STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

Donald B. Hocker, Circuit Court Judge

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Opinion No. 2015-UP-429 (S.C. Ct. App. filed 8/19/2015)

12-GS-46-2101

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THE STATE,

RESPONDENT,

V.

LEONARD EUGENE JENKINS,

PETITIONER

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

# INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 23, 2015. App. 19.

## QUESTION PRESENTED

Did the trial judge's refusal to allow Petitioner to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act violate Petitioner's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

## STATEMENT OF THE CASE

On June 13, 2013, a York County grand jury indicted Petitioner for a lewd act upon a child. The lewd act allegedly occurred "during or about the month of May 2011 through on or about the month of August 2011." R. 228. Assistant Solicitor Jennifer Desch called the case for trial before the Honorable Donald Hocker and a jury on August 13, 2013. Daniel Hall represented Petitioner. R. 1. After a two day trial and three witnesses, the jury found Petitioner guilty as charged. R. 219, lines 5-10. Judge Hocker sentenced Petitioner to ten years' imprisonment suspended upon the service of three years' imprisonment and probation for three years. R. 227, lines 4-10; R. 230.

Petitioner filed a timely notice of appeal, which was perfected. On August 19, 2015, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Jenkins, 2015-UP-429 (S.C. Ct. App. filed Aug. 19, 2015); App. 1-4. On September 3, 2015, Petitioner filed a petition for rehearing. App. 5-18. On October 23, 2015, the Court of Appeals denied the petition. App. 19.

Petitioner now files this petition for writ of certiorari.

## ARGUMENT

Violating Petitioner's right to confront the witnesses against him and to present a complete defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, the trial judge erred in refusing Petitioner's request to use a video tape of an interview between the prosecution's key witness and a police investigator to impeach the witness regarding her inconsistent statements about an alleged lewd act.

**Reasons to grant certiorari**

This Court should grant certiorari to review the Court of Appeals' decision in this case because of the substantial constitutional issues involved. The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him and the right to present a defense. The entirety of the state's case against Petitioner centered on the key witness's credibility as there was no other evidence against Petitioner. Thus, the ability of Petitioner to cross-examine the witness on prior inconsistent statements and to show those inconsistent statements through extrinsic evidence was essential to his right to cross-examine the state's witness and present a defense. The constitutional questions involved in Petitioner's case require review by this Court.

**Relevant facts**

*Direct examination of Minor 1*

Petitioner, his wife, and his three children lived across the street from Minor 1 in a double-wide trailer in 2011. R. 21, lines 6-22; R. 41, lines 14-16. Petitioner's daughter and Minor 1 were friends and played together often. R. 21, line 25 – R. 22, line 1; R. 24, lines 2-8. Minor 1 claimed that on an unknown day during the summer of 2011 she was playing with Petitioner's daughter when the two decided to enter Petitioner's house to cool down. Although

Minor 1 was unable to give a specific day, she recalled that she went to Georgia to stay with her grandmother approximately two weeks *after* summer started and remained there until about a week before school started again. Later, Minor 1 testified that the alleged incident occurred *before* she went to Georgia for the summer.

According to Minor 1, Petitioner, his wife, and all three of his children were in the home when the alleged touching occurred. While Petitioner's daughter used the bathroom, Minor 1 sat on the couch. Minor 1 claimed that at some point, Petitioner sat down on the couch beside her. Petitioner, who had been holding his toddler when he entered the room, placed the toddler on Minor 1's lap. Minor 1 claimed that while she was playing with the toddler, Petitioner reached over and touched her. Specifically, Minor 1 claimed that three of Petitioner's fingers went into the front of her shorts. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25.

Minor 1 claimed she was wearing blue jean shorts with a blue and white striped top when this occurred. Additionally, Minor 1 claimed that Petitioner put his hands "right in front where the zipper is" underneath her shorts and underwear. She elaborated that this was "right in the front, not between the legs but just like right down there in the front." Minor 1 referred to this area as "the privates." R. 29, line 11 – R. 30, line 6; R. 32, lines 19-24. All of this allegedly occurred while Minor 1 still had the toddler on her lap. When Petitioner's daughter walked into the room from the bathroom, Minor 1 put the toddler on Petitioner's lap and walked outside. She and Petitioner's daughter played for the rest of the day. R. 30, lines 9-17. Even when Minor 1 returned from Georgia later in the summer, she and Petitioner's daughter continued to play together. R. 36, lines 4-7.

