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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
Honorable Jocelyn J. Newman, Circuit Court Judge

Opinion No. 2025-UP-009 (S.C. Ct. App. Filed January 8, 2025)

Lower Court Case No. 2021-GS-40-02232

THE STATE,

RESPONDENT,

V.

TERRY GERRARD GRIDINE,

PETITIONER

APPELLATE CASE NO. 2021-001188

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 January 28, 2025.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred by affirming the trial court's ruling which prohibited Petitioner from cross-examining Complainant on whether she was arrested and unsuccessfully attempted to reach Petitioner to help her obtain bail a week before she alleged that he sexually assaulted her, since Petitioner was entitled to considerable latitude in cross-examining his accuser on her bias or motive to misrepresent?

II.

Whether the Court of Appeals erred by holding that the restriction of Petitioner's right to testify in his own defense

a. Was justified by the hearsay rules, where the interests served by those rules (reliability and confrontation) did not apply because the declarant admitted *in camera* the evidence was true?

b. Was justified under Rule 403, SCRE, based on unfair prejudice to the alleged victim, where the evidence had a high probative value since it went to Complainant's bias and motive to misrepresent, and where the evidence did not suggest a decision on an improper basis?

c. Must rise to the level of a due process violation to constitute reversible error, since the right to testify in one's own defense arises not only pursuant to the 14th Amendment, but also pursuant to the 6th and 5th Amendments?

III.

Whether the Court of Appeals erred by concluding the trial court's concededly erroneous ruling which prohibited Petitioner from impeaching Complainant with her prior inconsistent statements about the alleged assault was harmless

a. Where the Court of Appeals found the inconsistencies were about minor, collateral matters, since the inconsistencies related directly to the alleged sexual assault?

b. Where the Court of Appeals relied on text messages it termed a "pseudo confession," since whether the ambiguous messages were a confession was a question of fact for the jury?

IV.

Whether the Court of Appeals erred by affirming the trial court's denial of Petitioner's motion for a new trial based on cumulative error, since the cumulative effect of the errors was so prejudicial as to deprive Petitioner of a fair trial?

STATEMENT OF THE CASE

On September 14, 2021, a Richland County Grand Jury indicted Terry Gridine, Petitioner, for third-degree criminal sexual conduct. R. 392 – 393. Petitioner was tried before the Honorable Jocelyn Newman and a jury, on October 11 and October 13 – 14, 2021. Petitioner was represented by Tracy Pinnock and Kathleen Warren. April Sampson and Paul Walton prosecuted the case. R. 1. Petitioner was convicted as indicted and he was sentenced to ten years of imprisonment suspended upon the service of seven years of imprisonment and five years of probation. Petitioner was ordered to register as a sexual offender. Tr. 419, l. 15 – 420, l. 1; R. 394. On January 8, 2025, the Court of Appeals affirmed in an eight-page, unpublished opinion. *State v Gridine*, Op. No. 2025-UP-009 (S.C. Ct. App. filed January 8, 2025). Petitioner moved

for rehearing. The Court of Appeals denied rehearing. This petition for writ of certiorari follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari because substantial constitutional issues are directly involved, and the decision of the Court of Appeals is in conflict with prior decisions of this Court. Rule 242(b), SCACR. As to Issue I, the Court of Appeals found no error in the trial court's ruling prohibiting Petitioner from cross-examining Complainant about a source of her potential bias or motive to misrepresent, which was that Petitioner did not help Complainant get out of jail a week before she alleged he sexually assaulted her. This went to bias and motive to misrepresent and was fair game for cross-examination. The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. *Davis v. Alaska*, 415 U.S. 308 (1974). *See State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (as a general rule, on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness).

As to Issue II, Petitioner argued that the trial court's restriction of his own testimony on this topic violated his right to testify in his defense. The Court of Appeals held Petitioner did not show the restrictions on his testimony "rose to the exceptional level to show a due process violation." The right to testify in one's own defense is not limited to a single source in the Constitution. *See Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987) (the right to testify on one's own behalf at a criminal trial has sources in the Fourteenth Amendment, the Sixth Amendment, and the Fifth Amendment). The Court of Appeals essentially held a non-structural constitutional deprivation must rise to the level of a due process violation in order to be reversible. This was an error of law, because Petitioner did not have to meet the high bar of a due process violation to

