

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal From Beaufort County  
Hon. Carmen T. Mullen, Circuit Court Judge  
Appellate Case Tracking No. 2016-001934  
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S.C. SUPREME COURT

The State,

Respondent,

v.

James Simmons, Jr.,

Petitioner.

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Opinion No. 2016-UP-182 (S.C. Ct. App. filed April 20, 2016)  
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**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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## STATEMENT OF QUESTIONS PRESENTED

- I. Petitioner's issue regarding the testimony of the child victims' pediatrician is clearly not preserved for review on appeal and never should have been addressed by the Court of Appeals. Further, the issue is without merit as the testimony was for purpose of medical diagnosis. Finally, any error is entirely harmless in light of the cumulative testimony in the record.
- II. The child victim was clearly competent to testify and the Court of Appeals properly found the trial court's ruling allowing the testimony was correct.

## STATEMENT OF THE CASE

### **Procedural History**

Petitioner was indicted in Beaufort County for two counts of criminal sexual conduct with a minor in the first degree (2102-GS-07-1536 & -1537). (R. p. 379-380; 382-383). On June 18, 2013, Petitioner proceeded to trial before the Honorable Carmen T. Mullen and a jury. He was found guilty as charged and was sentenced to two concurrent terms of life imprisonment. (R. p. 355, line 20 – 356, line 5; 381; 384).

Petitioner filed a motion for new trial and a hearing on the motion was convened on October 31, 2013. The motion was denied at the conclusion of the hearing. (R. p. 369, lines 15-16; 371-378).

Petitioner filed a Notice of Appeal, and after briefing, the Court of Appeals heard argument on March 9, 2016. By unpublished opinion dated April 20, 2016, the Court of Appeals affirmed Petitioner's convictions and sentences. Petitioner's Petition for Rehearing was denied on August 18, 2016, and Petitioner filed a Petition for Writ of Certiorari.

This Return to the Petition for Writ of Certiorari follows.

### **Factual Background**

Petitioner is the father of Victim 1 and Victim 2 who are twin boys. The twins lived in a mobile home on family property on Saint Helena Island beginning when they were eight months old. They were initially cared for by Mamie Ruth Simmons and later by Petitioner's first cousin, Rose Simmons, after Mamie Ruth died. (R. 87, lines 3-23; R. 84, lines 12-14; R. 153, lines 16-23). In 2008, when the Victims were approximately eight years of age, Petitioner moved to the family house located on the family property next door to Rose's mobile home. Later, Petitioner's sister, her husband, and their three children joined Petitioner in that home. (R. 62,

lines 8-15; R. 72, lines 9-12; R. 89, line 1 – R. 90, line 8; R. 92, line 19 – R. 93, line 6; p. 101, lines 17 – 25; p. 125; R. 153, line 24 – R. 154, line 4; R. 242, lines 1-9; . 243, lines 1-25; R. 261, line 23 – R. 262, line 22; p. 273). Petitioner lived in the family home until approximately the summer of 2009 after the Victims completed the third grade. (R. p. 94, line 18 – p. 95, line 7; p. 97, lines 3 – 13). During the time that Petitioner lived in the family home, either Petitioner's girlfriend, Mahogany, or the mother of the twins, Cynthia Goethe, lived with him for periods of time. (R. 97, line 22 – R. 98, line 7; R. 102, lines 20-24; R. 249, lines 15-18; R. 250, lines 7-15; R. 263, lines 2-19; R. 278, line 1 – R. 279, line 7). The Victims frequently visited with Petitioner in the family house, including staying overnight, bathing, eating and dressing there. (R. 88, lines 22-25; R. 90, lines 3-11; R. 91, line 18- p. 92, line 18; R. 154, lines 18-25; R. 280, lines 4-9. When the Victims slept at the family house, they would either stay in Petitioner's bedroom with him or they would sleep with their little cousins. (R. 93, lines 9-19).

After Petitioner moved away and beginning in October 2009, great-uncle and great-aunt, Johnnie and Cynthia Simmons, began to take a more active role in the Victims' lives because Rose was unable to care for them on a full-time basis due to their behavior problems at school. (R. 72–73; R. 90-91; R. 94-96; R. 99-100; R. 143; R. 191-194; R. 209; R. 210). Johnnie and Cynthia Simmons first cared for the Victims on weekends but in May 2010, the Victims lived with them on a full time basis. Johnnie and Cynthia eventually adopted the Victims. (R. 95-96; 100; R. 185; R. 211-212; R. 65-68; R. 185-186; R. 198; R. 216).

