

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM YORK COUNTY  
Court of General Sessions  
Donald B. Hocker, Circuit Court Judge

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Opinion No. 2015-UP-429 (S.C. Ct. App. filed August 19, 2015)

Appellate Case No: 2015-002359

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S.C. Supreme Court

The State, ..... Respondent,

v.

Leonard Eugene Jenkins, ..... Petitioner.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. Whether Petitioner's failure to challenge the Court of Appeals ruling that his appellate argument regarding his rights under the Sixth or Fourteenth Amendments to the United States Constitution were not preserved for appellate review means that issue preservation ruling is now the law of the case and requires dismissal of his Petition for a Writ of Certiorari.

## STATEMENT OF THE CASE

Leonard Eugene Jenkins (Petitioner) was indicted at the June 13, 2013, term of the grand jury for York County for one count of lewd act upon a child (2012-GS-46-2101). He was represented by Dan Hall, Esquire, of the York County Bar. The State was represented by Assistant Solicitor Jennifer Desch of the Sixteenth Circuit Solicitor's Office. (R.p.1). On August 14, 2012, Petitioner proceeded to trial by jury before the Honorable Donald Hocker, pursuant to which he was found guilty as indicted. The trial court sentenced him to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment and three (3) years' probation. (R.p.215, line 3-p.227, line 13; p.228-230). Petitioner timely filed a notice of intent to appeal his conviction and sentence as well as a brief in support of his appeal and the Respondent (the State) filed a brief in response. Petitioner's conviction and sentence were subsequently affirmed in an unpublished opinion from the Court of Appeals. State v. Jenkins, Op. No. 2015-UP-429 (S.C. Ct. App. filed August 19, 2015). (App.p.1-p.4). Petitioner submitted a timely Petition for Rehearing and by Order filed October 23, 2015, the Petition was denied. (App.p.5-p.19). On November 18, 2015, Petitioner submitted a Petition for a Writ of Certiorari to this Court and now this Return on behalf of the State follows.

## STATEMENT OF FACTS

On afternoon during the summer of 2011, Petitioner committed a lewd act on the twelve-year-old victim by sticking his hand down the front of her shorts and underwear and touching her “privates.” The victim first disclosed the incident to her mother in February of 2012 when she turned thirteen. (R.p.19, line 8-p.38, line 14). Petitioner was subsequently arrested and indicted for lewd act upon a minor. On August 13-14, 2013, he proceeded to trial by jury pursuant to which he was found guilty as indicted.

At the call of the case, Petitioner made a motion in limine raising seven evidentiary issues, the last of which concerned a video recording of a police detective’s interview of the victim. Petitioner’s counsel said: “I state at this point, there was a video-recorded interview from the detective with the 13-year old child. We certainly don’t have any objections if the state intends or wishes to introduce that. So if we get to that point and they want to introduce that video of the interview then it would be without objection from the defense.” (R.p.2, lines 7-14). After the jury was selected and sworn, the trial court gave preliminary instructions and asked the parties to proceed with opening statements. (R.p.3, line 2-p.14, line 15). Petitioner noted the victim would be the only witness to the alleged incident and asked the jury to focus on how her story changed over time in assessing her credibility and whether the State would be able to meet its overall burden of proof. (R.p.14, line 16-p.19, line 1).

The State then called the victim to the stand. She gave specific testimony about the lewd act committed by Petitioner in the summer of 2011, when she was twelve years old. One morning the victim was playing outside with her friend, eleven-year-old Kacie Jenkins. Kacie lived across the street in a house with Petitioner, Petitioner’s wife Janet,

and two other children, Amber and Gracey.<sup>1</sup> Sometime in the early afternoon, Kacie went into her house to cool off. A few minutes later the victim followed her inside and sat on a couch to wait for Kacie to get out of the bathroom. While she was waiting, Petitioner came into the room carrying Gracey, sat down on the couch, and placed Gracey on the victim's lap. The victim began bouncing Gracey up and down on her knee when Petitioner reached over and put three of his fingers down the front of the victim's shorts and underwear. Petitioner touched the victim's "privates," making skin to skin contact. The victim handed Gracey back to Petitioner just as Kacie walked into the room, and the two girls went back outside to play for the rest of the day. At first, the victim did not tell anybody about the incident because she did not want to lose her only friend who lived on the same road. She continued being friends with Kacie but tended to stay outside and avoided Petitioner when they played. The victim did not disclose the incident to anyone until February of 2012 when she and her mother were watching a news story about some other person being reported for similar behavior, at which point she decided to tell her mother what had happened. The victim's mother called the police and reported the incident. (R.p.19, line 8-p.38, line 14).

