court recessed for lunch on Monday, October 15, 2018, which was three days earlier, Pike escorted Petitioner from the courtroom and walked her to the side room where her family was located. R. 1701, ll. 3-5; R. 1703, ll. 3-7. Pike claimed that when Petitioner opened the door she (Pike) saw "a laptop computer sitting on top of the table in the middle, and it had the live stream on it." R. 1801, ll. 12-17. Pike clarified that there was also a man in the room named Richard

McGowan. McGowan admitted it was his computer. Pike ordered McGowan to put the computer away. R. 1700, ll. 18-21. She was not sure how long they were watching the live feed because she was in the courtroom during the trial. R. 1702, ll. 22-25.

The defense then proffered Christian Moorers's testimony concerning the allegations he violated the sequestration order. Christian testified that he, Nikki, Caison, and Polly all waited in a side room off the courtroom during the trial because they were sequestered. He denied watching the live stream. He said he had headphones on and was listening to YouTube on his cellphone. R. 1710, l. 11 – 1711, l. 9. The previous Monday, Robert McGowan was also in the room with the family. Christian testified that McGowan had a laptop computer that he put on a table in the room. The laptop was on the edge of the table facing McGowan. Christian did not know if McGowan had the live stream playing on the laptop because he was not paying attention. Christian repeatedly denied watching the live feed or hearing any of the testimony. R. 1711, l. 16 – 1715, l. 10.

After Christian testified *in camera*, the trial judge ruled, "I think there was a violation of the sequestration order. I'm going to suppress any testimony from Christian Moorers, Nikki Moorers, Caison Moorers, [and] Polly Caison." Based on the judge's ruling, defense counsel requested to proffer the testimony of the witnesses. He stated, "Your Honor, I know we're trying to move forward, but I also know that . . . this is important. I would like to call the witnesses before the Court, and in the briefest way possible just proffer their testimony." The judge denied the request and refused "to take up the Court's time doing that." He asserted, "If it turns out I'm wrong, the appellate court will say I was wrong, I should have let them testify. But I don't think I'm wrong in that regard so I'm not going to take up time." R. 1720, l. 8 – 1721, l. 18.

Defense counsel made clear that he was "deeply troubled" about the defense's "inability to call witnesses." R. 1723, ll. 10-13. He later clarified that he was making a "due process

argument” because the exclusion of defense witnesses prohibited Petitioner from “putting on a defense.” He cited to a United States Supreme Court case which stated the government “must prove that the violation of sequestration order shaped the testimony.” R. 2162, ll. 12-24. The judge stood by his previous ruling.

The Court of Appeals held the trial judge was within his discretion to exclude Christian, Nikki, Caison, and Polly’s testimony. The court noted that the judge conducted an evidentiary hearing and found credible evidence existed that the witnesses violated the sequestration order. Moorer, 439 S.C. at 549, 888 S.E.2d at 737; App. 54. Additionally, the witnesses were previously told they were not allowed to have access to a device which could connect to the internet, but did so anyway. Id.; App. 54. Given these circumstances, the Court of Appeals found no error in the trial judge’s decision to exclude the witnesses’ testimony. Id.; App. 54. For the same reasons, the court “rejected” Petitioner’s argument that the exclusion of her witnesses “infringed her right to present a complete defense, thereby violating her right to due process,” emphasizing that the right to present a defense is not unlimited. Id.; App. 54.

### **Standard of Review**

“Whether a witness should be exempted from a sequestration order is within the trial court’s discretion.” State v. Washington, 424 S.C. 374, 409, 818 S.E.2d 459, 477 (Ct. App. 2018) (quoting State v. Singleton, 395 S.C. 6, 15-16, 716 S.E.2d 332, 337 (Ct. App. 2011)) (internal quotation marks omitted); See State v. Tisdale, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct. App. 2000). “The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge.” State v. Huckabee, 388 S.C. 232, 240, 694 S.E.2d 781, 785 (Ct. App. 2010) (quoting State v. Saltz, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001)). “The purpose of the exclusion rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial; and if

a witness violates the order he may be disciplined by the court.” Huckabee, 388 S.C. at 241, 694 S.E.2d at 785 (quoting United States v. Leggett, 326 F.2d 613, 613-614 (4th Cir. 1964)). “The question of the exclusion of the testimony of the offending witness, however, depends upon the particular circumstances and lies within the sound discretion of the trial court.” Id. (quoting Leggett, 326 F.2d at 613-614).