After moving in with Johnnie and Cynthia, the Victims initially did well in school but began having behavior problems again at the new school after a few months. (R. p. 187, line 11 – p. 188, line 2). Cynthia and Johnnie questioned the Victims about their bad behavior at the new school, including looking over bathroom stalls at others and feeling the private area of another

student. The Victims revealed that they were sexually assaulted when the Victims lived on the family property. (R.80; p. 191-196; p. 206-207; p. 213-214). Cynthia took the Victims to their pediatrician. (R. 193-194). She testified at trial that Victims were still wetting the bed between two to four times per week and that both initially experienced nightmares. (R. pp. 195, lines 5 – 21; 196, lines 1 – 5). When she was caring for them on the weekends and encountered problems with bathing, she noticed once that Victim 1's anal area was completely red. (R. 188, line 6 – – p. 190, line 8).

Victim 1 testified Petitioner used his hands to touch Victim 1's penis and butt several times, made Victim 1 touch Petitioner's penis, made Victim 1 put his penis in Petitioner's mouth, and Petitioner put his penis inside Victim 1's butt. (R. p. 131, line 1 – p. 132, line 10; p. 133, line 25 – p. 134, line 19; p. 146, lines 18 - 23). Victim 1 testified that the episodes occurred at night at Petitioner's house in Petitioner's bedroom when everyone was asleep. Victim 1 noted that Petitioner threatened him if he told anyone. (R. pp. 132, lines 17-23; p. 148, lines 17 – 24).

Victim 2 described how Petitioner touched his penis with his hands more than once and always in Petitioner's bedroom, and threatened him if he told anyone. (R. p. 155, line 10 – p. 156, line 18; pp. 157, lines 15-20). During the interview with Hope Haven, Victim 2 reported that Petitioner's penis touched his butt. (R. p. 178, lines 13 – 24). Victim 1 also contended that Petitioner brought men home and forced him to perform oral sex on the men. (R. pp. 67 lines 2-19; p. 84; pp. 140, line 12-23; pp. 141, lines 13-19; 146, lines 12-16). The Victims described that Petitioner penetrated their anuses with his penis and made them perform oral sex on him and he on them. (R. p. 78).

The Victims were examined by their pediatrician and also by a pediatric nurse practitioner for Hope Haven, focusing on the body areas disclosed by the Victims as subject to

abuse. Victim 1 disclosed multiple episodes of forced oral copulation and penile/anal penetration by Petitioner and exposure to pornography while living "over there." He also reported an itchy rash on his bottom, and soiling accidents. Their physical examinations of the Victims were normal which occurs in ninety-seven (97) percent of children who are sexually abused. (R. pp. 225-230; 235). Victim 2 disclosed oral copulation and penile/anal contact and bed-wetting. The episodes of bed-wetting were described as a common behavioral symptom for abused children.

## ARGUMENT

**I. Petitioner's issue regarding the testimony of the child victims' pediatrician is clearly not preserved for review on appeal and never should have been addressed by the Court of Appeals. Further, the issue is without merit as the testimony was for purpose of medical diagnosis. Finally, any error is entirely harmless in light of the cumulative testimony in the record.**

The Court of Appeals correctly found the issue regarding whether the pediatrician's testimony went outside the scope of statements necessary for medical purposes was not preserved and the Court should have ended its analysis at preservation. Further, the testimony did not constitute hearsay because it was properly admitted for medical diagnosis purposes, especially in light of the fact the pediatrician also provided treatment regarding the child victims' behavioral issues. Finally, any possible error in the admission of the testimony was entirely harmless given the cumulative evidence in the record.