Minor 1 never revealed this alleged encounter to Petitioner's daughter. R. 33, lines 14-24. In fact, Minor 1 told no one because she "didn't want to lose one of [her] friends that [she] had on that road." R. 35, lines 9-19. When Minor 1 turned thirteen in February of 2012, she and her mother were watching a television program about a sexual assault. When her mother advised Minor 1 to confide in her if something like that ever happened, Minor 1 "blurted it out." Her mother called the police immediately. R. 36, line 19 – R. 37, line 13; R. 39, lines 16-18. When the police arrived, Minor 1 did not write a statement; instead, her mother wrote the official statement to police without Minor 1 even present. R. 37, lines 14-20; R. 45, lines 4-14.

*Cross-examination of Minor 1*

On cross-examination, Minor 1 admitted she was interviewed by Detective Neely and the interview was videotaped.[1] R. 38, line 20 – R. 39, line 2. When she spoke to Neely, the alleged incident would have occurred eight or nine months earlier, according to her trial testimony. However, she told Neely that it occurred "two to three months ago." In fact, she said "it happened right before school started." When asked about this inconsistency, she explained that "it slipped [her] head because [she] was so nervous." R. 39, line 10 – R. 40, line 7. Later, Minor 1 testified that she realized she had "slip[ped] up" regarding the date after she was interviewed by Neely or the solicitor. She did not believe that Neely or the solicitor told her she had slipped up, but she did try "to get [her] story right." R. 46, line 5 – R. 47, line 2. Finally, Minor thought she had told Neely that she did not tell anyone what happened because of her friendship with Petitioner's daughter, but she was unable to give a definitive answer because she had not seen the video. R. 47, lines 16-23.

[1] Defense counsel proffered the video as Defendant's Exhibit #2. The exhibit is on file with this Court.

Petitioner questioned Minor 1 regarding the inconsistency in her direct testimony that she had on a blue and white top when the incident allegedly occurred and her statement on video that the top she had on during the video statement, which was olive green. R. 40, lines 16-24. Minor 1 responded, "I mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. Further, on the video, Minor 1 told Neely that when Petitioner touched her, she had her "knees almost up to [her] chest" and her legs were spread. This contrasted greatly with her trial testimony that Petitioner had placed his toddler on Minor 1's lap. R. 43, line 16 – R. 44, line 4. Minor 1 did not remember telling Neely that she thought only Petitioner's hand had touched her. R. 48, lines 2-9. Despite the stark contrast between her trial testimony and her video interview, Minor 1 testified that she told Neely "exactly what happened." R. 45, lines 17-19.

*Re-direct examination of Minor 1*

On re-direct examination, the prosecutor emphasized that Minor 1 had not watched the video of the interview and had not discussed the video with the prosecutor. To challenge the cross-examination, the prosecutor asked: "When you are answering Mr. Hall's questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?" Minor 1 responded, "I was pretty confused about what he was saying is what he had gotten from the report." R. 53, line 25 – R. 54, line 11. This line of questioning continued with the prosecutor asking "When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?" Minor responded, "kind of what he viewed on the video." R. 54, lines 19-23.

*Argument on the motion*

During a break, the solicitor argued that although the video was inadmissible due to the statute and case law because Minor 1 was thirteen-years old at the time of trial, the video was admissible as a prior consistent statement to rebut an allegation of recent fabrication. However, the solicitor argued that the admissibility was limited to time and place. R. 60, line 7 – R. 66, line 8. When the judge inquired if the solicitor wanted the "whole video to come in," the solicitor responded, "It is not that I don't or I do. If he would like to put it in, he could put it in. He could put it in as a defense exhibit." R. 66, lines 13-17. After the judge ruled that portions of the video would be admissible as a prior consistent statement to rebut an allegation of recent fabrication as long as it was limited to time and place, Petitioner moved to admit the entire video pursuant to Rule 613, SCRE. Petitioner argued that the video contained prior *inconsistent* statements made by Minor 1 and he should be permitted to impeach her with those statements. R. 71, line 7 – R. 75, line 1.