show a reversible error in the violation of his Fifth or Sixth Amendment rights. *Cf. Kentucky v. Stincer*, 482 U.S. 730, 735-45 (1987) (Court determined an accused's constitutional rights were not violated by his exclusion from a witness competency hearing by separately evaluating the accused's Sixth Amendment Confrontation Clause claim and his Fourteenth Amendment Due Process claim); *State v. Miller*, 441 S.C. 106, 120, 893 S.E.2d 306, 313 (2023) ("There are two constitutional bases requiring any confessions admitted into evidence to be voluntary: the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment right against self-incrimination," and this Court therefore addresses "each right in turn."). Petitioner established reversible error based on the violation of his right to present a defense regardless of whether the violation rose to the level of a due process violation.

Moreover, the Court of Appeals affirmed rulings by the trial court which misapplied evidentiary rules, such as holding that hearsay rules may properly limit the scope of an accused's testimony, in a case where the interests served by those rules (reliability and confrontation) did not apply since the declarant admitted *in camera* the evidence was true. "In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Rock v. Arkansas*, 483 U.S. at 55-56.

As to Issue III, the Court of Appeals held that ambiguous text messages rendered harmless the trial court's error in prohibiting Petitioner from impeaching Complainant with her prior inconsistent statements about the alleged sexual assault. The Court of Appeals used ambiguous evidence as if it were indistinguishable from conclusive evidence in the context of harmless error analysis. This conflicts with precedent from this Court laying out a proper harmless error analysis. *E.g.*, *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)

(error is harmless when it could not reasonably have affected the result of the trial). Issue IV, cumulative error, combines the above errors.

ARGUMENT

Relevant facts

Petitioner was in his fifties and a manager at Manchester Farms at the time of his trial. He had no history of committing sex crimes, and he had no history of inappropriate behavior with women. Petitioner had a girlfriend, several children, and grandchildren. He came from a large family. R. 383, ll. 18-22; R. 145, l. 24 – 146, l. 7; R. 267, l. 9 – 273, l. 10.

Petitioner's aunt, S.W. (Complainant) was in her seventies. Petitioner and Complainant had a "normal" relationship prior to the allegations. On October 26, 2017, Petitioner stopped by Complainant's house to kill some time, something he had been doing "forever." Complainant's son, Junior, was there but left. Petitioner confided in Complainant that he had been thinking of committing suicide; he was depressed by the approaching anniversary of his mother's death. According to Petitioner, he later left without incident. He denied sexually assaulting Complainant. R. 114, ll. 23-25; R. 272, l. 10 – 273, l. 4; R. 275, l. 14 – 277, l. 23; R. 269, ll. 9-12; R. 277, ll. 13-20; R. 119, ll. 18-21; R. 75, l. 1- 76, l. 24.

Complainant agreed that Petitioner admitted to her he had been contemplating suicide. She stated he talked about wanting to "do away with himself" while they were sitting around and watching television. Complainant said she advised Petitioner to "try to get counseling." Complainant claimed that Petitioner then went outside and when he came back in he sexually assaulted her. Complainant claimed Petitioner made sexually explicit remarks to her, tore at her clothes, and digitally penetrated her vagina. Complainant alleged she hit Petitioner with a lamp until he stopped. R. 120, l. 6 – 121, l. 2; R. 122, l. 24 – 127, l. 24.

On October 21, 2017, six days before she accused Petitioner of sexually assaulting her, Complainant was arrested for shoplifting. Complainant called Petitioner from the detention center to get his help posting her bond. However, she was unable to reach him. On October 26th, Complainant confronted Petitioner about his failure to answer the phone when she had called him for help from the jail. Later that night, she claimed he sexually assaulted her. Defense counsel would term the case a "he said/she said situation" before the jury. R. 165, l. 19 – 169, l. 5; R. 57, l. 12 – 60, l. 2; R. 119, ll. 8-11; R. 275, ll. 18-24; R. 50, ll. 20-21.

Petitioner believed his failure to help Complainant get out of jail was her motivation for falsely accusing him of sexual assault, and he unsuccessfully attempted to put this information before the jury. R. 249, ll. 11-19; R. 166, ll. 3-8.

Issue I

On cross-examination, defense counsel attempted to question Complainant as follows.

