STATE OF SOUTH CAROLINA

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SC Court of Appeals

IN THE SUPREME COURT

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Certiorari to Beaufort County

Kristi Lea Harrington, Circuit Court Judge

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Opinion No. 5395 (S.C. Ct. App. filed March 23, 2016)

12-GS-07-001633

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THE STATE,

RESPONDENT,

V.

GERALD BARRETT,

APPELLANT

APPELLATE CASE NO. 2013-002158

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PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 20, 2016.

## QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming the trial court's qualification of the forensic interviewer who interviewed the complainant as an expert in "child sexual abuse characteristics and behavior" in contradiction of this Court's decision in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015)?

2.

The State announced its intention to introduce expert testimony on the characteristics of child sexual abuse and produced discovery associated with this expert on the Thursday before petitioner's Monday trial. The trial judge denied petitioner's motion for a continuance to obtain a counter-expert. Did the Court of Appeals err in affirming the denial of a continuance by holding that petitioner was on notice of the State's expert witness from "[p]rior case law?"

## STATEMENT OF THE CASE

On August 23, 2012, a Beaufort County grand jury indicted petitioner for second degree criminal sexual conduct with a minor, lewd act on a minor under the age of sixteen, and kidnapping. R. 333 and Supp. R. 1. On March 28, 2013, petitioner was reindicted for the same charges with the dates in the indictments changed after petitioner issued a notice of alibi. Supp. R. 5. On May 20, 2013, petitioner was tried before the Honorable Kristi Lea Harrington and a jury. R. 1. Mary Concannon and Benjamin Shelton represented the State. R. 2. Trasi Campbell represented petitioner. R. 5, ll. 16 – 17. The jury acquitted petitioner of kidnapping. R. 283, ll. 3 – 23. The jury convicted petitioner of lewd act. R. 283, ll. 3 – 23. The jury could not reach a verdict on the criminal sexual conduct charge. R. 283, ll. 3 – 23.

Judge Harrington deferred sentencing so a presentence investigation could be conducted. R. 291, l. 24 – 292, l. 11. On October 2, 2013, Judge Harrington held a sentencing hearing and sentenced petitioner to twelve years' imprisonment suspended upon the service of nine years' imprisonment and four years' probation. R. 323, l. 20 – 324, l. 18. The court also imposed GPS monitoring and required registration as a sex offender. R. 323 l. 20 – 324, l. 18.

On November 10, 2015, the Court of Appeals heard oral argument. App. 1. The panel consisted of Judges Short, Lockemy, and Geathers. App. 1, 10. On March 23, 2016, the court issued a published opinion affirming petitioner's conviction. App. 1. On May 20, 2016, the court denied rehearing. App. 25. This petition follows.

## STATEMENT OF FACTS

In this close case with no evidence of physical abuse, the jury acquitted petitioner Gerald T. Barrett, Jr. ("Barrett") of one charge (kidnapping) and could not reach a verdict on another charge (criminal sexual conduct). R. 283, ll. 1 – 23. The complainant in this child sex abuse case ("Minor") was fifteen years old at the time of trial and fourteen when she alleged the abuse occurred. R. 95, ll. 6 – 18. She was living with her mother and her mother's boyfriend ("Shawn"). R. 95, ll. 21 – 22. Barrett was a friend of her mother's. R. 97, ll. 7 – 8. Minor had known Barrett since she was "little." R. 97, ll. 11 – 13.

Minor claimed that on the day the abuse occurred, she attended the St. Patrick's Day parade in Hilton Head with her mother, Shawn, and their friends. R. 98, ll. 7 – 24. Minor went home after the parade and was babysitting a child. R. 98, l. 25 – 99, l. 12. During the evening, her mother and Shawn returned and their friends came over for a party. R. 99, ll. 13 – 21. R. 81, ll. 1 – 14. Barrett came to the party. R. 81, ll. 24 – 25.

