THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT LACK SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, DO THE RELEVANT STATUTES PERMITTING THE EXERCISE OF SUCH JURISDICTION, WITHOUT A CASE-SPECIFIC ANALYSIS, FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE?

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A. Did Law Enforcement's Losing Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Violate Due Process, or At a Minimum, Require That a Spoliation Charge Be Given to the Jury?

B. Did Due Process, or Rule 5, Require Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial?

C. Did The Circuit Court Err in Prohibiting Defense Counsel from Cross-Examining Law Enforcement Witnesses on Their Investigation of This Matter, Specifically as Relates to the Investigatory Tools Provided to Law Enforcement by S.C. Code § 16-3-750?

D. Were McBride's Due Process Rights Violated When The Court Instructed the Jury That No Corroboration Was Required to Support the Alleged Victim's Testimony, Where Such Instruction Had The Effect of Impermissibly Shifting The Burden of Proof, Confusing the Jury, and Elevating the Importance of One Witness' Testimony Over Others In Contravention of McBride's Right Against Self-Incrimination?

III. WAS THE EVIDENCE PRESENTED BY THE STATE LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1)?

IV. WERE DEFENDANT'S MIRANDA RIGHTS VIOLATED, REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT?

STATEMENT OF THE CASE

Appellant Justin McBride ("McBride") was indicted on charges of first degree criminal sexual conduct with a minor and assault with intent to commit first degree criminal sexual conduct with a minor by return of a true bill on December 2, 2010.[1] McBride pled not guilty to both charges. A jury trial was held before the Honorable John C. Hayes, III on October 28-30, 2013. The jury returned a verdict of guilty as to Count 1, first degree criminal sexual conduct with a minor. (Transcript, hereinafter "Tr.," 375-76.) The jury returned a verdict of not guilty on Count 2, assault with intent to commit criminal sexual conduct. (Tr. 375-76.)

Following the verdict, McBride's counsel renewed previously made requests for directed verdict, renewed various objections to the Court's evidentiary rulings during trial, and made an oral motion for a new trial. (Tr. 379-80.) Those motions were denied. (Tr. 380-81.) On October 30, 2013, McBride was sentenced to 25 years imprisonment. (Tr. 395.) Notice of McBride's Intent to Appeal was filed on that same date. The Notice of Appeal

[1] This matter was never pending in Family Court. Rather, the solicitor, in her sole discretion, chose to file these charges against 16 year old McBride in Circuit Court under S.C. Code § 63-19-20(1). McBride contends this statute improperly vests this discretion in the prosecutor by defining who constitutes a "child" or "juvenile" by the crime allegedly committed instead of any analysis of the true maturity or best interests of the minor involved or justice itself.

was then filed with the lower court on November 1, 2013 and this Court on November 7, 2013, challenging both McBride's conviction and sentence.

STATEMENT OF THE BASIC FACTS

McBride is the cousin of the alleged victim in this case. (Tr. 80.) At the time of the alleged incident that gave rise to the charges, McBride was 16 years old; his cousin was 9. (Tr. 91.)

After returning from school on the school bus, the alleged victim found her mother was not at home. (Tr. 91.) She then either went to a neighbor's house, but did not stay because the neighbor had company, or went directly to McBride's house. (Tr. 91-93.) In any event, she ended up at McBride's house. (Tr. 93.) They all lived in very close proximity to one another.

The testimony from this point gets very unclear and confusing as to actual events. What is clear is that at some point the alleged victim left to return home. (Tr. 101.) At some point after returning home – again the timeline is not clear -- she disclosed some incident with McBride, her cousin. (Tr. 103, 107.) After some unspecified period of time, and with the alleged victim's mother wanting to wait until her husband (the alleged victim's father) got home, family members called the police. (Tr. 103, 259-260.)

Several police officers arrived, including a female officer who was called in to speak with the female alleged victim. (Tr. 178-179.) After getting the alleged victim's statement, that officer spoke with McBride. (Tr. 180.) This conversation occurred in McBride's home. (Tr. 181.) Two additional

uniformed officers[2] were also present during the questioning of McBride. (Tr. 181-182.) And, testimony revealed that, though not technically under arrest, officers stood essentially between McBride and the door to his home, as well as outside McBride's home. (Tr. 35-36, 181-182.)

McBride denied the actions described by the alleged victim. (Tr. 42, 183-184.) His version of events was, at all times, different from the alleged victim and consisted of no wrongdoing. (Tr. 183-184.) A portion of his statement – provided without being informed of his Fifth Amendment rights – was used against him at trial. (Tr. 330-333.)

Only a handful of witnesses testified at trial, including the alleged victim. The alleged victim's own testimony was confusing and conflicting. (Tr. 95, 99, 102-104, 130-132, 149.) She appears to assert that McBride attempted to force her to perform oral sex and attempted to penetrate her anally. (Tr. 95, 100-101.) She indicated that semen ended up on the shirt she was wearing, as well as on a tissue she used to wipe it off. (Tr. 97-98.)