On cross-examination, Petitioner asked the victim if she remembered being interviewed by Detective Neely after her mother reported the incident to the police. She testified she remembered being interviewed and acknowledged the interview was video recorded. Petitioner proceeded to question the victim about particular statements she made during that interview in an apparent attempt to show inconsistencies between those statements and her testimony at trial. Petitioner focused on five specific alleged

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<sup>1</sup> Gracey, whose full name is Graceland Jenkins, was a toddler at the time of the incident and is the biological daughter of Petitioner and Janet. Kacie and Amber are Janet's children from a prior marriage.

“inconsistencies” involving: (1) the timing of the incident; (2) the shirt the victim was wearing; (3) the position of the victim’s legs; (4) the reason the victim gave for the delay in her disclosure; and (5) whether Petitioner’s hand had actually touched the victim. (R.p.38, line 14-p.49, line 25).

First, Petitioner asked about the victim’s trial testimony that the incident happened in the summer, which he incorrectly characterized as approximately “eight or nine” months before her disclosure. He then asked if the victim had initially told Detective Neely it happened only two to three months before the disclosure. The victim unequivocally admitted making this statement to the Detective, but explained it was made because she was so nervous during the interview. Next, Petitioner asked the victim if she later told Detective Neely the incident happened right before school started; however, he did not give her an opportunity to admit or deny the statement because he compounded the question by immediately asking if she had seen the video. The victim replied “no,” and explained she had never seen the video recording of her interview. Later, Petitioner again asked about timing at which point the victim unequivocally acknowledged making a statement to Detective Neely that the incident happened “right before school started.” She then explained she thinks she meant to say it was “right before school ended,” and realized the slip-up sometime after the interview when she was trying to “get her story right.” (R.p.39, line 10-p.40, line 15; p.46, lines 5-25).

Second, Petitioner questioned the victim about her testimony that she was wearing a blue and white top when the incident occurred. He then asked if she had told Detective Neely she was wearing the same top as the one she was wearing during the interview, which was an olive green T-shirt rather than a blue and white one. The victim testified

she believed she had made that statement. She then explained she could not remember exactly what top she was wearing, but that it was either blue or green. (R.p.40, line 16-p.41, line 9). Third, Petitioner asked the victim about her trial testimony that Petitioner put Gracey on her lap just before the incident. He then asked if she had told Detective Neely she had her knees up to her chest and her legs spread at the time of the incident. The victim unequivocally admitted making that statement during the interview. (R.p.43, line 16-p.44, line 4).

Fourth, Petitioner questioned the victim about her testimony that she refrained from immediately disclosing the incident because she did not want to harm her friendship with Kacie. He asked the victim whether she ever said this to Detective Neely during the interview. The victim testified she thought she had, and Petitioner commented: "Maybe we will get an opportunity to see that." (R.p.47, lines 16-23). Finally, Petitioner addressed the victim's testimony at trial that Petitioner had touched her with his hand. He asked if she remembered telling Detective Neely "I think" that his hand was touching me. The victim testified she did not remember making that particular comment, but did not deny it. (R.p.48, lines 1-9). Petitioner concluded his cross-examination without making a motion or any other attempt to introduce all or part of the video recording into evidence. (R.p.49, lines 24-25).

On re-direct, the victim repeated her testimony that she had never seen the video recording of her interview with Detective Neely, and she testified she had never even talked about the video with the solicitor before trial. The victim testified that during cross-examination she was trusting Petitioner's counsel's version of what happened during the interview as being accurate. She testified she couldn't remember exactly what

she said during the interview with Neely, only that it was about the general incident, what happened, and where on her body she was touched. (R.p.50, line 3-p.59, line 6). The victim never claimed she did not remember making a statement to Detective Neely. Indeed, throughout her testimony she unequivocally admitted being interviewed after Petitioner's arrest. Petitioner declined when the trial court asked if he wished to conduct any re-cross-examination, and he again made no motion to introduce the video recording into evidence. (R.p.59, lines 7-11).

