

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable J. Cordell Maddox, Circuit Court Judge

**ORIGINAL**  
**RECEIVED**  
AUG 07 2019  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MICHAEL ALEXANDER COLLINS,

APPELLANT

APPELLATE CASE NO 2018-002027

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER  
Appellate Defender

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

ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the State's failure to obtain and preserve crucial physical evidence—the alleged instrumentality of a sexual assault—entitled appellant to a jury charge that an adverse inference may be drawn when such evidence is lost or destroyed?

## STATEMENT OF THE CASE

An Aiken County grand jury charged appellant with two counts of first-degree criminal sexual conduct with a minor and two counts of third-degree criminal sexual conduct with a minor. R. 209. On October 30, 2018, appellant was tried before the Honorable J. Cordell Maddox, Jr., and a jury. R. 1. Ashley A. Hammack and Heather Marie DeLoach represented the State. R. 1. Everett Keith Chandler represented appellant. R. 1. The jury convicted appellant. R. 198, l. 14 – 199, l. 4. Judge Maddox sentenced appellant to concurrent terms of imprisonment totaling twenty-five years. R. 204, ll. 6 – 14. This appeal follows.

### STANDARD OF REVIEW

The standard of review in this case is closely analogous to the standard for reviewing refusal of the request to charge a lesser-included offense. “An appellate court will not reverse the trial [court]’s decision absent an abuse of discretion.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Id. at 570, 647 S.E.2d at 166–67. “The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law.” Id. at 570, 647 S.E.2d at 167. “In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant.” State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014); (citing State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). “The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense.” Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

## ARGUMENT

The State's failure to obtain and preserve crucial physical evidence—the alleged instrumentality of a sexual assault—entitled appellant to a jury charge that an adverse inference may be drawn when such evidence is lost or destroyed.

The State presented no physical evidence that appellant sexually assaulted the complainant. R. 95, ll. 9 – 13. The physical evidence that could have been tested and used to create reasonable doubt for appellant was thrown away by the complainant's mother. R. 70, ll. 1 – 2. The complainant claimed appellant sexually assaulted her with a sex toy. R. 48, l. 7 – 50, l. 14. The mother testified that the police told her they did not need the sex toy. R. 85, l. 17 – 87, l. 2. She threw it in the garbage a few days after the alleged assault. R. 87, ll. 2 – 3.

The lead investigator denied telling the mother that she did not need the sex toy. R. 94, l. 18 – 95, l. 2. She testified, “When I requested the dildo that was in question, I was informed that it had been disposed of.” R. 94, ll. 18 – 20. However, the investigator went to the house on the same day that the complainant reported the sexual assault. R. 91, l. 4 – 93, l. 16. This would have been before the mother threw away the sex toy because the mother did not go back to the house after the complainant about the alleged abuse. R. 68, l. 21 – 69, l. 12. The lead investigator went back to the house “a couple weeks into the investigation” and took pictures. R. 92, ll. 8 – 21.

The State attempted to collect physical evidence from the complainant's body during a sexual assault examination performed by a nurse. R. 102, l. 11 – 110, l. 10. The complainant undressed over a piece of paper to collect any evidence that dropped from her body. R. 106, l. 1 – 107, l. 4. The nurse then used an “alternative light source” to look for body fluids on the complainant. R. 106, l. 1 – 107, l. 4. The nurse swabbed areas on the complainant's body that

illuminated and sent it to SLED for testing. R. 106, l. 1 – 107, l. 4. The complainant then underwent an invasive physical examination. R. 107, ll. 12 – 18.

In stark contrast to the nurse's exhaustive and invasive search for evidence on the child complainant, the police failed to recover the sex toy that was the instrumentality of the alleged crime. Appellant requested a spoliation charge from the trial judge. R. 138, l. 14 – 141, l. 23. R. 207. Appellant argued the sex toy could have been tested for DNA and that its "size and dimensions" could be compared to the eight year old girl. R. 139, ll. 3 – 15. The charge requested read:

In this case, there are allegations of spoliation or destruction of evidence. The State not only has the burden of proof of guilt but also it has the burden of producing evidence which could establish the innocence of the defendant.

When evidence is lost or destroyed by a party, you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party. If you find first that evidence was spoiled or destroyed, and if you further find that the evidence could help establish the innocence of the defendant, you may then consider those facts in deciding whether or not the State has met its burden of proof.

R. 207

The State argued that "the standard for a spoliation charge is whether a state agency acted in bad faith, and that standard has not been met here." R. 140, ll. 1 – 3. The State claimed that the sex toy likely would not have produced exculpatory evidence. R. 140, ll. 4 – 14. The solicitor also said that the mother throwing away the sex toy was not an action attributable to the State. R. 139, ll. 19 – 25. Trial counsel easily rebutted this part of the State's argument because the State's failure to collect vital evidence is an action. R. 140, l. 17 – 141, l. 11. Appellant also noted mother's testimony that the police told her they did not need the sex toy, which created a jury question on spoliation. R. 140, l. 17 – 141, l. 11. The trial judge denied the request, finding

no state action and that it was “a factual issue” and that it “goes to credibility.” R. 141, ll. 12 – 23. Appellant properly renewed his request for the charge. R. 176, l. 5 – 177, l. 15. R. 193, ll. 11 – 13.

