STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Donald B. Hocker, Circuit Court Judge

Opinion No. 2016-UP-436 (S.C. Ct. App. filed Dec. 14, 2016)

Indictment No. 2011-GS-01-046

THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

PETITIONER

APPELLATE CASE NO. 2017-000230

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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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 January 10, 2017. App. 41.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in failing to address the applicability of State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016)(Shearouse Adv. Sh. No. 1 at 13-21) to Petitioner's case where the trial judge failed to require the state to open in full during closing argument and reply only to the defense's closing argument, which violated Petitioner's state and federal constitutional rights to a fair trial and due process of law?

II. Violating Petitioner's state and federal constitutional rights to a fair and impartial trial, did the Court of Appeals abdicate its duty to review the trial judge's failure to declare a mistrial based upon the alleged victim's multiple emotional outbursts that disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented?

III. Did the Court of Appeals err in affirming the trial judge's refusal to permit Petitioner to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Petitioner in violation of Petitioner's state and federal constitutional rights to present a defense and confront his accuser?

STATEMENT OF THE CASE

Petitioner and Minor's mother were involved in a romantic relationship and had a child in common. In 2009 and 2010, Petitioner and Minor's mother lived in an apartment in Calhoun Falls. Minor and her two brothers, one of whom was Petitioner's son, lived in the apartment as well. R. 12, l. 1 – R. 14, l. 16; R. 69, l. 17 – R. 70, l. 2. The apartment had three bedrooms, one bathroom, a living room, and a kitchen. R. 22, ll. 7-17; R. 253, ll. 5-9. There were two doors going in and out of the apartment – one in the front leading to the living room and one in the kitchen. Both doors were visible from the kitchen and living room. R. 22, l. 18 – R. 23, l. 8. The apartment was not carpeted, but had a tile floor. The walls were cinderblock. R. 34, ll. 7-15; R. 253, l. 9; R. 253, l. 19.

On March 23, 2010, twelve-year old Minor began dating fifteen-year old Terrance C. Minor's mother did not approve of the relationship and would not let her talk to him and would not let Minor visit Terrance in his home. R. 34, ll. 16-24; R. 48, l. 15 – R. 49, l. 17; R. 69, ll. 8-11; R. 105, ll. 7-17; R. 161, ll. 18-24. On August 14 and 15, Minor received three photographs of Terrance on her phone. The photographs showed Terrance completely nude and with an erect penis. Shortly thereafter, Petitioner and Minor's mother discovered the photographs on her phone. Unsurprisingly, they were very concerned and punished Minor. Additionally, they informed Terrance's parents of the photographs. R. 36, ll. 9-13; R. 37, l. 11 – R. 41, l. 13; R. 42, l. 11 – R. 45, l. 24; R. 162, l. 10 – R. 163, l. 7; R. 248, l. 11 – R. 249, l. 18; R. 368 – R. 372.

The Accusation

Less than ten days later, on August 23, 2010, Minor told her band director, Rebecca Holland, that Petitioner had sexually assaulted her ten times. R. 107, ll. 15-23; R. 163, ll. 13-17; R. 168, ll. 13-24; R. 169, ll. 5-11; R. 169, ll. 19-23. "[B]ecause it was so late in the afternoon, there were no people at the school" for Holland to make a report; therefore, she decided she would

address the matter the following day at school. R. 169, l. 25 – R. 170, l. 5; R. 172, ll. 17-20. Holland took Minor to her home, where Petitioner lived.[1] R. 172, ll. 10-13. Holland took Minor home from school every day. Holland claimed that Minor would cry on the way home, but Holland never inquired as to why. Minor would ask not to go home. Holland also claimed that she would see Petitioner waiting for Minor and he would grab Minor by the arm when she arrived home. R. 170, l. 23 – R. 171, l. 20; R. 172, ll. 14-16. Subsequently on August 25, 2010, Holland informed Lori Lindler, the school's guidance counselor and the assistant principal, about the accusations. R. 107, l. 24 – R. 108, l. 7; R. 171, ll. 21-23; R. 183, ll. 6-16. Lindler contacted the police. R. 108, ll. 8-10; R. 185, ll. 23-24.

At school, Lindler sat down with Minor to review the details of her allegations. During their meeting, the two used a school calendar to arrive at ten dates when the assaults allegedly occurred, including August 26, 2009, October 31, 2009, December 14, 2009, December 26, 2010, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010.[2] R. 78, l. 18 – R. 79, l. 10; R. 79, l. 18 – R. 80, l. 16; R. 101, l. 21-25; R. 164, l. 16 – R. 165, l. 3; R. 184, l. 7 – R. 185, l. 1.[3] Minor's claims to Lindler concerned only sexual abuse; she made no allegations of physical abuse. R. 187, ll. 8-17. The day after Minor talked to the school officials

[1] The testimony on this point was conflicting. Minor said she talked to Holland at school and talked to Lindler the same day. R. 108, ll. 11-17. However, Holland and Lindler indicated otherwise.

[2] Minor told the nurse that she could remember the dates because she wrote about it in her diary. However, her diary did not contain entries for each of the encounters and did not contain details about the abuse. Instead, the diary contained poetry about her feelings. R. 124, ll. 2-10.

[3] Despite the dates testified to at trial, the warrants and incident report differed to some degree. For example, the first incident was alleged to have occurred on August 29, 2009, not August 26, 2009, and another incident allegedly occurred on February 14, 2010, not February 13, 2010. R. 206, ll. 9-14; R. 209, ll. 15-21. Initially, Minor said that all ten incidents occurred in Calhoun Falls. However, immediately before trial, she changed her story to say the alleged incident on December 26, 2009, occurred in Greenville County. R. 106, ll. 1-14; R. 207, ll. 2-12.

and police officers, her mother took her to the hospital. R. 110, ll. 21-24. Minor also met with a lady at Child's Place on September 28, 2010. R. 111, ll. 6-13; R. 259, ll. 21-25. Months later, in November 2010, Minor was examined by Dr. Lyle Pritchard. R. 112, ll. 7-18; R. 227, ll. 3-11.