The prosecution countered that there were no "outright denials" and argued that only an "outright denial" would "trigger[] extrinsic evidence." However, the prosecutor admitted Minor 1 repeatedly testified that she could not remember what her statements in the video had been. R. 75, line 10 – R. 76, line 24.

When Neely testified, Petitioner moved to introduce the video of the interview between Neely and Minor 1 into evidence pursuant to Rule 801(d)(1)(A). Petitioner explained the video contained inconsistent statements made by Minor 1. Additionally, Petitioner argued that the rule of completeness required the admission of the entire video. R. 109, line 25 – R. 111, line 15. Petitioner noted Minor 1's testimony differed from the video interview in multiple respects, including the timing of the alleged incident, how she was sitting, and how the alleged touching

occurred. R. 112, lines 5-25. Although the prosecutor admitted the video contained inconsistent statements, the prosecutor opposed the introduction of the video because Petitioner cross-examined Minor 1 as to those inconsistencies. R. 119, lines 3-21.

*Ruling by the judge*

The judge ruled first that Minor 1 was advised of the time and place of the statement and to whom the statement was made satisfying part of Rule 613(b). Next, the judge ruled that Minor admitted that in the video that "she had the same top on during the video." He further found that Minor 1 admitted that she said in the video that her knees were to her chest and that her legs were spread at the time of the alleged incident. Additionally, Minor 1 acknowledged that she did not tell anyone about the alleged incident because she did not want it to affect her friendship. However, the judge concluded that Minor 1 "neither admits nor denies telling Detective Neely that the defendant's hand was touching her. She said she did not remember." Based upon those findings, the trial judge ruled the video was not admissible for impeachment. R. 137, line 1 – R. 138, line 23; R. 154, lines 8-23.

**Discussion**

The South Carolina Rules of Evidence permit the introduction of extrinsic evidence of prior inconsistent statements of a witness when:

> the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness *does not admit* that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613, SCRE (emphasis added); see also State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998)(finding error in failing to admit extrinsic evidence of a statement where the witness denied

making the statement). A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

The Court of Appeals observed that "[i]n determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification." State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003)(citing State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) & C.J.S. Witnesses 727 (2002)). The Court explained that "[g]enerally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. Id. at 80, 591 S.E.2d at 636.

> If the witness neither directly admit[s] nor den[ies] the act or declaration, as when he merely says that he does not recollect, or, or as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

Id. (quoting State v. Sullivan, 43 S.C. 205, 211, 21 S.E. 4, 7 (1895)).

Nothing short of an absolute unequivocal admission satisfies Rule 613(b). In Blalock, 357 S.C. at 80, 591 S.E.2d at 636, the Court of Appeals held the witness's response to questions about her prior statement did "not meet the standard of a clear and unequivocal admission that the precedent case law demands." Acknowledging that the witness did "admit that she said the portion of the statement quoted" toward the end of the examination, the Court of Appeals held such an admission was not sufficient because the witness was adamant throughout her testimony that the statement as recorded by the detective was incomplete. Id. at 81, 591 S.E.2d at 636.

Similarly, in State v. Carmack, 388 S.C. 190, 201-202, 694 S.E.2d 224, 230 (Ct. App. 2010), the Court of Appeals held that a prior inconsistent statement by a witness who said his prior statement was "'accurate,'" that "certain details were not in his original statement because such details were not inquired into at the time and 'everything was chaotic'" was admissible because the witness "did not unequivocally admit making a prior inconsistent statement." In State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), the Court of Appeals held the trial court properly admitted a prior inconsistent statement by a witness who testified she "could not remember" having made the prior statement because such was "not an unequivocal admission."

*The way Petitioner allegedly touched Minor 1*

At trial, Minor 1 said Petitioner put his hands "right in front where the zipper is" underneath her shorts and underwear. R. 29, line 11 – R. 30, line 6; R. 32, lines 19-24. She also claimed that three of Petitioner's fingers went into the front of her shorts. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. However, on the video, Minor 1 told the officer only Petitioner's hand had touched her.

