

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal from Dorchester County  
Diane Schafer Goodstein, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

PETITIONER,

V.

JAMES ARCHIE CREWS, IV,

RESPONDENT

APPELLATE CASE NO. 2018-001939

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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**PETITIONER'S QUESTION PRESENTED**

Did the Court of Appeals err by reversing Crews's conviction based solely on the trial judge's decision to instruct the jury the testimony of a victim need not be corroborated where, when the trial judge's jury instructions are considered as a whole in conjunction with the other specific circumstances involved in Crews's case, the presentation of that particular instruction could not have misled or confused the jury in a manner improperly prejudicial to Crews and, thus, any error in its presentation was harmless beyond a reasonable doubt?

**RESPONDENT'S COUNTER-QUESTION PRESENTED**

Did the Court of Appeals correctly determine the trial judge's admittedly erroneous instruction that the complainant's testimony need not be corroborated by other evidence in contravention of State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), was not harmless beyond a reasonable doubt where there was no evidence corroborating the complainant's allegations and the state conceded in its closing argument that its entire case depended upon the jury believing the complainant?

## STATEMENT OF THE CASE

On December 3, 2015, a Dorchester County grand jury indicted Respondent for criminal sexual conduct with a minor in the first degree (2013-GS-18-1838). App. 342 - 343. The state, represented by Sheila Mims and Phil Giese, called the case to trial on March 14, 2016, before the Honorable Diane Schafer Goodstein and a jury. App. 5. Ash Chisholm and John Loy represented Respondent. App. 5.

At the conclusion of the presentation of the evidence, the state requested the judge instruct the jury on “the 16-3-657 language regarding the child’s testimony need not be corroborated.” App. 260, ll. 8-11. The judge agreed to the request. App. 260, l. 12. Trial counsel immediately objected, but the judge insisted that in order to “preserve” the objection, trial counsel would need to object “after the charge.” App. 260, ll. 15-19.

Knowing the judge would instruct the jury accordingly, the prosecutor’s central theme in closing was that Minor 1’s testimony “need not be corroborated” in this case. App. 266, ll. 20-23.<sup>1</sup> The prosecutor instructed the jury on how to determine a witness’s credibility, including demeanor, consistency over time, opportunity to know the facts testified to, and bias. App. 265, l. 23 – App. 266, l. 11. She then told the jury that corroboration could be used to determine a person’s credibility and that “corroboration is when one witness tells you something and another witness says something similar. Are they corroborating each other.” App. 266, ll. 13-18. Immediately thereafter, the prosecutor told the jurors

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<sup>1</sup> In the opening statement, the prosecutor set up this theme that Minor 1’s testimony need not be corroborated and informed the jurors that the judge would instruct the jury in this regard at the close of the case. Specifically, the prosecutor wanted “to focus” the jury’s “attention on one part of the law that the judge” would “instruct” “at the end of th[e] trial.” App. 48, ll. 1-4. That “part of the law” was that “in South Carolina a child witness’ testimony need not be corroborated.” App. 48, ll. 8-9. The prosecutor explained that the jurors could “convict someone based on a child’s testimony alone.” App. 48, l. 10. He asked the jurors “to keep that in mind” throughout the trial as various witnesses testified. App. 48, ll. 12-15.

Now, this is very important when you are dealing with these cases. The testimony of the victim need not be corroborated in prosecutions under South Carolina code of law 16-3-652 through 16-3-658. And criminal sexual conduct with a minor in the first degree falls within this statute. If you believe the testimony that you heard of [Minor 1], under our law that is enough to find [Respondent] guilty of criminal sexual conduct with a minor in the first degree.

App. 266, l. 19 – App. 267, l. 3.

According to the prosecutor, “the crux of this whole case” was Minor 1’s testimony that Respondent sexually abused him. App. 269, l. 21. “The rest around it is fluff. How many times and where and didn’t say this before, he didn’t say that after.” App. 269, ll. 21-23. Conceding that her case depended entirely upon the jury believing Minor 1’s testimony, the prosecutor said, “I want you to think about this. In this case it is black and white. You either believe [Minor 1] or you think he’s lying. There’s no black and white. You either believe [Minor 1] or you think he’s lying and I submit to you you should believe [Minor 1].” App. 270, ll. 3-9.

Grasping for straws, the prosecutor argued to the jurors that Minor 1’s testimony was corroborated by his own testimony and by his mother’s testimony.