Dr. James Simmons was called as the first witness at trial and was qualified as an expert in the area of pediatric medicine. He testified that he treated Victims from the ages of eight months until about one and one-half years before trial. He diagnosed Victims with attention deficit disorder when they were around the age of seven and prescribed medication for the condition. He also provided a diagnosis of possible opposition defiance disorder but no other mental illness for either Victim. (R. p. 22- 24; 45). Dr. Simmons recalled treating one of the victims for an irritated penis, uncontrollable bowels, and abdominal pain. (R. pp. 25 - 26). He opined that an irritated penis, uncontrollable bowels and abdominal pain could be the result of sexual abuse. (R. p. 27). He outlined classic textbook symptoms of sexual abuse to include a general behavior change, inappropriate behavior in school and urinary or stool incontinence. (R. p. 27). He stated that he saw the Victims in September 2010 for sexual abuse. (R. pp. 27 - 28).

After speaking with Victims' parents, Dr. Simmons spoke with Victim 1 alone, asked what happened, and referred Victim 1 for a forensic examination. (R. p. 28). At trial, Dr. Simmons was asked: "And Doctor, can you tell me what - - in talking to [Victim 1] what he told you happened." Petitioner then objected stating: "Your Honor, I object. It's hearsay. It's objectionable under 803. And certainly, he could limit it to the child's disclosure of date and time, and that's it." (R.29). The State then explained the testimony was being admitted pursuant to a hearsay exception and the court interposed "For medical diagnosis?" The State responded "purpose of medical diagnosis, exactly." The trial court's response was "You can go ahead." (R.29). In effect, the trial court ruled that testimony was admissible as long as it met the medical diagnosis exception.

Thereafter, Dr. Simmons testified that Victim 1 reported that when he was in the custody of Rose Simmons, they were watching "porn" and Petitioner made "them suck his penis." Dr. Simmons testified that Victim 1 reported a secret pact with Petitioner not to tell anyone. (R. p. 30, lines 1 – 24). Upon receipt of this information, Dr. Simmons terminated the discussion so as not to imprint Victim 1 with ideas. (R. p. 31; 32). Petitioner **never objected** when Dr. Simmons offered this specific testimony as exceeding the scope of Rule 803(4), SCRE. He never maintained the testimony regarding watching pornography or having a pact with the Petitioner exceeded 803(4)'s exception and was still hearsay.

Dr. Simmons also testified that he conducted a physical examination of Victims but found no physical signs of trauma, which he opined is common. Over objection, Dr. Simmons testified as an expert that the lack of physical findings it is not uncommon because the areas of the body in question heal quickly, the offender might not use anything that would leave marks or

injury, or the abuse is chronic. (R. p. 33; 47). Law enforcement authorities were contacted. (R. p. 31 – 32; 47).

Dr. Simmons was cross-examined by Petitioner on his medical records respecting the Victims and the family history taken. He testified that his records reflect that the Victims' mother suffers from schizophrenia and that in 2011 he increased the medication prescribed for the Victims' treatment of attention deficit disorder. In April 2012, Dr. Simmons noted a possible oppositional defiant disorder which tends to accompany attention deficit disorder. (R. p. 344, line 8 – p. 35, line 8). In 2004, Victim 2 was seen for constipation. (R. p. 35, lines 9 - 21). His records also reflect reports that Victim 2 was stealing medication from the school nurse and was seeing a therapist in May or June of 2011. His notes further reflect that in 2011, Victim 2 was not taking medication for attention deficit disorder and was having difficulty interacting with his peers but in late 2010, Victim 2 was not having difficulty sleeping or experiencing behavior problems. (R. p. 36, line 7 – p. 40, line 15). Dr. Simmons testified on cross-examination that Victim 1 reported that he "learned some faggot stuff." (R. 42, lines 4-11). Dr. Simmons last treated the Victims on November 22, 2011. (R. p. 43, lines 10-11).

Beaufort County Sheriff's investigator Jeremiah Fraser was called as the second witness and testified, in pertinent part, that based upon his investigation and interviews, Petitioner was identified as the suspect in the allegations of sexual abuse and that the sexual abuse occurred in the home on the family property on Saint Helena Island. (R. p. 54, line 5 – p. 55, line 16; p. 61, lines 10 – p. 62, line 25). On cross-examination by Petitioner, Fraser testified that Petitioner sexually abused the Victim 1 by forcing him to perform oral sex on his friends and on each other. (R. p. 97, line 2 – p. 73, line 13; p. 84, lines 1 - 10). On redirect examination Fraser recounted

the Victims' description of Petitioner penetrating their anuses with his penis and making them engage in acts of oral sex. (R. pp. 784, lines 1 - 18).