> Q Do you recall telling [Petitioner] that you had tried to reach out to him because you needed help?
>
> A No.
>
> Q So you did not call him?
>
> A No.
>
> Q Because you had been arrested?
>
> MS. SAMPSON: Objection, Your Honor.
>
> A That was some weeks—

R. 156, ll. 2-10.

The jury was excused, and the solicitor objected to the defense's line of questioning, citing Rule 5, SCRCrimP. The solicitor argued that since the defense had not told the State it intended to cross-examine Complainant about the arrest, defense counsel should be limited to

questioning her about Petitioner's refusal to help her with some unspecified matter. R. 157, l. 4 –170, l. 8.

Complainant's testimony was proffered. Complainant agreed that she was arrested, she tried to get in touch with Petitioner, could not reach him, and had to call her sister. Notably, Complainant was defensive and tried to minimize her unsuccessful attempt to reach Petitioner.

> BY MS. PINNOCK:
>
> Q Ms. [Complainant], you were arrested—you called [Petitioner] for help with posting your bond because you had been arrested, is that right?
>
> A No.
>
> Q You were not arrested?
>
> A Yes.
>
> Q Okay. And that was October 21st of 2017?
>
> A I didn't—
>
> . . .
>
> A I didn't call him. I was trying to get in touch with him to get in touch with my daughter.
>
> Q Okay. But you never talked to [Petitioner] on the phone, did you?
>
> A No.
>
> Q Okay. And you had to find somebody else to come assist you?
>
> A I couldn't get him, so I called my sister.
>
> Q Okay.
>
> A It had nothing to do with him.

R. 168, l. 5 – 169, l. 5.

The court ruled the testimony was inadmissible, and ruled the defense was limited to questioning Complainant, generically, that she had asked Petitioner for help.

> [T]he mention of **an arrest, considering what the testimony is, is of course inflammatory, it is bad character evidence**, it is – it **has little probative value**. And to the extent that it does have probative value, that value is outweighed by the **potential of substantial unfair prejudice to the victim**. And so pursuant to rules 403, 404, and some extent 608, I'm going to sustain the objection. And I won't tell you what questions to ask, but **I don't disagree with what [the solicitor] said in substance if this is about asking for help or financial help, or something like that**. I'm not going to tell you whether you should ask that or not, of course, but there shall be no mention of the victim, the alleged victim's arrest.

R. 171, l. 14 – 172, l. 8 (emphasis added). Defense counsel objected to the generic limitation, explaining that "needing to borrow ten dollars is not the same as not coming to get your family member out of jail." R. 172, ll. 18-21; R. 173, ll. 2-10.

The court issued a curative instruction ordering the jury to disregard the last question and answer it had heard. Thus, Complainant's initial, deceptive response that the arrest was "some weeks" rather than six days before this accusation was struck. Defense counsel then asked Complainant, generally, whether Petitioner had been unresponsive when Complainant "reached out to [Petitioner] for help." R. 174, l. 2 – 175, l. 17.

The solicitor unfairly exploited the erroneous ruling in closing argument: "[W]hat reason would she have to tell the same truth if it is a lie over and over and over?" "Why does she need to come and make up a lie? And if, as they would try to intimate, maybe he didn't help her do something, I don't care if you were helping me win a million dollars, I am not going to come to court and testify and tell law enforcement over and over—" "[W]hat bias does she have, what motivation would she have? And what is it? Other than it happened." R. 330, l. 8 – 331, l. 5.

The Court of Appeals concluded that "it was not error to limit cross-examination of Victim . . . Importantly, the trial court still allowed Victim to be questioned on whether she unsuccessfully sought assistance from Appellant prior to the sexual assault. The only limitation was that no mention of the arrest may be made. Appellant was still able to confront the witness through cross-examination." *State v. Gridine*, Op. No. 2025-UP-009.

Issue II

Defense counsel sought clarification about the scope of the ruling regarding the victim's arrest, as it related to Petitioner's own testimony. "Is Your Honor's ruling limiting what [Petitioner] can testify about?" The court stated, "We're not going to talk about the fact that she was arrested." Counsel again asked, "Through this witness or through Mr. Gridine also?" Defense counsel objected to restricting Petitioner's testimony.

> But the issue is, Your Honor, he was part of the conversation. And the actions from [Complainant] followed this conversation. If he can't explain to the jury why she had the motive and bias against him to a degree that would explain why she would be accusing him of a sexual assault . . .