And you think a kid can make up the fact that he looked through magazines and that there was a picture of a man with a woman with a penis? Woman with a penis. Well, here’s our corroboration. Here’s another reason you should believe [Minor 1]. Because [Minor 1] said there was a man with a penis in the magazine and he says one of the times when [Respondent] did this to me he made me wear a dress. What did Tara tell you? Our marriage started falling apart in August because he wanted to dress as a woman. That’s corroboration.

App. 273, ll. 2-12.

To counter the anticipated defense argument that the state lacked any physical evidence to support its case, the prosecutor “remind[ed]” the jury “about the charge you are going to hear that a child’s testimony does not need to be corroborated.” App. 274, ll. 15-19. In the prosecutor’s opinion, the reason for such a charge was “because you rarely have that physical evidence.” App. 274, ll. 19-21.

Thereafter, the judge instructed the jurors how to evaluate the credibility of child witnesses.

Now, during this trial you heard testimony from a child. Where a witness is a child you must determine as with any witness whether that testimony is believable. In deciding believability you may consider not only matters that I have already discussed with you, but you may also consider the age of the child, the child's ability to observe and remember facts and the child's ability to understand and answer questions. Because young children may not fully understand what is happening here, it is up to you to decide whether the child understood the seriousness of appearing as a witness at this criminal trial, whether the child understood the questions, whether the child has a good memory, and whether the child understands the difference between lying and telling the truth.

In addition, young children may be influenced by the way the questions are asked. It is up to you to decide whether the child understood the questions asked.

App. 319, l. 11 – App. 320, l. 6. This instruction was not given during the general charge on how to evaluate the credibility of witnesses. Instead, this section appeared after the instruction to the jury not to consider the fact that Respondent did not testify and consideration of expert witnesses. Cf. App. 315, l. 22 – App. 317, l. 18 with App. 316, l. 19 – App. 319, l. 10.

Immediately after the instruction regarding children as witnesses, the judge instructed the jury concerning the “no corroboration” rule. Specifically, the judge instructed:

Now, ladies and gentleman, I further charge you that the testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 and I further charge you that this offense is alleged to be a violation of Section 16-3-655.

App. 320, ll. 7-12.

In keeping with the judge's instruction that he must object to the charge after it was given, trial counsel re-iterated his earlier objection to the judge instructing the jury that the testimony of Minor 1 “need not be corroborated in the prosecution of this type.” App. 327, ll. 7-10. Trial counsel noted the charge would confuse the jury because the jurors could interpret the language to mean they could disregard the lack of corroborating evidence. App. 327, ll. 10-18.

Thereafter, trial counsel cited the dissent in State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), explaining that the charge biased the jury against the defendant by singling out the alleged victim's testimony as not requiring corroboration and appearing to express an opinion about the alleged victim's credibility. App. 327, l. 19 – App. 328, l. 5.

In response, Judge Goodstein noted the dissent in Rayfield, supra, was written by then-Associate Justice Pleicones, now Chief Justice Pleicones, and that a change in the law may occur. App. 328, ll. 6-9. "It may cease to be a minority opinion and become in fact the law." App. 328, ll. 9-10. Despite acknowledging the well-reasoned dissent in Rayfield, supra, Judge Goodstein overruled trial counsel's objection to the charge. App. 328, ll. 10-12.

Ultimately, the jury found Respondent guilty as charged. App. 333, ll. 11-16. On March 18, 2016, Judge Goodstein sentenced Respondent to life imprisonment. App. 339, ll. 17-20; App. 344.

Trial counsel filed a notice of appeal on March 24, 2016, which was served on opposing counsel on the same day. Thereafter, undersigned counsel perfected Respondent's appeal. Respondent challenged the trial judge's decision to charge the jury, over objection, that the testimony of the complaining witness need not be corroborated. App. 346-367. Petitioner admitted the judge erred, but argued any error was harmless beyond a reasonable doubt. App. 368-387. On July 25, 2018, the Court of Appeals issued an unpublished, *per curiam* opinion reversing and remanding Respondent's case. State v. Crews, 2018-UP-339 (S.C. Ct. App. filed July 25, 2018); App. 388-391.