Other witnesses included the alleged victim's mother and aunt and two of the police officers who responded to the original complaint. (Tr. 177, 223, 269.) The only physical evidence introduced included a color photograph of the alleged victim on the day of the incident. (Tr. 153-155, 187, 271.) The photograph purported to show a deodorant stain on the shoulder of the alleged victim's shirt. (Tr. 186.)

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[2] The police department no longer employs either the investigator or the two officers present during the questioning of McBride. (Tr. 37, 191.)

Disturbingly, responding officers did not collect the shirt worn by the alleged victim. (Tr. 200, 247.) Instead, after at least several days, the alleged victim's mother brought the shirt to the police department. (Tr. 247-248.) The shirt was never tested to determine the presence either of semen or deodorant. (Tr. 80, 199-200, 270, 351.) In fact, the shirt was never sent to SLED for any testing and was lost. (Tr. 275.) At no time was the shirt available to the defense; nor was it tested and results of such testing provided. (Tr. 161, 276.) The police also never tested any materials from McBride, such as his deodorant. (Tr. 213, 351.) Even the police department's evidence sheet, completed with all evidence submissions, was missing. (Tr. 277.)

Despite this lack of evidence, the jury returned a guilty verdict on the charge of first degree criminal sexual conduct with a minor based on the State's claim that oral sex occurred. (Tr. 375-376.) This verdict was unsupported by the evidence and followed several erroneous evidentiary decisions of the Circuit Court, along with confusing jury charges, violating McBride's Due Process rights. McBride, only sixteen at the time of the incident, was sentenced to 25 years without parole.

The facts in this case, discussed in greater depth as relevant to the issues raised below, and the legal errors committed at trial, require reversal of McBride's conviction.

ARGUMENT

This appeal raises a number of serious issues. First, this case involves significant legal questions regarding the proper treatment of juveniles in our criminal justice system. Moreover, the issues regarding the handling of evidence in this matter and treatment of those deficiencies at trial, if upheld, would only serve to encourage negligent investigation and handling of evidence. Specifically, when taken together, these errors made it impossible for McBride to defend himself absent taking the witness stand. A criminal defendant simply cannot be forced to undergo a process that would require such testimony. Even where no one error, alone, may mandate reversal, the totality of these circumstances – involving lost evidence, permitting introduction of surprise and incomplete evidence, excluded cross examination, and dangerously confusing jury charges -- hindered the defense to such an extent that the process provided simply cannot meet constitutionally required standards.

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, IF THE RELEVANT STATUTES PERMITTED THE EXERCISE OF SUCH JURISDICTION WITHOUT A CASE-SPECIFIC ANALYSIS, THOSE STATUTES FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE.

It is undisputed that McBride was only sixteen (16) years old at the time of the alleged crime. Current South Carolina law provides, in relevant part, that the Family Courts of South Carolina "shall have exclusive original jurisdiction and shall be the sole court for initiating action: (1) Concerning any

child living or found within the geographical limits of its jurisdiction: . . . . (d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance . . . ." S.C. Code § 63-3-510 (emphasis added). In accordance with this grant of exclusive jurisdiction, the law further provides that "a case involving a child must be transferred or retained as follows:"

> (1) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this State, it is ascertained that the child was under the age of seventeen at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case, together with all papers, documents, and testimony connected with it, to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section. . . .

S.C. Code § 63-19-1210 (emphasis added).

After initiation of a case in family court, where the case involves murder or criminal sexual conduct, the prosecuting authority "may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child . . ." S.C. Code § 63-19-1210(6). Various procedures are established for this transfer. Id. "If the circuit judge elects to exercise the jurisdiction of the general sessions court for trial of the case, he shall issue an order to that effect . . ." Id.

No constitutional provision could be located that provides for exclusive jurisdiction in the circuit court for this case. Indeed, exclusive jurisdiction for trials involving the violation of laws by a child of sixteen, like McBride, lies in

the Family Court. Once initiated in that court, the case may be transferred but only in accordance with S.C. Code § 63-19-1210. Discussions with trial counsel and review of the Circuit Court docket entries shows no evidence this case was transferred from any Family Court. Rather, the matter appears to have been initiated in Circuit Court.

Moreover, the circuit judge electing to exercise jurisdiction over a trial like this one is required to "issue an order to that effect." S.C. Code § 63-19-1210(6). The Circuit Court Judge entered no such order.

This procedure intentionally and rationally provides great discretion to the Family Court – the court vested with exclusive jurisdiction over juveniles. It is the Family Court that first determines a request to transfer an otherwise juvenile prosecution to the circuit court. S.C. Code § 63-19-1210(6) ("The judge of the family court is authorized to determine [the prosecution's] request [to transfer]."). But in all instances – in the absence of a constitutional grant of exclusive jurisdiction to the circuit court – the original subject matter jurisdiction lies in the Family Court.