A pediatric nurse practitioner, who examined the Victims, testified without objection<sup>1</sup> that Victim 1 disclosed multiple episodes of forced oral copulation, penile/anal penetration and exposure to pornography while living "over there." She stated that Victim 1 identified Petitioner as the perpetrator of the sexual abuse. Petitioner raised no objection to the question or answer as falling outside the scope of Rule 803(4), SCRE, because it exceeded what was necessary for medical diagnosis. (R. p. 226, lines 3 - 20; p. 228, lines 1 - 19). Victim 2 disclosed oral/genital and penile/anal contact to the nurse practitioner.

On cross-examination, the pediatric nurse practitioner confirmed that she was given information that Victim 1 was being forced to perform oral sex on Petitioner and Petitioner's friends. (R. p. 235, lines 12 - 23). She additionally confirmed sources reporting that Victims were forced to perform oral sex on Petitioner and each other and were forced to watch pornographic movies. (R. p. 236, line 3 - 25).

In his post-trial motion, Petitioner merely complained that the trial court erred in allowing the pediatrician to testify to unidentified hearsay statements made by Victim 1 and Victim 2 as being in violation of Rule 803(4), SCRE. (R. p.371; R. p. 364, lines 3 - 8). In his brief to the Court of Appeals, Petitioner for the first time identifies alleged hearsay statements related by Dr. Simmons which Petitioner asserts fall outside the scope of Rule 803(4) as exceeding what was necessary for medical diagnosis. As noted above, he never contemporaneously objected to the

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<sup>1</sup> Petitioner made a general pretrial motion to bar the pediatric nurse from testifying based upon a vague, inapplicable reference to State v Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). The motion was denied *in limine* when the State indicated it planned to call the pediatric nurse to testify about her physical examination of Victims and the information she received from them for purposes of medical diagnosis. The State explained that the information received by the pediatric nurse practitioner determined the scope of her examination pursuant to Rule 803(4), SCRE. Petitioner did not object in any manner when the testimony was elicited later at trial.

statements at the time they were made on the basis that the statements exceeded 803(4) and never gave the trial court the opportunity to rule on whether the statements were properly admissible under Rule 803(4).

Respondent submits that the issue is not properly preserved for appeal, and instead of merely questioning its preservation, the Court of Appeals should have found the issue not to be preserved. Petitioner failed to make a specific, contemporaneous objection to the trial court to enable the court to consider and rule upon the issue when the testimony was offered at trial. He merely generally objected prior to any testimony being offered to testimony that exceeded time or place. He never addressed the medical diagnosis exception to hearsay and never argued the testimony about which he now complains exceeded the permissible scope of Rule 803(4). His failure to contemporaneously preserve this issue for appeal precludes review by this Court. See State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: “A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.”); State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001) (stating that an objection must be sufficiently specific to bring into focus the precise nature of the purported error so that it can be understood by the trial judge); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (stating the defendant may not argue one ground on appeal and an alternate ground on appeal). This Court should deny the Petition for Writ of Certiorari on this question because it is clearly not preserved for review on appeal.

Second, Respondent submits the information was properly admitted as an exception to the rule against hearsay. In criminal cases, the appellate court sits to review errors of law only.

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). Our appellate courts give great deference when reviewing the evidentiary ruling of the trial court. The admission or exclusion of evidence is left the sound discretion of the trial judge. State v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007). The trial court's ruling on the admissibility of evidence will not be reversed on appeal absent abuse of discretion or the commission of legal error which results in prejudice to the defendant. Id. An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