The Court of Appeals agreed with Petitioner and Respondent that the trial court erred by instructing the jury that Minor 1's testimony need not be corroborated by other evidence. State v. Crews, 2018-UP-339 (S.C. Ct. App. filed July 25, 2018); App. 388-391. Thereafter, the Court

analyzed whether the state proved the error was harmless beyond a reasonable doubt. State v. Crews, 2018-UP-339 (S.C. Ct. App. filed July 25, 2018); App. 388-391. The Court held “the jury instruction was not harmless because the case boiled down to credibility.” State v. Crews, 2018-UP-339 (S.C. Ct. App. filed July 25, 2018); App. 388-391. The Court observed “there was no independent testimony from any other witness with firsthand knowledge as to the abuse – the only evidence was victim’s testimony and witnesses who recounted the abuse as disclosed to them.” State v. Crews, 2018-UP-339 (S.C. Ct. App. filed July 25, 2018); App. 388-391. “[T]he state conceded during closing argument [that] its case depended entirely upon the jury believing victim’s testimony.” State v. Crews, 2018-UP-339 (S.C. Ct. App. filed July 25, 2018); App. 388-391. Therefore, the Court concluded, “because the state’s case rested exclusively on victim’s testimony and the testimony of others who recounted the abuse as disclosed to them,” “the trial court’s error was not harmless.” State v. Crews, 2018-UP-339 (S.C. Ct. App. filed July 25, 2018); App. 388-391.

The state filed a petition for rehearing challenging the harmless error analysis employed by the Court of Appeals. App. 392-401. On October 1, 2018, the Court of Appeals denied the petition for hearing. App. 402. Thereafter, the state filed a petition for writ of certiorari asking this Court to invoke its discretion to review the harmless error analysis used by the Court of Appeals. This return follows.

## ARGUMENT

The Court of Appeals correctly determined the trial judge’s admittedly erroneous instruction that the complainant’s testimony need not be corroborated by other evidence in contravention of *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), was not harmless beyond a reasonable doubt where there was no evidence corroborating the complainant’s allegations and the state conceded in its closing argument that its entire case depended upon the jury believing the complainant.

On May 4, 2016, less than two months after Respondent’s trial, this Court decided *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). Overruling *Rayfield*, *supra*, this Court held charging a jury pursuant to section 16-3-657 of the South Carolina Code was “confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case.” *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. The South Carolina Constitution forbids judges from charging juries “in respect to matters of fact,” and limits judges to “declar[ing] the law.” S.C. Const. art. V, § 21. Thus, “it is not within the province of the court to express an opinion to the jury on its view of the facts.” *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. “By addressing the veracity of a victim’s testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak.” *Id.*

This Court found the state had not satisfied its burden of showing the error was harmless beyond a reasonable doubt because the “case hinged on credibility.” *Id.* at 500, 787 S.E.2d at 483. This Court was not dissuaded that the error was harmless even where two witnesses testified to seeing the alleged victim shortly after the sexual encounter and claimed to see “a

handprint” on her face or neck “matching” her version of events and witnesses describing the alleged victim’s demeanor as “afraid,” “withdrawn,” “nervous and tearful,” and “visibly upset and crying.” Id. at 501, 787 S.E.2d at 484. The case against Stukes included a DNA match and his inconsistent statements to authorities – at first, denying he knew the alleged victim and then claiming consensual sex. Id. Nevertheless, this Court held the error was not harmless in light of the confusing nature of the charge and the entire case boiling down to credibility. Id. at 483, 787 S.E.2d at 500.

Less than one month later, the Court of Appeals decided State v. McBride, 416 S.C. 379, 786 S.E.2d 435 (Ct. App. 2016).<sup>2</sup> The judge presiding over McBride’s trial also charged the jury pursuant to section 16-3-657 of the South Carolina Code that a victim’s testimony need not be corroborated in a sexual assault case. Id. The Court of Appeals held the charge was erroneous. Id. However, the Court found the state satisfied its burden of showing the error was harmless beyond a reasonable doubt. Id. The Court distinguished the evidence presented at McBride’s trial from that presented at Stukes’ trial. Id. According to the Court, “there was corroborating evidence” presented against McBride. Id. “The victim’s mother testified she smelled men’s cologne and saw the stain on the victim’s shirt. The mother’s sister testified she confronted McBride and he said he did not mean to do it, and ‘tr[ie]d to compromise with [her].’ The sister described it as McBride’s confession.” Id. (alterations in original).