Following a break and outside the presence of the jury, the solicitor advised the judge she had concerns about any attempt to introduce the video recording of what was essentially a "forensic interview" with Detective Neely. She explained she believed the State could not simply introduce the video into evidence because it was inadmissible hearsay, except possibly the specific portions of the video that might qualify for admission under Rule 801(d) as prior consistent statements being offered to rebut an allegation of recent fabrication, and that even then those statements would likely be limited to the time and place of the incident. Petitioner responded: "I am not objecting to the whole video coming in." He contended there was "exculpatory information" on the video and repeatedly stated he wanted it to come in to evidence. The solicitor commented that Petitioner could put the video recording into evidence as a defense exhibit if he wanted. Petitioner however complained that the State was trying to "stand behind a rule that it is inadmissible when my client is willing to waive and give up that and determine whether it is admissible. He wants it in." (R.p.60, line 7-p.67, line 11).

The parties continued to argue about whether all or parts of the video would be admissible and on what basis. After hearing the arguments, the trial court found the State

would be allowed to introduce evidence of the victim's prior consistent statements as to time and place because Petitioner's cross-examination implied recent fabrication. The court also found that at the appropriate time, if Petitioner wanted to move to introduce the entire video, the court would address the issue at that time. Petitioner's counsel stated: "I certainly agree with that analysis and the way to handle it." He then argued, for the first time, that pursuant to Rule 613(b), SCRE, the video recording should be admissible as extrinsic evidence of a prior inconsistent statement of a witness because the victim did not admit she made the prior inconsistent statements during his cross-examination.

(R.p.68, line 7-p.72, line 10). Counsel said:

I understand I may have the burden of trying to figure out whether or not I want to put it in or not, but however, I am at a little bit of a quandary of how to introduce this extrinsic evidence of a prior inconsistent statement. I disagree with the solicitor in that there are consistent statements in the video, that there are a number of inconsistent statements that are exculpatory. And certainly, I did try to do those without showing the video with the child to impeach her.

(R.p.72, lines 12-23). Counsel proposed that he be allowed to show pertinent parts of the video during his cross-examination of Detective Neely as proof of the alleged inconsistent statements without introducing them into evidence. The trial judge noted that typically a party would impeach a witness with evidence of prior inconsistent statements through that witness herself, but asked the State's opinion. The solicitor disputed the claim that the victim failed to admit her prior inconsistent statements, and argued that in any event Petitioner had already effectively brought out the alleged inconsistencies during cross without actually showing the video. Ultimately, the trial court ruled it would proceed as previously discussed, with the State being allowed to use Detective Neely to present evidence of prior consistent statements from the victim, and

Petitioner being allowed to cross-examine Neely on the interview, and possibly use the video to do so. (R.p.72, line 24-p.77, line 18).

The State then called Detective Carson Neely of the York County Sheriff's Office to the stand. He testified he had worked in law enforcement since 1998 and had been a detective since 2005. Detective Neely was assigned to the Violent Crime Unit, which investigated any crime against a person, including sexual conduct or assault against an adult or a child. He had special training in interviewing techniques, including classes in "finding words" and the RATAC method of forensic interviewing. Detective Neely testified he interviewed the victim on February 14, 2012, in a conference room at the Sheriff's Office. At that interview the victim was able to identify who had assaulted her. She initially said the incident happened two or three months prior, but later explained it happened in the summertime, between two school years. The victim told Detective Neely the incident took place in the living room at Petitioner's house. (R.p.78, line 18-p.93, line 6).

On cross-examination, Petitioner asked several questions about Detective Neely's interview of the victim. He acknowledged it was recorded and that his written report referenced a DVD recording of the interview. Neely testified the only time he watched the full video recording was once trial started. He admitted the video "cut off" towards the end so that the final portion of the interview was not recorded. Petitioner did not move to introduce all or any part of the video into evidence. (R.p.93, line 9-p.100, line 19). After brief re-direct examination and re-cross, Petitioner asked to take up a matter outside the presence of the jury. He said he was not yet finished with the witness. (R.p.100, line 23-p.103, line 25).

The jury was excused and the video recording was marked for identification as Defendant's Exhibit #2. Petitioner said: "I would like to try to introduce the video through Carson Neely on his part of cross. I would like to proffer it through him. I would let the Court look at it. I believe it is admissible." He argued that portions of the video were not hearsay and admissible because they included prior inconsistent statements, and that under the rule of completeness the entire video should be admissible. Petitioner asked to proffer the video through Detective Neely and for the trial court to make a ruling on its admissibility. The solicitor took the position the video was inadmissible except for any specific portions which could come in under Rule 801 and/or Rule 613. The video recording was then played outside the presence of the jury. Neely testified it was fair and accurate representation of the interview with the exception of one to five minutes at the end when the recording cut off. (R.p.104, line 3-p.109, line 24).