Absent a transfer from the Family Court, no jurisdiction exists in the circuit court. "The jurisdiction of a court over the subject matter of a proceeding is fundamental." State v. Guthrie, 352 S.C. 103,107, 572 S.E.2d 309 (Ct. App. 2002) (citation omitted). "The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." Id. (citations omitted). "The acts of a court

with respect to a matter as to which it has no jurisdiction are void." Id. (citations omitted).

Here the Circuit Court lacked subject matter jurisdiction in the absence of a family court's determination that transfer to that court was appropriate and the Circuit Court's order that it elected to accept that transfer of jurisdiction. Statutory provisions defining "child" or "juvenile" to the contrary simply cannot enlarge or restrict a court's jurisdiction contrary to those legal provisions granting such jurisdiction. See S.C. Code § 63-19-20(1) (in which the Juvenile Justice Code defines "child" or "juvenile" to exclude minors who are charged with certain crimes carrying sentences of fifteen years or more). Indeed, to define whether an individual is a child based on the acts committed, or solicitor preference, rather than the mental capacity and development of that individual runs counter to the entire body of law intended to protect and rehabilitate children. To leave discretion solely to the solicitor fails to protect the children of this State.

The basing of jurisdiction on definitions of "child" and "juvenile" that base those definitions on alleged crimes and then gives unfettered discretion to the solicitor to file charges in the Circuit Court, runs counter to the process due McBride.

To the extent that the overall statutory scheme intends to permit blanket and unchecked prosecutorial discretion to decide to try minors as adults, it runs afoul of Kent v. United States, 383 U.S. 541 (1966) and general constitutional protections afforded children based on their reduced capacity.

See generally Miller v. Alabama, 132 S. Ct. 2455 (2012) (determining that due to the different psychology and development between juvenile and adult minds a life sentence without parole imposed for a non-homicide crime ran afoul of the Eight Amendment); see also Graham v. Florida, 560 U.S. 48 (2010). Such a statutory scheme also runs afoul of the general treatment afforded children and the duties of a criminal prosecutor. It encourages charging offenses with more severe penalties to trigger the discretion of the solicitor.

It is simply inconceivable that whether a minor receives some formal consideration of the prudence of his facing charges as an adult simply rests with the solicitor. Vesting of such discretion invariably results in a failure to treat one minor similarly to another; and potentially violates the Equal Protection Clause of the United States Constitution. U.S. Const. amend. XIV. For example, where charges are originally filed in Family Court, a minor is entitled to review of the Kent factors, which factors include the following:

> (1) The seriousness of the alleged offense.
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
> (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> (4) The prosecutive merit of the complaint.
> (5) The desirability of trial and disposition of the entire offense in one court.
> (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> (7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.

(8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available.

State v. Jones, 392 S.C. 647, 652-653, 709 S.E.2d 696 (Ct. App. 2011) (citing the Kent factors and addressing whether the family court properly waived jurisdiction over a juvenile with a prior history of violent crime[3]). No consideration was given to any of these factors. Moreover, it seems counter to the purpose of the special code provisions aimed at children to leave the determination of one's childhood to whether a prosecutor charges the child with an offense serious enough to result in a serious sentence. In other words, where a child faces a minimum sentence of 25 years, the constitutional procedural safeguards should be greater, not lesser, when determining whether he shall face charges as an adult.

Moreover, as an officer of the court, the solicitor "represents all the people, including [the] accused, and [he] occupies a quasi-judicial position, whose sanctions and traditions he should preserve. It is his duty to see that justice is done. He must see that no conviction takes place except in strict conformity with the law, and that [the] accused is not deprived of any constitutional rights or privileges." State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244, 248-249 (2006) (emphasis added). Contrary to these duties, no explanation is required of a solicitor utilizing her sole discretion to remove the

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[3] Where someone charged with armed robbery and manslaughter, as in Jones, and with a prior criminal history of armed robbery gets the benefit of family court consideration prior to transfer to the circuit court, a child such as McBride, with no criminal history is entitled to equal protection and process under the laws.

trial of a child from Family Court to Circuit Court. The solicitor, here, failed to consider or represent any interest of the accused minor child.

The statutes addressing the treatment of children should be read together to provide some required analysis that trial as an adult is appropriate. Some procedure is required before the circuit court can exercise jurisdiction over a child who would otherwise be governed by the children's code, juvenile justice and the specialized family courts.

II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATED MCBRIDE'S DUE PROCESS RIGHTS.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; see also S.C. Const. Art. I § 3. As part of that guaranteed Due Process, the Confrontation Clause provides that a defendant in criminal cases "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. Art. I § 14. Inherent in the process due such a defendant, the State cannot be permitted both to rely on selective, surprise photographs of missing evidence, while depriving the defendant access to that evidence. And, inherent in the Confrontation Clause's protections is the right to relevant and thorough cross-examination of witnesses.

In this case, struggling with difficult facts, the Circuit Court unfortunately erred in a number of evidentiary rulings and decisions, resulting in insufficient procedural safeguards and violations of due process.

A. Where Law Enforcement Lost Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Due Process Was Violated, or At a Minimum, Required That a Spoliation Charge Be Given to the Jury.