According to Minor, the adults were on the porch and she was inside sitting on a couch watching television. R. 99, l. 19 – 100, l. 22. Barrett entered the room and sat down on the couch. R. 100, l. 23 – 101, l. 9. Minor moved to a chair. R. 101, ll. 10 – 12. Barrett followed her to the chair. R. 101, ll. 19 – 22. Minor claimed Barrett put his hand under her clothes and digitally penetrated her vagina. R. 102, ll. 16 – 103, l. 11. The solicitor asked Minor what she was doing "[w]hen he's doing this," and Minor replied, "Texting." R. 183, ll. 12 – 13.

Minor left the chair and went upstairs to her sister's room. R. 183, ll. 14 – 19. She awakened her sister and they talked, but Minor did not tell her sister about the alleged abuse. R. 103, l. 20 – 104, l. 8. Minor fell asleep in her sister's room and then moved to her room after waking up. R. 104, ll. 9 – 14. She got in the bed and went to sleep. R. 105, ll. 10 – 11. Even

though she claimed she had just been the victim of a sexual assault, Minor did not lock the door. R. 118, l. 21 – 119, l. 6. The doors to her room were made of glass and people could easily see into her room. R. 119, ll. 7 – 11.

Minor stated she was awakened by footsteps. R. 105, ll. 12 – 13. She pretended to be asleep. R. 105, ll. 14 – 15. Barrett laid down on the bed and began touching her "lower private area." R. 106, l. 10 – 107, l. 1. She alleged Barrett held her down and had sexual intercourse with her. R. 107, l. 13 – 108, l. 20. She did not scream or call for help. R. 108, ll. 21 – 22. Barrett "[j]umped up and left" after he heard a noise. R. 109, ll. 3 – 4. Minor went to the bathroom, urinated, and noticed blood and "[s]omething weird" that was white in color. R. 109, ll. 9 – 18. She took a shower, locked her door, and went to sleep. R. 109, ll. 15 – 23. Barrett received text messages from Barrett asking her to come downstairs, but she deleted them. R. 120, ll. 10 – 21. R. 123, l. 20 – 124, l. 1. Minor washed her clothes that she claimed had blood on them. R. 119, l. 21 – 120, l. 9.

Minor testified that she did not intend for adults to find out about the alleged abuse. R. 110, l. 17 – 112, l. 21. Minor claimed the first person she told about the alleged abuse was her little sister. R. 110, ll. 17 – 23. She testified that she "had to tell my grandma" because her sister told, "and my grandma made me tell her everything." R. 111, ll. 22 – 25. She testified that she told her peers (two female friends and her boyfriend) about the abuse before her step-grandmother found out from her little sister. R. 110, l. 24 – 111, l. 21.

Minor's step-grandmother was the State's first witness. R. 70, ll. 15 – 20. She stated that Minor told her about the abuse during spring break. R. 71, ll. 18 – 22. She said that Minor told her the abuse occurred "around St. Patrick's Day." R. 72, ll. 7 – 8. She first contacted Minor's father and then called law enforcement. R. 72, ll. 13 – 21. The step-grandmother could not

remember telling law enforcement that the abuse occurred "one to two weeks prior to the conclusion of school," but admitted that if that information appeared in a report it might be more accurate than what she could remember. R. 74, ll. 11 – 21. The State's lead investigator admitted that in a report made to police on July 3, 2012, the step-grandmother stated, "[Minor] advised the incident occurred one to two weeks prior to the conclusion of school." R. 198, ll. 10 – 14. At no point did the step-grandmother mention finding out about the abuse from Minor's sister and wringing the information from Minor. The witnesses were sequestered. R. 59, ll. 4 – 6.

Minor was examined by a pediatric nurse practitioner in August 2012. R. 165, ll. 19 – 20. R. 173, ll. 4 – 10. The nurse stated, "There were no findings on her exam." R. 173, ll. 9 – 10. She stated the hymen had no disruptions, tears, notches, or clefts. R. 173, ll. 11 – 20. The nurse testified this did not mean Minor had never had sex. R. 169, l. 17 – 171, l. 24.