After the proffer, Petitioner asked that the entire video recording be "presented to the jury." He argued it was not hearsay under Rule 801(d) because the victim testified at trial and was subject to cross-examination concerning the statement, and because the statement was inconsistent in certain respects to her trial testimony. Petitioner further argued it was not hearsay because the State sought to admit the victim's prior consistent statements to rebut an allegation of recent fabrication, and that since both parties identified prior statements that are not hearsay, the entire video recording where those statements were made should be admissible under the "rule of completeness." (R.p.109, line 25-p.111, line 21).

The trial judge asked Petitioner to point out specifically which statements from the interview he believed were inconsistent with the victim's trial testimony. Petitioner

alleged there were inconsistencies involving the timing of the incident, the position of the victim's legs, and the reason the victim gave for the delay in her disclosure. The solicitor opposed introduction of the entire video recording arguing it was a "back door attempt to get it in with the rule of completeness." She reiterated her concerns with admitting portions of the video recording which could run afoul of recent appellate court decisions regarding forensic interviews and vouching, and then argued Petitioner should not be allowed to now introduce the video recording as a prior inconsistent statement because it was too late. The solicitor argued Petitioner has missed his opportunity because the proper time to try to impeach the victim would have been during cross-examination. She also said she was not conceding the statements were in fact inconsistent. (R.p.111, line 16-p.116, line 17).

The trial judge agreed that Rule 613 seems to contemplate addressing prior inconsistent statements of a witness by examining that particular witness and introducing extrinsic evidence of a prior inconsistent statement through that witness if the proper foundation has been laid. Petitioner argued Rule 613 was not limited in this regard and that once the proper foundation was laid with the witness he should be allowed to introduce the extrinsic evidence at any point during trial. (R.p.116, line 18-p.118, line 20). The solicitor ultimately agreed there were some inconsistencies between the trial testimony and the victim's statements from the interview, but argued they had been "handled on cross-examination and for the most part admitted." She then appeared to concede Petitioner could bring in portions of the video through Detective Neely if the proper foundation was laid under Rule 613(b) and the victim actually denied making the statement. (R.p.118, line 21-p.122, line 9).

Next, Petitioner argued an alternative theory for admission of the video recording, contending he should be able to use it to impeach Detective Neely by showing he did not strictly follow the protocol for conducting a forensic interview as described in his trial testimony. The solicitor continued to object to Petitioner's request to admit the entire video recording under the "rule of completeness" and argued the trial court would have to decide whether each statement was admitted or denied by the victim before allowing it in under Rule 613(b). The trial court took the matter under advisement overnight and recessed for the evening. (R.p.123, line 20-p.130, line 11).

The following morning, the trial judge announced he had obtained a transcript of the victim's testimony for review in light of Petitioner's motion. He noted the victim acknowledged being interviewed by Detective Neely and that the interview was being videotaped. The judge then conducted a detailed examination and consideration of her testimony in regard to each of Petitioner's five alleged inconsistencies before ruling: "So based upon what was listed during cross-examination, I do not believe the video would be admissible for impeachment. So based upon what she admitted to in cross-examination, I think under the rules the video would not come in for impeachment purposes." (R.p.137, line 1-p.138, line 23). The trial judge then allowed the parties to look at the transcript together and said: "If you disagree with my summary of the testimony, then I will be glad to hear from you." After reviewing the transcript, Petitioner did not challenge the trial court's factual finding that the victim admitted making the prior statement as a whole, including the first four inconsistencies. He also did not offer any argument or challenge to trial court's conclusion that her testimony of not remembering the fifth inconsistency was equivalent to an admission for purposes of

the analysis. Instead Petitioner simply stated: “Your Honor, I respect the Court going through the testimony and pointing out the things of what the record accurately reflects. I don’t need to do that. I respect the court’s ruling on that. I have registered my objection. Based on what it appears the Court is going to rule, I have no further rationale to get the video in for the purpose of impeaching [the victim] through this witness.” (R.p.138, line 24-p.139, line 21). Petitioner stated: “I respect the Court’s opinion, but for the record, I do object to the Court’s ruling;” however, Petitioner never articulated a particular objection to that ruling in regard to the finding that he failed to meet the foundation requirements of Rule 613(b), SCRE. (R.p.140, lines 4-14).

