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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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

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

THE STATE,

RESPONDENT,

V.

TAMMY CAISON MOORER,

PETITIONER.

APPELLATE CASE NO. 2023-001317

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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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 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?

2. 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?

3. 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 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, 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?

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5. 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?

STATEMENT OF THE CASE

A Horry County grand jury indicted Petitioner for kidnapping and conspiracy to kidnap. On April 18, 2016, a pretrial hearing was held before the Honorable R. Markley Dennis, Jr. concerning the expert testimony of Grant Fredericks. Petitioner's case was called to trial on October 8, 2018 before the Honorable Benjamin H. Culbertson, and a jury. Gregory McCollum and Casey Brown represented Petitioner. On October 23, 2018, the jury found Petitioner guilty. R. 2342, ll. 2-14. She was sentenced to thirty years on each offense. 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. Moorer, Op. No. 5987 (S.C. Ct. App. filed June 7, 2023) (Howard Adv. Sh. No. 22 at 21). 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. Moorer, Op. No. 5987 (S.C. Ct. App. filed July 5, 2023) (Howard Adv. Sh. No. 26 at 10). Petitioner's second rehearing petition was denied by order filed July 24, 2023.

ARGUMENT

1.

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.

The Court of Appeals held that text messages referring to drug use were admissible to refute Petitioner's testimony that she was trying to get pregnant. The logical connection is both too weak and too attenuated to survive Rules 404(a), 404(b), and 403, SCRE. The specific messages were: (1) a message to 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;" and (2) a message to 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. 18-25.

The Court of Appeals further held that sexually explicit text messages and web searches for "Cougar Life" were admissible to prove motive and Petitioner's control over her husband's phone. The text messages admitted were allegedly exchanged between Sidney's phone and an individual only identified as Caleb, who was eighteen years old or perhaps even a minor, during the early morning hours of December 16, 2013. The specific messages admitted over objection were: (1) You are amazing; (2) I love it; (3) I want to feel it inside of me; (4) You are perfect; (5) Have you fucked a lot of girls?; (6) Do I get to see more?; (7) You are making my pussy wet; (8) I cum like 40 times during sex; (9) Something is wrong or very right with me; (10) Do you want a dirt pic?; (11) **Yes, ma'am**; (12) I'm in a dark spot. Dude, it's not the best; (13) Will that do for

now?; (14) I want you Caleb; (15) You don't even know; (16) I want to fuck the hell out of you; (17) I'm so fucking hot for you; (18) I'm lit. It's not fair. I'm saying all this crazy shit; (19) I want to fuck the hell out of you; (20) What would you want me to do to you, sweetie?; (21) **Well, you could start by sucking [my] dick;** (22) I def do that for you, babe; (23) Until you are fucking begging me to stop; (24) **Oh, yeah? I don't think I would**; (25) I want to fuck you so bad it hurts; (26) God damn you are one sexy mother fucker; (27) I've been fantasizing about your face for weeks; (28) When it's blackout time boys beg to stop; (29) I want you; (30) When do you turn 19?; (31) I am so wet for him right now; (32) I want to fuck you; (33) **That would feel so good;** (34) Hell, yes, it would; (35) **It's hard;** (36) You don't even know how bad I want that dick of yours; (37) I wish it was in me. R. 1319, l. 16 – 1326, l. 18.

Hours later Sidney's phone received an incoming call "apparently from Caleb's mother." "Right after that, there [was] a message from Sidney's phone that says, Dude I think your mom just called. . . . Someone just called from New York and asked why I was calling her **underaged** son." After Caleb confirmed the number who called Sidney's phone was his mother, there was a message from Sidney's phone to Caleb 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. 1327, l. 14 – 1331, l. 1.

During argument on Petitioner's objections at trial, 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).

"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." State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012).

The Court of Appeals erred by holding the trial judge did not abuse his discretion because the text messages concerning drug possession were improperly admitted character evidence. No logical relevance existed to a fact at issue. See State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). "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); 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.; See Rule 404(b), SCRE. "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "Further, even though the evidence is clear and convincing and falls within a Lyle 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).

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 the Court of Appeals 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. 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 zero 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.