Minor's mother did not testify. Minor's sister did not testify. Other than Shawn, none of the other adults who were at the party testified. The jury acquitted Barrett of kidnapping. R. 283, ll. 18 – 20. The jury convicted Barrett of committing a lewd act. R. 283, ll. 21 – 23. The jury could not reach a verdict on the criminal sexual conduct charge. R. 283, ll. 10 – 14.

## ARGUMENT

1.

The Court of Appeals erred in affirming the trial court's qualification of the forensic interviewer who interviewed the complainant as an expert in "child sexual abuse characteristics and behavior" in contradiction of this Court's decision in *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015).

This Court should grant certiorari because the Court of Appeals' published decision is in conflict with this Court's decision in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). Rule 242(b)(3), SCACR. In both Anderson and this case, the expert conducted the forensic interview of the complainant. In both Anderson and this case, the former forensic interviewer was given a different name by the solicitor to avoid the Supreme Court's decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). In Anderson, the new name for the forensic interviewer was an expert in "child abuse assessment." Here, the forensic interviewer was renamed an expert in "child sexual abuse characteristics and behavior." In both Anderson and this case, the renamed forensic interviewers bolstered the complainant's testimony by mirroring the allegations of abuse.

*How the Issue Was Raised at Trial*

Petitioner filed a motion opposing the qualification of forensic interviewer Kendra Twitty ("Twitty") as an expert and to exclude her testimony. R. 9, ll. 11 – 25. R. 327-30. Twitty conducted the forensic interview of Minor. R. 8, ll. 1 – 16. Citing State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), petitioner argued that courts may not qualify forensic interviewers as expert witnesses and that their interviews are not scientific. R. 327-30. Judge Harrington heard argument on this motion in conjunction with a motion for a continuance (raised in Question 2 of this petition) prior to trial. R. 5, l. 22 – 17, l. 7.

The State conceded that Kromah barred qualification of a forensic interviewer as an expert. R. 11, ll. 7 – 12. However, the Thursday before the trial began,[1] the solicitor informed the defense they intended to introduce testimony of "Child Sexual Assault Accommodation Syndrome" through the forensic interviewer. R. 6, ll. 3 – 12. The solicitor argued that instead of qualifying the forensic interviewer as an expert in forensic interviewing, they should be allowed to qualify her as an expert "in the field of child sexual abuse counseling and treatment." R. 11, ll. 7 – 18. The solicitor stated her intention to have the forensic interviewer testify concerning "delayed reporting, who they report to, why they choose to report to the sort of individuals, different aspects regarding, not [Minor] in particular, just general – generalized what – regarding these victims." R. 8, l. 19 – 9, l. 1. At the conclusion of the pretrial hearing, Judge Harrington denied the motion for continuance and deferred ruling on the expert issue until later in the trial. R. 16, l. 24 – 17, l. 7.

Following jury selection and other pretrial matters, the trial court again took up the issue of whether the forensic interviewer could be qualified as an expert and allowed to testify. R. 28, l. 1 – 50, l. 17. Petitioner argued that the State should not be allowed to offer testimony outside of the bounds of Kromah. R. 28, ll. 1 – 22. The solicitor again reiterated that they would not intend to qualify Twitty as an expert in forensic interviewing but instead, pursuant to State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) "as an expert in sexual abuse counseling and treatment for a child's sexual abuse trauma recovery." R. 28, l. 23 – 29, l. 13. The solicitor stated that the forensic interviewer would not be testifying "specifically about [Minor]." R. 28, ll. 8 – 13.

When asked by the trial judge the relevance of this testimony, the solicitor stated:

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[1] The trial began on a Monday.

> Well, [Minor] will be able to testify as to what she did after the sexual abuse occurred. And [Twitty]'s testimony is just shows – it is the State's intention to have [Twitty] testify that different patterns of behavior are commonplace in child sexual abuse victims.