Next, Petitioner resumed his re-cross-examination of Detective Neely. Petitioner asked to use the video to refresh Detective Neely’s memory of his interview with the victim, which led to a discussion outside the jury’s presence about whether the State would agree to admit the video into evidence. The solicitor said: “If the defense moves it in, I will agree to have it come in . . . .” (R.p.140, line 15-p.151, line 3). Petitioner then advised the trial court that when Detective Neely resumed testifying he intended to lay the foundation for the video, move it into evidence, and show the video to the jury. He repeated his desire that the entire video be admitted into evidence. Next, the trial judge re-stated his previously ruling in regard to the use of the video recording for impeachment purposes. He noted he had deemed the victim as having admitted everything she was asked in regard to what she stated on the video, and that therefore was no need to impeach her with the video itself. Petitioner again failed to challenge the trial court’s ruling that the victim had admitted every inconsistency from her prior statement. (R.p.151, line 6-p.154, line 24).

Petitioner then continued his re-cross-examination of Detective Neely, followed by additional re-direct examination from the State, and more re-cross-examination by Petitioner. Petitioner did not move to introduce the video recording of the interview either time he addressed additional questions to Detective Neely. (R.p.155, line 4-p.158, line 25). When Detective Neely finally stepped down, the State rested. (R.p.159, lines 2-4). Petitioner moved for a directed verdict and the motion was denied. Petitioner then called the victim's mother, Katrina Babb, as a witness but elected not to testify in his own defense. (R.p.159, line 14-p.178, line 16).

After a brief charge conference, the parties agreed to the trial judge's proposed jury charges and made closing arguments. Petitioner explained the judge would be charging the law of inconsistent statements and asked the jury to consider the victim's testimony in light of any inconsistencies and her admission that she had never watched the video recording of her interview before trial. The solicitor responded that even though there were inconsistencies between the victim's testimony and things she said during her interview, this did not mean she was lying and the jury had the duty to judge her credibility and believability. (R.p.179, line 14-p.202, line 25). The trial court then charged the jury on the burden of proof, the presumption of innocence, reasonable doubt, the respective and exclusive roles of the judge and jury, direct and circumstantial evidence, the credibility of witnesses, and the elements of the offense. (R.p.202, line 16-p.214, line 16). In regard to credibility the court charged:

There has been evidence presented that witnesses have made prior statements which are not consistent with witnesses' present testimony. You may use this evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given at trial.

(R.p.209, lines 2-11). The jury deliberated for less than an hour before finding Petitioner guilty as indicted. The trial court sentenced him to ten (10) years' imprisonment suspended upon the service of three (3) years' imprisonment and three (3) years' probation. (R.p.215, line 3-p.225, line 13).

### **CERTIORARI**

Petitioner argues this Court should grant certiorari to review the Court of Appeals' decision in this case because of the substantial constitutional issues involved. He contends the trial court's refusal of his request to use a video recording of a police investigator's interview of the victim to attempt to impeach her credibility violated his Sixth Amendment constitutional right to confront the witnesses against him and the right to present a defense. Petitioner argues the constitutional questions involved in his case require review by this Court.

The State disagrees and submits the Court of Appeals properly affirmed the trial court's ruling for all of the reason set forth in its opinion and for all of the reasons argued in the Final Brief of Respondent, which is hereby incorporated by reference. More critically, however, the State submits Petitioner's failure to challenge the Court of Appeals ruling that his appellate argument regarding his constitutional rights was not preserved for appellate review, requires dismissal of his Petition for a Writ of Certiorari. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Even if Petitioner's argument is not deemed waived, the Court of Appeals' decision was nevertheless a straightforward exercise of applying existing precedent,

logic, and practical consideration of the particular facts and circumstances of Petitioner's case and does not merit further review. Thus, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

## **ARGUMENT**

**Petitioner's failure to challenge the Court of Appeals ruling that his appellate argument regarding his rights under the Sixth or Fourteenth Amendments to the United States Constitution were not preserved for appellate review means that issue preservation ruling is now the law of the case and requires dismissal of his Petition for a Writ of Certiorari.**

On appeal to the Court of Appeals, Petitioner argued the trial court erred in refusing his request to use a video recording of a police investigator's interview of the victim as extrinsic evidence of a prior inconsistent statement to impeach her credibility. He alleged certain statements the victim made during the interview were inconsistent with her testimony at trial, and contended that by ruling the video itself was inadmissible, the trial court violated his 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. He continues to advance this argument in his petition for a writ of certiorari. The State submits Petitioner's argument should be denied and dismissed for several reasons and that the Court of Appeals properly affirmed the denial of his request to use the video recording.