“Hearsay is an out of court statement offered to prove the truth of the matter asserted therein.” State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. Id., citing Rules 801(c) and 802, SCRE; State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004). Pursuant to Rule 801(d)(1)(D), SCRE, “[i]n South Carolina, a sexual assault victim’s prior statements limited to time and place of the alleged incident are not hearsay if the victim testifies at trial and is subject to cross-examination.” State v. Jeffcoat, 350 S.C. 392, 395, 565 S.E.2d 321, 323 (Ct.App. 2002). The rule “allows other witnesses to testify the victim complained of the assault, but only as to ‘time and place,’ it specifically circumscribes such testimony by ‘excluding details and particulars,’ including the identity of the alleged perpetrator.” Id. at 395, 565 S.E.2d at 323. However, as an exception to hearsay, Rule 803(4), SCRE, provides that “[s]tatements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are not excluded at trial by the hearsay rule. To be admissible, the declarant’s motive in making the statement must be consistent with

the purpose of promoting diagnosis or treatment and the content of the statement must be such as is reasonably relied upon by a medical care provider in making a diagnosis or providing treatment. Willingham v. Crooke, 412 F.3d 553 (4th Cir. 2005). Respondent submits that the statements in question were “reasonably pertinent” to diagnosis or treatment, fall under the exception to the hearsay rule, and were properly admitted as evidence at trial.

In State v. Burroughs, the Court stated that “certainly, a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim.” State v. Burroughs, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct.App.1997). Statements of how and when abuse occurs provide the medical care examiner with specific areas and conditions to focus on for diagnosis and treatment.

The statements in question were made by Victim 1 to his pediatrician in the pediatrician’s office for the purpose of obtaining treatment for physical and emotional trauma, as well as on-going behavioral symptoms experienced by the Victims. The pediatrician treated the Victims’ physical and emotional manifestations for a number of years. In fact, it was the reoccurrence of behavior issues and acting out at school in a sexually related way that prompted the inquiry, disclosure, and examination by the pediatrician. The purpose of the report from Victim 1 was for medical diagnosis and to provide pertinent medical treatment and on-going care. The statements were critical to medical diagnosis because it enabled the pediatrician to know the areas of the Victims’ bodies to explore. The statements also were critical to assess the source and cause of emotional and behavioral symptoms and to address the measure of intervention necessary to remove the possible threat of continued assaults and to assess the impact and extent of the abuse for diagnostic purposes – not only physical trauma but emotional trauma as well. See United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (a doctor must be able to identify physical and

emotional problems that accompany child sexual abuse). The pornography and “pact” not to report the ongoing sexual abuse reflected grooming, betrayal of trust by a parent, and possible long-term emotional abuse that accompanied the physical assaults suffered by the Victims which would direct the type of emotional treatment, or behavioral treatment related to ODD, that might be necessary. The exposure to pornography and the “pact” were possible explanations of the external sources of the Victims inappropriate behavior with other students at school and were reasonably pertinent to treatment of the Victims on-going behavioral issues. State v. Aguallo, 350 S.E.2d 76 (N.C. 1986).

Nevertheless, the Court of Appeals properly concluded any error in the admission of the testimony was harmless. First, because it was cumulative to other evidence properly admitted at trial and, second, because the testimony was insubstantial in view of the evidence presented of Petitioner’s guilt such that it could not reasonably have affected the result of the trial. See State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict).

Any error in admitting the pediatrician’s testimony was harmless because it was merely cumulative to other testimony either un-objected to or specifically elicited by Petitioner at trial. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 443 (1978) (stating that admission of improper evidence is harmless when it is cumulative to other, unobjected-to testimony). The testimony of the pediatrician respecting the identity of the perpetrator was cumulative to testimony offered without objection from Officer Fraser indicating that, based upon his investigation and interviews, Petitioner was identified as the suspect. Petitioner’s identity as the perpetrator was also explored by Petitioner on cross-examination of Fraser. (R. pp. 54–55; 61–62; 78). It is also cumulative to the testimony of the pediatric nurse practitioner which was elicited without

objection on direct examination and by Petitioner on cross-examination. (R. pp. 226; 228; 235; SROA. p.1). The fact that Petitioner exposed the Victims to pornography was also elicited without objection from Petitioner and also explored by Petitioner during his cross-examination of the pediatric nurse. (R. pp. 226; 228; 236). Petitioner's reliance on Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), is misplaced in light of State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), in which a majority of this Court abandoned the theory upon which Petitioner relies.

Even if improperly admitted, Petitioner has not shown the requisite prejudice to support reversal of the convictions. State v. Price, 368 S.C. at 499, 629 S.E.2d at 366. The brief reference to pornography and a "pact," without more, are not critical facts. The evidence might have played a significant role had the Victims suggested they were exposed to pornography each time an assault occurred so as to establish a pattern of conduct; however, that is not the evidence in this case. In view of the very specific, detailed account of the sexual assaults and resulting in documented behavioral difficulties, any possible errors arising from the admission of this testimony was harmless and did not have had an impact on the verdict.