This case presents the disturbing situation of law enforcement's failure to investigate to the detriment of McBride's ability to defend himself. First, law enforcement, aware of the alleged victim's claims that semen ended up on the shirt she was wearing, failed to collect that shirt as evidence. (Tr. 199-200.[4]) Rather, they merely told the alleged victim's mother to bring this critical evidence with her several days later to a forensic interview. (Tr. 247-51, 260-64.) At the forensic interview, the alleged victim's mother was then told to take the evidence to the police station, which she did. (Tr. 247-51, 260-64.)

Somehow, with no explanation whatsoever, this evidence went missing. (Tr. 270-73.) Also without explanation – and, indeed, with the Court's sustaining an objection to defense counsel's questions about this

[4] No dispute can exist that the shirt and any evidence on it was important. Detective Hamlet agreed that they would (or should) have collected a shirt that may have some biological agents on it. (Tr. 199-200.) She also testified that collection procedures generally would not be to wait a few days to collect such evidence. (Tr. 201.) She further stated that the longer it takes to collect evidence the higher risk of tampering or disappearance of that evidence. (Tr. 209.) Lieutenant McCrea expressly testified that "[i]f proper procedures had been followed, the evidence would have been sent to sled [sic] within a couple of days of being received." (Tr. 273.) But he was not aware of any clothes being sent to SLED, SLED had no record of any such submissions, and no testing results were ever received by law enforcement investigating this matter. (Tr. 273.) And, now the shirt is simply gone.

issue – the solitary officer in charge of evidence at the time was no longer employed by the Kingstree Police Department. (Tr. 270-73.) A clear inference existed that this may not have been the first time evidence went missing under this officer's care. (Tr. 270-73.) Where the alleged victim clearly states that physical evidence should be present on a piece of clothing, the disappearance of that clothing, especially when no care was taken to preserve it by law enforcement, eliminates the defendant's ability to mount a defense to the charges against him. This failure amounts to a violation of his Due Process rights under the United States and South Carolina Constitutions.

"To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, **or** (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) (emphasis added). It is clear from the testimony that if the claims made by the alleged victim were true, semen would be found on the shirt the alleged victim was wearing at the time.[5]

The value of the shirt to this case was obvious. Indeed, the Solicitor relied on a photograph of the shirt to show that deodorant appeared to be present on one shoulder. No photographs show the presence of any other substance on the shirt.

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[5] In addition to stating clearly that semen ended up on her shirt, the alleged victim also stated that she attempted to wipe some off with a tissue she then threw in the bathroom trashcan. Law enforcement failed even to look in that trashcan to see if the tissue could be found. (Tr. 199-201, 336.)

Without access to the shirt, potentially exculpatory and key evidence, McBride could not properly cross-examine any of the State's witnesses. The exculpatory value the shirt presented would be obvious to anyone aware of the allegations and McBride's denials. Disputing the source, origination of, or existence of the visual markings was made impossible by only permitting photographs showing a single angle or view of the shirt. And, no other means exist to obtain this evidence.

The Circuit Court erred in its attempt to distinguish this case from Cheeseboro by inventing the concept that exculpatory or inculpatory value cannot be determined without some forensic test. (Tr. 315.) No dispute can exist that testing the shirt for the presence of semen likely would have provided a definitive answer to whether the victim's allegations were true.

To require some forensic test unfairly places the burden on the defendant to establish the exculpatory nature of evidence to which the defendant can never gain access because law enforcement lose or destroyed it. Such a test creates an incentive for the spoliation of evidence. Here, forensic investigation of the shirt could have revealed no semen on it at all, raising serious doubts about the alleged victim's credibility.

Moreover, the Court's refusal to allow defense counsel to question law enforcement as to the reason for the evidence officer's separation from employment to determine if his handling of evidence played a role, (Tr. 274), denied McBride even the ability to attempt to show bad faith in the handling of this evidence. This line of questioning, contrary to the Solicitor's sustained

objection, was clearly relevant to the circumstances surrounding the disappearance of key evidence.

In an attempt to address this serious evidentiary issue, defense counsel requested a jury charge on spoliation of evidence intended to allow the jury properly to consider the significance of the missing evidence.[6] The requested charge explained that the state had "the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt." (Defense Request to Charge #1 Spoliation) The charge further would have explained to the jury that if the jurors found the evidence "could help establish the innocence of the defendant or create doubt about whether or not he is guilty" they could consider those facts in determining whether the State met its burden. (Id.) The Court refused the requested instruction and did not provide any instruction on spoliation. (Tr. 311-316.)

"To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial." State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). Under the circumstances of this case, the refusal to instruct the jury on the spoliation issue was erroneous. Moreover, the failure properly to instruct the jury on this issue was prejudicial. The State's case rested entirely on the assertions of the alleged victim. The loss of physical evidence to clearly determine the veracity of those assertions prejudiced McBride.

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[6] Defense counsel renewed his request for the spoliation charge and objected to the failure to so instruct the jury. (Tr. 373.)