R. 30, ll. 2 – 7. Petitioner again objected that if "Ms. Twitty wants to testify as a child sexual abuse counseling and trauma expert, that's not relevant to this case." R. 30, ll. 18 – 20. Petitioner further argued that such testimony about the late disclosure was tantamount to vouching for Minor's credibility. R. 31, ll. 1 – 12. After the trial judge asked the solicitor if the forensic interviewer would just be drawing inferences out of "textbooks," the solicitor responded Twitty would be basing her testimony on her training, education, and experience. R. 32, l. 21 – 33, l. 3. The solicitor further argued:

> The State's understanding of <u>Kromah</u> is that Kendra **Twitty would not be able to testify to bolster the credibility of Minor.** She could not testify regarding that. We have no intention of asking questions or eliciting any testimony regarding the truthfulness of [Minor's] testimony. **She can, though, lend credibility to her allegations**, and that is where the child sexual Abuse Accommodation Syndrome comes in and that's where the general findings of child sexual abuse victims comes into play with her expertise in those. We have no intention of her speaking **specifically to the credibility of [Minor]**, and I think that's where maybe I got confused over why it's a generalized testimony as opposed to specifics.

R. 34, l. 21 – 35, l. 9 (emphasis added).

Judge Harrington then asked for a proffer of Twitty's testimony. R. 37, l. 24 – 38, l. 1. Twitty attempted to explain "Child Sexual Abuse Accommodation Syndrome." R. 39, l. 23 – 41, l. 14. Twitty stated, "Pretty much, it's a way of adults understanding – understanding what children go through when they're sexually abused and how children handle themselves in an abnormal situation." R. 40, ll. 8 – 11. She stated the syndrome had five "associations" or "phases" or "components:"

> secrecy is one; helplessness is one; entrapment and accommodation is one; delayed disclosure on – delayed disclosure, nonconflicting or unconvincing disclosure; and retraction or recantation would be one as well. And I'm – I may be missing – no. I think that's it.

R. 40, ll. 12 – 20. Twitty stated that not all victims of sexual abuse have these characteristics, but some children have a combination of them. R. 40, l. 21 – 41, l. 4. Twitty opined that while some children who are abused "over excel in things," other children may do the opposite and "have behavior outbursts and get – turn to substance abuse, cutting, other behaviors that are – whatever they're doing to accommodate the abuse that's happening to them." R. 41, ll. 5 – 14. She admitted she had never been through any special training specifically for "Child Sexual Abuse Accommodation Syndrome." R. 41, ll. 15 – 19.

Three times Twitty testified that a layperson would be able to recognize these characteristics just as she would. R. 42, ll. 7 – 10. R. 42, l. 24 – 43, l. 5. R. 43, ll. 21 – 23. Twitty also testified that "Child Sexual Abuse Accommodation Syndrome" was "not really a syndrome" but "[c]haracteristics, I guess you could say." R. 43, ll. 6 – 11. She agreed with defense counsel that accommodation syndrome could not prove that abuse has occurred. R. 45, ll. 8 – 10. Twitty said that it was not a diagnostic tool. R. 45, ll. 15 – 17. When defense counsel finally asked what use it had, Twitty answered the "use it provides to me is educating, I guess you would say, the laypeople, the families, the world about what it's like for a child that is sexually abused." R. 45, ll. 18 – 22. Twitty also admitted that the problems children have could be from "a lot of other issues, not necessarily just child sexual abuse." R. 46, l. 24 – 47, l. 7.

Following Twitty's proffered testimony, defense counsel argued that the State would use it only as "a rehabilitation tool" to explain defects in Minor's testimony such as the delay in reporting. R. 48, l. 14 – 49, l. 9. Defense counsel also argued that it was "pseudoscience" and

should not be admitted. R. 49, ll. 5 – 9. Again citing Schumpert, the State argued it was admissible because Twitty's "specialized knowledge… gives rise to indicate that those particular characteristics could be indicative of child sexual abuse. **Not always, but sometimes.**" R. 49, ll. 10 – 19 (emphasis added). Judge Harrington decided to withhold ruling until she heard Minor's testimony. R. 50, ll. 15 – 17.