R. 172, l. 18 – 173, l. 14. The court then withheld ruling on whether it would restrict Petitioner's testimony on the topic. After the court advised Petitioner of his rights to testify in his own defense or to remain silent, the solicitor argued that Petitioner should be foreclosed from testifying that Complainant tried to contact him from the jail. The court asked defense counsel how Petitioner knew about Complainant's arrest, and defense counsel reiterated that Petitioner was told so by the Complainant herself, the night of the alleged sexual assault. The solicitor then claimed the testimony was inadmissible hearsay. R. 247, l. 5 – 249, l. 6.

Defense counsel argued: "we would not have this issue if we had been allowed to cross-examine [Complainant] on that issue." "[W]e have been hamstringed at this point[.]" Defense

counsel posited that Petitioner's rights to due process and to present a defense by exploring bias and motive should override a hearsay objection on these facts. R. 249, l. 8 – 250, l. 16. The court sustained the objection.

> Okay. You were not barred yesterday from asking her whether she later told him that she called him or something that would give some nexus to what you are trying to do today . . . I'm not going to allow the hearsay testimony about something that he heard later that she might have done from the jail, and whatever. So that objection is sustained.

R. 250, l. 17 – 251, l. 15.

Petitioner went on to testify in his defense, but on this matter he only testified in general terms that the evening Complainant accused him of sexual assault, they had a discussion about the fact that Complainant had previously called him for assistance because she "needed help with something" but Petitioner did not receive the call. R. 275, ll. 9-24.

The Court of Appeals concluded: we "find no reversible error in the limitation of Appellant's testimony on the issue."

> As it relates to Appellant's own testimony, we do not believe the circumstances rose to the exceptional level required to show a due process violation. The trial court did not place arbitrary or disproportionate restrictions on Appellant's testimony. In contrast, the court allowed Appellant to testify to Victim reaching out for assistance prior to the sexual assault. His right to testify in his own defense was not so severely hampered, such as the absolute prohibition in *Rock*, to rise to the level of a due process violation. **Because the exclusion of the evidence was based upon prior inadmissibility under Rule 403, inadmissible hearsay evidence, and it did not rise to the exceptional level required to show a due process violation, we find Appellant's right to testify in his defense was not violated.**

State v. Gridine, Op. No. 225-UP-009 at 4 – 5 (emphasis added).

Issue III

Officer Christian[1] arrived to take a report on the alleged assault, and Complainant detailed the allegations. The officer's body-worn camera captured the exchange. According to what she told Officer Christian, Petitioner put her in a choke hold, so she pushed his arms away. Complainant told Officer Christian she moved from the recliner to the couch to the recliner after Petitioner had her in the choke hold. Complainant told Officer Christian that Petitioner kept asking if her son was home. Defense Exhibit #1. On direct examination she stated that Petitioner hugged her just prior to assaulting her. She stated on direct examination that she had just gotten up from the recliner when the assault happened. On cross-examination, Complainant denied saying she pushed Petitioner's arms away when he had her in a hug or choke hold. On cross-examination, Complainant denied saying she had moved from the recliner to the couch. On cross-examination Complainant denied saying that Petitioner kept asking if her son was home. R. 123, l. 11 – 127, l. 5; R. 180, l. 16 – 194, l. 22.

Defense counsel reminded Complainant that Officer Christian's body-camera had captured her statements and Complainant listened to the body-camera audio through headphones. After listening to the audio, Complainant still claimed she had not said those things to Officer Christian. R. 183, l. 4 – 188, l. 4; R. 193, l. 12 – 194, l. 22.

After the State rested, the defense recalled Officer Christian in its case-in-chief. Officer Christian confirmed that Defense Exhibit #1 was the recording from his body-camera, and the defense attempted to play the relevant portions of the footage to impeach Complainant's testimony. The solicitor objected to hearsay and argued Petitioner could not use the footage for

[1] Officer Christian's body-worn camera footage captured Complainant's' claims the night she reported the alleged assault. R. 57, l. 12 – 58, l. 9. The footage was offered for identification as Defendant's Exhibit #1 and is on file with this Court.

impeachment because Officer Christian "can't impeach her statement." Defense counsel argued she had complied with Rule 613(b), SCRE. The court sustained the objection. R. 256, l. 6 – 265, l. 7. The jury did not hear the impeachment evidence.

The Court of Appeals concluded: "The State concedes and we agree the trial court erred in prohibiting the extrinsic evidence; however, we find such error was harmless. *State v. Gridine*, Op. No. 2025-UP-009 at 5.