Unlike Breeze, this case does not involve evidence (narcotics) that the defendant admitted existed. And, contrary to most cases involving the unavailability of evidence to the defendant, the evidence, here, was not disposed of in the ordinary course of the relevant law enforcement department's policies. See, e.g., State v. Breeze, 379 S.C. 538, 546, 665 S.E.2d 247 (Ct. App. 2008). In addition, these cases involve evidence that was not clearly crucial to the case. See, e.g., State v. Adams, 304 S.C. 302, 304, 403 S.E.2d 678, 680 (Ct. App. 1991) (where defendant claimed a due process violation based on lost breathalyzer results that deprived him of the ability to challenge the validity – not the results – of the test).

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right to a trial by jury. U.S. Const. amend. VI. "[T]rial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . " Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (emphasis in Apprendi).

Where the missing evidence reasonably could be expected either to prove or disprove the events reported by the alleged victim, there can be no clearer deprivation of Due Process and the very Sixth Amendment right to a jury trial where such evidence is lost. Due to the loss of the shirt, McBride was deprived of the opportunity to have the truth of every accusation

determined by the jury. At a minimum, a jury charge permitting a negative inference against the State would have been required.

Under circumstances such as these, the State simply cannot be permitted to mishandle evidence so egregiously and then claim no Due Process violation because the defendant cannot prove the exculpatory character of that evidence. Prosecutors have a constitutional duty, even absent a request by a defendant, "to give the defendant evidence which would raise a reasonable doubt about his guilt." State v. Jackson, 302 S.C. 313, 314-15, 396 S.E.2d 101, 101 (1990) (citing United States v. Agurs, 427 U.S. 97 (1976)).

This duty is completely ignored and elusive if the State can simply choose not to determine or to ignore the exculpatory nature of evidence that obviously carries a strong likelihood of physical evidence – or lack of evidence that would be exculpatory – lose that evidence and then proceed to trial against the defendant. To permit this verdict to stand, would simply encourage law enforcement to act recklessly or in bad faith to the detriment of the jury trial system and the constitutional protections afforded criminal defendants.

Based on the conduct of the State, McBride is entitled to have his conviction vacated and this charge dismissed. In the alternative, McBride is entitled to a new trial during which he can be permitted a proper opportunity to mount a defense through full cross-examination (as required by the Sixth Amendment to the U.S. Constitution, U.S. Const. amend. VI) of the State's

witnesses and with an appropriate jury instruction as to the jury's ability to consider this missing evidence or, at a minimum, complete exclusion of any reference to the shirt or anything that may or may not have been present on it.

B. Due Process and Rule 5 Required Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial.

In addition to completely losing the shirt itself, the State also came to trial with a color photograph purportedly of the alleged victim wearing the missing shirt. (Tr. 160-61.) That photo, according to the contentions of the witnesses and the Solicitor, showed deodorant stains (presumably from McBride) on the shoulder.[7] Defense counsel did not see this photograph until the first day of trial. (Tr. 157-158, 161.) Indeed, the Solicitor stated that she "got the color photographs this morning." (Tr. 161, lines 11-19.) Not only did permitting use of this photo violate McBride's due process rights, the failure to produce it until trial violated South Carolina Rules of Criminal Procedure 5(a) and 5(c). SCRCrimP 5.

During arguments on McBride's motion to exclude the photo, it became clear that when the State copied and provided its file materials to the defense, this photo appeared merely as a black sheet of paper with no photo visible. (Tr. 160-61.) The Solicitor responded to this motion by stating that defense counsel could have come to review the file, but later acknowledged that she

[7] The photos did not show, nor did anyone claim they showed, any evidence of semen on the shirt.

did not even have the photograph in her file until that morning. (Tr. 161.) And, the Circuit Court correctly understood the situation:

> The bottom line is, the defense was provided with, they had the opportunity to inspect. But at the time you gave them the right to inspect, all you had were two black sheets of paper. (Tr. 165-66.)

The Circuit Court described a duty to weigh the prosecutor's duty to produce against the defense's duty to inspect. Here, McBride contends that not only should that balancing have come out in his favor, but that at any time prior to the first day of trial, the prosecution had nothing to inspect, just "two black sheets of paper."

The Circuit Court admitted that things like the previously undisclosed photograph "bother judges immensely." (Tr. 173.) The judge elaborated as follows: "I want to make the record to clear that these irritate me to no end where law enforcement pops up with stuff at the last minute." (Tr. 174.) Nonetheless, the judge allowed the photo. (Tr. 173.)

The United States Supreme Court recognizes a defendant's "area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). "[D]efendants have the right to request and obtain from the prosecution evidence that is material to the guilt of the defendant or relevant to the punishment to be imposed." State v. Jackson, 315, 396 S.E.2d 101 (1990) (citing Brady v. Maryland, 373 U.S. 83 (1963) (emphasis added)). Here, the Solicitor introduced, over the objection of defense counsel, a photograph that was not provided to McBride prior to trial. Used to corroborate at least part of the alleged vicitm's testimony, this

evidence was clearly material to the guilt of the defendant. Having not been provided at any point prior to trial, it should have been excluded.