The Court of Appeals further erred in holding the sexual 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. The sexually graphic messages published to the jury did little to support the conclusion that Petitioner had control over Sidney's phone. Further, there was less prejudicial evidence the state could and *did* use to establish this allegation if that was the state's real intent. For example, the state introduced evidence that Petitioner's children were texting Petitioner on Sidney's phone. Investigator Lynch 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. 10-23 (emphasis added). Subsequent messages of a similar nature were also read into the record. See R. 1318, l. 24 – 1319, l. 9. Lynch also described messages sent from Petitioner's phone on December 8, 2013 to three different people that state her "battery is dying" and to "text [her] other phone (843) 385-3175 [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.

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 Petitioner's statements during police interviews and her testimony that she and Sidney had an open relationship. Evidence Petitioner and Sidney had an open relationship did not make 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). 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. See Chapman v. California, 386 U.S. 18, 24 (1967).

2.

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.

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. 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. Petitioner moved pretrial to limit Fredericks' testimony. A pretrial hearing 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. 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." 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." 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. 31, l. 23 – 34, l. 2.

According to Fredericks, forensic video analysts employ a methodology referred to as ACEVR, which stands for "analyze, compare, evaluate, verify, and report." R. 54, ll. 2-16. The Court of Appeals quoted Fredericks' assertion that this method is "universally accepted" and erroneously equated this meaningless acronym with scientific reliability. See App. 13-14.

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. He further determined that the truck had "HID headlights." He then examined the headlight spread pattern using the same methods he used to determine the other characteristics of the truck. R. 50, l. 15 – 52, l. 23. Fredericks ultimately opined during the pretrial hearing that the vehicle seen on the surveillance footage 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 (emphasis added).

Fredericks said his report was "peer reviewed" by George Reis, who is certified as a forensic video examiner by something called "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.

During the pretrial hearing, the defense called Bruce Koenig, who like Fredericks owns a business that assists in the examination of video evidence, to counter the purported reliability of Fredericks' opinion. Judge Dennis qualified Koenig as an expert in forensic video analysis. R. 82, l. 9 – 85, l. 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." He asserted that such methods have been used for a long time, including by the FBI. Koenig testified that Fredericks "did a very thorough job in the rear projection and . . . in his comparisons." Koenig agreed with Fredericks' opinion that the unknown vehicle on the surveillance footage was consistent with a certain class of vehicle. He asserted, "I believe he is absolutely correct that he tested X amount of vehicles and of those vehicles, the questioned vehicle . . . matches by far one of those types of vehicles." 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. 105, l. 15 – 110, l. 1 (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." No research in the forensic field or peer reviewed articles support the uniqueness of headlight spread pattern to each vehicle. 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. 110, l. 7 – 116, l. 18.

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).

Petitioner did not object to Fredericks' opinion as to the class or characteristics of the questioned vehicle, but to Fredericks' opinion concerning the uniqueness of headlight spread patterns. R. 73, ll. 15-18. Counsel 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. Petitioner renewed her objection at trial. R. 890, l. 2 – 893, l. 5; R. 946, l. 23 – 947, l. 3.

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 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. He also used the same cameras that were used to record the original videos. R. 46, ll. 15-21. 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. 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. 10-21. Fredericks claimed 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 the Moorers' 2013 Ford F-150 Limited 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.* He asserted, "[T]he questioned vehicle and the known vehicle are one in the same." R. 947, l. 14 – 948, l. 8.

"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). "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).

Allowing Fredericks to testify that Petitioner's Ford F-150 Limited pickup truck was the exact 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 was error because his conclusions were unreliable and not based on science. "In 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." Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). "Relevant here is the command that 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)) (emphasis added).

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, 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. With so many Ford F-150s on the road, Fredericks' impermissible conclusion that the vehicle on the surveillance videos was the Moorers' *to the exclusion of all others* was highly prejudicial.

3.

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 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, 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.