When questioned about this inconsistency, Minor 1 claimed she *did not remember* telling the officer that she thought *only* Petitioner's hand had touched her. R. 48, lines 2-9. Minor 1 unequivocally denied telling the officer that only Petitioner's hand had touched her:

> Q. Do you remember telling Detective Neely on the video that - - I think your words were, I think that his hand was touching - - do you remember saying that? You don't remember that?
>
> A. No.

R. 48, lines 2-5. This *denial* required introduction of extrinsic evidence of the inconsistent statement pursuant to the plain language of the statute and controlling case law. See Rule 613, SCRE; see also Fossick, 333 S.C. at 69-70, 508 S.E.2d at 33; Copeland, 278 S.C. at 572, 300 S.E.2d

at 63; Blalock, 357 S.C. at 80, 591 S.E.2d at 636; State v. Carmack, 388 S.C. at 201-202, 694 S.E.2d at 230; Moses, 390 S.C. at 523, 702 S.E.2d at 406. The Court of Appeals held Minor 1's statement in the video was not inconsistent with her trial testimony concerning the way Petitioner allegedly touched her. However, a comparison of the testimony and her videotaped statement revealed an inconsistency in this regard. Further, on cross-examination, Minor 1 testified that she did not remember telling Neely that only Petitioner's hand had touched her. This failure to unequivocally admit the prior inconsistent statement entitled Petitioner to present the extrinsic evidence.

*The time period in which the alleged incident occurred*

Minor 1 testified the alleged incident occurred during the first two weeks of summer in 2011. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. However, when Minor 1 spoke to the investigating officer, Minor 1 claimed the alleged incident occurred "two to three months ago" meaning two to the three months before her interview with the officer. She told the officer "it happened right before school started." R. 39, line 10 – R. 40, line 7. Minor 1's statements to the officer were in great contrast with her trial testimony because according to her testimony, the alleged incident occurred during the first two weeks of the summer, which would have been *eight or nine months* before her interview with the officer.

On cross-examination, Minor 1 said that she told Neely that the alleged incident took place two to three months prior to her interview. However, Minor 1 explained her answer by saying "I mean, I hadn't really a good time - - I was trying to remember exactly when it happened because I tried as best as possible, but it slipped my head because I was so nervous." R. 39, line 10 – R. 40, line 7; R. 46, line 5 – R. 47, line 2. R. 39, line 19 – R. 40, line 2.

On re-direct examination, the prosecutor asked "how narrow" was Minor 1's answer to the officer on the timeframe. Minor 1 responded that she was trying to narrow it down and told the officer everything she could remember. R. 55, lines 10-21. In response to the prosecutor's questioning on re-direct examination, Minor 1 testified that she could "not remember a lot of [the video interview] because it was about maybe - - it was just a while ago" and she could "not really remember exactly." R. 58, lines 11-21.

Minor 1's testimony was *not* an unequivocal admission regarding a central issue of the case – when the alleged improper touching occurred. When questioned about the inconsistency, Minor 1 did *not* admit that she had been inconsistent. Rather, she claimed it had slipped her mind and that she was trying to get her story straight. Minor 1's testimony was *not* an unequivocal admission that she had given a prior inconsistent statement on this vital matter. The Court of Appeals held Minor 1 admitted making a prior inconsistent statement; however, the record revealed Minor 1's testimony was not an unequivocal denial. See App. 2. Further, the Court of Appeals refused to consider the impact of the solicitor's re-direct examination because Petitioner "did not raise this specific argument at trial." App. 2, n.1. This was error. The trial judge clearly considered the impact of the re-direct examination when ruling on the motion because the ruling was delivered after the re-direct examination. See R. 137, line 1 – R. 138, line 23; R. 154, lines 8-23. Therefore, Petitioner should have been permitted to use the videotaped interview to impeach Minor 1's credibility.

*The clothing Minor 1 was wearing*

Minor 1's testimony was that she wore a blue and white top when the incident allegedly occurred, but on the video she told the officer she was wearing the top she had on at the time of the interview – an olive green shirt – when the alleged incident occurred. R. 40, lines 16-24.