> We find such error was harmless considering the rest of the evidence, specifically the text messages sent from Appellant to Victim following the sexual assault. **In the messages, Appellant admits that he "f..... Up"** and pleads for forgiveness from Victim. Further, when he was confronted with the events of the evening per Victim's messages, **he does not deny the events, but rather states, "I can't live like this." We find these messages serve as a pseudo confession** from Appellant and are very conclusive of his guilt. **Further, the inconsistent statements . . . did not have any bearing on the actual allegations of sexual assault. They dealt with minor, collateral statements** that we believe would not have affected the outcome of the jury.

State v. Gridine, Op. No. 2025-UP-009 at 6.

Although the jury deliberated for two-and-a-half or three hours and asked to be recharged on the law, Petitioner was convicted as indicted. R. 367, l. 22 – 373, l. 13; R. 379, ll. 24-25.

Issue IV

At the conclusion of the trial, Petitioner moved for a new trial based on the cumulative error doctrine. The trial court denied the motion. R. 379, l. 23 – 380, l. 24. The Court of Appeals concluded: "no prejudicial errors combined to affect Appellant's right to a fair trial," and that even if errors were made, "they did not prejudice Appellant in light of other evidence." *State v. Gridine*, Op. No. 2025-UP-009 at 8.

I.

The Court of Appeals erred in affirming the trial court's ruling prohibiting Petitioner from cross-examining Complainant on whether she was arrested and unsuccessfully attempted to reach Petitioner to help her obtain bail a week before she alleged that Petitioner sexually assaulted her, since Petitioner was entitled to considerable latitude in cross-examining his accuser on her bias or motive to misrepresent.

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const. amend. VI). This right includes the right to cross-examine witnesses. *Id.* (citing *Pointer v. Texas*, 380 U.S. 400, 401 (1965)). "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-17 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). "Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." *State v. Brown*, 303 S.C. at 171, 399 S.E.2d at 594 (citations omitted). As a general rule, on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness. *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976).

"A criminal defendant may show a violation of the Confrontation Clause 'by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the

facts from which jurors could appropriately draw inferences relating to the reliability of the witness.'" *State v. Blackwell*, 420 S.C. 127, 150, 801 S.E.2d 713, 725 (2017) (quoting *State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). "As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion. This rule is subject, however, to the Sixth Amendment's guarantee of a defendant's right to a 'meaningful' cross-examination." *State v. Mitchell*, 330 S.C. 189, 196, 498 S.E.2d 642, 645 (1998). The "denial or significant diminution" of the right to confrontation and cross-examination "calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (cleaned up). "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317.

It was error to deny Petitioner the ability to confront the complaining witness about a potential source of bias and motive to misrepresent. *Davis v. Alaska*, 415 U.S. at 316-17. The record does not show the topic was clearly inappropriate. *Mizzell, supra*. Any juror would want to know if and why a complainant in a "he-said, she-said" sexual misconduct case such as this one had a motive to lie. The jury should have been able to hear and consider the evidence. The evidence was proper because it tended to show bias. *Brewington*, 267 S.C. at 101, 226 S.E.2d at 250.

The trial court ruled the proposed cross-examination was inadmissible under Rules 403, 404, and 608, SCRE. The Court of Appeals cited Rules 402, 403, 404(b), and Rule 608(c) in its opinion. *State v. Gridine*, Op. No. 2025-UP-009 at 3 – 4. In this case, those rules provided a

basis for admitting the evidence, not for excluding it. Rule 402, SCRE provides that evidence which is not relevant is inadmissible. Rule 403, SCRE permits the exclusion of relevant evidence if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). During the proffer, Complainant admitted that she had been arrested on October 21, 2017, she tried to contact Petitioner but was unable to reach him, and had to get her sister to help her get out of jail. This would have been particularly embarrassing for an older woman with no criminal record, and Petitioner asserted she held a grudge against him over it. Complainant confronted Petitioner about his failure to help her get out of jail on the same night she alleged Petitioner sexually assaulted her. The evidence was relevant and highly probative since it went to bias and provided a motive for falsely accusing Petitioner of this crime. It impacted Complainant's credibility since she tried to minimize it and gave a (stricken) deceptive response about the timing. The evidence did not suggest a decision on an improper basis. The State would not have been unfairly prejudiced by this cross-examination.