*The Trial Judge's Ruling*

After Minor testified, Judge Harrington asked the solicitor what testimony she planned to elicit from Twitty. R. 125, l. 25 – 126, l. 2. The solicitor stated she planned to elicit the date and time of the interview, the demeanor of Minor, and then qualify Twitty as an expert "regarding the behavior of and trauma of child sexual abuse victims." R. 126, ll. 3 – 17. Defense counsel argued the testimony was inadmissible, that the syndrome had never been approved as a field of expertise in South Carolina, and that it was irrelevant on the issue of delayed disclosure because defense counsel intentionally chose not to cross-examine Minor regarding how long it took her to report the sexual assault. R. 126, l. 24 – 127, l. 18. The court ultimately ruled that she would allow "limited testimony… to discuss generally behavioral evidence as to delayed disclosure." R. 130, l. 21 – 131, l. 7. The trial judge noted defense counsel's exception to the ruling. R. 131, l. 8. After *voir dire* and over the defense's objection, Judge Harrington told the jury that Twitty was "qualified in the area of—as a mental health professional, specifically in the area of child sexual abuse characteristics and behavior. . . ." R. 143, ll. 11 – 14.

*The Court of Appeals' Ruling*

The Court of Appeals held that qualification of Twitty was not "reversible error." Barrett at 128, 785 S.E.2d at 389. The court acknowledged Anderson's conclusion that a forensic interviewer who met with the child should not be qualified as an expert, but interpreted this Court's

"better practice" language as merely advisory. Id. at 128-31, 785 S.E.2d at 389-91. The court stated that "although the Anderson court offered cautionary advice, it did not prohibit outright the practice of qualifying the forensic interviewer who conducted the alleged victim's forensic interview as an expert in child abuse assessment." Id. at 130, 785 S.E.2d at 390.

*Twitty's Testimony Before the Jury was Inadmissible under* Anderson

Especially given the fact that Twitty interviewed Minor, Twitty's testimony violated the bounds of Anderson. Twitty described her interview with Minor. R. 136, l. 1 – 138, l. 8. One of Twitty's first statements to the jury was that she worked with children who "**have been** sexually abused." R. 134, l. 20 – 135, l. 4 (emphasis added). Twitty told the jury that Minor was referred to her by the Beaufort County Sheriff's Office. R. 136, ll. 4 – 8. She described Minor as "very quiet and shy and closed and guarded." R. 136, ll. 18 – 21. Twitty said Minor "shut down" when asked about the abuse and Twitty had her write down her allegations. R. 137, ll. 1 – 15. They "talked about what she wrote down." R. 137, ll. 9 – 15. When the solicitor verified that Minor was "eventually able to—to write or verbalize what happened," Twitty responded, "That's correct." R. 138, ll. 6 – 8. The jury was therefore well aware that Twitty interviewed Minor and knew the substance of her allegations.

Twitty tailored her supposedly "generalized" testimony regarding delayed disclosure to fit the facts of this case. She testified that children usually "never tell" and an adult usually finds out by accident, which matched Minor's claims that she had to tell her step-grandmother because her sister told. R. 144, ll. 8 – 9. R. 145, ll. 2 – 19. R. 111, ll. 22 – 25. Twitty's testimony was tailored to match Minor's testimony that children usually tell peers, as Minor testified she told her friends and boyfriend before her step-grandmother discovered the allegations from the sister. R. 110, l. 24 – 111, l. 21. R. 145, ll. 2 – 19. The fact that Twitty testified about characteristics

that matched Minor's allegations—especially after the jury learned that she had conducted a forensic interview of Minor—could only be offered to show that Twitty believed Minor's allegations. The clear inference was that Twitty believed Minor had been abused.

Anderson stated that to "allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility." Id. at 218-19, 776 S.E.2d at 79. This Court stated that the forensic interviewer in Anderson "vouched for the minor when she testified only to those characteristics which she observed in the minor." Id. See also State v. Favoccia, 51 A.3d 1002, 1023 (Conn. 2012) (referring to such prosecution tactics as "indirect vouching"). As shown above, the jury knew that Twitty interviewed Minor and Twitty recited "general" abuse characteristics that matched Minor's allegations. The solicitor even described Twitty's purpose as to "lend credibility" to Minor's testimony. R. 34, l. 21 – 35, l. 9. The impermissible inference that Twitty believed Minor was inescapable.