When Petitioner asked if the top she had on during her interview with the officer was an olive green t-shirt, Minor 1 responded, "I mean, I can't remember exactly what the top was. It was - - it was either blue or green. I can't really remember." R. 40, line 25 – R. 41, line 7. Quite clearly, this was *not* an unequivocal admission that she gave a prior inconsistent statement.

The color of Minor 1's shirt on the date of the alleged incident was not a collateral matter as the Court of Appeals held. See App. 2-3. Minor 1's statements about the color of her shirt were very relevant to the case. "[T]he credibility of a witness with respect to a material issue in a case is not a collateral, immaterial or irrelevant matter." State v. Galloway, 263 S.C. 585, 593, 211 S.E.2d 885, 889 (1975)(internal citation omitted). Thus, "if a prior statement bears upon the story of a witness with such force and directness as to give it appreciable value in determining whether or not that story is true, such statement may be introduced against him." Id. Minor 1's prior inconsistent statement about the color of her shirt at the time of the alleged improper touching was central to Minor's credibility. The entire case boiled down to whether Minor 1 was telling the truth. The fact that Minor 1 gave inconsistent statements on the matter was very material to her credibility, which was the only issue in the case. This was a classic "he said, she said" as there were no other witnesses and no physical evidence. The only evidence that Petitioner engaged in any improper conduct was Minor 1's testimony, which was contradictory and inconsistent with statements she gave to the police when the alleged event would have been fresher in her mind.

*The reason Minor 1 delayed making allegations of the sexual assault*

At trial, Minor testified that she *thought* she had told the officer that she did not tell anyone what happened because of her friendship with Petitioner's daughter, but she was unable to give a definitive answer because she had not seen the video. R. 47, lines 16-23. Specifically,

when Petitioner asked if Minor 1 had told the officer that she had not told anyone about the alleged incident because of her friendship with Petitioner's daughter, Minor responded, "I thought I had." R. 47, lines 16-22. However, the video was incontrovertible evidence otherwise – Minor 1 had not told the officer why she did not reveal the alleged incident.

Petitioner should have been permitted to explore her prior inconsistent statements – even those where Minor 1 had made no statement, but claimed that she had. See Rule 613, SCRE; see also Fossick, 333 S.C. at 69-70, 508 S.E.2d at 33; Copeland, 278 S.C. at 572, 300 S.E.2d at 63; Blalock, 357 S.C. at 80, 591 S.E.2d at 636; State v. Carmack, 388 S.C. at 201-202, 694 S.E.2d at 230; Moses, 390 S.C. at 523, 702 S.E.2d at 406. The Court of Appeals held Petitioner was not allowed to impeach Minor 1 with the videotaped statement in which she never advised Neely of the reason she delayed disclosing the alleged abuse because Petitioner "was not seeking to prove a prior inconsistent statement but rather a prior statement was never made." App. 3. Certainly, Petitioner was trying to prove that a prior statement was never made. This proof would have been inconsistent with Minor 1's testimony that a prior statement had been made. Thus, the testimony of Minor 1 at trial was inconsistent with her videotaped statement to Neely. As such, it fit within the purview of Rule 613(b), SCRE, and the constitutional right to cross-examination.

*The position Minor 1 had her legs at the time of the alleged incident*

Minor 1 testified that while she sat on the couch, Petitioner placed his toddler daughter on Minor 1's lap. While Minor 1 was playing with the toddler on her lap, Petitioner reached over and improperly touched her. R. 24, line 12 – R. 29, line 10; R. 34, line 21 – R. 35, line 8; R. 35, line 23 – R. 36, line 3; R. 42, lines 16-25. However, during her video recorded interview with the investigating officer, Minor 1 told the officer that when Petitioner touched her, she had her "knees almost up to [her] chest" and her legs were spread. R. 43, line 16 – R. 44, line 4.

Although on cross-examination, Minor 1 admitted she told Neely that her knees were almost to her chest and that her legs were spread when the alleged touching took place, R. 43, line 20 – R. 44, line 4, the state's re-direct examination of Minor 1 revealed that even these admissions could not be construed as unequivocal admissions due to Minor 1's lack of memory of the interview with Neely as explained more fully below. R. 54, lines 5-11; R. 54, lines 19-23.