**II. The child victim was clearly competent to testify and the Court of Appeals properly found the trial court's ruling allowing the testimony was correct.**

The Court of Appeals properly found the trial court did not err in allowing the child victim to testify as a competent witness. The trial court fully explored the issue of Victim 1's competency in an *in camera* hearing and properly determined that Petitioner failed to meet his burden of establishing that Victim 1 was not competent to testify.

The record reflects that Petitioner made a pre-trial request for a hearing to determine the competency of the child victims. Petitioner offered that "it's customary with children of this age that your Honor would need to have a competency hearing." (R. 2, lines 20 – 23). Petitioner also offered as support for the motion that the children were seeing a mental health counselor, were prescribed medication for behavioral problems, and that the mother of the victims is schizophrenic which calls their competency into question. (R. p. 3, line 8 – p. 6, line 4). On appeal, Petitioner argues that evidence established Victim 1's inability to distinguish reality from fantasy due to his youth and what Petitioner speculates are mental disorders, which diminished Victim 1's ability to perceive and remember the events with a substantial degree of accuracy. Petitioner also argues that the history of mental illness in Victim 1's family and attention deficit disorder limited his ability to appreciate the importance of telling the truth. However, other than through pure speculation, Petitioner failed to establish that anything interfered with Victim 1's ability to distinguish a lie from the truth or the ability to properly perceive and accurately communicate about the matter in litigation.

The record before this Court reveals that a competency hearing was held out of the presence of the jury before Victim 1 testified at trial. During the hearing, Victim 1 testified that he is twelve years old, is a rising sixth grader, and is home-schooled. (R. p. 104, line 10 – p. 105,

line 2). He provided information about the street and county in which he lives. (R. p. 105, lines 9 - 12). The following colloquy also occurred:

Q: Do you know what it means to tell a lie?

A: Yes, Ma'am.

Q: So if I said that the Judge is a man, would that be the truth or a lie?

A: That's a lie.

Q: That's right. And . . . , is it right or wrong to tell a lie?

A: It's wrong.

Q: And do you promise that everything you tell will be the truth

A: Yes. Ma'am.

(R. 105, line 13 – 24). On cross-examination, the following occurred:

Q: .... have you ever lied?

A: I have to my – my mother now. . . . I've been telling some lies to them, most times about what time that I'd get up in the morning.

Q: Have you ever lied at school?

A: At school? I have lied to some teachers, yes, Ma'am . . .

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Q. Was it right to lie to your teachers?

A: No, ma'am.

Q: Okay. Why did you lie to your teachers?

A: I figured I could get away with some things that I - - that, when I - - I don't think that I could get into trouble for.

Q: So, it's okay to lie if you're probably not going to get into trouble for it, right?

A: It's not good to lie at all.

Q: It's not good to, but if you can get away with it, lying might be okay?

A: No, ma'am.

Q: Is it ever okay to lie?

A: No, ma'am.

(R. p. 106, line 11 – p. 107, line 23). When asked whether he had imaginary friends when he was younger, Victim 1 testified that he played with “some animals around the yard and sometimes (he would) make things on like a piece of paper and . . . play with them . . . (such as a) kite. (R. p. 108, lines 2 – 8). When asked about imaginary friends, Victim 1 stated that he caught a frog the previous night and talked to it. When asked if the frog talked back, Victim 1 responded, “He just croaked, ribbet.” (R. p. 108, lines 13 – 16). When pressed about playing with imaginary friends, Victim 1 stated that he does not hear the friends actually say anything but only in his imagination. (R. p. 108, lines 17 – 21). When asked whether he listens to what “they” tell him, Victim 1 explained that sometimes they tell him not to do things that are wrong and sometimes tell him to do something wrong. He explained that he doesn't want to do something wrong but might feel a lack of control. (R. p. 108, line 17 – p. 109, line 13).

The following colloquy between Victim 1 and the trial judge thereafter occurred:

Q: . . . do you go to church with your grandma – or parents?