## **Discussion**

The Court of Appeals erred by holding the trial judge did not abuse his discretion by excluding the testimony of Petitioner’s children, Christian Moorer, Nikki Moorer, and Caison Moorer, and her mother, Polly Caison, because the witnesses allegedly violated the sequestration order by viewing the live feed of the trial during the morning of October 15, 2018. App. 54.

“A circuit court may order the sequestration of any witness by order or by motion of a party.” Id. (citing Rule 615, SCRE). “However a party is not entitled to have witnesses sequestered as a matter of right; instead, the decision to sequester a witness is within the sound discretion of the circuit court.” Id. (citing State v. Simmons, 384 S.C. 145, 173, 682 S.E.2d 19, 33-34 (Ct. App. 2009)); See State v. Caldwell, 378 S.C. 268, 278, 662 S.E.2d 474, 480 (Ct. App. 2008); State v. Fulton, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998).

“The mere opportunity for witnesses to compare testimony is insufficient to compel sequestration.” State v. Sullivan, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981) (citing State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979)); State v. Carmack, 388 S.C. 190, 197, 694 S.E.2d 224, 227 (Ct. App. 2010); Caldwell, 378 S.C. at 279, 662 S.E.2d at 480. Where a sequestration order has been issued, its violation does not automatically result in disqualification of the witness to testify. In fact, our appellate courts have frequently approved allowing testimony from witnesses who had been sequestered but were in the courtroom during the testimony of one or more other witnesses. See, e.g., State v. Saltz, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001);

Huckabee, 388 S.C. at 241-243, 694 S.E.2d at 785-786; Simmons, 384 S.C. at 173-174; 682 S.E.2d at 33-34; Fulton, 333 S.C. at 375, 509 S.E.2d at 827.

In this case, even if there was a violation of the sequestration order, it was minor. The proffered testimony established that Pike observed a laptop computer streaming the live feed in the room with the excluded witnesses when she escorted Petitioner to the room after court recessed for lunch on Monday, October 15, 2018, the sixth day of trial.<sup>5</sup> Only two witnesses testified that morning. These witnesses were Dennis Hart (R. 999, l. 11 – 1013, l. 18) and Jill Domogauer (R. 1014, l. 8 – 1093, l. 19). Therefore, *at most*, the excluded witnesses heard the testimony of these two state witnesses.

Hart was the kitchen manager at the Tilted Kilt in 2013 at the same time Elvis was a hostess. Hart testified that he hired Sidney as a maintenance man because the restaurant had numerous “plumbing issues.” He was aware of the relationship between Sidney and Elvis. After the relationship ended, Hart called Sidney to see if he was available to perform some maintenance for the restaurant. Hart claimed Petitioner barged “into the conversation and proceeded to tell me how Heather was causing problems for her and her family and spreading rumors that she was pregnant by her husband, and she also asked me to fire her because Sidney was not allowed to work for me anymore if Heather was working there.” Hart never saw Sidney at the Tilted Kilt again after that conversation. R. 999, l. 20 – 1003, l. 15.

Jill Domogauer, a crime scene investigator with the Horry County Police Department, testified about her search of Elvis’s car on December 20, 2013 while the vehicle was parked at the Elvis family residence and her search of Elvis’s apartment on that same day. See R. 1015, l. 19 – 1038, l. 23. Domogauer likewise testified about her role in the search of the Moorers’

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<sup>5</sup> The trial lasted twelve days.

house in February 2014. R. 1039, ll. 3-5. She identified numerous electronic devices she seized from the home, including cell phones, iPads, and a computer tower. See R. 1039, l. 6 – 1055, l. 5.

It is difficult to see how Hart or Domogauer’s testimony could have tainted or shaped the testimony of the excluded witnesses. They were going to testify about Petitioner’s alibi, and other matters that are unknown since the judge denied the request to proffer their testimony.