Rule 404(b), SCRE provides that: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." This evidence was not offered to show bad character, and it met one of the exceptions listed in 404(b), SCRE because it went to the complainant's motive to fabricate the alleged assault. The State would not have been unfairly

prejudiced by the admission of the evidence because there was no risk the jury would convict Complainant, who was not on trial, based on criminal propensity. Rule 608(c), SCRE provides that, "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." The testimony had a legitimate tendency to throw light on Complainant's bias and motive to misrepresent.

The limitation imposed by the trial court, that Petitioner could only generically ask the complainant if Petitioner had failed to help her, was toothless. Complainant's testimony was not subjected to the crucible of cross-examination. The restriction on Petitioner's cross-examination was error. U.S. Const. amend. VI; *Davis v. Alaska*, 415 U.S. at 316-17. *See State v. Gracely*, 399 S.C. 363, 373-74, 731 S.E.2d 880, 885-86 (2012) (trial court improperly prevented questioning which would have examined the extent of that bias and the witnesses' possible motivations for testifying against the accused); *State v. Grace*, 350 S.C. 19, 33, 564 S.E.2d 331, 338 (Ct. App. 2002) ("Petitioner's right to present a defense mandates that he be permitted to freely cross examine the witnesses about the credibility issues relevant to his defense.").

II.

The Court of Appeals erred by holding that the restriction of Petitioner's right to testify in his own defense

a. **Was justified by the hearsay rules, where the interests served by those rules (reliability and confrontation) did not apply because the declarant admitted *in camera* the evidence was true.**

The Court of Appeals' opinion cited to Rules 801(c) and 802, SCRE: the definition of hearsay, and the rule that hearsay is generally inadmissible. *State v. Gridine*, Op. No. 2025-UP-009 at 4. However, "restrictions of a defendant's right to testify may not be arbitrary or

disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55-56 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). A State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Rock*, 483 U.S. at 55. "In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.*, 483 U.S. at 55-56. Petitioner was not permitted to testify about Complainant's potential motive for falsely accusing him of sexual assault because the judge ruled it was hearsay since Complainant was the declarant: she told him she had tried to contact him to help with her arrest. The hearsay problem only existed because Petitioner was improperly foreclosed from cross-examining Complainant about the topic in the first place. As defense counsel correctly argued, the State created the hearsay problem.

Hearsay rules were insufficient to override Petitioner's right to testify in his defense on these facts. The purpose of hearsay rules is to guarantee the reliability of evidence and to preserve the right of confrontation for the defendant in a criminal case. U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Petitioner was the defendant in this case: he was the party with the right to confrontation. There was no reliability problem with this evidence. It was undisputed that Complainant had been arrested and unsuccessfully tried to call Petitioner for help with bail just before she accused him of sexually assaulting her. A State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony," *Rock*, 483 U.S. at 55, but that is what happened.

b. Was justified under Rule 403, SCRE, based on unfair prejudice to the alleged victim, where the evidence had a high probative value since it went to her bias and

motive to misrepresent, and where the evidence did not suggest a decision on an improper basis.

The Court of Appeals concluded that because cross-examination of Complainant about this topic was excluded under Rule 403, it was proper to keep Petitioner from testifying about it as well. *State v. Gridine*, Op. No. 2025-UP-009 at 4 – 5. Rule 403, SCRE provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "The Rule 403 concern most often invoked is the danger of unfair prejudice. In the context of Rule 403, evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Williams*, 430 S.C. 136, 151, 844 S.E.2d 57, 65 (2020) (cleaned up). Under Rule 403, "a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case." *Id.*, 408 S.C. at 616, 759 S.E.2d at 168. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *Id.* (cleaned up).

Evidence of Complainant's arrest and her unsuccessful attempt to reach Petitioner to help her get out of jail was admissible under Rule 403 since it provided an explanation for Complainant's bias against Petitioner, provided a motive for falsely accusing him of this crime, and did not suggest a decision on an emotional basis. It also impacted Complainant's credibility since she answered the initial question in front of the jury deceptively (this question and answer

were stricken) as it relates to the timing of the arrest. When defense counsel initially asked Complainant about the arrest, Complainant falsely stated the arrest was "some weeks" before the alleged sexual assault when it was instead six days. She also tried to minimize the fact that she had reached out to Petitioner about this when questioned *in camera*, maintaining that "it had nothing to do with him." R. 156, ll. 2-10; R. 168, l. 5 – 169, l. 5. The evidence was relevant and probative. Allowing Petitioner to explore Complainant's bias, motive to misrepresent, and credibility on this matter would not have been unfairly prejudicial. It would have been legitimately prejudicial. *Gray*, 408 S.C. at 616, 759 S.E.2d at 168. The complainant was not on trial. Hearing that she had committed the crime of shoplifting would not unfairly dispose the jury to convict her of another crime based on general criminal propensity. This was a "he-said, she-said" sexual assault case. "In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Rock*, 483 U.S. at 55-56. Rule 403 and did not justify the limitation.