Initially, Minor claimed that on each of those occasions, Petitioner penetrated her vagina. R. 79, ll. 14-17. However, later, Minor claimed penetration of her vagina with his penis during every encounter except the last one. On that date, he put his penis in her mouth. R. 88, ll. 10-18. She also changed her story to say that she recalled him putting his penis in her "butt hole." R. 88, ll. 19-21. Minor testified that she bled the first time Petitioner penetrated her vagina and when he penetrated her butt hole. R. 88, l. 24 – R. 89, l. 2.

Concerning the first alleged assault, Minor claimed this occurred at home while her mother and brothers were there. Minor claimed Petitioner assaulted her in the living room on the couch. During her testimony, Minor claimed Petitioner asked to see the sizes of her bra and panties. Then, he started kissing her and rubbing her. Petitioner then removed her clothes and penetrated her vagina with his penis. R. 82, ll. 17-24; R. 83, ll. 4-6; R. 83, l. 10 – R. 84, l. 11; R. 87, ll. 1-8. Minor previously said that during the first alleged encounter, Petitioner threw her on the couch and hit her in the face with his fist. R. 139, ll. 20-25; R. 275, l. 4 – R. 276, l. 7. She also claimed that she screamed during this attack. R. 140, lines 8-10. She claimed there was blood everywhere. R. 140, ll. 11-12.

Regarding the second alleged assault, Minor testified there was a football game on October 30, 2009. R. 126, ll. 22-24; R. 128, ll. 4-8.[4] Minor did not recall saying that Petitioner "stuck it up

[4] Minor claimed the football game on October 30, 2009, was a home game. However, a school calendar showed the game was away in Twiggs County, Georgia. R. 134, l. 9 – R. 135, l. 1. Then, Minor changed her story to say it may have been after a Junior Varsity football game. R. 135, ll. 11-16.

[her] butt" that time, but she remembered that she screamed and Petitioner hit her busting her lip. R. 128, ll. 9-14. Previously, Minor had stated Petitioner "stuck it up her butt." R. 276, ll. 19-21. The next morning, Minor woke up on the couch in the living room to an empty house. Her shorts were up, but her underwear was down. Her shirt was on a lamp. R. 131, ll. 1-21; R. 277, ll. 16-24; R. 279, l. 14 – R. 280, l. 3. She admitted that anyone who left the apartment would have had to walk right by her in her disheveled state. R. 132, ll. 23-25. Although the following morning would have been a Saturday based on the date, Minor told the interviewer that she had missed her ride to school that day and her mother had to give her ride. She also told the interviewer that her brothers were gone because their school bus arrived at 7:00 a.m. R. 278, ll. 1-8.

Regarding the last incident, Minor claimed that Petitioner put her on the couch, took out his penis and placed it in her mouth. She bit his penis and he started screaming. She then ran to her room and placed her dresser in front of the door. R. 145, l. 22 – R. 146, l. 16.[5]

Minor's mother never saw or heard anything that made her suspect any kind of sexual abuse. R. 20, ll. 18-21. Minor's mother never heard any screaming in the house. R. 21, ll. 22-24

Supposedly, Minor told Terrance that Petitioner had sexually assaulted her months before he told his mother about the alleged abuse on August 26, 2010. Terrance's mother told the school counselor, Lindler. R. 53, ll. 9-25; R. 58, l. 18 – R. 59, l. 4; R. 73, l. 23 – R. 74, l. 1; R. 78, ll. 5-19; R. 106, ll. 17-23; R. 183, ll. 17-21. According to Terrance, Minor claimed that during the first assault "he went through her anal and she screamed," then he stopped and "went through the front." Minor told Terrance that her brother walked in during the assault. When Minor told her brother to

[5] According to the Executive Director of the South Carolina Housing Authority, the apartment where Minor lived had bedroom doors with locks. R. 253, ll. 13-17. This was according to HUD regulations. R. 254, l. 25 – R. 255, l. 3. The apartments were inspected annually to ensure all remained in line with the regulations. R. 255, ll. 20-24.

get her mother, Petitioner told him no, whipped the brother, and slapped Minor. Thereafter, Minor "passed out and woke up in a tub full of bloody water." R. 54, l. 4 – R. 55, l. 16.[6] Minor told Terrance that during the most recent assault, Petitioner "walked in her room one night and snatched his pants down and hers." R. 56, l. 13 – R. 57, l. 2. One night while Petitioner was assaulting Minor, Terrance sent a text message to Minor's phone. The phone was in the bedroom with Minor's mother and the text message indication woke Minor's mother. When this happened, Petitioner stopped the alleged assault. R. 57, ll. 3-13.[7] Minor told Terrance that "one night when she was asleep [Petitioner] put his private part in her mouth and she bit it." Petitioner "got mad and grounded her." Minor claimed that Petitioner would not stop the abuse even if she were bleeding. She further claimed "that blood was on the sheets, and it was coming out quick, but he wouldn't stop." R. 57, l. 17 – R. 58, l. 3.

The Trial

On February 4, 2011, an Abbeville County Grand Jury indicted Petitioner for nine counts of criminal sexual conduct with a minor in the second degree. R. 2, ll. 15-20; R. 376 - 377. The state, represented by C. Yates Brown and Lance Sheek, called the case for trial before the Honorable Donald B. Hocker and a jury on May 27, 2014. Janna Nelson and Shane Goranson represented Petitioner. R. 1. After a three-day trial, the jury acquitted Petitioner of eight of the charges. However, the jury found Petitioner guilty as to one (2011-GS-01-0046). R. 349, l. 1 – R. 350, l. 7. Thereafter, Judge Hocker sentenced Petitioner to sixteen years' imprisonment. R. 351, ll. 20-22; R. 392. After the trial, Petitioner filed a timely motion for new trial. R. 368 – R. 372. A hearing on

[6] Minor denied that her brother ever walked in on one of the alleged sexual assaults. R. 152, ll. 15-19. However, Minor agreed that she passed out and woke up in a tub full of bloody water. R. 152, ll. 20-22; R. 153, ll. 12-20. Minor told Holland that she woke up in bloody water ten times – after each incident. R. 175, ll. 10-18.