While the Court of Appeals did not expressly couch its discussion in terms of harmless error, the attempt to distinguish Barrett's case from Anderson reads like a harmless error analysis. Just like in Anderson, Barrett's case "turned solely on the credibility of the minor and of Appellant." Anderson at 219, 776 S.E.2d at 79. This case was close and Minor's claims—especially that she was texting while being sexually assaulted at a party with numerous adults close by—were problematic. The jurors obviously did not believe all of Minor's claims. They acquitted Barrett of kidnapping despite Minor's testimony that he held her down. R. 107, ll. 22 – 24. The jurors could not reach a verdict on the CSC charge. Other than Shawn, the State presented no witnesses who were present the night of the party. On the facts of this weak case, the Court of Appeals erred in its application of Anderson. This Court should grant certiorari and reverse.

2.

The State announced its intention to introduce expert testimony on the characteristics of child sexual abuse and produced discovery associated with this expert on the Thursday before petitioner's Monday trial. The trial judge denied petitioner's motion for a continuance to obtain a counter-expert. The Court of Appeals erred in affirming the denial of a continuance by holding that petitioner was on notice of the State's expert witness from "[p]rior case law."

This Court should grant certiorari on Issue 2 because the Court of Appeals' decision has the potential to allow rampant discovery abuse by solicitors. The Court of Appeals held:

> **Prior case law** is clear that the topic of general behavioral characteristics of sexually abused children could arise in a CSC case with a minor. . . . **Therefore, Barrett was on notice** that the trial might include testimony regarding general behavioral characteristics of sexually abused minors. Accordingly, the trial court did not abuse its discretion in declining to grant a continuance.

Barrett at 135, 785 S.E.2d at 392 (emphasis added) (citation omitted). If the Court of Appeals' decision is allowed to stand, it will promote trial by ambush. This Court should not allow the vast universe of potential topics covered in precedent to substitute for notice—in a timely fashion—of the specific experts who will testify for the State. The decision below places an insurmountable notice standard on defense counsel in preparing for trial and in the PCR actions to follow.

Our state's discovery rules and the requirements of Brady v. Maryland, 373 U.S. 83 (1963) "each has the same goal of ensuring the criminal defendant's right to a fair trial." State v. Kennerly, 331 S.C. 442, 454, 503 S.E.2d 214, 220 (Ct. App. 1998). Rule 5 requires disclosure, upon request by the defense, of expert reports which are material to the preparation of the defense or intended to be used by the State at trial. S.C. R. Crim. P. 5(a)(1)(D).

Discovery protections for criminal defendants in this State remain at the barest minimum. Civil defendants can use interrogatories, requests for production, requests for admissions, and

depositions to ensure a fair trial. S.C. R. Civ. P. 26, 30, 33, 34, 36. Civil lawyers may also issue their own subpoenas. S.C.R. Civ. P. 45(a)(3). Criminal defense attorneys lack access to any of these tools. In federal prosecutions, the government has a duty to disclose expert witnesses. Fed. R. Crim. P. 16(a)(1)(G). Upon a defendant's request, the government must "give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(G). In Brady, the Court stated that the aim of due process is "avoidance of an unfair trial to the accused." Brady, 373 U.S. at 87. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Id. See also S.C. Const. Art. I, § 3 (South Carolina due process clause). Refusing to grant a continuance in this case deprived appellant of due process and was an abuse of discretion.

In this case, Barrett's trial started on a Monday. The previous Thursday, the State "dropped off" a "packet of information" at defense counsel's office. R. 6, l. 3 – 7, l. 2. The information was the State announcing its intention to introduce expert testimony on "Child Sexual Assault Accomodation Syndrome" through Twitty. R. 6, l. 3 – 7, l. 2. Defense counsel researched the issue over the weekend and determined that she needed time to hire an expert witness to contest the State's expert. R. 6, l. 3 – 7, l. 2. As defense counsel put it, "There are some research articles that, you know, label it and put it in the area of junk science, and there are others that find some credibility to it. And with no counter argument, I'm sort of left, in my opinion, being ineffective for Mr. Barrett." R. 6, l. 3 – 7, l. 2. When Judge Harrington asked defense counsel if she was prepared to proceed if this evidence were excluded, she responded, "I am." R. 7, ll. 3 – 5.