Finally, this Court held a trial judge’s erroneous instruction that the state need not provide corroborating evidence of an alleged victim’s testimony was not harmless beyond a reasonable doubt in State v. Witherspoon, 418 S.C. 641, 642-643, 795 S.E.2d 685, 686 (2016). This Court held “given the centrality of the issue of credibility ..., and the absence of other

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<sup>2</sup> Proceeding *pro se*, Mr. McBride filed a petition for writ of certiorari seeking review in this Court on August 22, 2016. On June 16, 2017, this Court denied certiorari.

overwhelming evidence of [Witherspoon]’s guilt,” “the erroneous charge instructing the jury that the victim’s testimony need not be corroborated was prejudicial.” *Id.* at 643, 795 S.E.2d at 686.

As Petitioner conceded, the trial judge erred in charging the jury that Minor 1’s testimony need not be corroborated in light of this Court’s decision in *Stukes*, *supra*. Thus, the only question for the Court of Appeals was whether the state could satisfy its burden that the error was not harmless beyond a reasonable doubt. As the Court of Appeals held, the state simply could not do so in this case.

The entirety of the state’s case depended upon the credibility of Minor 1. This point was made abundantly clear in the state’s closing argument. According to the prosecutor, “the crux of this whole case” was Minor 1’s testimony that Respondent sexually abused him. App. 269, l. 21. “The rest around it is fluff.” App. 269, ll. 21-23. As the prosecutor said, “You either believe [Minor 1] or you think he’s lying. ... You either believe [Minor 1] or you think he’s lying and I submit to you you should believe [Minor 1].” App. 270, ll. 3-9. The prosecutor used the erroneous charge to shore up its weak case using the “need not be corroborated” charge as its theme. App. 266, ll. 20-23. In fact, the prosecutor repeatedly emphasized “[t]he testimony of the victim need not be corroborated in prosecutions” “for criminal sexual conduct with a minor in the first degree.” App. 266, l. 19 – App. 267, l. 3. The prosecutor’s phrasing made it clear that these types of cases were special and because of this special quality, if the jury believed Minor 1, then that was enough to find Respondent guilty. App. 266, l. 19 – App. 267, l. 3.

Additionally, the state told the jury the statute concerned the testimony of *child* witnesses who allege criminal sexual conduct. App. 274, ll. 15-19 (“a child’s testimony does not need to be corroborated”). According to the state, when a *child* claimed to be the victim of criminal sexual conduct, the *child*’s testimony need not be corroborated by other evidence. App. 274, ll.

15-19. While the statute provides that the testimony of an alleged victim of criminal sexual conduct need not be corroborated, the statute does not carve out any special treatment for children and does not apply only to children. This aspect of the prosecutor's argument is particularly important when analyzed in conjunction with the judge's instructions to the jury. The judge charged the jury with instructions specific to testimony from children. In fact, the charge instructed the jury to evaluate the credibility of children using a different standard than the one applied to all other witnesses. This specific charge was followed immediately by the "no corroboration" instruction.

Coupling the placement of the charge to the jury as following the child-specific (and different) instruction on credibility with the solicitor's argument that the General Assembly has promulgated legislation to permit jurors to render verdicts of guilty based upon testimony from *child* witnesses who allege sexual abuse without corroboration demonstrates the additional prejudice Respondent suffered due to this erroneous charge. One of the last things the jury heard before the administrative matters of the verdict form were that credibility of child witnesses is determined under a different standard, testimony of victims alleging sexual abuse need not be corroborated, and then the reading of the indictment, which alleged that Respondent had committed sexual battery. Despite the inconsistencies and the dearth of evidence, the jury was left with but one option – to convict – based upon the judge's instructions.

Contrary to the state's argument on appeal that the jury charge on the credibility of juvenile witnesses essentially cancelled out any harm Respondent may have suffered due to the unconstitutional "no need for corroboration" charge, the judge's instruction on this point reinforced the harm to Respondent. Essentially, the jury was told to evaluate Minor 1's testimony differently. The state asserted, on appeal, the instruction on how to evaluate the

testimony of juveniles necessarily required a higher level of scrutiny than for other witnesses. However, reading the judge's instructions as a whole, as this Court must, it is clear the instructions encouraged the jury to believe Minor 1. When read in conjunction, the juvenile witness instruction helped to explain away the inconsistencies in Minor 1's testimony. Essentially, the judge told the jurors to give Minor 1 the benefit of the doubt because of the nature of the allegation, his age, the ability of children to understand questions and provide clear answers, and the limitations on the memories of children.