[7] Minor denied this occurred. R. 160, ll. 17-24; R. 161, ll. 8-11.

the motion commenced on July 15, 2014, before Judge Hocker. R. 352. Judge Hocker denied the motion by a written order filed on July 23, 2014. R. 373. Petitioner received notice of the order on July 28, 2014.

The Appeal

On August 4, 2014, Petitioner served his notice of appeal. Petitioner's appeal was perfected in the Court of Appeals by undersigned counsel, Susan Barber Hackett. On October 19, 2016, the Court of Appeals affirmed Petitioner's conviction and sentenced in an unpublished opinion. App. 1-4. Subsequently, Petitioner filed a petition for rehearing. App. 5-18. On December 14, 2016, the Court of Appeals denied the petition for rehearing, but withdrew the previous opinion and submitted a new opinion. State v. Tate, 2016-UP-436 (S.C. Ct. App. filed Oct. 19, 2016); App. 19-24. On December 29, 2016, Petitioner filed a petition for rehearing concerning the substituted opinion. App. 25-40. On January 10, 2017, the Court of Appeals denied the petition for rehearing.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

I. The Court of Appeals erred in failing to address the applicability of *State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016)(Shearouse Adv. Sh. No. 1 at 13-21) to Petitioner's case where the trial judge failed to require the state to open in full during closing argument and reply only to the defense's closing argument, which violated Petitioner's state and federal constitutional rights to a fair trial and due process of law.

Relevant facts

Prior to closing arguments, defense counsel moved to require the state to open in full and use their final argument for rebuttal only. R. 284, l. 21 – R. 285, l. 3. Defense counsel submitted a written motion in support of this position as well. R. 363 – R. 367.[8] Petitioner compared the order of closing to that in civil cases. Petitioner argued that in civil cases, the jury is not being asked to determine guilt and the burden of proof is much lower. R. 286, ll. 6-17. Despite Petitioner's well-reasoned arguments, the judge denied the motion. R. 286, ll. 6-17.

Thereafter, the parties proceeded to closing arguments with the state opening on the law, then defense counsel arguing in full, and the state arguing again. At the conclusion of the arguments and jury instructions, defense counsel noted multiple statements by the prosecutor to which she could not respond due to the order of the closing arguments. First, the prosecutor argued to the jury that "[d]efense counsel wasn't there and can't tell you what happened." The obvious response would be that the prosecutor was not there either. R. 340, ll. 9-12.

Second, the prosecutor related a personal story of when he had traumatic events in his life and that he could not remember what he wore. Defense counsel argued that "[n]one of this case is

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[8] Defense counsel argued this issue in the motion for new trial as well. R. 368 – R. 372.

about clothing. It's about statements, things that were said, things that happened." When the subject of clothing was presented, no questions were asked about the details of the clothing. Further, the questions about the clothing concerned what she stated to police and others around the time of the alleged incident, not at the trial, as the prosecutor implied to the jury. R. 340, ll. 12-22.

Third, defense counsel argued the prosecutor made "just an absolute misrepresentation to the jury about the DNA evidence." Specifically, the prosecutor asked the jury why would the state send Petitioner's cover for DNA testing when it would just show his DNA. This was a misrepresentation because the state did send the cover for DNA testing. The report was that there was no blood on the covers; therefore, the prosecutor's argument was "a total misleading and inaccurate statement." R. 340, l. 22 – R. 341, l. 7.

Fourth, the prosecutor argued there was no dispute about Minor telling her boyfriend about the alleged assaults a month and a half before. However, this was not true because Minor responded that she could not remember when she told her boyfriend about the alleged assaults. R. 341, ll. 7-14.

Fifth, the prosecutor made disparaging remarks comparing prosecutors and defense attorneys. Specifically, the prosecutor told the jury "how glad he was to be on this side and that his ethical obligations were different." Due to the order of arguments, defense counsel could not tell the jury that the prosecutor, who was a former public defender, "defended one of these cases just earlier this year ... and got his guy off, and in a child sex case in another circuit." R. 341, ll. 15-24.

Discussion

On December 14, 2016, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Tate, 2016-UP-436 (S.C. Ct. App. filed Dec. 14, 2016). Concerning this issue, the Court of Appeals stated only:

> As to whether the trial court erred in failing to require the state to open in full during closing argument and reply only to the defense's closing argument: State v. Gellis, 158 S.C. 471, 487, 155 S.E. 849, 855 (1930)("[I]f a defendant offers any evidence on trial of the case, the state is not deprived of its general right to opening and concluding arguments."); State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977)("The solicitor is entitled to open the closing arguments to the jury unless the defendant has offered no evidence."); id. at 25, 235 S.E.2d at 809("The solicitor is not required to make an opening argument to the jury on issues of fact, ... but may do so in his discretion.").

Tate, supra; App. 23.

Fifteen days after the Court of Appeals issued its substituted opinion in the instant case, this Court decided State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016)(Shearouse Adv. Sh. No. 1 at 13-21) addressing the content of closing arguments in criminal trials. Although Petitioner asked the Court of Appeals to rehear his case based on the Beaty decision, the Court of Appeals denied the petition for rehearing with no mention of the case. App. 25-41.[9] Petitioner respectfully requests this Court grant certiorari to review this issue because the decision of the Court of Appeals is in conflict with this Court's decision in Beaty. See Rule 242(b)(3), SCACR.

This Court held "that in a criminal trial where the party with the 'middle' argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter." Beaty, supra. Thus, it is now settled that when a defendant requests the state "open in full" for closing argument, the state must do so. The trial judge erred in failing to require the state to open fully during Petitioner's trial.

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[9] As an initial matter, Petitioner benefits from the Beaty ruling as his case was pending on direct review and the issue was preserved for review. See State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009)(citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final), Harris v. State, 543 S.E.2d 716, 717-718 (Ga. 2001)(reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline' – i.e., cases which are pending in direct review or not yet final")).

Closing argument is "an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound." Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974)(Douglas, J., dissenting). The South Carolina Rules of Criminal Procedure are silent on the order of closing arguments. However, the Rules of Civil Procedure provide that

> [t]he moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party's claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply my respond in full but may not introduce any new matter.