*Effect of the solicitor's re-direct examination*

The state's re-direct examination of Minor 1 reinforced and highlighted the equivocation of Minor 1's responses relative to her prior inconsistent statements and turned the unequivocal admissions into equivocations. After the prosecutor made clear that Minor 1 had not seen the video, she asked, "So the video that was taken a year and a half ago - - when you are answering Mr. Hall's questions, are you just trusting he is giving you what happened or do you have a recollection of what you talked about?" Minor 1 responded that she was "pretty confused about what he was saying is what he had gotten from the report." R. 54, lines 5-11. Unabashed, the prosecutor continued: "When Mr. Hall is asking you questions about what is in the video, do you independently remember or do you understand or trust that he is telling you what he viewed on the video?" Minor 1 responded, "Um, kind of what he viewed on the video." R. 54, lines 19-23.

The prosecutor's re-direct examination portrayed defense counsel as dishonest in his cross-examination by suggesting that what defense counsel said was on the video was not in fact on the video. This was particularly disingenuous in light of the prosecutor's repeated objections to Petitioner's attempts to introduce the video into evidence. The prosecutor misled the jury in her questioning of Minor 1 as to what was contained on the video and how the Minor 1's statements to the officer differed from her trial testimony. The deceitful questioning created a false impression for the jury regarding the veracity of Minor 1 and of defense counsel personally.

Without question, the prosecutor's re-direct examination of Minor 1 turned *each* of her responses into equivocations. Further, the prosecutor's questions cast personal aspersions on Petitioner's counsel by suggesting that counsel's questions were not accurate as to what was contained on the video. Consideration of the prosecutor's re-direct examination demonstrates that Minor 1's responses were not unequivocal admissions to inconsistent statements. Therefore, Petitioner should have been permitted to introduce the video to impeach Minor 1. The Court of Appeals refused to consider Petitioner's argument that the solicitor's re-direct examination of Minor 1 converted Minor 1's admissions into equivocations because Petitioner "did not raise this specific argument at trial." App. 2, n.1. However, the Court of Appeals failed to note that the ruling on the motion occurred after the solicitor conducted re-direct examination, and would have been a factor considered by the judge. Further, the motion to admit the video was formally made only after Minor 1 testified and during the testimony of the officer because the appropriate foundation had to be laid. Thus, the trial court considered the direct examination, cross examination, and re-direct examination in making its ruling on the motion to admit the video as extrinsic evidence of Minor 1's prior inconsistent statements.

The case law is clear that unless a witness unequivocally admits to making the prior inconsistent statement, then extrinsic evidence of the prior inconsistent statement is admissible. The trial judge clearly erred in excluding the video interview containing Minor 1's prior inconsistent statements because Minor 1 failed to unequivocally admit to making those statements. The testimony by Minor 1 was the only evidence in the record to support a conviction. Minor 1's credibility was central to the case. Although Petitioner cross-examined Minor 1 and the police officer who interviewed her, Petitioner's cross-examination was cut short by the judge's ruling that he could not present video evidence of contradictory statements by Minor 1. The video

was powerful evidence because it was incontrovertible. The judge's ruling denied Petitioner the right to confront his accusers and present a complete defense. See State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012); State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Fossick, 333 S.C. 66, 508 S.E.2d 32 (1998); State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

## CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of November, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
NOV 18 2015
SC Court of Appeals

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Certiorari to York County

Donald B. Hocker, Circuit Court Judge

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Opinion No. 2015-UP-429 (S.C. Ct. App. filed 8/19/2015)
12-GS-46-2101

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THE STATE,

RESPONDENT,

V.

LEONARD EUGENE JENKINS,

PETITIONER

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Leonard Eugene Jenkins #138712, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, and the S.C. Court of Appeals this 18th day of November, 2015.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of November, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender



November 18, 2015

J. Benjamin Aplin, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Leonard Eugene Jenkins

Dear Ben:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosures

cc: Court of Appeals