There was no corroborating evidence presented. The state's case consisted of three main witnesses: Minor 1, his mother, and the nurse who examined him.<sup>3</sup> The state offered no physical or forensic evidence, except to the extent the video recorded interview of Minor 1 by the forensic interviewer would be considered forensic evidence. The nurse who examined Minor 1 found no physical findings to support Minor 1's accusations. Rather, the nurse and mother were presented as witnesses to testify that Minor 1 had disclosed instances of sexual abuse to them. However, the examination of those witnesses revealed inconsistencies with the stories told

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<sup>3</sup>The state also called Millicent Walker, a forensic interviewer at the Dorchester Children's Center, who interviewed Minor 1 on November 14, 2013. App. 242, ll. 9-20. Her testimony was limited to laying a foundation for the introduction of the video recording of the forensic interview of Minor 1. App. 243, ll. 22-24; State's Exhibit #4. The state also called Kendra Twitty, a forensic interviewer and therapist at Hope Haven, a children's advocacy center and rape crisis center. She testified as an expert in the field of child-abuse dynamics. App. 124, ll. 13-23; App. 128, ll. 3-4. Twitty's testimony consisted of explaining her experience of how children recall information. According to her experience, children who experienced trauma do not "remember things in, like, a linear fashion.... They remember, like, flashbulbs or kind of a snapshot of a memory to recall their traumatic experience." App. 128, ll. 11-20. She also explained that children who are abused do not tell right away – something called "delayed disclosure." App. 129, ll. 4-9. She provided multiple reasons for delayed disclosure. App. 129, l. 10 – App. 130, l. 1. Twitty had never met Minor 1 and offered no evidence to corroborate his testimony. App. 133, ll. 17-20.

by Minor 1 at trial. Further, the video recorded interview – the forensic interview – revealed additional inconsistencies in Minor 1’s revelations of alleged sexual abuse.

According to Minor 1, the abuse occurred continuously – “There wasn’t a break.” App. 96, ll. 2-7. During the trial, Minor 1 told the jurors that the last encounter was on November 11, 2013, the day before Minor 1 and his mother went to the police. App. 115, l. 25 – App. 116, l. 6. However, he told the forensic interviewer that the last encounter was on October 31, 2013, which he remembered because this was his mother’s birthday. State’s Exhibit #4 at 17:49. Initially, Minor 1 told the police that Respondent made him have sex with him thirty-four times, but at trial, Minor 1 claimed “[i]t happened way more than that many.” App. 116, ll. 15 – App. 117, l. 1. Oddly, Minor 1 told the forensic interviewer the abuse was only a couple of times. State’s Exhibit #4 at 17:58. At trial, Minor 1 claimed Respondent did “the bad stuff” to him “[a] couple times a week, like three, maybe four times a week” “[w]henever [his] mom and [his] sister were gone.” App. 72, ll. 2-11.

Minor 1 claimed one sexual encounter happened when his nephew was present. However, Minor 1’s nephew did not testify at trial. According to Minor 1, Respondent threatened that if he sucked his thumb, then “the bad stuff would happen.” App. 65, ll. 15-21. Despite Minor 1’s best efforts, he was unable to resist the temptation and sucked on his thumb. As a result, “the bad stuff happened.” App. 65, ll. 23-24. According to Minor 1, Respondent caught him sucking his thumb and instructed him to go to sister’s room and take off his clothes, which he did. App. 66, ll. 19-24. Thereafter, according to Minor 1, Respondent put his penis in his butt and put his penis in Minor 1’s mouth. App. 67, ll. 1-2.

Minor 1 told the jurors that the “bad stuff” usually happened in sister’s room, but it also happened on the couch in the living room. App. 67, ll. 18-23. He claimed that “one time,” while

Respondent was in the bathtub, he made Minor one put his mouth on his penis. App. 67, l. 24 – App. 68, l. 1; App. 92, l. 19 – App. 93, l. 2. Minor 1 remained outside the bathtub, but managed to put his mouth on Respondent’s penis while Respondent was lying in the bathtub and “do the rock-back-and-forth motion.” App. 68, ll. 4-8; App. 93, l. 5-15. When Respondent instructed him to stop, he did, “went back out and went on with [his] day.” App. 68, ll. 8-9.