Rule 43(j), SCRCP.

In a 1911 case, this Court explained that a defendant in a criminal case who has the right to reply in argument by reason of not introducing evidence may decline to open in argument and still retain the right to make the closing argument to the jury either upon the case in general or by way of reply to the state's argument. State v. Garlington, 90 S.C. 138, 72 S.E. 564, 566 (1911). South Carolina required the prosecution to close in full prior to the defense's closing argument pursuant to court rule – Rule 59 of the Circuit Court. See State v. Atterberry, 129 S.C. 464, 124 S.E. 648, 651 (1924). Subsequently, the rule changed to require the partying having the opening in the argument to disclose fully the law.[10] Thus, this Court held in State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971), that the solicitor was no longer required to make an opening argument to the jury on issues of fact. Id. In Beaty, supra, this Court "restore[d] what had been, largely by court rule, the practice in this state for many years until 1971." In affirming Petitioner's conviction and sentence, the Court of Appeals cited a case from 1977 to support its conclusion that the solicitor was not required to open fully on the facts and the law and rebuttal be limited to responding to what the

[10] Rule 58 of the Circuit Court Rules provided for the order of closing at the time.

defendant argued in closing. App. 23. In doing so, the Court of Appeals made clear that its decision was not in conformity with "the practice in this state for many years until 1971," which is what this Court restored in Beaty.

The trial judge's refusal to require the state to open fully denied Petitioner's right to a fair trial and due process of law because it prevented him from responding to specific points made the prosecutor. This Court determined Beaty suffered no prejudice as a result of the trial judge's ruling that the state would not be required to open fully at his trial. However, Petitioner suffered harm as a result of the court's ruling, and after the closing arguments, Petitioner argued to the judge the specific harm he suffered as a result of the erroneous ruling. Several of the points – especially, those mischaracterizing the record and demeaning the defense – could not have been anticipated. The prosecution should have been made to open fully as to the law and the facts with the Petitioner having an opportunity to respond to the argument and close fully on the law and the facts. The prosecution could have refuted any unanticipated arguments by Petitioner in a rebuttal. Permitting the content of arguments in this fashion would have ensured the Petitioner's rights to a fair trial and due process of law were not at odds with his right to present a full and complete defense. The prior practice governing content of closing arguments forced defendants to choose between presenting a defense, which would forfeit last argument, or not to present a defense and keep last argument. No further explanation is needed to demonstrate how this scenario places a defendant on the horns of a dilemma.

II. Violating Petitioner's state and federal constitutional rights to a fair and impartial trial, the Court of Appeals abdicated its duty to review the trial judge's failure to declare a mistrial based upon the alleged victim's multiple emotional outbursts that disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented.

Relevant facts

During defense counsel's opening statement to the jury, Minor was visibly and audibly upset. The outburst was so extreme that defense counsel stopped her remarks to the jury: "Your Honor, it looks like - - it looks like [Minor] is upset and I don't want that to distract the jury." R. 9, ll. 21-24. Thereafter, the judge called the lawyers to the bench, but provided no instruction to the jury. The opening statement continued, followed immediately by the calling of the state's first witness. R. 9, ll. 23-25. When the jury was out of the courtroom during a recess, the judge placed on the record that Minor was emotional during defense counsel's opening statement. Surprisingly, the judge indicated "the court has no problem with that." However, the judge noted that "if that's still a recurring problem then I think we ought to agree that she needs not to be in the courtroom because of the potential nature it has to be disruptive." R. 28, ll. 9-21. Again, no instruction was provided to the jury concerning Minor's emotional outburst.

During the state's direct examination of Minor, the state asked if Minor needed to take a short break, and she responded that she did. The judge agreed to take a break. R. 84, ll. 12-22. Thereafter, the state inquired of the judge regarding how to "handle this." According to the state, it was very difficult for everybody and he did not "want to sit her up there while she's crying in front of the jury." R. 84, l. 23 – R. 85, l. 3. The judge responded that it was evident that Minor was having difficulty testifying, but stated she "was going to have to do the best job that she can." He

further stated that she was "going to have to, you know, try to - - you know, try not to be emotional." R. 85, ll. 4-10.

The judge then addressed Minor directly: "I know this is difficult for you to testify. I understand that. But it's really important that you do the very best that you can and there is a lot to cover in questions that will be asked of you. So you just need to do the very best that you can so we can get through your testimony." R. 86, ll. 18-24. When the jury returned, Minor's direct examination continued with no instruction for the jury concerning how to consider, if at all, Minor's emotional outbursts.

Well into the cross-examination, Minor stated she did not "want to keep talking about it." R. 155, ll. 3. When asked if she could continue, Minor requested a break. R. 155, ll. 4-7. The judge excused the jury and permitted Minor to have a break. R. 155, ll. 8-21. With the jury excused, the judge remarked that he realized Minor was emotional, but he noted "it's being disruptive." He instructed the prosecutors to "go out there and talk to her." R. 155, ll. 22-25. Preempting defense counsel's motion for a mistrial based upon Minor's outbursts, the judge noted that while he was "not being unsympathetic," he had "to maintain decorum in this courtroom." He could not "tolerate the witness storming out of the courtroom in the manner in which she did." Concerning the jurors, the judge's explanation was confusing and contradictory: "I think probably the vast majority, if not all of the jurors, were back in the courtroom, or most of them at least were back in there when that took place." He continued that he hoped the solicitors had explained to Minor that he could not "allow that sort of conduct." R. 156, ll. 7-21.

Defense counsel then moved for a mistrial "because of the pretty extreme display of emotion that was going on while [Minor] was sobbing as the jury left the jury box and while the door back there behind the jury box was still open she started yelling out for her mother." Defense

counsel could not "imagine that even if the jury was right down the hall in their room that they would not have heard that demonstration." Minor's repeated and extreme emotional outbursts could be construed only as prejudicial and attempting to influence the outcome of the case based on emotion, not evidence. R. 156, l. 25 – R. 157, l. 12. Defense counsel further noted that Minor's emotional conduct began during the opening statements and permeated throughout the trial. R. 158, ll. 13-25.