The trial court erred in refusing the spoliation charge. The State cannot, through inaction, accomplish the destruction of valuable evidence. The Complainant’s mother’s testimony establishes that the police were, at a minimum, grossly negligent in failing to obtain the sex toy. As trial counsel pointed out, her testimony at least created a jury question on the State’s actions resulting in the loss of this evidence.

The State also erred in arguing that bad faith was required based on State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015). The appellant in Reaves sought a dismissal of his charges because of the State’s loss of evidence. The Court adopted the bad faith standard for evaluation of his request to dismiss based on the federal due process clause from Arizona v. Youngblood, 488 U.S. 51 (1988). However, nothing in Reaves expressly stated the Youngblood bad faith analysis applied to a spoliation jury instruction. The Court noted that Reaves received a spoliation charge and left for another day the propriety of the spoliation charge in criminal cases and what the standard for charging it would be. Reaves at n.5.

This Court, in State v. McBride, 416 S.C. 379, 389, 786 S.E.2d 435, 440 (Ct. App. 2016), interpreted Reaves as implying that “Adverse inference charges are rarely permitted in criminal cases.” The McBride Court affirmed the trial judge’s refusal to give an adverse inference spoliation charge. Id. The Court used the bad faith standard. Id.

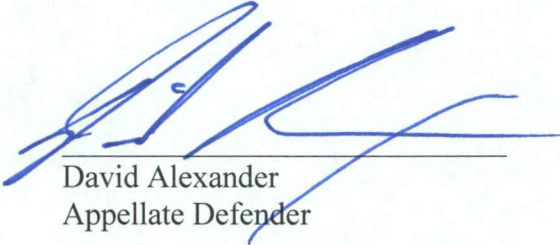
While after Reaves, the bad faith standard certainly applies to a motion to dismiss, the proper standard for evaluating the propriety of a jury charge is whether there is any evidence to support it. See State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014) (stating standard in

context of request for a lesser-included offense charge). Nor is it clear that the “any evidence” necessary is evidence of bad faith. Many states have rejected the Youngblood standard based on state law. See, e.g. State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999). These states primarily use a balancing test that examines: (1) the degree of negligence involved; (2) the significance of the evidence that was destroyed; and (3) the sufficiency of the other evidence against the defendant. Id., 2 S.W.3d at 917.

South Carolina should adopt such a test focusing on negligence instead of bad faith when examining an adverse inference charge. Under such a test, the mother’s testimony alone creates a jury issue on negligence, if not actual bad faith. Appellant’s requested charge takes the credibility contest between the mother and the investigator into account. It places the role of determining this credibility contest where it belongs—with the jury—and allows the jury to determine what role to assign any inference from the loss of the sex toy. Had the trial court properly instructed the jury, the outcome of this close case, would have been different. This Court should reverse.

**CONCLUSION**

For the foregoing reasons, this Court should reverse appellant's convictions and remand for a new trial.



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of August, 2019.

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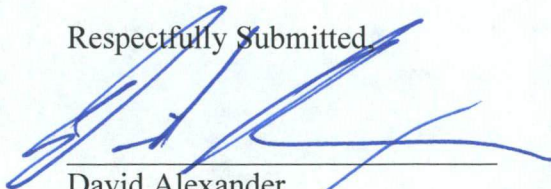
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PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Michael Alexander Collins states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Cordell Maddox, which was held on October 30 - November 1, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Michael Alexander Collins.

Respectfully Submitted,



\_\_\_\_\_  
David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 7th day of August, 2019.

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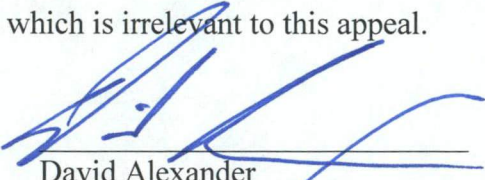
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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Trial Transcript dated October 30-November 1, 2018
- (3) Court's Exhibit No. 2 (CD)
- (4) Court's Exhibit No. 3 (Spoliation of Evidence)
- (5) Court's Exhibit No. 4 (Jury Question)
- (6) State's Exhibit No. 4 (Forensic Interview CD)

I certify that this designation contains no matter which is irrelevant to this appeal.

August 7, 2019

  
\_\_\_\_\_  
David Alexander  
Appellate Defender

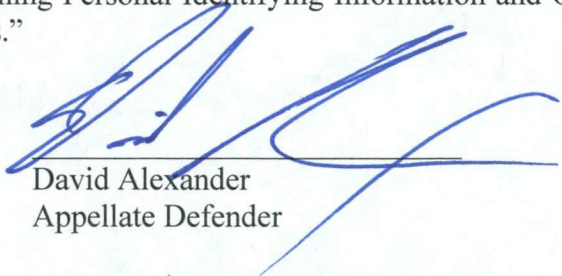
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ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 7, 2019.



David Alexander  
Appellate Defender

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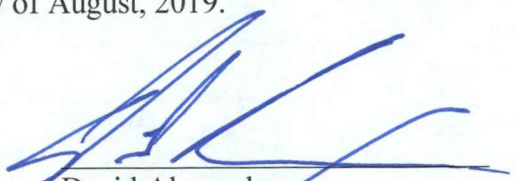
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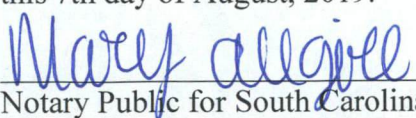
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Michael Alexander Collins, 378191, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of August, 2019.

  
David Alexander  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 7th day of August, 2019.

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