A: I go on Saint Helena's Gospel Baptist Church.

Q: Okay. Do you go to Sunday School, or do you actually go in to church.

A: Well, sometimes I used to go to Sunday School when I was over here. .... So we go to real church . . . instead of doing Sunday School . . . . But we hear what they discuss in Sunday School, because they discuss everything before we go into preteen and all that.

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Q: And do you understand that what you're doing here today is important, right?

A: Yes, ma'am.

Q: And you understand that you cannot tell a lie. Is that correct?

A: I understand.

Q: And not in this circumstance, necessarily, but what happens to you if you tell a lie?

A: I get punished, and God, he will – he will write that in his Book of Life, and that'll be met at the Judgment when I go.

Q: Does it hurt you when you tell a lie, too, just in your heart?

A: It hurts me, but most times when I tell a lie, it probably hurts someone else, but mostly it hurts me.

Q: Okay. And I want to make sure. You're going to tell me everything today that's only the truth. You understand that?

A: Yes, ma'am.

Q: And if you don't remember something, and someone asks you a question, I want you to say I don't remember. Okay? You understand that, right?

A: Yes, ma'am.

Q: Because if you can't remember, you can't remember, right?

A: Yes, ma'am.

(R. p. 110, line 5 – p. 1127, line 2).

Petitioner objected to Victim 1's competency contending he has imaginary friends, hears voices and sometimes listens to the voices and allows the voices to overcome his will. (R. p. 113, line 13 – 114, line 7). Petitioner further objected because Victim 1 equivocated about lying and getting away with it and did not understand the difference between telling the truth and a lie.

(R. 114). Petitioner questioned Victim 1's mental capacity and requested an examination to determine Victim 1's mental health. (R. 114, line 8 – p. 115, line 7).

The trial court ruled that Victim 1 was a thoughtful, smart child and that Petitioner's interpretation of Victim 1's testimony was "completely the opposite of what (the court) saw." (R. p. 114, lines 9 – 12). The trial court, who heard and observed Victim 1, determined that Petitioner put words in his mouth that were simply not there." (R. p. 114, lines 11 – 15). See South Carolina Dep't of Social Servs. v. Doe, 292 S.C. 211, 355 S.E.2d 543 (Ct.App. 1987)(stating that in making a determination respecting competency of a witness, the trial judge must rely on personal observation of the child's demeanor and responses to questions posed).

The trial court concluded:

I think he was more than competent. I think he certainly understands right from wrong. He explained that he gets punished when he speaks or tells a lie. The fact that they've put the fear of God in him, if he does tell a lie, that it's going to be written in the Judgment Book, I think just adds that much more credence to the boy understanding the difference between the truth and a lie. I think he's more than competent, and very bright, and very thoughtful. (R. p. 114, lines 9 - 24).

Victim 1 testified following the competency hearing during which he clearly demonstrated an accurate recollection of the sexual assaults perpetrated upon him by Petitioner and clearly demonstrated the ability to express himself concerning the matter in question in a manner as to be understood by the jury. (R. 130-135). He fully recounted the details, including the place, time periods and time of day the sexual encounters occurred, the identity of the perpetrator and described in detail the sexual acts perpetrated by Petitioner. Id. During Petitioner's cross-examination during his trial testimony, Victim 1 admitted to having imaginary friends when he was "little," that he still has one, and that he sometimes hears voices in his head

telling him things. He stated that he listens to the right voice and ignores the wrong one. (R. p. 145).

At the close of the State's case, Petitioner again questioned Victim's 1's mental capacity and ability to accurately recall the events and suggested that the trial court could strike his testimony. The trial court again found Victim 1 to be well-mannered, mature, appropriate in conduct and competent to testify. (R. p. 240). The matter was revisited in a post-trial motion and the trial court ruled similarly. (R. p. 364 -366).

As the Court of Appeals correctly found, every person in South Carolina is presumed competent to be a witness except as otherwise provided by statute or rule. Rule 601(a), SCRE; Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). "A witness must have personal knowledge of the matter and must swear or affirm to tell the truth." State v. Needs, 333 S.C. at 142, 508 S.E.2d at 861. A person will be disqualified as a witness if the court determines that (1) the proposed witness is incapable of expressing himself to the judge or jury concerning the matter or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth. SCRE 601(b), SCRE; see also South Carolina Dep't of Social Servs. v. Doe, 292 S.C. 211, 355 S.E.2d 543 (Ct. App. 1987).