Finally, Minor 1 claimed that Respondent made him look at magazines filled with “naked pictures of people” in the shed. App. 75, ll. 11-16. The people in the magazines were “[d]oing the things that [Respondent] would make [Minor 1] do.” App. 75, ll. 19-21. He even saw a picture of a girl with a penis in one of the magazines. App. 75, ll. 22-25. In complete contradiction to this testimony, during the forensic interview, Minor 1 specifically denied seeing pictures of people with no clothes in any form – photographs, cell phone, computer, movies. State’s Exhibit #4 at 18:11. No magazines – and no pornography – of any sort were introduced at trial.

Minor 1 claimed Respondent would put something on his penis prior to inserting it into his anus. He was unsure what it was, but claimed it was from a tube. App. 67, ll. 3-13. However, during his forensic interview, Minor 1 stated he did not know if Respondent put anything on his penis. State’s Exhibit #4 at 17:52. At trial, he also claimed that “a couple times [Respondent] wore this - - it was a cheetah-looking short dress. It was - - it was tiny. It was, like a cheetah dress, super tiny.” App. 76, ll. 20-24. When the solicitor prodded for more information on this point, Minor 1 said, “It wasn’t, like, a dress. It was - - no, it wasn’t like a dress.” App. 76, l. 25 – App. 77, l. 2. However, he said it was not for a man. App. 77, ll. 3-4.

He also described Respondent has have a “hard,” “hairy,” “dark brown” penis. App. 79, ll. 5-18. This too was in direct contradiction to his statements to the forensic interviewer that the

top of Respondent's penis turned white. State's Exhibit #4 at 18:05. On cross-examination, Minor 1 even claimed that Respondent made Minor 1 place his penis into Respondent's butt. App. 86, ll. 14-15. In addition to the "white stuff" being wiped on sister's blanket, Minor 1 said the "white stuff" was on the couch, living room floor, and anywhere else where Respondent was during the encounters. App. 100, ll. 1-24.

Despite these numerous accusations, the state failed to produce any lubricant recovered from the home, a cheetah print dress or shirt, or any items of evidence from the home containing Respondent's DNA or even the presence of sperm and/or semen.

When Minor 1 was nine-years old, he told his mother about the alleged abuse after his mother and Respondent argued and separated. When his mother asked Minor 1 if she should give Respondent another chance, Minor 1 said, "no, no, no." App. 77, ll. 10-16. His mother questioned him on his response and he "told her a couple of lies." App. 77, ll. 16-19. When his mother did not believe the "lies," he told her "about the stuff that [Respondent] was doing." App. 77, ll. 19-20. His mother called the police. App. 77, ll. 24-25. Minor 1 saw a doctor and spoke to a woman at the Dorchester County Children's Center. App. 78, ll. 5-10.

Minor 1 admitted that his trial testimony differed from statements he had made previously. App. 106, l. 24 – App. 107, l. 1; App. 109, ll. 8-10; App. 113, ll. 3-7. He candidly admitted he had not told the police, the medical doctor, or the forensic interviewer about the sexual encounters in the shed or the one encounter in the bathtub. App. 87, l. 23 – App. 88, l. 17; App. 98, ll. 18-23. Minor 1 never told the police or the forensic interviewer regarding Respondent wearing a cheetah print shirt/dress. App. 108, ll. 5-14. He claimed he remembered the bathtub incident while "watching [his] phone." App. 98, l. 24 – App. 99, l. 2; App. 113, ll. 11-14. The incidents involving the cheetah outfit and the magazines "just came" to him. App.

113, l. 18 – App. 114, l. 7. He also reviewed a prior statement in which he claimed he was abused in the bedroom shared by his mother and Respondent, but claimed he was not thinking clearly when he said that because it “definitely never happened in their room.” App. 98, ll. 4-11. During his forensic interview, Minor 1 told the interviewer that the last incident occurred on October 31, 2013, which was his mother’s birthday. State’s Exhibit #4 at 17:49. However, at trial, Minor 1 claimed nothing happened on that date, and that the last encounter was on November 11, 2013. App. 114, l. 19 – App. 115, l. 6; App. 118, ll. 10-14.