The solicitor admitted handing over this information on the Thursday before trial. R. 7, ll. 7 – 13. The State opposed the continuance, inexplicably by arguing that the expert evidence was

"well established in the area of child sexual abuse cases." R. 7, ll. 7 – 13. Despite the fact that the State admitting putting defense counsel on notice of the expert testimony on Thursday, the State argued that since Twitty was the forensic interviewer, that appellant should have already been on notice. R. 7, l. 16 – 9, l. 10. Defense counsel readily agreed that she knew of Twitty as the forensic interviewer, but argued that, after Kromah, she did not think expert testimony from Twitty would be admissible and did not know until Thursday that the State intended to introduce "Child Sexual Assault Accommodation Syndrome" evidence through Twitty. R. 9, l. 11 – 11, l. 4. The trial judge denied the motion for a continuance "based upon the fact that she was named as the interviewer." R. 16, l. 24 – 17, l. 7.

Failing to present expert testimony in response to the State's case prejudices a criminal defendant and the court should have granted a continuance in this matter. In McKnight v. State, 378 S.C. 33, 43-44, 661 S.E.2d 354, 359 (2008), the defendant received a new trial in part because she was prejudiced by counsel's failure to seek a continuance to secure a favorable expert's testimony. In State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002), the Court reversed based on the trial court's denial of a continuance to obtain transcripts of a previous trial.

While it is true, as stated in McMillian, that reversals for failure to grant a continuance are rare, most of the cases upholding the denial point to some failure on defense counsel's part. See, e.g., State v. Register, 323 S.C. 471, 482, 476 S.E.2d 153, 160 (1996) (defense counsel waited until a month before trial to investigate DNA evidence). But see State v. Nicholson, 366 S.C. 568, 579, 623 S.E.2d 100, 105-06 (Ct. App. 2005) (finding that prosecution had no obligation to disclose sexual abuse expert). In this case, defense counsel was blameless. The State admitted not informing the defense of the expert testimony until it was too late for the defense to obtain its own expert. Defense counsel could not have anticipated this expert testimony would be admitted after

Kromah. If the Court finds that such testimony was properly admitted and a proper subject for expert testimony, then the trial court abused its discretion in refusing to allow the defense time to obtain its own expert to counter this damaging evidence.

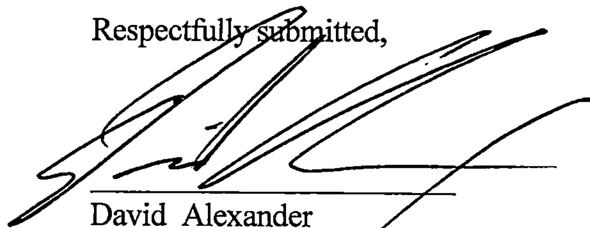
As discussed in Question 1, Twitty was allowed to buttress Minor's testimony with opinions that bore the imprimatur of a court-qualified expert. Twitty admitted that studies had been done on false accusations and that delayed disclosure was more common in cases involving years of repeated abuse. R. 150, l. 17 – 151, l. 17. R. 164, ll. 10 – 14. These admissions show the importance of the defense having its own expert to rebut Twitty's testimony and that the defense could have obtained an expert to explain conflicts in the field and whether Twitty's opinions had any scientific basis. This case was close and the jury, in acquitting Barrett of kidnapping and failing to reach a decision on the criminal sexual conduct charge, necessarily disbelieved parts of Minor's story.

If not reversed, the Court of Appeals' decision will embolden solicitors to ambush the defense with late disclosures of experts. As a practical matter, solicitors still retain control of when cases are called for trial. See State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). Combined with this power, this language in the Court of Appeals' opinion will promote the denial of notice and time to prepare for defendants. This Court should grant certiorari and reverse.

## CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's conviction.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 28th day of June, 2016