c. Must rise to the level of a due process violation to constitute reversible error, since the right to testify in one's own defense arises not only pursuant to the 14th Amendment, but also pursuant to the 6th and 5th Amendments.

The Court of Appeals held the restrictions on Petitioner's testimony did not rise "to the exceptional level required to show a due process violation." *State v. Gridine*, Op. No. 2025-UP-009 at 5. This misses that Petitioner's argument was not based solely on due process grounds but was also based on the Fifth and Sixth Amendments. The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution, including the Fourteenth Amendment. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call

'witnesses in his favor[.]'" *Id.*, 483 U.S. at 52 (citing *Washington v. Texas*, 388 U.S. 14, 17-19 (1967)). "Logically included in the accused's right to call witnesses whose testimony is material and favorable to his defense, is a right to testify himself, should he decide it is in his favor to do so." *Id.* (cleaned up). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.*, 483 U.S. at 52 (citing *Harris v. New York*, 401 U.S. 222, 225 (1971)).

Although Petitioner asserts he has shown a due process violation pursuant to the Fourteenth Amendment, he also asserts he has shown a violation of his Sixth Amendment right to call witnesses in his favor and his opportunity to testify as a corollary to the Fifth Amendment's guarantee against compelled testimony. Petitioner's argument is that he was denied his right to testify and to present a complete defense. He does not have to meet the high bar of a due process violation to show reversible error, since additional Amendments guarantee this right. While due process is one way to prove a constitutional violation, it is not the only way. *E.g.*, *Kentucky v. Stincer*, 482 U.S. 730, 735-45 (1987) (Court determined an accused's constitutional rights were not violated by his exclusion from a witness competency hearing by separately evaluating the accused's Sixth Amendment Confrontation Clause claim and his Fourteenth Amendment Due Process claim). The restriction on Petitioner's right to testify on his own behalf, in this case, did rise to the high level of a due process violation. It also violated his Fifth and Sixth Amendment rights to testify in his defense, which presented a lower bar. *Rock*, 483 U.S. at 62; U.S. Const. amend. V; U.S. Const. amend. VI; U.S. Const. amend. XIV.

III.

The Court of Appeals erred by concluding the trial court's concededly erroneous ruling which prohibited Petitioner from impeaching Complainant with her prior inconsistent statements about the alleged assault was harmless

a. Where the Court of Appeals found the inconsistencies were about minor, collateral matters, since the inconsistencies related directly to the alleged sexual assault.

The "harmless error rule embodies a commonsense principle our appellate courts have long recognized—whatever doesn't make any difference, doesn't matter." *State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (cleaned up). "In determining whether error is harmless beyond a reasonable doubt, we often look to whether the defendant's guilt has been conclusively proven such that no other rational conclusion can be reached." *Id.* (cleaned up). Error is harmless when it could not reasonably have affected the result of the trial. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." *State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998) (citations omitted).

The Court of Appeals erroneously concluded the statements "did not have any bearing on the actual allegations of sexual assault." *State v. Gridine*, Op. No. 2025-UP-009 at 6. The statements directly related to the alleged sexual assault: they were inconsistent statements about Petitioner's actions and words just prior to and during the alleged assault, and inconsistent statements about Complainant's actions just prior to and during the alleged assault. The

inconsistencies were consequential. Whether you said you pushed your assailant's arms off of you or whether you did not matters. So does saying you were on the couch then, versus saying were not on the couch now. Saying that your assailant asked if your son was home then, versus now saying your assailant did not ask if your son was home, also matters. Inconsistencies in the complaining witness's retelling of the circumstances of the alleged sexual assault, in a trial for the alleged sexual assault, was not something that "doesn't make any difference," and therefore "doesn't matter." *Reyes*, *supra*. The error was not harmless given the nature of the case, the importance of Complainant's testimony, and the other limitation placed on Petitioner's cross-examination of her. There was a reasonable likelihood that prohibiting Petitioner from impeaching Complainant with her inconsistent statements about the alleged assault could have affected the result of the trial. *Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151; *Fossick*, 333 S.C. at 70, 508 S.E.2d at 34.

b. Where the Court of Appeals relied on text messages it termed a "pseudo confession," since whether the ambiguous messages were a confession was a question of fact for the jury.