The Fourth Circuit Court of Appeals has referred to the “exclusion of a defense witness” as “an extreme remedy” because it “impinges upon the right to present a defense.” United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000) (citing United States v. Cropp, 127 F.3d 354, 363 (4th Cir. 1997)). In Rhynes, while the court found the defense did not violate the sequestration order, it held that even if it had, the court still would have held the exclusion of the defense witness “constituted reversible error.” 218 F.3d at 320. Exclusion of Petitioner’s witnesses eviscerated her ability to present a complete defense. See Burgess, 391 S.C. at 21, 703 S.E.2d at 515 (quoting Crane v. Kentucky, 476 U.S. at 690) (“The United States Constitution guarantees a criminal defendant the right ‘to present a complete defense.’”); see also S.C. Const. art. I, § 14 (2009) (“Any person charged with an offense shall enjoy the right ... to be fully heard in his defense....”); S.C. Code Ann. § 17-2-60 (2003) (“Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....”). Christian, Nikki, Caison, and Polly were crucial witnesses for the defense. Without their testimony, Petitioner was unable to refute much of the state’s evidence. The extent of the prejudice is difficult to articulate since the trial judge erroneously refused to allow Petitioner to proffer the testimony of these witnesses. Nonetheless, it was undisputed that they were Petitioner’s alibi witnesses. The refusal to allow a proffer of their testimony was further error and fundamentally unfair.

Exercise of discretion must be consistent with Petitioner’s due process right to a fair trial. What occurred in this case when the trial judge refused to allow Petitioner to present an

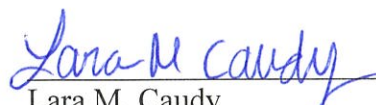
alibi defense where the breach of the sequestration order, if any, was hyper technical, and where the state was not prejudiced in the least, was then compounded by the additional arbitrary refusal to allow a defense proffer of the excluded alibi evidence so Petitioner could make a proper record for meaningful review by the appellate courts violated the essential demands of fairness. Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991) (citing Aldridge v. United States, 283 U.S. 308, 310 (1931)).

Respectfully, this Court should grant certiorari and hold the Court of Appeals erred by finding the trial judge did not abuse his discretion by excluding Petitioner's witnesses based on a minor alleged violation of the sequestration order.

### CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant certiorari and order further briefing on the questions presented. Petitioner's request is that this Court direct a verdict of acquittal for kidnapping and conspiracy to kidnap. In the alternative, Petitioner requests this Court reverse her convictions and remand for a new trial.

Respectfully Submitted,

  
Lara M. Caudy  
Appellate Defender

Robert M. Dudek  
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 31st day of August, 2023.

RECEIVED

Aug 31 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal from Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5987 (S.C. Ct. App. Filed July 5, 2023)  
Lower Court Case Nos. 2014-GS-26-01127, 2018-GS-26-03066

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THE STATE,

RESPONDENT,

V.

TAMMY CAISON MOORER,

PETITIONER.

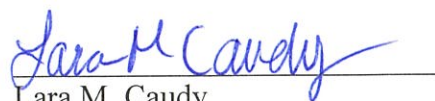
APPELLATE CASE NO. 2023-001317

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari to the Court of Appeals and the accompanying appendix in the above referenced case have been served on David A. Spencer, Esquire, at his primary email address listed in the Attorney Information System (AIS), which is dspencer@scag.gov, and the Court of Appeals, at its e-filing email address, which is ctappfilings@sccourts.org, this 31st day of August, 2023.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

**From:** [Bryant, Hannah](#)  
**To:** [David Spencer](#); [Anne Mueller](#); [Mark Farthing](#); [SC - COLLINS CAROLINE](#); [Caudy, Lara](#); [Dudek, Robert](#); [Warren, Kaylynn](#)  
**Subject:** Tammy Moorer Appellate Case No. 2023-001317 Petition for Writ of Certiorari to the Court of Appeals  
**Date:** Thursday, August 31, 2023 2:27:00 PM  
**Attachments:** [2023-001317 - State v. Tammy Moorer - COA Cert Petition.pdf](#)  
[2023-001317 - State v. Tammy Moorer - Appendix.pdf](#)

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Dear Mr. Spencer,

Please find attached for service a copy of the Petition for Writ of Certiorari to the Court of Appeals and corresponding Appendix in the above referenced case, which will be filed today.

**Hannah Bryant**

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South Carolina Commission on Indigent Defense  
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