### **Law of the Case**

First and foremost, the State submits Petitioner's failure to challenge the Court of Appeals ruling that his appellate argument regarding his constitutional rights was not preserved for appellate review, requires dismissal of his Petition for a Writ of Certiorari.

In its unpublished opinion, the Court of Appeals specifically held: “Because [Petitioner] did not make any argument at trial regarding his rights under the Sixth or Fourteenth Amendments, these issues are not preserved for our review.” (App.p.2). Petitioner does not challenge this holding anywhere in his petition for a writ of certiorari; therefore, whether right or wrong, it is the law of the case. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“An unappealed ruling, right or wrong, is the law of the case.”); State v. Looper, 412 S.C. 363, 365, 772 S.E.2d 516, 517 (Ct. App. 2015). Because Petitioner’s constitutional arguments are not preserved for appellate review, this Court should decline to address them and should deny certiorari.

#### **Analysis / Discussion of Merits**

To the extent this Court disagrees in regard to issue preservation, the State submits the Court of Appeals nevertheless properly affirmed the trial court’s denial of Petitioner’s Rule 613(b), SCRE, request to use a video recording of a police investigator's interview of the victim to impeach her credibility. First, Petitioner’s claim was not preserved for appellate review because: (1) Petitioner did not specifically object to or otherwise challenge the trial court’s factual findings that the victim admitted making the prior statements, and (2) Petitioner waived any Rule 613(b) challenge previously argued when he failed to move to introduce the video after the solicitor stated on the record that she would not object to any further motion by Petitioner seeking admission. Second, it was a proper exercise of the trial court’s discretion not to admit the extrinsic evidence pursuant to Rule 613(b) where: (1) Petitioner was given a full and fair opportunity to confront the victim; (2) the

foundational requirements of the Rule were not met; (3) any minor inconsistencies did not impact the “essential meaning” of the prior statement; and (4) exclusion was proper pursuant to Rule 403, SCRE. Two of these substantive issues are explored in more detail below.

### **Confrontation Clause**

Petitioner’s argument is grounded in a claim that the trial court’s evidentiary ruling violated his right to confront the witnesses against him. As an initial matter, Petitioner’s argument is misplaced. As a general rule, a trial court’s ruling on the proper scope of cross-examination will not be disturbed on appeal absent a manifest abuse of discretion. State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012); State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to “to be confronted with the witnesses against him” during trial. U.S. Const. amend. VI. Specifically included in a defendant’s Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). “The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced.” State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

Petitioner conducted extensive cross-examination of the victim. He asked her pointed questions regarding her interview with Detective Neely and was successful in getting the victim to acknowledge inconsistencies between details she provided during that interview and her testimony at trial. The trial court did not impose any limits on

Petitioner's cross-examination of the victim and Petitioner never sought to introduce the video recording of the interview, or any part of that video, during that cross-examination. (R.p.38, line 14-p.49, line 25; p.59, lines 7-11). Thus, Petitioner's constitutional right to confront the victim and to conduct a meaningful cross-examination of her was fully protected at trial. U.S. Const. amend. VI; Gracely, supra; Aleksey, supra. The trial court did not interfere with Petitioner's opportunity for effective cross-examination of the victim; therefore, Petitioner's claims regarding the right to confront witnesses and present a complete defense under the Sixth and Fourteenth Amendments to the United States Constitution was properly denied.

#### **Rule 403, SCRE**

Even if this Courts finds that a narrow Rule 613(b) analysis would support admission of the video recording, exclusion was nevertheless appropriate pursuant to Rule 403, SCRE, because: (1) the probative valued of the video recording was substantially outweighed by the danger of unfair prejudice, and (2) the video would have constituted a needless presentation of cumulative evidence.