In denying the mistrial motion, the trial judge noted "we've had a lot of emotion displayed by this witness throughout her testimony, a lot of crying, I think she's gone through a good many Kleenexes. We have had to take a break or two." Nevertheless, the judge determined Minor's repeated and extreme emotional outbursts were "not the amount and type of prejudice that would justify a pretty severe remedy of declaring a mistrial." R. 158, ll. 3-12.[11]

During closing argument, defense counsel tried to anticipate the state's closing argument specifically regarding Minor's emotional state during her testimony. Defense counsel "thought that maybe one of the things that might be said is that [Minor] has been revictimized or retraumatized by having to come in here and tell you what happened." Defense counsel informed the jury it was not her intent to do that. She further explained that a defendant has the right to confront his accusers pursuant to the Constitution, which is what defense counsel was doing. R. 307, l. 16 – R. 308, l. 6.

[11] Petitioner renewed the motion for a mistrial in the written motion for new trial. R. 368 – R. 372. Petitioner argued he was entitled to a new trial based on the trial judge's failure to grant a mistrial based on Minor's "several extreme emotional reactions throughout the course of the trial." Petitioner explained Minor "cried several times while testifying, and broke down sobbing during cross-examination." Further, Petitioner noted that when the jury was exiting the courtroom, Minor "ran from the courtroom yelling for her mother." Petitioner argued Minor's emotional reactions prejudiced the jury. Further, Petitioner argued the judge failed to give the jury a curative instruction to disregard the emotional display and decide the case only on the facts presented. R. 368 – R. 372.

Concerning the emotional outbursts, defense counsel reminded the jury "[t]he first time you see [Minor]'s emotional reaction is when I was giving you my opening statement and telling you how I was going to be talking about these different versions of her story. And when she knew that was going to happen she got upset. And when it happened on the stand she got upset." The jury could interpret the outbursts, and their timing, "one of two ways." Either Minor "was crying because what happened to her was so horrible and she doesn't like having to go through it again or she's crying because somebody is pointing out the problems with the things she's saying and the reason you shouldn't believe it, and that – and that is difficult for her." R. 308, ll. 16-23.

The prosecutor's closing argument immediately responded to the argument regarding why the case was being tried: "I'll never make an apology for that because I'm not ashamed to be doing what I'm doing here today. ... I will prosecute these cases." R. 315, ll. 14-19. He then said the defense had a different ethical obligation than he because he represented the people, while defense counsel represented the defendant. R. 316, ll. 3-12. After apologizing for getting "a little bit wound up," the prosecutor explained, "This is what I do. I prosecute crimes where children are victims and I believe it whole heartedly." R. 316, ll. 12-15. He further preached, "As long as I have breath in my body I will stand up for the victims of these types of crimes and I will never be ashamed of it." R. 316, ll. 23-25.

When describing how the jury could judge Minor's credibility, the solicitor asked the jury to remember Minor's "raw emotion." Specifically, he focused on when she told defense counsel she did not "want to think about it." He continued:

> You're making me go back and back through and I don't want to think about it. I don't want to relieve it. Don't you understand that. That's what that child said to this lady. Now, I understand as a grown attorney, having done this over and over again, maybe it's not a big deal. To that child, it was a very, very big deal.

R. 321, ll. 6-17. Circling back to Minor's emotional testimony, the prosecutor asked the jury not to get "sidetracked by what a lawyer tells you. You look at what those witnesses said and you decide if you're convinced that this man did penetrate that child. Was that a [*sic*] emotion you watched real. Because if she's made all this up and she's put on that kind of act, she deserves an Academy Award, because that was compelling." R. 324, ll. 18-25.

Discussion

"The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution." State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). "[T]he very heart of a 'fair trial' embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment." Id. at 303, 295 S.E.2d at 631.

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013)(citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). However, this standard of review does not mean "no review." The opinion of the Court of Appeals on this issue eliminates appellate review of the decisions of trial judge's on mistrial motions. Although the Court acknowledged that "[t]he decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge" and that reversal was required when the trial judge abused his discretion or when manifest prejudice resulted, the Court failed to consider whether the judge abused his discretion or if manifest prejudice resulted from the repeated outbursts. See State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996). Instead, the Court's sole focus was on the trial judge's presence at the trial as providing an opportunity for a better perspective than a

cold record. If this view prevails, then all appellate issues for which the standard of review is an abuse of discretion must result in no review at all on appeal as the trial judge is always in a position to have a better opportunity for observing the actual trial than a cold record offers. In light of the Court of Appeals' abdication of its duty and its erroneous application of the standard of review, Petitioner respectfully requests this Court grant certiorari to review the lower court's opinion. Rule 242(b)(3), SCACR. Additionally, substantial constitutional issues are directly involved. Rule 242(b)(4), SCACR.

While a mistrial should be granted only when "absolutely necessary" and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." Id. Another way of describing when a mistrial must be granted is when there is "manifest necessity." State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930). "The less than lucid test is ... whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 32-33, 301 S.E.2d 471, 472 (1983).

This Court held a mistrial was in order where "spectators filled the courtroom seats to capacity and even stood against the walls," there were several outbursts of laughter from the spectators requiring an admonition from the judge, a juror reported that one spectator glared at her with "'obvious disgust,'" and the jurors overheard a spectator making opinionated remarks. Stewart, 278 S.C. at 301-302, 295 S.E.2d at 629-630. This Court held it was error for the trial judge to deny the motion for a mistrial "without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice." Id. at 302, 295 S.E.2d at 630. Further, this Court held the judge's reliance on his instructions to the jury to

disregard improper spectator conduct was insufficient to assure Stewart received a fair trial. Id. at 304, 295 S.E.2d at 631.

In another case involving disorder in the court, this Court held a defendant was entitled to a new trial where there was "no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled to, a fair, impartial, and legal, trial." State v. Gens, 107 S.C. 448, 93 S.E. 139, 140 (1917). In this transporting liquor case, several ladies held large posters condemning liquor traffic before the jury during part of the trial. The ladies sat directly in front of the jury and to the left of the judge. Id. at 448, 93 S.E. 139. This Court held:

> The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge.