The state moved pretrial to exclude the testimony of Petitioner's alibi witnesses, including her children, Christian and Nikki, her sister, Ashley Caison, and her mother, Polly Caison, because Petitioner allegedly failed to comply with Rule 5, SCRCrimP. The solicitor said the defense first notified the state of an alibi defense on Friday, September 28, 2018. The defense sent the solicitor an email at 7:31 p.m. that read, "Ms. Moorer may want to use her children during her trial as her alibi that she was home the night of the incident." A follow up email was sent eight minutes later that provided the names of the children. The solicitor

responded on Monday, October 1, 2018 requesting the full names and addresses of the witnesses and the specific place and address Petitioner claimed to have been. R. 150, l. 13 – 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 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 seven days before trial. However, he noted law enforcement interviewed the children during the initial investigation. He further asserted Petitioner had a fundamental right to present a defense "beyond the specific rule." R. 158, l. 5 – 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 testimony from Petitioner's alibi witnesses "for procedural reasons." 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. 1690, l. 19 – 1691, l. 17. Defense counsel again emphasized that the state had subpoenaed Petitioner's children, knew who they were, knew their addresses, and had already interrogated them. R. 1792, ll. 19-25. However, the judge was unrelenting 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.

"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) "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.

The Court of Appeals erred in accepting the state's claim that it was prejudiced by the late disclosure of Petitioner's alibi witnesses when it had previously interviewed them, knew what they would say regarding alibi, could have interviewed them *again* before they testified, and even had the witnesses under subpoena. Rule 5(e)(1) states in part: "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."

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 Moorer, Nikki Moorer, 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.

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, 498 S.E.2d 212 (Ct. App. 1998) (assuming the state failed to properly produce photographs pursuant to Rule 5, the judge did not abuse his discretion by admitting the photographs when there was no prejudice to the appellant).

The judge's ruling also deprived Petitioner of her federal and state constitutional rights to present a complete defense. See 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)); S.C. Const. art. I, § 14 (2009); 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...."). 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."

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.

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. If these witnesses were not favorable, then the state would have had no reason to try to exclude them.

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 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.

On the morning of October 18, 2018, after the trial judge reaffirmed his ruling that Petitioner could not present evidence of alibi, Petitioner called her oldest son, Christian Moorer, as her first witness. Before Christian took the stand, the solicitor argued that certain defense witnesses had violated the sequestration order by viewing a live feed of the trial. He identified the witnesses as Christian Moorer, Nikki Moorer, and Caison Moorer, who are Petitioner's three children, and Polly Caison, Petitioner's mother. R. 1694, l. 12 – 1697, l. 23.

The state called Jade Pike, a deputy with the 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. 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." 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. She was not sure how long they were watching the live feed because she was in the courtroom during the trial. R. 1700, l. 12 – 1703, l. 25.

The defense then proffered Christian Moorer'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 phone. The previous Monday, 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. 1710, l. 11 – 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 Moorer, Nikki Moorer, Caison Moorer, [and] Polly Caison." Based on the judge's ruling, defense counsel requested to proffer the testimony of the witnesses. 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 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." Id. at 241, 694 S.E.2d at 785.

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. "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). 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. at 126, 551 S.E.2d at 247; Huckabee, 388 S.C. at 241-243, 694 S.E.2d at 785-786; State v. Simmons, 384 S.C. 145, 173-174; 682 S.E.2d 19, 33-34 (Ct. App. 2009); State v. Fulton, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998).

In this case, even if there was a violation of the sequestration order, it was minor. The proffered testimony established that Pike observed a 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. 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. 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' 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 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). 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.'"); 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 their testimony. 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)).

5.

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.

"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." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

The state conceded at trial that there was no direct evidence of Petitioner's guilt. Consequently, the question presented for certiorari is whether the state presented *substantial* circumstantial evidence to support the offenses. S.C. 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." The mens rea required for the offense of kidnapping is "knowledge." State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999). 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."

In State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987), this Court upheld the denial of Owens' motion for a directed verdict for kidnapping because evidence of a struggle existed and evidence connected Owens to a ransom note.

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 Moorer 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 Moorer'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 Moorer children, whom she was babysitting, walking home when Petitioner and Sidney returned that morning. The phone location evidence established that both Petitioner's phone and Sidney's phone were home for the rest of the morning. 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.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant certiorari and order further briefing on the questions presented. Petitioner requests 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,

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ATTORNEYS FOR PETITIONER

This 26th day of September, 2023.