Throughout the trial, Petitioner argued he wanted the entire video recording to be admitted into evidence despite the solicitor's concerns it consisted of an otherwise inadmissible "forensic interview" with Detective Neely. (R.p.60, line 7-p.67, line 11; p.111, line 16-p.116, line 17). The solicitor was rightfully concerned the forensic interview might be wrought with hearsay and comments constituting vouching which our appellate courts have found particularly troubling. See State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013) (holding that a forensic interviewer should not have been allowed to testify about a "compelling finding" of child abuse, as that was the

equivalent of stating the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding the admission of the forensic interviewer's written report into testimony to be error because the reports stated that each child "provided a compelling disclosure of abuse by Petitioner."); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding the forensic interviewer's "opinion as to whether she thinks something happened [was] nothing other than her inadmissible opinion as to whether the victim was telling the truth"). As explained in detail in the Final Brief of Respondent, the video recording had very limited probative value in light of the victim's testimony about her prior statements. Given the danger of unfair prejudice, the trial court properly excluded it despite Petitioner's suspect claim that he wanted the entire video admitted.<sup>2</sup>

The video recording also constituted cumulative evidence. Petitioner was allowed to effectively impeach the victim through cross-examination regarding the prior statements, getting her to unequivocally admit the inconsistencies in all but one instance. In light of these efforts, admission of the video recording itself would have been needlessly cumulative. For all of these reasons, there was no abuse of discretion

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<sup>2</sup> Petitioner argues the solicitor's re-direct examination of the victim somehow portrayed defense counsel as dishonest by suggesting that what defense counsel said was on the video was not, in fact, on the video. He claims the solicitor's suggestions were "particularly disingenuous" and that her "deceitful questioning created a false impression for the jury regarding the veracity of [the victim] and of defense counsel personally." (Petition, p.17). However, contrary to these claims, it appears the solicitor took extraordinary steps throughout the trial to ensure the fairness of the proceedings by attempting to limit introduction of potentially inadmissible evidence. Indeed, it was defense counsel's repeated attempts to lure the solicitor into introducing the video recording that suggest a hidden motive. As a public defender and former solicitor with many years of criminal experience, it is unclear whether trial counsel was merely trying to attack the victim's credibility with her prior inconsistent statements, or was attempting to manufacture a future post-conviction relief claim in the event of a conviction. Either way, the State takes issue with appellate counsel's characterization of the solicitor's advocacy as "disingenuous" and "deceitful." See Donald E. Campell, Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility, 47 Gonz. L. Rev. 99 (2011) (examining the obligations of civility in the practice of law).

by the trial court and the Court of Appeals' decision affirming Petitioner's conviction should likewise be affirmed.

### **Harmless Error**

Should this court find the issue is preserved and that the Court of Appeals should have concluded the trial judge erred in refusing to admit the video recorded interview into evidence, the State submits any error was harmless beyond a reasonable doubt. In determining harmless error regarding any issue of witness credibility, the appellate court will consider the importance of the witness's testimony to the prosecution's case, whether the 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. Fossick, 333 S.C. at 69, 508 S.E.2d at 34. (citing State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) and Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

Here, the trial court allowed a meaningful cross-examination with numerous opportunities for impeachment, including specifically allowing Petitioner to inquire into the victim's allegedly inconsistent statements. The additional introduction of the video recording as sought by Petitioner would at best have been marginally relevant. The jury was given sufficient information to judge the credibility of the victim's testimony. Furthermore, the video itself would have been cumulative to the victim's admissions regarding the alleged inconsistencies. In regard to overall strength, the victim gave compelling testimony describing how she was inappropriately touched by Petitioner. Petitioner suffered no unfair prejudice as a result of the ruling regarding exclusion of the video recording. Fossick, supra. In light of all these factors, exclusion

of the video recording as extrinsic evidence of the victim's prior inconsistent statements as impeaching evidence was harmless. Thus, the Court of Appeals decision affirming Petitioner's conviction should likewise be affirmed.

### CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.


Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina  
December 18, 2015

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM YORK COUNTY  
Court of General Sessions  
Donald B. Hocker, Circuit Court Judge

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DEC 18 2015

S.C. Supreme Court

Opinion No. 2015-UP-429 (S.C. Ct. App. filed August 19, 2015)

Appellate Case No: 2015-002359

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The State, ..... Respondent,

v.

Leonard Eugene Jenkins, ..... Petitioner.

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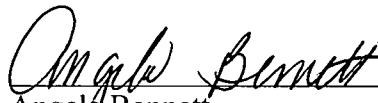
**PROOF OF SERVICE**

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I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated December 18, 2015, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.  
This 18<sup>th</sup> day of December, 2015.

  
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