Id. Despite the jurors indicating they were not influenced in any manner by the posters, this Court held the trial judge should have set aside the verdict. Id.

On the other hand, in State v. Hughes, 336 S.C. 585, 596-597, 521 S.E.2d 500, 506 (1999), this Court found a trial judge did not abuse his discretion in denying a motion for a mistrial where the deceased's mother "loudly exited the courtroom" followed by her sister during the cross-examination of a medical expert. The trial judge noted that the mother's conduct "could be interpreted as a 'negative comment' on the defense evidence," the disruption was short and "the jury already knew how she felt since she had testified as a victim impact witness" in the capital sentencing proceedings. Id. This Court found the jury "likely understood her outburst as an expression of [her] grief," about which she had already testified. Id.

Similarly, in State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996), the Court of Appeals held that the displays of emotion – audible crying by spectators – in the courtroom during the alleged victim's testimony did not require a mistrial. When defense counsel moved for a mistrial, the trial judge stated "he did not believe that any displays of emotion so far would have tainted the jury." To ensure additional emotional outbursts would not prejudice the jury, the judge cleared the courtroom and instructed the jury that the courtroom had been cleared due to the display of emotion by observers. Id. Further, the judge implored the jurors that they were not to draw any inferences from this fact as neither side had done anything improper and reminded the jurors that they were to base their verdict on the testimony and evidence presented, not on emotion. Id.

In another case involving an emotional outburst, this Court held no mistrial was required where the deceased's sister had a minor outburst while testifying when asked to identify the defendant. State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996). This Court held the emotional outburst was ameliorated by the trial judge dismissing the jury and calling a recess as soon as the outburst occurred to give the witness an opportunity to calm down. Id. at 93, 470 S.E.2d at 105. Further, this Court was persuaded that the outburst had little effect on the jury because it occurred at the beginning of the trial and was "very limited in time and in scope." Id. As in Hughes, this Court surmised that the sister's outburst was an expression of grief and the jury likely understood that. Id. While finding the curative measures here sufficient, this Court warned that some cases involving a witness's or spectator's outburst "may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction." Id. at 93, 470 S.E.2d at 106.

In the substituted opinion, the Court quoted extensively from Anderson, supra. However, what the Court failed to consider was how Petitioner's case was distinguishable from Anderson. One of the key factors in affirming the trial judge's denial of a mistrial was the "incident occurred at

the beginning of trial and was very limited in time and in scope." Id. at 93, 470 S.E.2d at 105. This contrasted greatly with the numerous and repeated emotional outbursts during Petitioner's trial. The complaining witness began her emotional outbursts during defense counsel's opening statement and her histrionics culminated during her testimony when she stormed off the witness stand. Further, the Anderson Court explained the outburst was "an expression of grief over the death of her sister, and the jury likely understood it as just that." Id. Again, in contrast, the complaining witness's outburst during Petitioner's trial were not expressions of grief, but were an effort to draw attention to herself, distract the jury from the real issue, and to move the jury based on emotions, not evidence.

The trial judge erred in failing to order a mistrial based on Minor's repeated and extreme emotional outbursts, and the Court of Appeals compounded this error by abdicating his duty to review the decision of the trial judge for an abuse of discretion. Although the trial judge was aware of Minor's disruptive behavior, took repeated breaks for Minor to compose herself, and admonished Minor regarding her behavior, the trial judge never instructed the jury concerning how to consider, if at all, Minor's behavior. Minor's sobbing began during defense counsel's opening statement. Her sobbing continued during her direct examination, which was after several witnesses had testified. Thus, her emotional outbursts were not limited to single event or to the beginning of the trial. Minor's improper actions culminated in her storming from the witness stand and screaming for her mother within earshot of the jurors. Despite Minor's conduct, the judge never told the jury not to consider her conduct in their deliberations. Minor's constant sobbing, storming from the witness stand, and screaming for her mother were a far cry from the deceased's mother "loudly" exiting the courtroom in Hughes, supra. The conduct on display at Petitioner's trial was not limited to crying by spectators as in Jones, supra, where the judge cleared the courtroom and instructed the

jury not to draw an adverse inference from clearing the courtroom and to decide the case based only on the evidence presented. Despite the Court warning in Anderson, supra, that in some cases, a witness's or spectator's outburst "may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction," no instructions were given here. See Anderson, 322 S.C. at 93, 470 S.E.2d at 106.

Instead, the jury heard from a "wound up" solicitor in closing that Minor's "raw emotion" was proof that she was telling the truth. According to the solicitor, Minor's performance was so real and "compelling" that if she were not telling the truth, then she deserved an Academy Award. The solicitor instructed the jury to do exactly what it is *not* supposed to do – use the emotion of a witness to form the basis for its verdict. Further, in describing his opinion that Minor's testimony was "compelling "as evidenced by her repeated emotional outbursts, the solicitor improperly conveyed to the jury his belief that Minor was telling the truth. See State v. Jennings, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011)(holding that a forensic interviewer's report that each child had provided a "compelling" disclosure of abuse could only be interpreted to mean the forensic interview believed the children were being truthful).

The trial court failed to grant a mistrial where the ends of justice required one. Minor's continuous sobbing and repeated emotional outbursts tainted the proceedings. While some emotion is to be expected in these types of cases, Minor's conduct was extreme, even theatrical, as acknowledged by the prosecutor's remark regarding the Academy Awards. Minor's conduct deprived Petitioner of the fair trial he deserved and that the Constitution demands. The taint of her performance could be removed in no other way except a mistrial.

III. Violating Petitioner's state and federal constitutional rights to present a defense and confront his accuser, the Court of Appeals affirmed the trial judge's erroneous ruling that Petitioner not be permitted to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Petitioner.