Although Minor 1 claimed his older sister witnessed multiple incidents of sexual abuse, sister did not testify at the trial. App. 102, l. 20 – App. 103, l. 22; State’s Exhibit #4 at 18:06. Although Minor 1’s testimony indicated that at least some corroborating evidence could have been found – the pornographic magazines, sperm/semen on items where it should not have been – the state presented none. Minor 1 even indicated that his sister witnessed the incidents of sexual assault, but the state did not call sister to testify despite the fact that she was Minor 1’s older sister, and presumably competent to testify. The state presented the jurors with contradictory evidence from Minor 1 and asked the jury to trust them through the use of the “no corroboration” charge. Minor 1’s testimony before the jury differed significantly from his prior statement in a prior hearing and from his statements during his forensic interview. He even claimed the date of the last sexual encounter was different. He changed the type of abuse occurring and the locations for the abuse. Without question, the state’s case against Respondent depended solely upon Minor 1’s credibility, which was called into question by his forensic interview and the cross-examination revealing his inconsistent statements. It was only the judge’s instruction to the jury – a victim’s testimony regarding criminal sexual conduct need not be corroborated – that could have saved the state’s case.

As a final point, the state attempts to distinguish Respondent's case from "the type of 'he said she said' situation the jury had to evaluate and address in Stukes. Pet. at 14. According to the state, Stukes testified that he engaged in consensual intercourse with the alleged victim, but Respondent "neither offered any contradictory testimony or statements at any point prior to or during trial nor offered testimony from any other witnesses to present a version of events that differed from [Minor 1]'s version." Pet. 14-15. In the state's estimation, "without competing testimony or witnesses, the jury could not have improperly concluded the statutory non-corroboration language meant [Minor 1]'s testimony could or should be held to one standard requiring no corroboration while the testimony of other opposing witnesses was to be held to a different standard that required corroboration." Pet. at 15. Put simply, the state requests this Court punish Respondent for exercising his constitutional right not to testify, which this Court cannot do. See State v. Browning, 154 S.C. 97, \_\_\_, 151 S.E. 233, 235 (analyzing a case for harmless error and explaining that neither the trial court nor the appellate court could "punish" the defendant "for the exercise" of his rights not to testify and not to introduce evidence).

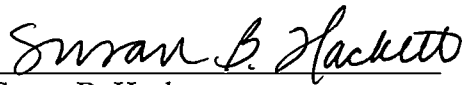
When Respondent entered his not guilty plea and demanded a jury trial, he was denying the charges. There was no need for him to testify to deny the allegations. "An accused has the right to rely entirely upon th[e] presumption of innocence and the weakness in the state's case against him." State v. Posey, 269 S.C. 500, 503, 238 S.E.2d 176, 177 (1977). It is elementary that a court may not punish a defendant for exercising a constitutional right. See e.g., Castro v. State, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) (holding that a trial judge abuses his discretion when he considers the fact that the defendant exercised his constitutional right to a jury trial as a factor in sentencing the defendant). The state's request that this Court use Respondent's decision

to exercise his constitutional right not to testify demonstrates how desperate the state is to maintain this conviction at all costs despite the admitted error.

Respondent respectfully requests this Court deny the petition for certiorari because there are no special and important reasons to review this case. See Rule 242(b), SCACR. There are no novel questions of law as this case involves a straightforward application of this Court's precedent. See Rule 242(b)(1), SCACR. There was no dissent at the Court of Appeals; rather, the Court issued an unpublished *per curiam* opinion. See Rule 242(b)(2), SCACR. The Court of Appeals' decision follows this Court's precedent. See Rule 242(b)(3), SCACR. While the case involves substantial constitutional issues, those issues were correctly resolved by the Court of Appeals using this Court's guidance and controlling authority. See Rule 242(b)(4), SCACR. Finally, there is no conflict between the opinion from the Court of Appeals and the United States Supreme Court. See Rule 242(b)(5), SCACR. The Court of Appeals issued a well-reasoned decision applying this Court's recent opinion in Stukes, and there are no special or important reasons calling for the exercise of this Court's discretionary review.

**CONCLUSION**

Respondent respectfully requests this Court deny the petition for writ of certiorari. If this Court grants the petition, Respondent respectfully requests the opportunity to brief the issue presented.

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR RESPONDENT

This 2nd day of November, 2018.

**RECEIVED**  
NOV 02 2018  
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to the Court of Appeals  
Appeal from Dorchester County  
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

PETITIONER,

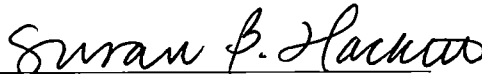
V.

JAMES ARCHIE CREWS, IV,


RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and James Crews, #367441, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 2nd day of November, 2018.

  
\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me  
this 2nd day of November, 2018.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027