Moreover, the State was permitted to use this photograph showing only a portion of the shirt the alleged victim was wearing. Without the availability of the shirt, or at least photographs showing the entire shirt, allowing this evidence is akin to permitting one side to play selected parts of a recording or read selected parts of a statement or transcript into the record without the ability of the defendant to demand the entirety of the evidence be included in order to provide the jury completeness and context. See, e.g., S.C. Rule of Evidence 106. The State simply cannot be permitted to select a portion of an item of evidence to introduce in an attempt to bolster one of its witness' credibility while denying to the defendant access to the rest of that item to determine if it actually supports or contradicts the witness.

The State used this surprise evidence selectively to bolster the alleged victim's testimony.[8] This use was improper and violated McBride's fundamental Due Process rights. Not only was he unable to examine the actual shirt – lost by law enforcement – but he was now forced to respond to a photograph not seen until the day of trial and, indeed, not even in the Solicitor's file for review by defense counsel.

The Circuit Court determined that the proper evaluation of this issue was a balancing of state compliance with Rule 5 and McBride's rights. (Tr. 168.) Rule 5(g), however, expressly addresses this evaluation and permits

[8] Had law enforcement kept and tested the shirt for all substances, as was normal procedure, no photo would have been necessary.

waiver of the rule's production requirements only upon a showing of good cause. SCRCrimP 5(g); see also Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012). No good cause was argued or shown. The Circuit Court erred in permitting the introduction of this photograph, prejudicing McBride, and requiring a new trial.

C. The Circuit Court Erred in Prohibiting Defense Counsel from Cross-Examining Law Enforcement Witnesses on Their Investigation of This Matter, Specifically as Relates to the Investigatory Tools Provided to Law Enforcement by S.C. Code § 16-3-750.

Crimes like criminal sexual conduct often come down to the veracity of the parties. Physical evidence is not always available and direct evidence, such as third party witnesses, rarely exists. For that reason, the South Carolina General Assembly recognized existing common law that defendants could be convicted on these charges even in the absence of corroborating testimony to support the accuser's allegations. See S.C. Code § 16-3-657. That said, in further recognition of the issues created in such uncorroborated cases, the legislature clearly set out to provide appropriate tools for law enforcement to evaluate the truthfulness of these serious allegations.

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

S.C. Code § 16-3-750. Admittedly, this statute does not require law

enforcement to administer a polygraph; nor does it appear to require an alleged victim to submit to such a test. But it does specifically provide a useful investigative tool to determine the truthfulness of an accuser in situations like this one.

Particularly given the other issues surrounding the police department's handling of this investigation, McBride was entitled to have his counsel question the State's investigative witnesses about their knowledge of this statute, the availability of a polygraph for use during their investigation, and to determine whether use of this tool was ever considered and the reasons why or why not. Defense counsel was prohibited from even asking generically whether any means existed to determine the validity of the allegations. (Tr. 122.) There appears to be no evidentiary basis on which the Court excluded this questioning. (Tr. 214, 222, 306-10.)

The Circuit Court, ruling on the defense motions for directed verdict and/or mistrial, itself realized the significance of this issue. "Quite candidly, I hope that of course if Mr. McBride is found not guilty then the matter is over. But if he is found guilty, I feel confident this will go up on appeal." (Tr. 309.) This realization stems from the obvious discomfort with a statutory scheme that permits a no corroboration instruction, but prevents the defendant from inquiring of law enforcement if they used the tools available to them to verify the alleged victim's statements.

D. McBride's Due Process Rights Were Violated When The Court Instructed the Jury That No Corroboration Was Required to Support the Alleged Victim's Testimony, Where Such Instruction Had The Effect of Impermissibly Shifting The Burden of Proof, Confusing the Jury, and Elevating the Importance of One Witness' Testimony Over Others In Contravention of McBride's Right Against Self-Incrimination.

It is correct that the current law of South Carolina provides that "[t]he testimony of the victim need not be corroborated in prosecutions" for criminal sexual conduct. S.C. Code § 16-3-657. The common law previously recognized this principle. Including this concept in instructions to the jury in this case, however, unconstitutionally shifts the burden of proof away from the State and to the defendant.[9] Given the totality of the circumstances, prior case law considering similar instructions but lacking the other issues present in this case, is not dispositive. See generally, State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

As the Court in Rayfield noted, at least one purpose of the no corroboration statute was to recognize

> that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator . . . .

Rayfield, 631 S.E.2d at 249 (emphasis added). Here, however, physical evidence should have existed; and absent the deficient investigation and loss

[9] As defense counsel argued, the statute is "basically saying, anyone can accuse anyone and the actual accusation is enough. When someone is facing a depravation of a liberty to the extent of 25 years to life, we may have a due process problem here." (Tr. 50-60.)

of evidence, that physical evidence likely would have provided an answer to whether the crime was committed as described by the victim. In the light of the admission of some evidence (e.g., photographs of the missing shirt), and the exclusion of other evidence (e.g., lack by investigators of their full set of investigatory tools), adding on the no corroboration instruction virtually ensured confusion of the jury. Given the lack of other evidence, repetition of the no corroboration charge, and the lack of other safeguards, the Circuit Court violated McBride's Due Process rights by including this jury charge.[10]

Even if facially constitutional to the extent that juries in determining credibility are rarely required to find corroborating evidence in order to believe a witness' testimony, that the law provides this no-corroboration rule does not mean that instructing the jury of this legal standard is proper under these circumstances. See S.C. Const. Art. V § 21; see also State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947).

The jury charges, as given, were confusing to a reasonable juror in terms of the jury's assessment of the alleged victim's testimony. The

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[10] To the extent one reads the existing precedent as supporting the jury charge given, which McBride contends is incorrect given the totality of the circumstances, the best approach is the one proffered by Justice Pleicones in his separate opinion in Rayfield, including the following propositions: "Some principles of law, however, are not to be charged to a jury. [citation omitted] . . . . we did not hold in Schumpert that this no-corroboration charge was proper. Rather, '[t]aking the charges as a whole, we [found] no reversible error.' [citation omitted] . . . I would hold that it is error for a trial court to charge the jury that an alleged victim's testimony needs no corroboration." Rayfield, 631 S.E.2d at 249. Like the court in Indiana, Justice Pleicones further recognized that the no-corroboration was more a standard for courts to apply in considering directed verdicts or on appeal. Id.

Supreme Court of Indiana perhaps described the problem with such instructions best:

> The challenged instruction is problematic for at least three reasons. First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder.[11] Third, using the technical term "uncorroborated," the instruction may mislead or confuse the jury.

Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). In Ludy, the jury was instructed that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." Id. at 460. Similarly, the jury in McBride's case was charged that "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the law of this State." (Tr. pp. 367-68.)

"A jury instruction must be viewed in the context of the overall charge." State v. Hughey, 339 S.C. 439, 458, 529 S.E.2d 721, 730 (2000) (overruled on other grounds) (citations omitted). "The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." Id. Where one witness' testimony is highlighted as not requiring corroboration, a reasonable juror would be confused and have difficulty determining what that means for evaluation of the other witnesses and the

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[11] That corroboration is not necessary is a legal principle to be used by courts in determining sufficiency of verdicts. Its inclusion in jury charges confuses the already appropriate charges that the jury is the decider of witness veracity generally. Unless instructed that corroboration is required, as is the case is some limited cases, it is unreasonable to assume a jury would require corroboration.

evidence as a whole. Moreover, it seems to infer a greater credibility for the victim witness, a presumed credibility, that is counter to the general law regarding the jury's role in assessing witness credibility and to confuse the State's burden of proof.

"[C]harging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need be corroborated. By specifically charging that the alleged victim's testimony need not be corroborated, the trial court singles out the alleged victim and 'appears to express an opinion on her credibility.'" Rayfield, 631 S.E.2d at 251-252 (Pleicones, concurring in part, dissenting in part) (citing State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting)).

When the giving of this instruction is viewed in the light of the related ruling that did not permit defense counsel to cross-examine law enforcement on the statutorily permitted use of a polygraph, it becomes even more constitutionally troubling. The case now presents a situation where a number of methods of corroboration existed – the shirt, the polygraph – but McBride could point to none of them, or their absence. Clearly, this type of information is relevant, having the potential of creating reasonable doubt in the minds of the jurors and should have been available to be considered by them. Exclusion, particularly when paired with this instruction to the jury, was highly prejudicial to McBride.

Providing an instruction that no corroboration was necessary also casts a shadow on McBride's right not to testify. See U.S. Const. amend. V.

The instruction suggests that nothing more than an allegation by a victim is necessary. This inference easily creates a perception on the part of reasonable jurors that unless that testimony is contradicted it is enough. To contradict what allegedly happened in the home when only the alleged victim and McBride were present would require McBride himself to testify. A jury provided this instruction may, indeed, require a defendant's testimonial denial to reach a verdict of not guilty.

The no-corroboration instruction improperly emphasizes one witness. Such an instruction is not required accurately to charge the jury on the law, given the more general instructions concerning the jury's ability to consider the credibility of all witnesses and to rely on their testimony to establish the facts in a case. As recognized by various judges, the continued use of no-corroboration instructions in cases involving sexual crimes provides no legitimate benefit and serves only to confuse jurors. See People v. Gammage, 828 P.2d 682, 702-704 (Cal. 1992) (Mosk, J., concurring).

III. THE EVIDENCE PRESENTED BY THE STATE WAS LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1).

The jury convicted McBride of first degree criminal sexual conduct with a minor in violation of S.C. Code § 16-3-655(A)(1). That statute, in relevant part, provides the following:

> (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
> (1) the actor engages in sexual battery with a victim who is less than eleven years of age ....