Relevant facts

During the cross-examination of Minor's mother, Petitioner asked her about finding some photographs of Terrance C., Minor's ex-boyfriend, on Minor's phone. R. 34, l. 25 – R. 35, l. 1. The state agreed there were three photographs of Terrance's genitalia on Minor's phone. R. 37, ll. 11-20. The state objected that the photographs were not relevant and questions regarding the photographs were prohibited by the Rape Shield Law. R. 35, ll. 11-21. The state also argued the photographs were more prejudicial than probative as well. R. 36, ll. 14-19. Petitioner argued that the photographs were important to establish a motive for why Minor would make up the allegations against Petitioner. R. 36, ll. 3-13. To this, the state proposed to limit the questioning to whether the phone was being used in an improper manner and whether Minor got into trouble for using the phone in such a manner. R. 36, ll. 14-19.

Petitioner explained that the photographs appeared on Minor's phone on August 14 and August 15 of 2010. Petitioner made her allegations of sexual assaults on August 25, 2010. Petitioner and Minor's mother discovered the photographs on Minor's phone and Minor was punished. Petitioner argued that the jury learning that Minor had pictures of Terrance on her phone was not enough information to support the motive to fabricate the allegations. R. 38, lines 3-14. The jury would not appreciate why someone would tell this story without knowing the contents of the photographs. R. 41, ll. 8-12. To the judge's questioning regarding relevancy, Petitioner

explained the content of the photographs were relevant to explain fully Minor's motive to fabricate and went to her credibility. Petitioner explained explaining the motive was part of the defense to which Petitioner had a constitutional right to present. Petitioner made clear there would be no questioning of any witness regarding whether Minor and Terrance were having sex, which would keep the evidence in compliance with the Rape Shield Statute. Further, Petitioner made clear the line of questioning regarding the content of the photographs would not include a request that the jury see the photographs. R. 39, l. 9 – R. 40, l. 6; R. 41, ll. 12-13.

The judge found the content of the photographs was not relevant. He ruled that Petitioner could "ask if there were pictures on the phone concerning Terrance that the mom disapproved of, if she did, that [Petitioner] disapproved of if he did," but he refused to allow Petitioner to "tell the jury that they are actually Terrance's private areas." His ruling would permit Petitioner to argue motive because Minor got into trouble over the photographs on the cell phone, but he was adamant that the jury not learn the nature of the photographs. R. 40, ll. 7-25. In short, the judge found that Minor's improper motive to make the false allegations could be established without the jury knowing that the pictures were of male genitalia. R. 41, l. 23 – R. 42, l. 4.

To support Petitioner's argument that the content of the photographs were necessary for the jury to understand Minor's motive, which was part and parcel of Petitioner's right to present a defense, and not in violation of the Rape Shield Statute as argued by the state, Petitioner cited State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989) and State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991). Petitioner noted that Minor told the interviewer that she had never had sex with someone else and the content of the photographs would attack her credibility in this regard.[12]

[12] Minor testified that she had never had any sexual contact with anybody other than Petitioner. R. 116, ll. 14-18.

Petitioner assured the judge the photographs were not an attempt to make Minor look bad, but were to attack her credibility and establish a motive for making up the allegations. R. 61, l. 19 – R. 63, l. 25.[13]

Thereafter, Petitioner proffered the testimony of Minor's mother on this point. Minor's mother admitted Petitioner found photographs of a naked Terrance on Minor's phone. Petitioner showed the photographs to her. She thought the photographs were inappropriate so she had a discussion with Minor and Terrance's parents. She clarified that the photographs showed a young man's penis, but she could not remember if the penis were erect. R. 42, l. 11 – R. 44, l. 4.

After the proffer, the judge remained steadfast that the jury would not learn what the photographs actually showed. He also refused to allow the jury to learn that the photographs showed Terrance was naked. R. 44, ll. 5-14.

Before the jury, Minor's mother testified that twelve-year old Minor had a fifteen-year old boyfriend named Terrance C. at the time the allegations of sexual misconduct were made. R. 44, l. 23 – R. 45, l. 24. Minor's mother saw at least one inappropriate photograph of Terrance on Minor's phone. R. 45, ll. 2-5.

According to Minor, when Terrance became her boyfriend on March 23, 2010, her mother found out she had a boyfriend and refused to allow her to speak to him or allow Terrance to visit. R. 161, ll. 15-24. Minor admitted her phone had three inappropriate pictures of Terrance on it. R. 162, ll. 17-19. Her mother and Petitioner found the pictures and disciplined her, including taking

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[13] Petitioner renewed the motion to present the content of the photographs to the jury in the motion for new trial. As explained in the motion, there was no attempt to show the photographs to the jury due to the age of the young man in the photographs, but there was an attempt to inform the jury that the photographs showed the young man naked and with a fully-erect penis. Petitioner argued that his right to present a defense and his rights to a fair trial and due process were denied as a result of the trial judge's erroneous ruling. R. 368 – R. 372.

her phone away. R. 162, l. 24 – R. 163, l. 7; R. 163, ll. 10-11. Not long after that, Minor made allegations of sexual assault against Petitioner and he was arrested. R. 163, ll. 8-9; R. 163, ll. 13-17.

Bart Cave, an expert in the field of forensic phone analysis, analyzed Minor's cell phone as part of state's investigation. Cave found three inappropriate photographs on the phone. R. 248, ll. 1-25. Cave determined the dates and times of the photographs appearing on the phone: two arrived at 12:36 a.m. on August 15, 2010, and one arrived at 11:59 a.m. on August 14, 2010. R. 249, ll. 1-18.

Discussion

In ruling on this issue, the Court of Appeals noted the standard of review, prior cases limited a defendant's right to present a defense, Rule 401, SCRE, Rule 403, SCRE, and prior cases limiting a defendant's rights under the Confrontation Clause. App. 23-24. However, the Court's opinion offered little to explain the reasoning by the affirmance on this issue. In light of the substantial constitutional issues directly involved, discussed more fully infra, Petitioner respectfully requests this Court grant certiorari to review the decision of the Court of Appeals. See Rule 242(b)(4), SCACR.