The Court of Appeals concluded that in text messages, Petitioner "admits that he 'f…..Up' and pleads for forgiveness from Victim." *State v. Gridine*, Op. No. 2025-UP-009 at 6. Notably, Petitioner did not apologize after Complainant sent him a message accusing him of sexual assault. He apologized before that. Petitioner sent Complainant a message on October 27th, which said: "Please forgive me." No sexual context preceded this. Petitioner said he was apologizing for telling her he was thinking of committing suicide. (Complainant admitted Petitioner told her he was thinking of committing suicide that night.) She responded with a message saying: "Sorry what you did". State's Exhibit #10 – 11. Petitioner then sent back a

message saying: "Don't worry, you will never have to see me again. I f….. Up." At that point there was still no sexual context or sexual accusation to the messages. Complainant then sent Petitioner a message accusing him of trying "to have sex with your own Aunt." Petitioner responded by saying: "I don't understand," and, "Can you call me for a second?" To repeat, he responded to her accusing him of sexual assault not with an apology but with a message that said: "I don't understand." State's Exhibit #12 – 13. Complainant messaged Petitioner asking where he was. Petitioner subsequently messaged: "Just want to say something to you," and, "I can't live with this." State's Exhibit #15.

The Court of Appeals ruled that: "when [Petitioner] was confronted with the events of the evening per Victim's messages, he does not deny the events, but rather states, 'I can't live like this.' We find these messages serve as a pseudo confession . . ." This ruling ignores that Petitioner's response when confronted with the accusation was instead: "I don't understand." State's Exhibit #13 – 14. The messages were ambiguous and were not conclusive of guilt. Petitioner provided an explanation for the messages that was plausible. He testified that his apology text and the "I f'd up" text were apologizing for making suicidal threats. Complainant admitted Petitioner confessed suicidal thoughts to her that night prior to allegedly assaulting her. This Court has recognized that "humans commit, and attempt to commit, suicide for a myriad of reasons including, but not limited to, prison conditions, family issues, financial problems, mental illness, emotional instability, disbelief in the justice system, stress, failure, and embarrassment." *State v. Cartwright*, 425 S.C. 81, 92, 819 S.E.2d 756, 761 (2018). Petitioner stated his texts responding to Complainant's sexual assault accusation of, "I don't understand," and, "can you call me for a second," were because he did not understand what she was talking about because there was no basis for the accusation. R. 280, l. 1 – 293, l. 6.

The phrase "pseudo confession" has never appeared in any South Carolina appellate opinion, and for good reason. That is because whether an ambiguous statement is a confession is a question of fact. The Court of Appeals cherry-picked the messages and took the worst view of them possible. This was improper. *See generally State v. Brown*, 360 S.C. 581, 594, 602 S.E.2d 392, 399 (2004) ("an appellate court does not sit as a factfinder in a criminal case and should avoid resolving cases in a manner which appears to place the appellate court in the jury box"); *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (the assessment of witness credibility is within the exclusive province of the jury); *State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) (where defendant maintained he lacked mens rea for armed robbery and kidnapping because he believed he was involved in a complicated CIA operation which required him to commit a staged robbery, improper jury instruction on "orders of another" required new trial).

IV.

The Court of Appeals erred in affirming the trial court's denial of Petitioner's motion for a new trial based on cumulative error, since the cumulative effect of the errors was so prejudicial as to deprive Petitioner of a fair trial.

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). The following rights are among the minimum essentials of a fair trial: "a right to examine the witnesses against him, to offer testimony, and to be represented by

counsel." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

As seen, in closing, the solicitor asked the jury repeatedly why Complainant would lie. Petitioner had an answer to the solicitor's question. He attempted to answer it two ways. He had the right to put his answer before the jury. Petitioner was not permitted to impeach his accuser with her inconsistent statements about the crime itself. Cumulative error should apply since the errors combined to deny him a fair trial. *Beekman*, 405 S.C. at 237, 746 S.E.2d at 490; *Chambers*, 410 U.S. at 294.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,

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Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of February, 2025.