In State v. Needs, this Court determined that a "proposed witness understands the duty to tell the truth when he states that he knows that it is right to tell the truth and wrong to lie, that he will tell the truth if permitted to testify, and that he fears punishment if he does lie, even if that fear is motivated solely by the perjury statute." State v. Needs, 333 S.C. at 134, 143, 508 S.E.2d at 861. To be competent to testify, "a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath." Id. at 143, 508 S.E.2d at 861 (citing

Commonwealth of Pennsylvania v. Goldblum, 447 A.2d 234 (Pa. 1982)). The party opposing a witness has the burden of proving the witness is incompetent. Id. The determination of a witness's competency to testify is a question for the trial court, and the trial court's decision will not be overturned absent an abuse of discretion. Id.; see also TNS Mills, Inc. v. South Carolina Dep't of Rev., 331 S.C. 611, 503 S.E.2d 471 (1998); State v. Green, 267 S.C. 599, 230 S.E.2d 618 (1976). After the trial court has properly determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury. Id. at 144,508 S.E.2d at 862.

The Court of Appeals correctly determined the record supports the trial judge's findings and conclusions. The inquiry conducted and answers provided during the competency hearing illustrate Victim 1's ability to distinguish the truth from a lie, that it is wrong to tell a lie and right to tell the truth, that adverse consequences arise if he does not tell the truth, and that he will tell the truth if permitted to testify. Victim 1's detailed account of the sexual assaults reveals that he was able to perceive and remember specific details and communicate about the matter intelligently. He clearly understood the duty to tell the truth.

Petitioner provides nothing but speculation in support of his contention that Victim 1 was not a competent witness. Petitioner fails to develop a link between Victim 1's ability to testify and his mother's schizophrenia. He also fails to establish that attention deficit disorder prevented Victim 1 from understanding his duties as a witness, including the necessity to tell the truth, or interfered with his ability to perceive and relate the facts as needed. Nevertheless, our Supreme Court has determined that mental illness is insufficient to rebut the presumption of competency. Sellers v. State, 362 S.C. 182, 192, 607 S.E.2d 82, 87 (2005). In this case, Victim 1 understood the duty to tell the truth, swore to do so, had personal knowledge of the matter, and effectively communicated the knowledge and matters he experienced in a cogent manner. As in

Sellers v. State, 362 S.C. 182, 192, 607 S.E.2d 82, 87 (2005), the jury was fully aware Victim 1 suffered from attention deficit disorder and possible oppositional defiance disorder that accompanies attention deficit disorder. The jury was also aware of his mother's mental illness. While Petitioner failed to explore the symptoms of these conditions or establish any link between the disorders and the ability to properly serve as a witness, the information was developed at trial and it was for the jury to decide to believe all or none of Victim 1's testimony.

Thus, the Court of Appeals properly found the trial court did not abuse its discretion in finding Victim 1 competent to testify. See State v. Givens, 267 S.C. 47, 225 S.E.2d 867 (1976) (stating trial court did not abuse its discretion in finding a child witness competent when the witness testified that he attended school to the seventh grade, had a belief in God, and that he believed he would be punished if he did not tell the truth and was rational and responsive to questions asked). This Court should deny the Petition for Writ of Certiorari as to Petitioner's Question 2.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 25, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to the Court of Appeals  
Appeal From Beaufort County  
Hon. Carmen T. Mullen, Circuit Court Judge  
Appellate Case Tracking No. 2016-001934  
\_\_\_\_\_

**RECEIVED**

OCT 25 2016

S.C. SUPREME COURT

The State,

Respondent,

v.

James Simmons, Jr.,

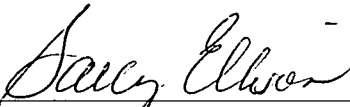
Petitioner.

\_\_\_\_\_  
**PROOF OF SERVICE**  
\_\_\_\_\_

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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 certify that all parties required by Rule to be served have been served.  
This 25<sup>th</sup> day of October, 2016.

  
\_\_\_\_\_  
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