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. "The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility." State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). "[C]ross-examination is essential to a fair trial as guaranteed by the Sixth Amendment and due process as required by the Fourteenth Amendment." State v. McCoy, 274 S.C. 70, 72, 261 S.E.2d 159, 160 (1979). This guarantee ensures a defendant has the opportunity to cross-examine a witness

concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." To establish a violation of the Confrontation Clause, Petitioner must show that he was prohibited from asking questions designed to show bias on the part of Minor. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

The Rape Shield Statute prohibits "[e]vidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct ... in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656." S.C. Code Ann. § 16-3-659.1(1). This statute is completely inapplicable to the instant matter because Petitioner was not offering evidence of specific instances of Minor's sexual conduct, opinion evidence of Minor's sexual conduct, or reputation evidence of Minor's sexual conduct. In fact, the photographs could not demonstrate specific instances of Minor's sexual conduct as the photographs did not depict Minor engaged in any sex acts. Rather, Petitioner was offering three sexually explicit photographs on the twelve-year old's phone from her fifteen-year old boyfriend to show the motivation Minor had to lie about the allegations of sexual abuse.

Having determined the Rape Shield Statute does not bar the evidence, the only remaining question is whether the evidence was relevant. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

Was the fact that Minor had three photographs of her naked boyfriend showing his fully erect penis on her phone relevant to Minor's credibility?

Deciding an issue similar to the one presented in the instant matter, this Court in State v. Finley, 300 S.C. 196, 199, 387 S.E.2d 88, 89 (1989) noted that relevant evidence "need not be sufficient in itself to establish the whole or any definite portion of a party's contention." Finley sought to introduce a tape recording of a conversation with the alleged criminal sexual conduct victim in which the victim agreed to drop the charges in exchange for money. The trial judge refused. On appeal, this Court found the tape recording was relevant on the issues of whether Finley tried to obstruct justice or whether the alleged victim was trying to extort money. Id.

Additionally, this Court held that Finley should be allowed to present evidence that the alleged victim engaged in sexual intercourse with her neighbor in full view of Finley on the night she claimed Finley assaulted her. Id. at 200, 387 S.E.2d at 90. Finley's defense was that the alleged victim fabricated the charges to keep him from telling anyone about her sexual conduct with the neighbor. "The unique facts of this controversy, coupled with [Finley]'s right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness." Id. This Court found the evidence was "essential to a full and fair determination of [Finley]'s guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party." Id. (citing State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)); see also State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (holding that evidence of victim's sexuality was admissible when offered for a purpose other than to attack the victim's morality).

Although State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (Ct. App. 2000) principally concerns the Rape Shield Statute, it is instructive for what type of evidence is relevant in criminal

sexual conduct cases. In Grovenstein, the victims accused the defendant of anally penetrating them with rolled-up paper. Id. at 213, 530 S.E.2d at 408. Before the victims knew the defendant, they had been "accused of inserting objects in the vagina and rectum of a young girl." Id. The Court held that evidence of these accusations prior to meeting the defendant "should have been admitted because it provided an alternate explanation of how the young victims would be familiar with the sexual conduct they alleged [the defendant] committed." Id. at 220, 530 S.E.2d at 412. The Court ruled that the Rape Shield Statute "is not a blanket exclusion of evidence concerning alternative sources of a child victim's sexual knowledge." Id. at 219, 530 S.E.2d at 411. Thus, relevant evidence in a criminal sexual conduct case is evidence that provides an alternate explanation of how young victims would be familiar with sex.

In affirming the trial judge's erroneous ruling, the Court of Appeals relied heavily upon State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). Petitioner's case is easily distinguished from Dickerson. First, Dickerson involved whether the defense should be permitted to ask the pathologist about the results of a preliminary urinalysis test. Id. at 116, 716, S.E.2d at 903. During a proffer, the pathologist testified the urine screen test was presumptively positive for cocaine, but that the test alone was unreliable. Id. Further, the pathologist testified that no confirmatory testing was done. Id. The trial judge refused to admit the evidence, finding it was inherently unreliable, and as a result would be misleading and confusing to the jury. Id. This Court held that the relevance of evidence that the deceased actually had cocaine in his system would have been "dubious, at best," based on the facts of the case. Id. at 116, 716 S.E.2d at 903-904. The test did not challenge the pathologist's findings regarding cause of death and "would only have injected irrelevant considerations into the trial." Id. at 117, 716 S.E.2d at 904. Thus, the presumptive test was of little probative value and served only to confuse the jury. Id. This contrasted greatly with

the proffered evidence at Petitioner's trial. One of the questions for all juries in criminal sexual conduct with minor cases is how does a minor have specific knowledge of sex. The default answer is that the abuse must have occurred unless there is evidence to show the minor acquired the knowledge from some other source.

While the photographs showing a naked Terrance with an erect penis did not show that Minor was familiar with all aspects of sex, the photographs certainly demonstrated that Minor had some knowledge of sex outside of the alleged abuse. Thus, under Grovenstein, the photographs were relevant to demonstrate Minor's knowledge of sex from an alternate source. Of course, the photographs served more than this purpose. The photographs were the impetus for Minor to fabricate her fantastical tale of sexual abuse. At twelve-years old, Minor had an older boyfriend and her parents did not approve. In fact, her mother and Petitioner had forbidden her to talk to him and would not allow her to visit him. When the two learned that Minor had sexually explicit photographs of Terrance on her phone, the two were outranged and punished her, as all parents would. The content showed just how serious Minor's misbehavior was and just how desperately she was to deflect the punishment. Photographs of Terrance's naked body with a fully erect penis on twelve-year old Minor's phone were a far cry from simply "inappropriate" photographs. The actual content of the photographs demonstrated Minor's knowledge of sex and the outrage her parents felt over her misconduct. The punishment she would suffer would be severe – just as the revenge she would dole out. The jury deserved and needed to know the content of those photographs in order to evaluate Minor's credibility and to learn that Minor had a very big incentive to fabricate the allegations against Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing to review the Court of Appeals' decision in this case. If this Court decides to grant the petition and dispense with further briefing, Petitioner respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully Submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Donald B. Hocker, Circuit Court Judge

Opinion No. 2016-UP-436 (S.C. Ct. App. filed Dec. 14, 2016)
Indictment No. 2011-GS-01-046

THE STATE,

RESPONDENT,

V.

KEITH DENVER TATE,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Keith Denver Tate, #236480, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of February, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE ME this 21st day of February, 2017.

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