Based on the facts in this case, "sexual battery" requires evidence of "fellatio . . . or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." S.C. Code § 16-3-651(h). No definition of fellatio exists in the statute. Thus, its ordinary, dictionary definition must be used. Smith v. United States, 508 U.S. 223, 228 (1993). Fellatio is defined as "oral stimulation of the penis." Merriam-Webster online dictionary (http://www.merriam-webster.com/medical/fellatio). Thus, to have committed this crime, there must be evidence of oral stimulation – contact – between the defendant's penis and the alleged victim's mouth. The alleged victim's testimony does not reveal any fellatio actually occurred. In describing the events for which McBride was charged, she testified as follows:

> Q And then did what?
>
> A He then he grabbed my head. Then he told put my manhood – my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out of his manhood. . . .

(Tr. pp. 96-97; see also Tr. 121.) Though she testifies that the "white and clear stuff" then went in both her mouth and on her shirt, she never says there was actually any contact between her mouth and the defendant's penis. Nor is any such evidence elicited on cross-examination as to that fact.[12]

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[12] On cross-examination, the alleged victim did state that "it" went in her mouth, but there is no reference to McBride's penis and, thus, no way to infer the "it" referenced on cross-examination is anything other than the semen she

Defense counsel moved for directed verdict on this issue at the close of the State's case. (Tr. 300-305.) That motion was renewed at the close of the case and prior to submission to the jury. (Tr. 317.) A ruling on a directed verdict motion based on insufficient evidence is concerned with the existence or nonexistence of evidence, not its weight. See State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). Nonetheless, there must be either "direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused" to the crime charged and to be submitted to the jury. State v. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002) (emphasis added); see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002). Here, no direct evidence exists as to contact or stimulation; rather, the evidence is only that the "white and clear stuff" made contact with the alleged victim's mouth and shirt. Contact with the penis must have occurred for McBride to commit the sexual battery required for the offense for which he was charged.[13]

The State chooses the charges to bring against a defendant. And, the jury is charged and returned a verdict on that charge. Regardless whether the evidence could support some other charge – some crime that did not

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testified to on direct. (Tr. 121.) Indeed, her testimony reflects that whatever went in her mouth was not McBride's penis or his "manhood" but the stuff that came out of it: "It went in my mouth. That's when the stuff came out of his manhood and went in my mouth." It refers to the stuff – what went in her mouth.

[13] Defense counsel moved for a new trial under Rule 29 based on this insufficiency of evidence and on other grounds. (Tr. 380.)

require evidence of actual contact[14] – in this case a showing of contact is required. "Penal statutes are strictly construed against the State and in favor of the defendant." Morgan, 352 S.C. at 367 (citation omitted). "Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." Id.

Here, strictly construing the statute against the State requires an interpretation that fellatio, as used in S.C. Code § 16-3-651(h)'s definition of sexual battery, requires actual contact between the alleged victim's mouth and the defendant. See Morgan, 352 S.C. at 372-73 (making it clear that for the sexual battery of cunnilingus to occur – the female equivalent of fellatio – contact between the mouth and the genitals is, by definition, required). For sufficient evidence to exist it must be direct, which it is not, and if circumstantial, it must be substantial, which it is not. McBride was entitled to, and the district court erred in not granting, directed verdict in this matter and on this charge.

"[A] trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254 (2001).

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[14] No request was made by the State to include lesser offenses that may not have required contact. Indeed, charging a lesser offense may have eliminated the solicitor's statutory discretion to charge McBride in Circuit Court and require a filing in Family Court. Having charged McBride under this statute, the State was required to prove every element of that charged offense.

IV. DEFENDANT'S MIRANDA RIGHTS WERE VIOLATED REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V. A very brief Jackson v. Denno, 378 U.S. 368 (1964) hearing was held before the Circuit Court. (Tr. 24-50.) The Circuit Court did exclude a portion of McBride's statement, but no legal reason exists to exclude only a portion of such a statement while permitting introduction of other portions. The statement was either given freely and voluntarily or it was not.

As the Circuit Court explained, "I just don't believe that someone should be put in a situation where their option is freedom to leave when they are in a place they have an absolute right to be; that being their own habitation." (Tr. 50, lines 14-17.) This case does not present the situation of a student in the principal's office, In re Dolshagen, 280 S.C. 84, 310 S.E.2d 927 (1984). Nor is the situation of police questioning at the scene of an accident or at the police station. This case involved a minor, in his home being questioned by uniformed officers with multiple other units outside. (Tr. 24-50.)

Even if technically free to leave, McBride's only option was to leave his home and go to some other location. Especially a child of sixteen, with no prior criminal history, cannot reasonably have been expected to know he had a choice not to speak to the officers. Just as the Circuit Court excluded a

portion of the statement, the entire statement should have been excluded, as well as any reference to it.

CONCLUSION

For the foregoing reasons, Appellant Justin McBride respectfully requests this Honorable Court reverse his conviction and order either dismissal of the charge on which he was convicted or a new trial.

Respectfully Submitted,

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